Indexed as:

Racco v. General Accident Assurance Co.

Between
Guiseppe Racco and Rosa Racco, Plaintiffs, and
The General Accident Assurance Company and The New Rotterdam Insurance Company, Defendants

[1992] O.J. No. 308

9 C.C.L.I. (2d) 208

[1992] I.L.R. 1806

[1992] I.L.R. para. 1-2825 at 1806

31 A.C.W.S. (3d) 807

Action No. 91-CQ-2355

Ontario Court of Justice - General Division
Toronto, Ontario

Matlow J.

Heard: February 12, 1992
Judgment: February 19, 1992

(5 pp.)

Insurance -- Automobile insurance -- Duties of insurer -- Personal injury -- Whether plaintiff had claim against defendant's insurer.

The plaintiffs were injured in a motor vehicle accident as a result of the negligence of two persons who were insured by the defendants. The plaintiffs framed their action as one based on an alleged breach of the defendants' statutory duty as prescribed by the Insurance Act. The plaintiffs submitted that the defendants were required, pursuant to section 393(b)(ix) of the Act, to negotiate a fair adjustment and settlement of their claims and to make advance payments to them. The defendants'

failure to do this constituted a violation of section 394 and gave the plaintiffs a civil cause of action against them. The defendants applied for an order striking out the statement of claim and dismissing the action against them.

HELD: Application allowed. The defendants owed no duty to the plaintiffs. There was therefore no breach of any such duty. The plaintiffs were strangers to the insurance contracts between the defendants and their insured. Without the type of statutory intervention contained in section 226(1), the plaintiffs had no direct claims against the defendants. The plaintiffs could not rely on section 393(b)(ix) and they did not have a reasonable cause of action, at this point, against the defendants.

STATUTES, REGULATIONS AND RULES CITED:

Insurance Act, R.S.O. 1980, c. 218, ss. 226(1), 393(b), 393(b)(ix), 394.

T.P. Charney, for the Plaintiffs.
T. Bean, for the Defendant, The General Accident Assurance Company.
C. Anderson, for the Defendant, The New Rotterdam Insurance Company.

MATLOW J.:-- Both motions on behalf of the defendants for orders striking out the statement of claim are granted and judgment is to issue dismissing this action with costs. Those costs may be assessed or, at the option of the defendants, I am prepared to fix them upon further application.

The issues on these motions, which involve the relationship between certain injured persons and insurers, have been litigated in various jurisdictions in the United States but according to all counsel, they have not been dealt with in any reported case in Canada. Accordingly, because this is apparently a case of first impression in Canada, I propose to set out my reasons, albeit briefly, in writing.

The following is the gist of the allegations contained in the statement of claim which raise the issues in question. The plaintiffs were both injured in a motor vehicle accident as a result of the negligence of two persons who are insured by the defendants in this case. The male plaintiff requires further care and treatment as a result of his injuries but he has exhausted all of his no-fault benefits and he is unable to afford the further care and treatment required. Further, the defendants have refused to settle the plaintiffs' claims in good faith and, as well, have refused to make any advance payments to the plaintiffs.

The plaintiffs framed their action as set out in the statement of claim as presently amended as one based on an alleged breach of the defendants' statutory obligations as prescribed by the

Insurance Act. As well; they have alleged "the torts of deliberate misfeasance and/or nonfeasance".

The following are the provisions of the Insurance Act, R.S.O. 1980 as amended to which reference is made:

"Section 393(b)	"Unfair or deceptive acts or practices" includes...".
Section 393(b)(ix)	"Any conduct resulting in unreasonable delay or resistance to the fair adjustment and settlement of claims".
Section 394	"No person shall engage in any unfair or deceptive act or practice".

The plaintiffs take the position that the defendants are required, in accordance with section 393(b)(ix), to negotiate a fair adjustment and settlement of their claims and to make advance payments to them and that the defendants' failure to do so constitutes a violation of section 394 and confers a civil cause of action on them.

The defendants, however, take the position that they have no duty whatsoever to the plaintiffs until after the plaintiffs have established some liability on their insureds by way of judgment. The defendants rely upon section 226(1) of the Insurance Act which reads as follows:

> "Any person who has a claim against an insured for which indemnity is provided by a contract evidenced by a motor vehicle liability policy, notwithstanding that such person is not a party to the contract, may, upon recovering a judgment therefor in any province or territory of Canada against the insured, have the insurance money payable under the contract applied in or towards satisfaction of his judgment and of any other judgments or claims against the insured covered by the contract and may, on behalf of himself and all persons having such judgments or claims, maintain an action against the insurer to have the insurance money so applied."

The American cases cited to me, although interesting, are not particularly helpful in the resolution of the issues before me. The American statutory provisions can all be readily distinguished.

I am persuaded of the correctness of the defendants position. In my view, the defendants have no statutory or other duty to the plaintiffs. It follows, therefore, that there can be no breach of any such duty. The plaintiffs are strangers to the insurance contracts between the defendants and their insureds and without the type of statutory intervention that appears in section 226(1) of the Insurance Act, the plaintiffs can have no direct claims against the defendants. The plaintiffs are not yet entitled to rely on s. 393(b)(ix) and they clearly do not have a reasonable cause of action at this point in time against the defendants.

In my view, it matters not that the plaintiffs' action rests on multiple legal bases. On any legal characterization of the plaintiffs' claims, the claims are bound to fail. There is no reasonable cause of action alleged in the statement of claim and there would be no point in allowing this action to proceed further.

Because of the conclusion to which I have arrived, it is not necessary for me to determine whether a breach of section 394 of the Insurance Act can ever give rise to a civil cause of action or whether an aggrieved person is limited to the procedural remedies set out in the applicable statutory provisions.

MATLOW J.