IS IT NOW OPEN HUNTING SEASON ON INSURANCE ADJUSTERS?

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The decision of ***Spiers v. Zurich*** (1999) O.J. 3683, (Sup. Ct.), motion for leave to appeal dismissed by Mr. Justice Philp on December 2, 1999, has engendered some publicity in recent months and perhaps a little fear (or at least astonishment) among some employees of and lawyers working for insurance companies. Although in ***Spiers***, Mr. Justice Cavarzan ruled that adjusters owe insured persons a personal duty of good faith and could be held independently liable for breach of that obligation, does this mean that it is now open hunting season on insurance adjusters?

Certainly some Plaintiffs' counsel think so which is evidenced by the fact that our office is now seeing more claims which resemble the pleadings in ***Spiers*** emanating from various lawyers.

However, we beg to differ.

The motion to dismiss the Plaintiff's claim as against the individual insurance adjusters in ***Spiers v. Zurich*** was one of about 30 which were all returnable on the same day. The Statements of Claim which gave rise to these motions were all similarly constituted and were issued by the same solicitor. As the decision indicates, a writ search conducted at the Hamilton Court office for actions commenced since January 1, 1998 revealed that there were 66 similar Statement of Claims emanating from the office of the same lawyer. These actions claim payment for statutory accident benefits which were alleged to have been unlawfully withheld by various insurers. In almost every case, including the ***Spiers*** action, aggravated, exemplary and punitive damages were sought from the insurer and from individual defendants, namely claims adjusters. These adjusters were either full-time employees of the insurer or independent adjusters employed on an *ad hoc* basis to represent the insurers as agents of the insurers in their dealings with the plaintiffs.

The crux of Mr. Justice Cavarzan's decision is summarized at page 5:

> *There is a duty of good faith owed by the insurer to the insured. Although that duty emanates from an implied term of the contract of insurance between the insurer and the insured, it has an independent and concurrent existence arising out of the principles of tort law. Adjusters, too, owe a duty of good faith to the insured and can be held liable to the insured for breach of that duty. Although the proximity of the relationship between the adjuster and the insured results from the contractual arrangement between the adjuster's employer and the insured, the duty owed to the insured by the adjuster originates in tort law. This can give rise to a new and separate cause of action.*

It is our view that despite the publicity generated from the ***Spiers*** case, there is nothing contentious or novel about Mr. Justice Cavarzan's decision. Canadian authorities at the appellate level including the Supreme Court of Canada clearly confirm that employees acting beyond the scope of their employment will be held personally liable for tortious conduct causing physical injury, property damage or a nuisance (see for example ***London Drugs Ltd. V. Kuehne & Nagel International Ltd*** [1992] 3 S.C.R. 299; ***Adga Systems v. Valcom*** (1999) 43 O.R. (3d) 101 (C.A.). In addition, in ***Whiten v. Pilot*** (1999) 42 O.R. (3d) 641 (Ont. C.A.), the Ontario Court of Appeal found that the relationship between the insurer and insured is of sufficient proximity to give rise to a concurrent duty in tort alongside the insurer's implied contractual obligations to act in good faith. Mr. Justice Cavarzan simply applied these two well entrenched principles and found that there could be a viable cause of action against the individual insurance adjusters for a breach of their obligations of good faith.

Although insurance adjusters acting beyond the scope of their employment may be personally liable to insured persons, the converse is also true. In the absence of fraud, deceit, dishonesty or want of authority on part of an employee, an employee is not personally liable for actions carried out in the course of employment. In that regard, employees of companies are protected from personal liability unless their actions are themselves tortious, so that they exhibit a separate identity of interest from that of the company, thus making the act or conduct complained of their own. An employee who carries on discussions and makes decisions relating to the business carried on by the corporation, if acting within the scope of his or her authority as human agent for the corporation, is simply causing the corporation itself to act and form legal relationships. As a general proposition, it is not the employee in such a situation who is entering into legal relationships with third parties (***Syrtash v. Provident Life Insurance*** (1996), 42 CCLI (2d) 314 (Ont. Ct. Gen. Div.); ***Craik v. Aetna Life Insurance Co. of Canada*** (1996), O.J. No. 2377 (C.A.); ***Serel v. 371487 Ontario Ltd.*** (1996), 18 O.T.C. 135 (Gen. Div.), pages 2, 3 and 5 (QL); ***Islington Village v. CIBC*** (1992), 12 C.P.C. (3d) 331 (Ont. Ct. Gen. Div.).

There is a very salient feature of Mr. Justice Cavarzan's decision which continues to be overlooked. Although Mr. Justice Cavarzan dismissed the defendant's motion in ***Spiers*** on the basis that a cause of action existed against the individual insurance adjusters, there was no finding that any of the defendant adjusters did anything wrong. According to the case law, unless there is evidence to show that the employee has made the act complained of his or her own distinct, personal act rather than the act of the corporation, the claims against the individual employees should be dismissed (***Syrtash v. Provident Life Insurance,*** *supra****; Craik v. Aetna Life Insurance Co. of Canada,*** *supra*; ***Serel v. 371487 Ontario Ltd,*** *supra*; ***Islington Village v. CIBC,*** *supra*).

If there was no such finding, one may reasonably query as to how the claims against the adjusters managed to survive the scrutiny of the defendants' motion? The answer is

simple. The motion in ***Spiers*** was brought pursuant to *Rule* 21.01(1)(b) seeking to dismiss the Plaintiff's claim against the individual defendants as disclosing no reasonable cause of action. Under *Rule* 21.01(2)(b) no evidence is admissible on such a motion. Moreover, under a Rule 21 motion, the pleadings are taken as proven or at least capable of being proved (***Hercules Management Ltd v. Ernest & Young*** (1997), 146 D.L.R. (4th) 577 (S.C.C.); ***Uneterreiner v. Wilson*** (1982), 40 O.R. (2d) 197 (C.A.). A Statement of Claim will not be struck out unless it is "plain and obvious" that it discloses no cause of action (***Hunt v. T & N*** [1990] 2 S.C.R. 959).

Therefore, the only issue on the motion in ***Spiers*** was the sufficiency of the pleading. Having already concluded that a viable action existed in tort against insurance adjusters acting beyond the scope of their employment, it is our view that Mr. Justice Cavarzan had no choice but to dismiss the motion given that the cause of action was sufficiently pleaded in that if the allegations were proved at trial, the Plaintiff would prevail. This proposition is manifestly evident from page 5 of the decision when Mr. Justice Cavarzan stated:

> *The allegations in the Statement of Claim in **Spiers** suggest that the individual defendants were not acting bona fide within the scope of their authority. They were parties with the insurance company, their employer, in dealings intended to frustrate the just claims of the plaintiff. Whether or not this was so will depend upon the evidence in the case. It is far from plain and obvious at this early stage in the litigation that no independent duty of care can possibly exist in the circumstances here and that, accordingly, the action should be dismissed.*

In other words, since the Statement of Claim in ***Spiers*** alleged that the individual defendants were not acting *bona fide* within the scope of their employment, the pleadings thereby disclosed a reasonable cause of action notwithstanding that there was not one iota of evidence adduced to substantiate the allegation.

Given that even the most unsophisticated pleading can disclose a reasonable cause of action against an insurance adjuster for breach of his or her good faith obligation, what could be done in order to remedy this predicament where it is clear that the adjuster did nothing wrong? The answer lies in Rule 20.

A motion for summary judgement, unlike the situation on a motion to strike pleadings, requires an examination of the evidence in support of the Plaintiff's claim. The Plaintiff must establish his claim as being one with a real chance of success (***Hercules Management Ltd. v. Ernst & Young*** (1997), 146 D.L.R. S.C.C. (4^{th}) 577; ***Guarantee Company of North America v. Gordon Capital Corp.*** (1999) 178 D.L.R. (4^{th}) 1. A motion for summary judgement permits the motion judge to consult not only the pleadings, but affidavits, cross-examinations of the deponent, examinations for discovery, admissions and other evidence to determine whether there is a genuine factual dispute

between the parties (***Dawson v. Rexcraft Storage and Warehouse Inc***. (1998), 164 D.L.R.(4th) 257.

On a motion for summary judgement, the motion judge is entitled to assume that the record contains all the evidence which the parties will present if there is a trial **(*Dawson v. Rexcraft Storage and Warehouse Inc.,*** *supra*; ***Rogers Cable TV Limited v. 373041 Ontario Ltd.*** (1994), 22 O.R. (3d) (Gen. Div.). A genuine issue for trial is not raised by denial in the face of overwhelming evidence to the contrary, in the absence of any additional evidence to support the denial. A respondent on a motion for summary judgment must lead trump or risk losing ***(Rogers Cable TV Limited v. 373041 Ontario Ltd,*** *supra****; Guarantee Company of North America v. Gordon Capital Corp.,*** *supra;* ***1061590 Ontario Ltd. v. Ontario Jockey Club*** (1995), 21 O.R. (3d) 447 (Gen. Div.).

It should be noted that if there is a genuine issue of credibility, a trial is required and summary judgment should not be granted (***Aguonie v. Galion Solid Waste Material Inc***. (1998) 38 O.R. (3d) 161 (C.A.). However, the mere existence of an issue of credibility will not defeat a motion for summary judgment since the issue of credibility must be genuine. "Genuine" means not spurious, and if the evidence on a motion for summary judgment satisfies the Court that there is no genuine issue of fact which requires a trial for its resolution, the requirements of the rule have been met. Therefore, the proposition that an issue of credibility precludes the granting of summary judgment applies only when there is a genuine issue of credibility (***Transamerica Occidental Life Insurance Company et at v. Toronto-Dominion Bank*** (1999) 44 O.R. (3d) 97; ***Trinacria Travel Agency Ltd. v. Tolomi Construction Ltd.*** (1999) O.J. No. 1746 (S.C.); ***Dawson v. Rexcraft Storage and Warehouse Inc.,*** *supra;* ***Irving Ungerman Ltd v. Galanis,*** *supra;* ***Guarantee Company of North America v. Gordon Capital Corp.***, *supra.*

Therefore, when faced with an unmeritorious claim against an insurance adjuster, defence counsel should move for summary judgement with supporting affidavit material (and possibly other evidence as well). Although the nature of the evidence adduced will vary depending on the particular facts of the case, defence counsel will ultimately want to establish that any decisions made by the adjuster on the Plaintiff's file was not arbitrary and callous but rather taken within the scope of the adjuster's employment to fairly and properly adjust the Plaintiff's claims within the confines of the *Statutory Accident Benefits Schedule* based on the available evidence (ie medical evidence, surveillance etc.).

The issue to be decided on the motion should not be whether or not the decisions made by the adjuster on the Plaintiff's file was ultimately correct. After a full hearing of all of the evidence, it is not unprecedented for judges and arbitrators to find that the Plaintiff was entitled to a greater amount of accident benefits than was provided by the insurer. That consideration is wholly irrelevant to the issue of whether or not the adjuster was acting beyond the scope of his or her employment. As long as the adjusters handled the

file in good faith, in accordance with the policies and procedures set out by his her employer and acted within the confines of the *Schedule,* the claim against the adjuster should be summarily dismissed.

As indicated at the outset of this paper, the motion to dismiss the Plaintiff's claim as against the individual insurance adjusters in ***Spiers v. Zurich*** was one of about 30 which were all returnable on the same day. However, there were seven other motions which were also returnable on the same day before Mr. Justice Cavarzan which were brought by us. The Statement of Claims which gave rise to these seven motions were either similar to or identical to the allegations contained in the ***Spiers*** action and emanated from the office of the same lawyer.

However, the seven motions brought by our firm were brought for summary judgement pursuant to Rule 20 as opposed to pursuant to Rule 21. Although we were confident that we would have been successful in having the claims against the adjusters summarily dismissed, Mr. Justice Cavarzan did not have an opportunity to make a ruling on our motions. That is because the Plaintiffs in all seven actions consented to the striking of the claims against the adjusters personally, and in five out of the seven motions, **with costs** payable by the Plaintiffs to the defendants. In fact, no evidence was ever submitted by the Plaintiffs to support the allegations contained in their pleadings. Moreover, none of the adjusters were cross examined on their affidavits in support of the summary judgment motion.

It is on his last point that some consideration must be given. It is trite to say that to succeed in challenging this type of "boiler plate" allegation on a summary basis, some evidence must be placed before the motions judge to establish that the allegations in the Statement of Claim are untrue. The best evidence in this regard will almost always come from the adjuster. There are those who suggest that it is unwise to expose the adjusters to being cross examined on their affidavits, lest such a cross examination give fuel to the allegations, and put the defence in a worse position than it was in had it not brought the summary judgment motion. In response to those concerns we say that those who are concerned about ways to lose will have a harder time finding ways to win.

What difference does it make exposing an adjuster to be cross examined on his or her affidavit, as opposed to being produced as a party to be examined for discovery? The line of questioning ought to be narrower on the affidavit than at discovery. We say that if the summary judgment motion is successful, then there will be no examination for discovery of the adjuster (except for the one acting as a representative of the company on the substantive entitlement issues), and the personal liability of the adjuster, which is of no little concern to him or her, will be disposed of.

Of course, there are instances where you may not want to bring the summary judgment motion:

1. Where the adjusting of the file may not be outside of the standards of the industry, but are clearly not within the procedures mandated by the company by whom the adjuster is employed.

2. Where the adjuster's conduct, while not necessarily tortious, may appear to an objective observer to be well below the standards of adjusting such that the judge may find there to be a triable issue;

3. Where the adjuster's ability to effectively communicate as a witness is so lacking that exposing them to cross examination on an affidavit is likely too risky to undertake, no matter how innocuous the file handling may appear to have been;

In conclusion, the inclusion of claims against adjusters personally raises the stakes in the litigation. Obviously, if successful, the allegations will cause greater damages to the plaintiff. However, the prospect of being challenged on a summary basis should not be ignored by plaintiff's counsel. The costs on these motions, invariably to the loser of the motion, are extremely high - in some instances, into the five figure range. These are pretty high stakes for a motion, so it is strongly recommended that defence counsel who choose this route think carefully before so doing. However, perhaps a wiser admonition would be that plaintiffs' counsel resist the temptation to make this into a boiler plate allegation, lest their clients be left with a hefty costs bill that may eat into whatever legitimate damage award they have coming to them on the merits of the substantive claim. To this end, it would certainly be unwise for a plaintiff's counsel to plead these types of allegations without specific instructions from the client, lest that counsel be exposed to a claim over by his or her own client when there is a cost award granted on a successful summary judgment motion.