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Hutchinson et al. v. Clarke

[1988] O.J. No. 1855

66 O.R. (2d) 515

35 C.C.L.I. 186

12 A.C.W.S. (3d) 329

Action No. 88/86

Ontario
High Court of Justice

Potts J.

October 24, 1988.

Counsel:

F.D. Powell, Q.C., for plaintiffs.

D. Los, for defendant.

T. Charney, for Wausau Insurance Company.

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1 POTTS J. (orally):-- This is an application by Wausau Insurance Companies (hereinafter referred to as "Wausau") for an order that:

(a) leave be granted abridging the time for service;
(b) leave be granted pursuant to Rule 13 of the Rules of Civil Procedure to allow Wausau to intervene in this action by being added as a party defendant;

(c) that the trial of this action be adjourned to the next sittings of the court, and
(d) that leave be granted to allow Wausau to file a statement of defence and cross-claim.

2 I have heard argument, to this point, on an issue which I initially defined as: Is Wausau entitled to be added as a defendant?

3 The second issue which was to be argued, if the answer to the first issue was "Yes", was: In the circumstances of the particular case, should the court exercise its discretion, and in fact add Wausau?

4 I have heard legal argument as to the legal position as it applied previously and as of today. Indeed, I think it is correct, and counsel have agreed, that under Rule 13 Wausau is certainly entitled to apply to be added. But I propose now to sketch the argument as to the extent to which -- as counsel for Wausau has argued -- the law has changed by virtue of the introduction of Rule 13.

5 I was referred to Rioso v. Marko (1982), 39 O.R. (2d) 661, 140 D.L.R. (3d) 314, 34 C.P.C. 34, a decision of the Divisional Court. That was a situation where the defendant was underinsured. Mr. Justice Southey stated, at p. 664:

> Master Sandler found that the appellant is not directly concerned in the issue to be litigated, but that the appellant would be directly affected in its legal rights or in its pocket, in that it will be bound to foot the bill under the underinsured motorist endorsement. With deference to the learned master, I am unable to appreciate the distinction between a direct interest and an interest of the type which he recognized the appellant as having. In my view, the appellant has a direct interest in the issues to be litigated in this action.
>
> The master then went on to consider whether he should exercise his discretion to allow the appellant to intervene. On the question of adequacy of representation of the appellant's interest, if not added, he concluded, and I think rightly so, that the appellant could not comfortably rely on adequate representation, even though the defendant Marko is represented by a well-known and competent law firm experienced in motor vehicle negligence defence litigation.

He also stated, at p. 665:

> In my judgment, the learned master attached undue weight to the effect of permitting an insurer to take a role in litigation that is adverse to its policyholder who is bound to furnish relevant information to the insurer.

Further on, at p. 665:

> On the other side of the scales is the interest of the appellant in the action. It seems to me to be inconsistent with the usual practice in our courts to require a person with a direct and substantial financial interest in the result of an action to remain on the sidelines without the opportunity to defend itself.

Further, at p. 665:

> On the question of harm or prejudice to the appellant, if it is not permitted to join in the action as a party defendant, the learned master's final conclusion that none would occur seems to me to be inconsistent with the view he expressed earlier that the appellant could not comfortably rely on the present defendant's solicitors to represent it adequately. As mentioned above, I think such doubts are well- founded. If there is little or no dispute as to liability, and if the plaintiff's recovery will almost certainly exceed the policy limits of the Royal Insurance by hundreds of thousands of dollars, it is unlikely that the defendant will be as keenly interested as the appellant in seeing that damages are assessed properly.

6 In the result, the appeal was allowed, and the insurance company was added as a defendant in the action.

7 I was also referred to Re Waterloo Ins. Co. and Zurbrigg (1983), 43 O.R. (2d) 219, 3 C.C.L.I. 94, 37 C.P.C. 264, a decision of the Court of Appeal; Zuber J.A. stated at pp. 220-2:

> Waterloo now perceives that it is at least possible that it may be obliged to pay the plaintiff's judgment (if one is obtained) by virtue of the uninsured automobile coverage in its policy. Against this background Waterloo sought to be added as a party defendant to this action pursuant to Rule 136 of the Rules of Practice. The action has not yet proceeded to the point where it can be said whether or not State Farm will enter the action as a third party or whether or not the defendants will assert a counterclaim but both of these procedures are very real possibilities.

> It is obvious that if Waterloo were added as a party defendant it would be, to say the least, in a strange position. As the liability insurer of Zurbrigg, it is obliged to defend its insured and, indeed, the insured is obliged to co-operate in this defence. As a party defendant seeking to avoid liability on the uninsured automobile coverage, it would be at liberty to seek to maximize the liability of its own insured and minimize his damages. This would surely put Waterloo in an impossible position in which it would have to choose between its own interests and that of its insured.

> There are, of course, many examples of lawsuits between an insurer and its

own insured and each seeks to protect his own interest. This case, however, is different. Here, the insurer seeks to intervene in a contested action between its insured and another and take a position adverse to its insured. In my respectful view, the clearest mandate would be required before such a situation could be tolerated.

. . . . .

In the course of argument, the appellant relied heavily on the case Riosa et al. v. Marko (1982), 39 O.R. (2d) 661, 140 D.L.R. (3d) 314, [1983] I.L.R. para. 1-1593, a decision of the Divisional Court. In that case, the issue was identical to the one at hand excepting only that the insurance coverage in question was underinsured motorist coverage. This type of coverage is optional rather than mandatory. However, the insurance contract adopted the same procedures for determining disputes between the insurer and its insured as exist for uninsured automobile coverage pursuant to Reg. 535 and, particularly, s. 4(1)(c). The Divisional Court in that case, reversed a decision of Master Sandler and allowed the plaintiff's insurer to be added as a party defendant. It is apparent from the reasons set out herein that I am not in agreement with the decision of the Divisional Court; in my respectful view, Riosa et al. v. Marko should not be followed. This appeal is dismissed with costs.

8 Those two cases cited the then Rule 136:

136(1) The court may, at any stage of the proceedings, order that ... any person who ought to have been joined, or whose presence is necessary in order to enable the court effectually and completely to adjudicate upon the questions involved in the action, be added ....

The new rule is rule 13.01(1), which reads:

13.01(1) Where a person who is not a party to a proceeding claims,

(a) an interest in the subject matter of the proceeding;

(b) that he or she may be adversely affected by a judgment in the proceeding ...

. . . . .

the person may move for leave to intervene as an added party.

> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

9 It was generally conceded that rule 13.01 very much enhanced the prospects of an insurance company, in such circumstances, being added as a party, than under the prior rule.

10 Mr. Justice Eberle, in an unreported case, Power & Power v. County of Hastings et al., added an insurance company as a party defendant, and, in effect, came to the conclusion that the decision in the Waterloo case no longer applied, having regard to rule 13.01. He stated, at p. 3:

> Zurbrigg [the Waterloo case] was decided in 1983, at which time the Rules of Practice did not permit a person to have himself added as a party defendant. On January 1, 1985, the new Rules came into force, including rule 13.01 which does not seem to have any parallel in the earlier rules.
>
> In Zurbrigg at p. 222, the court said:
>
> "It therefore appears that if the matters of liability and quantum of damages have been previously determined in a contested action, then those matters are closed."
>
> Rule 13.01 now provides a procedure enabling the S.E.F. 42 insurer to bring itself into the action.
>
> The S.E.F. 42 endorsement makes applicable s. B(3) of the policy to the determination of legal liability and amount of damages. Included in s. B(3) are the provisions found in s. 4(1) of R.R.O. 1980, Reg. 535, quoted in the Zurbrigg case. Those provisions are now found in s. 5(1) of the statutory terms.
>
> These provisions do not require that liability and quantum be determined in an action between the insured and a tortfeasor but only that if they have been, then these issues cannot be relitigated by the S.E.F. 42 insurer.
>
> In the present case, no judgment has been obtained against any tortfeasor and the S.E.F. 42 insurer wishes to participate in the present action because it meets

> the requirements of rule 13.01. I think it is clear that it does meet those requirements.

11 Counsel for the plaintiff argued that Mr. Justice Eberle was wrong. It was suggested that Mr. Justice Eberle erred when he found that:

> These provisions do not require that liability and quantum be determined in an action between the insured and a tortfeasor but only that if they have been, then these issues cannot be relitigated by the S.E.F. 42 insurer.

I agree with the conclusion that Mr. Justice Eberle reached in this regard.

12 Counsel for the plaintiff also argued that as the policy was issued in July, 1984, and the new rule did not come into effect until January, 1985, the accident having occurred in July of 1985, before the expiry of the policy, that to allow Wausau to be added as a party defendant at this stage would, in effect, be asking to change the provisions of the contract. As is generally conceded, S.E.F. 42, and its successor S.E.F. 44, are optional provisions, and not mandatory provisions, under the Insurance Act, R.S.O. 1980, c. 218, whereby the insured and the insurer enter into a contract in consideration of the payment of an additional premium.

13 In support of this contention counsel for the plaintiff referred me to Corrigan v. Employers Ins. of Wausau A Mutual Co.; Mercer, Third Party (1984), 48 O.R. (2d) 354, 13 D.L.R. (4th) 305, 8 C.C.L.I. 1 (H.C.J.). In that case the insured brought an action against the tortfeasor, and a separate action versus the insurer. In the action versus the insurer, the insurer added the tortfeasor as a third party. The tortfeasor applied to have the action dismissed as premature, and this application was resisted by both the plaintiff and the defendant. Griffiths J. held that the action brought by the insured versus the insurer prior to judgement or agreement was premature, but as the insured and insurer wanted to maintain the action the tortfeasor had no status to insist upon its dismissal. However, he was entitled to have the third party proceedings stayed or dismissed. I did not find this case to have any particular relevance to the issue before me, apart from the fact that it establishes that the S.E.F. endorsement is a contract.

14 It is conceded by counsel for the plaintiff that, if we were dealing with an S.E.F. 44 endorsement, then, in all probability, the insurance company would have at least a far better chance of being added as a defendant, having regard to the provisions of para. 5(f), which reads:

> 5(f) No findings of a Court with respect to issues of quantum or liability are binding on the Insurer unless the Insurer was provided with a reasonable opportunity to participate in those proceedings as a party.

15 The fact that that might be so, in my view, is not particularly relevant to the legal issue. Even under S.E.F. 42, the insurer is certainly entitled to apply under Rule 13, and in my view, is in a much stronger position to make the application than an insurer was prior to Rule 13 being

introduced.

16 Now that doesn't mean that the insurer in this case is necessarily entitled to be added. That question remains in the discretion of the court, having regard to the particular circumstances of this case, and as is set out in rule 13.01(2).

17 The motion is adjourned to permit counsel for the plaintiff to file affidavit material. Of necessity, the trial of this action is adjourned to the next sittings of the court.

Order accordingly.