



Ontario Superior Court of Justice

Toronto Small Claims Court

22741
EAZ

Andrea Heiner, Plaintiff

FEB 01 2016

and

Mohammad Pasha, Durham Rapid Taxi Inc., Desjardins General Insurance Group Inc., and Certas Direct Insurance Company

Defendants

Korenberg, N., paralegal, for the Plaintiff
Schatzker, E., lawyer, for the Defendants Mohammad Pasha and Durham Rapid Taxi Inc.
Arduini, J., lawyer, for the Defendants Desjardins General Insurance Group Inc. and Certas Direct Insurance Company

Decision

This matter was heard on May 15, 2015 and July 21, 2015. Having read the pleadings and heard the evidence, I find in favour of the Defendants.

The Pleadings

The Plaintiff, Andrea Heiner, ("Heiner") claims damages against the Defendants in the amount of \$25,000.00 for breach of contract, negligence, loss of use and diminished value. Heiner also is seeking damages for bad faith, aggravated and exemplary damages.

Heiner pleads that at all material times she was the owner and operator of a 2012 Honda Civic, bearing Ontario license plate BNKP-474, (the "Honda Civic") which was involved in a motor vehicle accident on May 31, 2012 (the "Accident").

The Defendant, Mohammad Pasha ("Pasha") was the operator of a 2004 Chevrolet Impala, bearing Ontario license plate BCDF-693 (the "Chevrolet Impala").

The Defendant, Durham Rapid Taxi Inc. ("Rapid Taxi") owned the Chevrolet Impala.

The Defendants, Desjardins General Insurance Group Inc. and Certas Direct Insurance Company (collectively referred to as the "Desjardins Group") are property and casualty insurers. The Desjardins Group insured Heiner's Honda Civic for property damage and loss.

Heiner pleads that at all material times, she held a valid automobile insurance policy Number D2302945 (the "Policy") issued by the Defendant Desjardins General Insurance (Ontario) underwritten by Certas Direct Insurance Company, a subsidiary of Desjardins General Insurance.

Heiner pleads that her Policy included an OPCF 43 Removing Depreciation Deduction Endorsement (the "Policy Endorsement"). The Endorsement provides that an insurer will pay to the policyholder an amount that will remove the depreciation incurred or to replace the automobile with the same make and model, similarly equipped, should loss or damage occur to the automobile within 24 months of the original purchase date.

On May 31, 2012, Heiner was driving on Bayly Street Westbound approaching the GO station at 1322 Bayly Street in Pickering, Ontario. Pasha, driving the Chevrolet Impala, proceeded to make a left turn on a red light and collided with the Honda Civic.

Heiner pleads that the Accident was caused by Pasha's negligence. Further, Heiner pleads that Rapid Taxi is responsible and liable for Pasha's negligence.

Heiner pleads that the Desjardins Group did not deal with her fairly or in good faith. She pleads that the conduct of the Desjardins Group constitutes negligence, and a breach of its duty to act fairly and in the utmost good faith. Heiner pleads that she sustained damage and loss, including damage to her Honda Civic, and the diminished value to her Honda Civic.

In their Defence, Pasha and Rapid Taxi plead that it was Heiner's erratic, negligent driving that caused the Accident. They plead that Pasha operated the Chevrolet Impala in a safe and prudent manner at all material times, without fault or neglect on his part. They plead that if Heiner sustained the damages and losses as alleged, these damages and losses did not occur as a result of any negligence, breach of duty or want of care on their part.

Further, Pasha and Rapid Taxi plead that Section 263 of the *Insurance Act*, R.S.O. 1990, c.I.8 (the "*Insurance Act*") applies to the present case and prevents Heiner from bringing her claim against these Defendants.

In their Defence, the Desjardins Group plead that if Heiner incurred damages as a result of the Accident, such damages were caused by the negligence of Pasha and Rapid Taxi. The Desjardins Group pleads that it complied with its requirements under the Policy, and that it is not at law responsible for any further damages that may have been incurred by Heiner as a result of the Accident.

The Evidence

Andrea Heiner testified on her own behalf. She testified that the Honda Civic was four months old at the time of the Accident. Her evidence was that she was driving westward on Bayly Street in Pickering, Ontario, approaching the GO Station, when the Chevrolet Impala turned left in front of her.

Heiner referred to Tab C of Exhibit 1, the Plaintiff's Book of Documents. This document is the Vehicle Purchase Agreement relating to the Honda Civic. It demonstrates that Heiner paid \$26,657.87 for the Honda Civic; it was purchased as a brand new vehicle on February 8, 2012. At the time of the Accident, the Honda Civic was just under four months old with a very low mileage reading of 2868 km.

Heiner was taken to the hospital immediately following the Accident, and the Honda Civic was taken to Alliance Repair. As a result of the Accident, the Honda Civic sustained significant damage, and was not drivable. The airbags in the vehicle deployed and the vehicle was towed to a body shop to await the insurance appraiser. Heiner's evidence was that she spoke to Malick Diallo ("Diallo"), Claims Advisor with her insurance company on at least four occasions. She repeatedly told Diallo that she wanted her vehicle replaced, not repaired. She wasn't given a choice. Diallo told her that she had to resolve her claim with the Desjardins Group, or they wouldn't pay for the repair costs.

Heiner's evidence was that by August 3, 2012 the repairs for her Honda Civic had not yet commenced. She was using a rental car, and ultimately had the rental car for 81 days. Tab E of Exhibit 1 is the Summary of Charges with respect to the rental car. She began the rental period on June 12, 2012 and returned the vehicle on August 21, 2012. Heiner had the rental car for an extended period, because she was having a conflict with her insurer with respect to its decision to repair the Honda Civic, rather than replacing it. The Desjardins Group paid for half of the rental car charges incurred. Heiner referred to Tab B of Exhibit 1, which was correspondence enclosing partial reimbursement for the rental car in the amount of \$1192.81.

Heiner referred to Exhibit 3, correspondence from Diallo to her dated August 3, 2012. This communication states that the Desjardins Group would cover storage charges for the Honda Civic from May 31, 2012 to June 1, 2012 in the amount of \$60.00 per day. Any further charges would be at Heiner's own expense.

Heiner's evidence was that after receiving this correspondence, she agreed to the repairs to the Honda Civic. She stated that this decision was made under duress. Diallo told her in a phone conversation that her insurer would no longer pay for any further car rental charges or storage charges. Her evidence was that her resolve weakened in the face of all of the bills relating to the Accident.

Heiner referenced Tab F of Exhibit 1. This documents repairs to the Honda Civic in the amount of \$17,120.92.

Heiner testified that the value of the Honda Civic went down dramatically because of the Accident. A year after the Accident, she went to the Honda dealership, and was told that the Honda Civic only had a value of \$11,000.

The Plaintiff's second witness was Michael Abate ("Abate"), of Abate Appraisal Services. He has worked as an automotive appraiser for 28 years. During his career, Abate has worked with collision repair shops. He works for both insurance companies and consumers. He is often called upon to provide opinions with respect to whether or not it is economically feasible to repair a vehicle. He was qualified to provide expert testimony.

In this case, Abate only became involved after the repair was done. Abate's CV and Report were introduced collectively as Exhibit 2. His opinion was that it was not economically feasible to have the Honda Civic repaired; it should have been rendered a total loss. Further, his opinion was that the repairs would cause the Honda Civic's value to decline by \$8500.00.

Abate reviewed the two repair statements found at Tab G and Tab H of Exhibit 1. Tab G is the original estimate reflecting repairs in the amount of \$14,061.25. This estimate is dated June 5, 2012. Tab H is a supplemental estimate dated September 9, 2012 showing additional repairs required in the amount of \$2816.71.

Abate testified that based on the sum of the repairs required, compared to the value of the Honda Civic, the prudent course would have been to declare the Honda Civic a total loss. The calculation used a formula based on the model year of the car and repair costs. The salvage value of the vehicle is also taken into account.

Abate also testified with respect to the claim of diminished value. His evidence was that whenever a vehicle has a claim history, the result is a diminution in the value of the vehicle. In this case he estimated that the diminished value was \$8500.00. In other words, as a result of the Accident, the Honda Civic's value will have declined by \$8500.00, even after the repairs were completed. Whenever a vehicle is involved in an

accident, resulting in a claims history, this information has to be disclosed to the purchaser.

Abate referred to the chart titled Estimated Salvage Returns attached to his opinion letter. The chart reveals that the Honda Civic had a salvage value equivalent to 30.4 % of its value immediately before the Accident. Abate confirmed that the repairs to the Honda Civic were conducted to industry standards and there were no signs of poor workmanship or deficiencies.

The Desjardins Group called Albert Hagadorn ("Hagadorn") as its first witness. Hagadorn has worked in the auto industry since 1969 in various capacities including as a body shop owner, as a used car dealer and as an appraiser. Hagadorn was the appraiser retained by the Desjardins Group to conduct the property damage appraisal following Heiner's Accident. He was the author of the two estimates found at Tabs G and H of Exhibit 1. The two estimates were prepared using the Mitchell Repair Guide. The first estimate showed repair charges of \$14,061.25. The second appraisal reflected additional damage, requiring \$2816.71 in repairs. The total repairs were therefore \$16,877.96. Hagadorn testified that he did not provide a written report to the Desjardins Group.

Hagadorn reviewed some of the assumptions in Abate's report. He questioned the \$3000 depreciation figure applied to the Honda Civic; he thought this figure was excessive. A better figure for depreciation would be \$1500.00. Further, he estimated that the salvage value could be lower than 30.4%. He also took issue with the fact that the rental car fees were included in the total loss calculation. Hagadorn testified that neither car rental charges nor storage should form part of the total loss calculation.

Hagadorn's evidence was that the Honda Civic was still repairable. The vehicle was well within the repair parameters. Generally, if the repair costs are 70 per cent or less of the value of the car, the car is repairable. Where the repair costs exceed 70 per cent of the value of the vehicle, the vehicle will be considered to be a total loss. In this case, the conclusion reached was that it would be easier to repair the Honda Civic, rather than sell it for salvage. Hagadorn's evidence was that a different conclusion may have been reached if he was aware at the outset that the total repairs would exceed \$17,000.00. Hagadorn explained that the insurance company ultimately makes the decision if a vehicle is a total loss.

The second witness for the Desjardins Group was Malick Diallo. Diallo is a property claims advisor with the Desjardins Group. Diallo was the property damage claims adjuster involved in adjusting Heiner's claim. He began in this role five years ago; and had worked in this capacity for a year and a half when he was involved with Heiner's claim. He testified that he contacted an appraiser immediately after Heiner reported her Accident, to assess the damage to Heiner's car.

Diallo was referred to Tab 9, of Exhibit 4, the Desjardins Groups' Document Brief; these are the log notes maintained with respect to Heiner's insurance claim. At page 9, the log notes indicate that an appraisal of the repairs was requested. On June 6, 2012, Diallo

discussed the appraisal with Heiner. He advised her that the cost of repairs were less than the value of her car. Diallo informed Heiner that the appraiser makes the final decision as to whether a vehicle is a total loss based on the cost of repairs.

The log notes document a series of discussions between Diallo and Heiner. He advised her that it is the insurance company's responsibility to determine whether to deem a vehicle repairable, or a total loss.

On June 12, 2012, Hagadorn advised Diallo that the Honda Civic was definitely repairable. There wasn't any major structural damage. In coming to this conclusion, Diallo reviewed the file with his manager, Tammy Parente, as well as Piyush Shah, a Claims Specialist.

Diallo reviewed the issue of the rental car reimbursement. His evidence was that generally, he would only authorize payment of a rental car for the duration of the repairs. In this case, the car repairs took 26 days. The Desjardins Group paid for 42 days of car rental.

Diallo's evidence was that at no time did he treat Heiner with malice. He was always very respectful to her. However, Heiner yelled and swore at him, on more than on occasion.

No evidence was tendered on behalf of Pasha or Rapid Taxi.

Decision

Heiner submits that the Desjardin Group breached its contract with her. Heiner's position is that the Desjardins Group failed to undertake a reasonable and unbiased investigation into her claim. It failed to complete a full investigation of the damages sustained by the Honda Civic, and pressured Heiner to authorize the repair of her car.

Heiner submits that she was subject to undue pressure by the Desjardins Group, particularly with respect to the correspondence that she received dated August 3, 2012 and entered at Trial as Exhibit 3.

Heiner argues that her vehicle clearly suffered diminished value damage as a result of the negligence of the Defendant, Pasha. Evidence was presented at the Trial that Heiner's vehicle suffered diminished value. Even though the actual property damage to the Honda Civic was repaired, both appraisers agreed that diminished value would still affect Heiner's vehicle.

Heiner argues that diminished value is a kind of damage equivalent to pure economic loss. Therefore, it is not to be considered property damage under Section 263 (5) of the

Insurance Act. Heiner's position is that Section 263(5) does not apply to this action, as the damage being claimed is not property damage.

Heiner relies on two cases to support her claim to diminished value: *Cummings v. 565204 B.C. Ltd.* 2009 BCSC 1009 (CanLII) and *King v. Satchwell* 2013 ABPC 358 (CanLII). Heiner acknowledges that in Ontario, a claim for diminished value may not yet have been tested. However, Heiner urges this court to follow the Alberta and British Columbia cases relating to diminished value.

Heiner seeks \$25,000.00 from the Desjardins Group. Her position is that her insurer breached the Policy. The Desjardins Group was obligated to declare Heiner's vehicle a total loss, and to provide her with a new similar vehicle with no depreciation. Further, Heiner argues that the Desjardin Group failed to pay Heiner the full cost of the rental vehicle.

With respect to the third party, Pasha and Rapid Taxi, Heiner is seeking the diminished value that her vehicle suffered in the amount of \$8500.00.

The Desjardins Group argues that there was no breach of contract, and that it did not act in bad faith following the subject loss. Further, it states that no further amounts are owing to Heiner in respect of car rental amounts she paid following the subject loss.

The Desjardins Group refers to the Certificate of Automobile Insurance located at Tab A of Exhibit 1 – the Plaintiff's Book of Documents. Page 3 of the Certificate of Automobile Insurance provides as follows:

“This Certificate is proof of a contract of insurance between the Named Insured and the Insurer, subject in all respects to the Ontario Automobile Policy.”

The Desjardins Group also relies on Paragraph 6.2 of the Policy that provides as follows:

“What We Will Cover

We will pay the cost of damage to the automobile, its equipment, contents and for the loss of use of the automobile or contents arising from an accident for which another person would have been legally responsible in the absence of section 262 of the Insurance Act (Ontario).”

The Desjardins Group also points to paragraph 6.6 at page 39 of the Policy, which states as follows:

“Our Right to Repair, Replace or Rebuild the Automobile

We have the right to repair, replace or rebuild the automobile rather than pay for the damage. If we choose to do this, we will let you or other insured persons know in writing

within seven days of receiving notice of the claim. We will complete the work within a reasonable time using parts of similar kind and quality.”

The Desjardins Group submits that paragraph 6.6 of the Policy confers upon the insurer the right to determine whether an insured’s vehicle will be replaced or repaired following a loss.

The Desjardins Group submits that it is clear that after a certain period of time during which Heiner protested its decision to repair her vehicle, she ultimately approved the repairs to her vehicle, and the body shop proceeded with the repair work. Accordingly, she accepted the proposed settlement put forward by the Desjardins Group, that the damage be repaired rather than replacing the Honda Civic.

The Desjardins Group submits that Heiner admitted during her testimony that her insurer had the discretion to decide whether her vehicle would be repaired or replaced following the Accident. She admitted that there were no safety or performance concerns with the Honda Civic after it was repaired. Her sole claim is for the diminished value of her Honda Civic, a claim for which there is no coverage available under any policy of automobile insurance in Ontario. Further, she is also claiming for amounts she paid for a rental vehicle – she retained the vehicle for 81 days whereas the repairs only required approximately 20 days. Finally, the test for establishing bad faith has not been met.

Pasha and Rapid Taxi submit that Section 263 of the *Insurance Act* bars Heiner’s claim against them. They submit that Section 263 (1) sets out certain criteria that must be satisfied before the section is applicable. These criteria are:

- a) Heiner’s vehicle was damaged arising from the use or operation of another automobile (the vehicle driven by Pasha) in Ontario;
- b) Heiner’s vehicle is insured under a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario, in this case the Policy;
- c) Pasha’s vehicle is insured under a motor vehicle liability policy by an insurer that is licensed to undertake automobile insurance in Ontario.

Pasha and Rapid Taxi submit that all three criteria are met in this case. Therefore, s. 263 of the *Insurance Act* applies to this action. Where the criteria in subsection 263 (1) of the *Insurance Act* are met, subsection 263 (5) prohibits claims for property damage against anyone involved in an accident:

“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;

(b) an insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to its insured under this section."

Pasha and Rapid Taxi submit that any diminished value to Heiner's vehicle is simply part of the "damages to the insured's automobile" which cannot be claimed by virtue of section 263 of the *Insurance Act*. If any loss of market value was experienced by Heiner, then it falls within the ambit of section 263 (5).

Pasha and Rapid Taxi acknowledge that claims for diminished value have been brought in other jurisdictions in Canada, including British Columbia and Alberta. However, no cases in jurisdictions in Canada with legislation similar to Ontario's have considered whether a plaintiff can recover for diminution of value against another motorist.

Pasha and Rapid Taxi also argue that if Heiner is entitled to an award for diminution of value, then the amount claimed is excessive and ought not to exceed 15% of the actual cash value of a comparable vehicle.

In sum, Pasha and Rapid Taxi submit that Heiner's claims against them are statute barred by section 263 of the *Insurance Act*. To permit Heiner to enjoy a fully repaired vehicle and then to sue for an unproven sum for diminished value is to ignore the legislative intent of s. 263 of the *Insurance Act*.

On balance, I agree with the submissions of the Desjardins Group, Pasha and Rapid Taxi. I do agree with Heiner that she has suffered a diminished value with respect to her Honda Civic. I am prepared to accept the expert evidence of Abate in this regard, and accept that the value of the Honda Civic declined by \$8500.00 as a result of the Accident.

Further, I understand from the evidence that Heiner had a strong preference to have her Honda Civic deemed a total loss. Her evidence was that she felt pressured to authorize the repairs to her vehicle, and ultimately did so, only because the storage and rental charges were mounting.

Nevertheless, the question with respect to her claim against the Desjardins Group must be answered according to the terms of the Policy. Paragraph 6.2 of the Policy provides that the Desjardins Group must cover the cost of damage to Heiner's vehicle. The Desjardins Group did cover the cost of all repairs to the Honda Civic.

More importantly, Paragraph 6.6 of the Policy provides the Desjardins Group with the right to repair, replace or rebuild Heiner's vehicle. In this case, the Desjardins Group was completely within its right to make a decision to repair Heiner's vehicle as it did.

I take note of the evidence of Hagadorn. He indicated that he may have come to a different recommendation with respect to the issue of whether the Honda Civic was a total loss, if he had known the total cost of repairs at the outset. Nevertheless, I find that the Desjardins Group made the appropriate inquiries, and appropriately followed the advice of Hagadorn, when it decided that it was more economical to repair the Honda Civic, rather than replace it. There is no evidence that would lead me to conclude that the Desjardins Group breached the Policy when it repaired the Honda Civic. It acted strictly according to the terms of the Policy. The Policy does not provide any coverage for diminished value. Without express coverage for this type of damage, Heiner's claim against the Desjardins Group must fail.

In addition, I am not prepared to order that Heiner be compensated for the rental car expense that she incurred. As submitted by the Desjardins Group, Heiner was paid \$1192.80 for the rental car. She continued to rent a vehicle for 81 days, when the actual repairs took less than 3 weeks.

Given my findings that the Desjardins Group complied with the terms of the Policy, I similarly do not find that Heiner is entitled to punitive damages. I did not hear any evidence that would convince me that Heiner was treated in bad faith while the Desjardins Group was adjusting her property damage claim.

As stated in *Whiten v. Pilot Insurance Co.* [2002] 1 S.C.R. 595, 2002 CarswellOnt 537 per Binnie J.:

"Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency". *Hill v. Church of Scientology of Toronto*, [1995] 2 SCR 1130 (S.C.C.) at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behavior. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)."

Having examined the log notes and heard the evidence of Diallo, I can find nowhere the type of misconduct required by an insurer for an award of punitive damages.

This leaves Heiner's claim against Pasha and Rapid Taxi. Here, I agree with their submissions with respect to the limitations imposed by the *Insurance Act*. In my view, the language of s. 263 clearly bars Heiner from bringing an action against these two Defendants. She is limited by virtue of the *Insurance Act* to a claim against her own insurer.

In *Clarendon National Insurance v. Candow*, 2007 ONCA 680 at para 7, R.G. Juriansz J.A. noted as follows:

“Section 262 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.”

Pasha and Rapid Taxi submit that there are no cases that deal with the issue of diminished value in Ontario. In fact, there is a decision from this Court dated February 9, 2015 that deals with the issue of diminished value, *Moore v. Lee* [2015] O.J. No. 1616. In that case, Deputy Judge Buie considered a claim for depreciation as a result of a motor vehicle accident. She decided as follows:

“In this case, the loss suffered by the plaintiff is a direct result of the motor vehicle accident. The legislature by enacting s. 263 (5)(a.1) created an exception to s. 263 and its limits, but this exception only gives a right of action if it is being brought “under an agreement” which is not a contract of automobile insurance and furthermore is limited to contracts not tort actions.

In my opinion, while one has sympathy for the plaintiff, and perhaps this is an issue which should be reviewed by the legislature, depreciation flows from the accident and the resulting property damage and does not fall within s. 263(5)(a.1).”

Deputy Judge Buie’s decision was followed in a very recent decision of this Court dated January 4, 2016, written by Deputy Judge Hunt, *Keyhani v. Downsview Chrysler Toronto*, [2016] O.J. No. 20. In this decision, Deputy Judge Hunt summarized the facts in that case as follows:

“A man purchased a car, a car for which he had great expectations. He is the plaintiff. He takes it to a dealership for servicing. The dealership is the defendant. The car is damaged as a result of its being struck by another car being driven by an employee of the defendant, a car dealership, while on the defendant’s premises.

The dealership acknowledges its responsibility and offers to repair the damages to the vehicle, at the dealership, with the costs covered under its own policy of liability insurance; so far, so good. But that is not enough for the plaintiff. He wants recompense for diminution in market value. That is the plaintiff’s claim and is the essential issue in

this lawsuit. Is diminution in market value of an automobile, resulting from an accident, an actionable head of damages?"

Deputy Judge Hunt concludes after a very thorough analysis of no fault insurance in Ontario "that any effort to recover the apparent diminished value of the vehicle is barred by the operation of section 263 of the *Insurance Act*."

I am prepared to follow these two decisions of this Court to conclude that no action for diminished value can properly be brought against Pasha or Rapid Taxi; s. 263 of the *Insurance Act* bars a claim against these two Defendants. Accordingly, Heiner's claim is dismissed in its entirety. I want to thank all three representatives for their thorough arguments and presentation.

Judgment

The Plaintiff's claim is dismissed against all Defendants. All parties may make written submissions with respect to costs on or before Friday, February 26, 2016.



Deputy Judge Anschell
January 27, 2016