

Case Name:

Totic v. State Farm Insurance Co.

Between

**Radojka Totic, plaintiff, and
State Farm Insurance Company, defendant**

[2002] O.J. No. 2597

40 C.C.L.I. (3d) 133

24 C.P.C. (5th) 159

114 A.C.W.S. (3d) 830

Court File No. 2954/97

Ontario Superior Court of Justice

Whitten J.

Heard: June 11, 2002.

Judgment: June 26, 2002.

(16 paras.)

Counsel:

Rocco Grilli, for the plaintiff.

Linda Matthews, for the defendant.

1 WHITTEN J.:-- The plaintiff has sought an order striking out the Jury Notice delivered by the defendant on January 21, 1998. The thrust of the application by the plaintiff is that the plaintiff seeks declaratory relief in the action and therefore the issue of fact and the assessment of damages, in accordance with section 108(2) 10, of The Courts of Justice Act, shall be tried without a jury. (underlining mine)

2 Accordingly, the issue becomes whether the relief sought by the plaintiff is truly declaratory relief?

The Pleadings

3 In the prayer for relief contained in the Statement of Claim issued December 2, 1997, the plaintiff seeks (aside from the standard request for costs and pre and post judgment interest) "a) weekly income replacement benefits and /or loss of earning capacity benefits for the period from April 25, 1997 and continuing; b) a declaration of this Court that the plaintiff suffers a substantial inability to perform the essential tasks of her employment as a result of the motor vehicle accident of April 20, 1995; c) a declaration of the Court that the plaintiff qualified and continues to qualify for weekly income replacement benefits and/or loss of earning capacity benefits; d) a declaration of this Court that the plaintiff has an impairment which permanently prevents this plaintiff from performing the essential tasks of any other employment; e) punitive damages and/or aggravated damages in the amount of \$25,000.00."

4 The body of the Statement of Claim, or the material facts upon which the claim is based commences with the standard identification of the parties and the circumstances of the motor vehicle accident of April 20, 1995. The contractual relationship of the parties is established; namely, that the defendant was the insurer of a particular automobile insurance policy and the plaintiff was the insured. The contents of the policy are referred to. Section B of the policy is specifically referred to as it is this section which provides, amongst other things, for weekly income replacement benefits and loss of earning capacity benefits. Paragraph 7 stipulates that those benefits ceased April 25, 1997, a point just short of a payment history of 104 weeks. The plaintiff pleads additionally that the defendant by its actions has breached an implied covenant of good faith.

Analysis

5 As mentioned, the plaintiff seeks to characterize the relief as "declaratory", and therefore is exempt from trial by judge and jury pursuant to Section 108.

6 Justice Goodman in *Cosford, Cosford and Lothian Cosford Holdings Inc. v. Cornwall* (1992), 9 O.R. (3d) 37 C.A. stated,

"The right to a trial by jury in those cases where it has not been provided by statute that trial be without a jury, is a fundamental one. The courts have long recognized it as a right which should not be interfered with lightly." (at p. 43)

7 Undoubtedly because of the respect attributed to the right to a jury trial, the applicable jurisprudence is rife with the view that a jurist must look beyond the prayer for relief in a claim to determine the "pith and substance of the action".

8 Justice Chadwick in *MacLennan v. National Life Assurance of Canada* [1994] O.J. No. 1242 (Ont. Ct. of Justice - Gen. Div.) referred to and quoted from *The Law of Declaratory Judgment* (2nd edit) by L. Sarna. The author stated (at para. 7 of the judgment);

"The declaratory judgment is a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his

rights. While consequential relief may be joined or appended, the court has the power to issue a pure declaration without coercive direction for its enforcement."

9 Although declaratory relief can be obtained in contractual matters (*Ibid.* para 8), in the majority of cases parties would plead breach of contract and seek the consequential damages.

10 Declaratory relief is available in a variety of situations and is not dependant upon the existence of a legal relationship. As Justice Dixon observed in *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 830 (quoted by Chadwick J. in para. 10, *Ibid.*)

"Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship in respect of which "a real issue" concerning the relative interests of each has been raised and falls to be determined." (underlining mine)

11 If the parties have a legal relationship determined by a contract, a form of substantive content, the availability of a remedy depends on the terms of the contract. In other words, a jurist faced with conflict between parties who have a contractual relationship (referred to as having privity of contract), looks to the contract as the basis of adjudication. He or she does not have to look elsewhere to determine the rights possessed or not by the parties. This process does not require a declaration, which as seen above, is a finding independent of content and relationship. This process simply requires a determination.

12 With respect to continuing or future events, for example, a continuing disability or incapacity to perform any or all employment, a contract can set out a description of the possible continuing or future event, and the response to the event. The text of a contract cannot be utilized to determine the actual duration of the factual circumstances. A declaration of status is required, which essentially stands until evidence occurs which establishes otherwise. *Ref. Coombe v. Constitution Insurance Co.* (1980), 29 O.R. (2d) 729 (Ont. C.A.) *Wilson J.* at p. 733. Alternatively, a contract can provide for a regime, which monitors future status by providing for input as to the status of the individual seeking the ongoing relief.

13 Such is the case with part VI of the Statutory Accident Benefits, *Ont. Reg. 776/93* which forms part of every automobile insurance policy. Essentially, s. 20(1) of the Regulation provides that an insured who requires benefits beyond the 104 weeks in which weekly income replacement benefits were received pursuant to Part II of the Regulation, shall be paid weekly loss of earning capacity benefits (potentially for their lifetime if the insured qualifies under Part VI). This contract provides for a regime, and therefore a declaration is not required with respect to duration or status. A determination is required as to whether the insured qualifies for the operation of the Part VI regime.

14 In the matter at hand, there is a contractual relationship between the parties. That relationship is defined by the contract of insurance. The contract provides for weekly income replacement benefits up to 104 weeks under Part II of The Statutory Accident Benefits. Therefore, the first question is, does the plaintiff qualify for the full 104 weeks? This is a part of prayer for relief, it does not require a declaration as such. It requires a determination as to the applicability of the contract. If the plaintiff succeeds in so qualifying, then Part VI of the Statutory Accident Benefits (which is incorporated in the policy of insurance) cuts in to provide for future benefits. This is, in essence, the balance of the prayer for relief (save and except the seeking of punitive or aggravated damages).

Again, a declaration is not required, rather a determination is required as to applicability of the Part VI regime. The action is in essence, a claim based on breach of contract. What is required throughout is a factual determination of whether or not the past and future benefits are payable. The triers do not have to go outside of the contractual relationship to make that determination. The claim for punitive or aggravated damages is a claim for exemplary damages based on the nature of the alleged breach of contract. The whole action is in the context of the automobile policy. A trier does not have to go afield to determine the rights and issues between the parties.

15 The "pith and substance" of the claim is for breach of contract and consequential damages. It is not a claim for declaratory relief. Accordingly, the Jury Notice shall stand.

16 Counsel may submit memoranda as to costs within 30 days.

WHITTEN J.

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---- End of Request ----

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