

The Right To Subrogate: Court Finds Bailment As An Exception To S. 263 Of The Insurance Act

22 novembre 2018

Overview

When certain statutory criteria are met, s. 263 of the Insurance Act, R.S.O. 1990, c. I.8 (the Act) bars tort claims for property damage following a motor vehicle accident.

On January 9, 2018, the Divisional Court released a decision in the case of *Burridge v. Hardy*, 2018 ONSC 202 (*Burridge*) dismissing an appeal from the 2016 small claims court decision. *Burridge* stands for the proposition that “a right of action against a person under an agreement” for the purpose of s. 263(5)(a.1) of the Act – an important exception to the subrogation bar in a motor vehicle accident context – includes a right of action in bailment.

Facts

Hardy asked to borrow *Burridge*’s automobile for a weekend in order to attend a wedding. In response to the request, *Burridge* answered “there’s the keys, go for it.” *Burridge* gave Hardy his permission. It was understood that Hardy was to return the automobile “whenever he was done with it,” and while no payment or compensation was expected, Hardy was expected to “just leave the gas in it that was there.” After leaving the wedding, while impaired, Hardy turned left into an oncoming vehicle. Hardy was 100 per cent at fault for the collision. Hardy was subsequently convicted of impaired driving causing bodily harm and his license was suspended.

Court’s Decision

The court determined that the right of action in bailment constituted “a right of action under an agreement” for the purpose of s. 263(5)(a.1) of the Act.

However, the court provided limits to this determination by way of establishing four criteria that must be satisfied:(1)The bailee is partially or wholly at fault for the collision in accordance with the fault determination rules;(2)At the time of the collision, the bailor

is insured under optional “collision” or “all perils” coverage pursuant to s. 7 of the Ontario Automobile Policy 1 (OAP 1) with regards to the bailed automobile;(3)The bailee either(a)has possession of the insured’s automobile in connection with a commercial purpose set out in s. 7.4.1 of the OAP 1;(b)violates the terms of the policy; or(c)uses the automobile in any of the circumstances included in s. 7.2.2 of the OAP 1 (illegal use provisions); and(4)The bailee is insured for third party liability under the provisions of a separate contract of automobile insurance, in circumstances where such coverage is available to respond to the property damage claim asserted by the subrogated insurer.

Applying the criteria, the court concluded that Hardy was in possession of the automobile as a gratuitous bailee and was obligated to return it in the same condition. **The failure to do so resulted in a breach of Hardy’s bailment obligations. Secondly, Hardy was at fault for the collision that resulted in damage to BurrIDGE’s automobile which the insurer paid out pursuant to s. 7 of the OAP 1. Finally, Hardy’s use of the automobile was within s. 7.2.2 of the OAP 1 with respect to “illegal use.”**

Implications

As noted above, BurrIDGE, in circumstances where specific criteria are satisfied, will be an important decision for insurers seeking to bring subrogated actions in motor vehicle property damage cases, as it creates an exception to the bar against subrogation set out in the direct compensation scheme, as prescribed by s. 263 of the Act.

Par

[Larry Elliot, Matthew Sherman](#)

Services

[Contestation de réclamations d’assurance](#)

BLG | Vos avocats au Canada

Borden Ladner Gervais S.E.N.C.R.L., S.R.L. (BLG) est le plus grand cabinet d'avocats canadien véritablement multiservices. À ce titre, il offre des conseils juridiques pratiques à des clients d'ici et d'ailleurs dans plus de domaines et de secteurs que tout autre cabinet canadien. Comptant plus de 800 avocats, agents de propriété intellectuelle et autres professionnels, BLG répond aux besoins juridiques d'entreprises et d'institutions au pays comme à l'étranger pour ce qui touche les fusions et acquisitions, les marchés financiers, les différends et le financement ou encore l'enregistrement de brevets et de marques de commerce.

blg.com

Bureaux BLG

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000, rue De La Gauchetière Ouest
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

Les présents renseignements sont de nature générale et ne sauraient constituer un avis juridique, ni un énoncé complet de la législation pertinente, ni un avis sur un quelconque sujet. Personne ne devrait agir ou s'abstenir d'agir sur la foi de ceux-ci sans procéder à un examen approfondi du droit après avoir soupesé les faits d'une situation précise. Nous vous recommandons de consulter votre conseiller juridique si vous avez des questions ou des préoccupations particulières. BLG ne garantit aucunement que la teneur de cette publication est exacte, à jour ou complète. Aucune partie de cette publication ne peut être reproduite sans l'autorisation écrite de Borden Ladner Gervais S.E.N.C.R.L., S.R.L. Si BLG vous a envoyé cette publication et que vous ne souhaitez plus la recevoir, vous pouvez demander à faire supprimer vos coordonnées de nos listes d'envoi en communiquant avec nous par courriel à desabonnement@blg.com ou en modifiant vos préférences d'abonnement dans blg.com/fr/about-us/subscribe. Si vous pensez avoir reçu le présent message par erreur, veuillez nous écrire à communications@blg.com. Pour consulter la politique de confidentialité de BLG relativement aux publications, rendez-vous sur blg.com/fr/ProtectionDesRenseignementsPersonnels.

© 2026 Borden Ladner Gervais S.E.N.C.R.L., S.R.L. Borden Ladner Gervais est une société à responsabilité limitée de l'Ontario.