

## INTRODUCTION

1. The Plaintiff is in the auto rental business.
2. The Defendant Mehendra Bhandari (Bhandari), while operating an automobile rented from the Plaintiff, was involved in a minor collision.
3. The Plaintiff seeks to recover damages for the repair of the rental, and consequent economic losses.<sup>1</sup>

## ISSUES

4. The issues at trial were:
  - a. Validity and enforceability of the auto rental agreement as against Bhandari;
  - b. The application of Section 263 of the Insurance Act (is the claim barred, and if not, can I make a finding and allocation of fault);
  - c. Sufficiency of proof of damages and/or unjust enrichment;
  - d. Is there a direct right of action by the Plaintiff as against the driver's insurer?

## FACTS

### *First Accident*

5. Bhandari had previously been involved in an at fault motor vehicle collision. At that time, he obtained a temporary rental replacement automobile from the Plaintiff.

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<sup>1</sup> The only parties to this lawsuit are the Plaintiff auto rental company and two defendants, being Bhandari, the driver of the rented auto and his auto insurer, Security National Insurance Company (SNIC).

6. The rental was delivered by the Plaintiff's representative to the scene of that prior accident, where Bhandari signed<sup>2</sup> a preprinted 'standard' rental agreement. He initialed a box labelled LDW and T&WDW, and a box containing the annotation "RESPONSIBILITY ACCEPTED", meaning that there was no 'loss damage waiver' by the Plaintiff and Bhandari took responsibility for the 'FULL VALUE' of any damage to the rented automobile.
7. On the evidence before me, I find Bhandari knew what he was signing and is bound by its terms.

#### *Second Accident*

8. Bhandari was then subsequently involved in another collision, this time while driving the rented automobile on August 7<sup>th</sup>, 2016, at the intersection of Ray Lawson Blvd and Hurontario Street in Brampton. The collision was minor. There was no evidence of any personal injuries arising out of the collision. Both vehicles involved in the collision were drivable post-collision. Police did not attend the scene and no police report was ever prepared. The only witnesses to the collision were the two drivers, their respective spouses, and in the case of Bhandari, a friend, seated in the rear passenger side of the vehicle.

#### *Bhandari Version of accident*

9. Bhandari is an accountant by profession. He was headed to Toronto, to attend a cultural event. He testified that he was in the right lane of Ray Lawson Blvd and

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<sup>2</sup> Prior to signing, Bhandari made a number of changes and alterations to the preprinted form and had to await confirmation from the rental company as to its acceptance of those changes. I can safely infer that he read the rental agreement, prior to signing, in order to make the changes and alterations to it.

had come to a stop prior to its intersection with Hurontario Street. He was intending to turn right onto Hurontario Street, but couldn't do so immediately, as a pedestrian was crossing the intersection.

10. He testified that there was a vehicle to his left, in the left lane, which proceeded ahead, but when the traffic light "suddenly" turned red, that vehicle, having already entered the intersection onto Hurontario, was now blocking traffic. Within seconds, he saw that vehicle reverse direction and travel from the left lane into the right lane thus colliding into the left front of Bhandari's rented auto.

*Lead vehicle version of accident*

11. The driver of the lead vehicle, being the other vehicle to the collision, had a completely different version of events.
12. He testified that he also is an accountant by profession. The morning of the accident he was headed to church as he did every Sunday, and his vehicle was in the right turning lane of Ray Lawson Blvd just into the intersection of Hurontario Street. His vehicle was stopped. He was intending to turn right onto Hurontario Street from Ray Lawson Blvd when the rear of his vehicle was struck from behind by the Bhandari vehicle.
13. The Defendant insurer, SNIC, just happened to coincidentally insure both the lead vehicle and Mr. Bhandari as driver of the rented replacement vehicle (the following vehicle), under separate policies of insurance.<sup>3</sup>

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<sup>3</sup> SNIC's claims adjusters for both the leading vehicle and for Mr. Bhandari, each concluded separately, that their respective insured was not at fault, and closed their respective files. The lawsuit arises because the insurer of the Plaintiff's vehicle was never notified or contacted by the Plaintiff of the collision and no claim was made by the Plaintiff as against its own insurer of the rented auto.



14. Effectively, the Plaintiff had no collision coverage on its rented auto as it chose to have a very high deductible and advanced no claim under its own insurance policy as against its own insurer.

15. The Plaintiff now brings suit against Bhandari in contract, as driver of the rented auto, and against Bhandari's insurer, SNIC, for collision damages and consequent economic losses.

#### NON-SUIT & MOTION TO REOPEN

16. At the conclusion of the Plaintiff's case, the Defendants moved for non-suit, but elected to call evidence in defence.

#### *Motion to reopen Plaintiff's case*

17. Prior to opening the defence, however, the Plaintiff moved to reopen its case and have the driver of the lead vehicle testify. The Defence took umbrage and characterized this as a strategic move on the part of the Plaintiff to address an absence of evidence on the issue of fault.

18. I exercised judicial discretion and granted leave to the Plaintiff to reopen its case and call a further witness which was stated to have been unavailable earlier in the proceeding. I based my decision on the basis that this 'slip' by the Plaintiff, if uncured, would be of greater prejudice to the Plaintiff than to the Defendant, and in any event could be addressed in costs.

#### *Non-suit*

19. I reserved on the non-suit motion to the conclusion of trial.

20. The test on a non-suit motion is whether the Plaintiff has made out a prima facie case; it is not based on a balance of probabilities.
21. On the evidence before me, and even if I excluded for purposes of the motion the evidence presented when the Plaintiff reopened its case, I find that the Plaintiff had made out a prima facie case as it related to Bhandari, but not as far as SNIC was concerned.
22. I find that the Plaintiff has presented some evidence on all elements of its claim as against Bhandari. There was some evidence on: liability; fault; damages and economic loss.
23. I am satisfied that the inferences which the Plaintiff seeks could be drawn from the evidence adduced, and if assigned their most favourable meaning, could result in a ruling for the Plaintiff.
24. However, at the conclusion of trial, the non-suit motion was not renewed.
25. For these reasons, the non-suit motion as against Bhandari fails and is dismissed. Costs of the non-suit motion as against Bhandari are reserved.

*Non-suit and claim against SNIC ( the Insurer)*

26. As for defendant SNIC, there was no evidence of any privity of contract between the Plaintiff and Defendant's insurer (SNIC), nor was there any evidence that the Plaintiff was a named insured in any policy or contracts of insurance between Bhandari and SNIC.
27. On the evidence at trial, the Plaintiff has failed to make out any duty owed by SNIC to the Plaintiff.

28. The Plaintiff cannot do an end run around Section 2633(5)(a.1) by seeking compensation from SNIC directly<sup>4</sup>.
29. Since Bhandari's legal obligation to pay for the damage to the Plaintiff's vehicle under the rental agreement has been extinguished by Section 263(5)(a.1) of the Act, SNIC has no obligation to pay for this damage.
30. Simply put, there was no known cause of action advanced at trial to support the Plaintiff's claim against SNIC.
31. The Plaintiff has failed to make out a prima facie case as against SNIC.
32. I find that there simply were no facts and no evidence put forward by the Plaintiff to support any claim as against SNIC or to draw any inferences in favour of the Plaintiff as against SNIC.
33. For these reasons the Defendant's motion for non-suit as it relates to the claim against SNIC succeeds and is granted and the claim as against SNIC is thus dismissed. Costs of the non-suit motion as against SNIC are reserved.

#### CONTRACT CLAIM AGAINST BHANDARI

34. I now turn to the Plaintiff's claim in contract as against Bhandari.
35. The preliminary question and hurdle to overcome is Section 263(5)(a.1) of the Insurance Act (Act).
36. Section 263 of the Act applies to this case because:
- a. The Plaintiff's automobile suffered damage from use and operation in Ontario; and

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<sup>4</sup> Owasco Canadian Car & Camper Rental Ltd. v. Fitzgerald et al., 2021 ONSC 7235.



- b. The Plaintiff's automobile was insured in keeping with the requirements of this subsection; and
- c. At least one automobile was insured in keeping with the requirements of this subsection.

37. Under Section 263(2) of the Act, the Plaintiff, as insured, would be entitled to recover damages to its automobile from its own insurer under any collision coverage.

38. However, for economic reasons<sup>5</sup>, the Plaintiff chose a high deductible. The damages occasioned to its rental automobile, arising from the Bhandari collision, fell within the deductible portion.

39. The rental agreement prepared by the Plaintiff and signed by Bhandari, makes Bhandari responsible for all damages occasioned to the automobile in the course of its rental.

40. Prior to enactment of Section 263(5)(a.1), the Plaintiff may indeed have succeeded in such claim. However, the June 1999 amendment<sup>6</sup>, as enacted by Section 263(5)(a.1) of the Act, limits and restricts the Plaintiff's recovery. It both overrides and takes priority over any contractual provisions in the rental agreement to the contrary.

41. The Defendant argued that fault and a finding of fault was critical if any recovery was to be had pursuant to Section 263(5)(a.1) of the Act, and particularly the last phrase of that section.

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<sup>5</sup> The Plaintiff's principal testified that due to high premiums, the Plaintiff elected to have a high deductible for collision coverage.

<sup>6</sup> Made June 22, 1999.

42. In turn, for a finding of fault, Sections 263(3) and (4) of the Act would be engaged.
43. Section 263(3) of the Act provides that any recovery shall be based on the degree of fault of the insurer's insured as determined under the Fault Determination Rules.<sup>7</sup> The 'Rules', however, are only intended as a guide for insurance adjusters, who determine 'fault' at first instance in the course of the adjusting process. A party not satisfied with the degree of fault established or allocated under the 'Rules', or an insured not satisfied with a proposed settlement and the matters at issue, may bring an action against the insurer for a determination in accordance with the ordinary rules of law.
44. No party to this lawsuit, nor any party to the accident at issue, has brought any such suit.
45. Absent any fault finding and allocation within the ambit of Section 263 of the Act, recovery by the Plaintiff from Bhandari is precluded.
46. Since there was no finding or allocation of fault, as against Bhandari, by the insurers (there was no finding of fault of either driver to the collision) there can be no recovery by the Plaintiff.<sup>8</sup>
47. Section 263(5)(a.1) of the Act provides that in cases where Section 263 applies, an insured's *"right of action under an agreement ... in respect of damages to the insured's automobile is limited 'to the extent that the person is at fault or negligent in respect of those damages'"*. Bhandari was wholly not at fault for the

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<sup>7</sup> Typically, a collision between a leading vehicle and a following vehicle provides for fault allocation to the following vehicle.

<sup>8</sup> At trial the Plaintiff made reference to emails from and between SNIC's clerical staff and between adjusters. Any commentary in these emails was neither a finding or allocation of fault nor intended to be such.



accident that damaged the Plaintiff's vehicle, as determined by the insurers. As such, the plaintiff's right of action against Bhandari is entirely eliminated against him under the rental agreement<sup>9</sup>.

48. The Plaintiff's claim was not framed as one in negligence for fault determination.

I note that it was prepared by a lawyer, as was the defence. At trial, parties should generally be restricted to the pleadings in presenting their case. But even in the less formal and more relaxed spirit and forum of the Small Claims Court, where a case can be determined on matters in fact raised at trial, even if not pled, prejudice and fairness must not be ignored.

49. Numerous authorities were presented and argued in submissions. The OWASCO and Quality Car Rentals v. Sedaghat et al. 219 ONCS 5431 (CANLII)<sup>10</sup>, involve near identical issues and similar facts. These decisions provide a complete answer and response to the Plaintiff's claim and why such cannot succeed.

50. The Plaintiff has had plenty of time to prepare for trial, here, it was some five years ago, since August 2017, when the claim was first issued. Limitation periods have long expired. No amendment to the pleadings was sought. No adjusters were called to testify as to their respective determinations of fault. No accident reconstruction expert or report was put in evidence. It was clear from the Plaintiff's pleading, that no thought was given to Section 263 of the Act, and profoundly evident at trial, that the sole focus of the claim was in contract,

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<sup>9</sup> See OWASCO below at pghs 9, 12 & 13.

<sup>10</sup> I am also mindful of the Owasco Canadian Car & Camper Rental Ltd. V. Fitzgerald et al. 2021 ONSC 7235 (OWASCO) and Quality Car Rentals Inc. v. Sedaghat et al. 219 ONCS 5431 (CANLII). Both are Divisional Court appellate decisions on appeal from The Small Claims Court.

pursuant to and based on the auto rental agreement only. It would be both unfair and prejudicial to the defendants to permit the Plaintiff to pursue a claim not pled. To do so is not something that could be compensable in costs.

#### UNJUST ENRICHMENT

51. Finally, I address the alternative claim for unjust enrichment on which no meaningful time was spent at trial.

52. I find there was no unjust enrichment to Bhandari, but even if there was, the Insurance Act is a complete juristic reason and response to such.

#### DAMAGES

53. In light of my findings, the issue of damages is moot.

#### OUTCOME & DISPOSITION

54. For these reasons the Plaintiff's claim fails and will be dismissed.

#### TRIAL PROCEDURAL ISSUES

55. The matter was first called for trial February 28<sup>th</sup>, 2019.

56. It was spread over 7 full days (Nov 28, 2019, Feb 16, 2022, Mar 16, 2022, May 3, 2022, May 4, 2022, May 5, 2022, May 10, 2022).

57. Voluminous materials were filed and referenced at trial.

58. I have carefully reviewed, evaluated and weighed all the evidence presented, comprising the oral testimony of all witnesses, the pleadings, the documents (comprising both as received and as exhibited and proven)

and the various written submissions and facts of the parties. I have also expended significant time reading and reviewing the authorities and decisions referenced and touched upon at trial.

59. I am also mindful of the 2019 directive of Regional Senior Justice Daley that over the last few years trials have become longer and more complex. As a result, there are times when the Court must reserve on its decision in order to properly reflect on issues at stake and to draft brief reasons. This is one such case. I wish to assure the parties that the mandate for brief reasons does not mean that I have not fully reviewed and considered the evidence, submissions, the law, legal principles and authorities provided.

Dated at Brampton:

A handwritten signature in black ink, appearing to read "Barycky D.J.", with a stylized flourish at the end.

Deputy Judge George Barycky