Fasken, by her Litigation Guardians et al. v. Iola et al.

[Indexed as: Fasken (Litigation guardian of) v. Iola]

46 O.R. (3d) 754
[1999] O.J. No. 4941
Court File No. 99-CV-172758

Ontario Superior Court of Justice
Stinson J.
December 20, 1999

Insurance -- Automobile insurance -- Failure by plaintiff to comply with notice and early disclosure requirements of s. 258.3 of Insurance Act not providing basis for striking out statement of claim -- Act expressly permitting non-compliance with early disclosure requirements while precluding plaintiff from recovering prejudgment interest for any period of time prior to service of notice under s. 258.3(1)(b) -- Defendant not entitled to declaratory order regarding plaintiff's disentitlement to prejudgment interest or to order requiring plaintiff to comply with early disclosure requirements -- Insurance Act, R.S.O. 1990, c. I.8, s. 258.3.

The defendants brought a motion for an order striking out the statement of claim on the basis that the plaintiffs had not complied with the notice and early disclosure requirements of s. 258.3 of the Insurance Act. Alternatively, they sought an order requiring the plaintiffs to comply and declaring that prejudgment interest on the claim be suspended pending compliance.

Held, the motion should be dismissed.

Section 258.3(9) of the Act expressly permits a person to commence an action without complying with s-s. (1). However,

the Act imposes sanctions upon a plaintiff who chooses non-compliance: that plaintiff is precluded from recovering prejudgment interest for any period of time prior to the service of a notice under s. 258.3(1)(b). As well, the court is directed to consider a plaintiff's failure to comply with the notice requirements when awarding costs. It would be inappropriate to make a declaratory order regarding the plaintiffs' disentitlement to prejudgment interest, as s-s. (8) expressly addresses that issue and dictates a particular result. An order requiring the plaintiffs to comply with the notice requirements would also be inappropriate. By imposing the sanctions found in s-ss. (8) and (9), the legislature has already provided a remedy for non-compliance. Absent express authority to do so, the court should not create a remedy that the legislature chose not to include. More importantly, no w that the action had been commenced and pleadings exchanged, the defendants had full rights of production and discovery of the plaintiffs. Any information that they could have received from the plaintiffs voluntarily pursuant to s. 258.3(1), they could not seek under the Rules of Civil Procedure.

Statutes referred to

Insurance Act, R.S.O. 1990, c. I.8 (am. 1996, c. 21), ss. 258.3, 258.4, 258.5(1), (5)

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 33

MOTION for an order striking out a statement of clam.

Heather L. Kawaguchi, for defendants/moving parties.
David N. Delagran, for plaintiffs/responding parties.

[1] STINSON J.: -- This motion raises novel questions about the consequences of non-compliance with the notice and early disclosure obligations imposed under s. 258.3 of the Insurance Act, R.S.O. 1990, c. I.8, as amended by S.O. 1996 c. 21, s. 22,

upon a would-be plaintiff in a motor vehicle accident claim. The defendants complain that the plaintiffs have not complied with the requirements of that section, and seek an order striking out the statement of claim. In the alternative, they seek an order requiring the plaintiffs to comply, and declaring that prejudgment interest on the plaintiffs' claim be suspended pending compliance.

The Statutory Scheme

[2] Section 258.3 was part of a package of amendments to the Insurance Act that came into force on November 1, 1996 pursuant to the Automobile Insurance Rate Stability Act, S.O. 1996, c. 21 (also known as Bill 59). According to a summary of the proposed legislation distributed by the Ministry of Finance, Bill 59 introduced "[n]ew procedures for making tort claims . . . to provide early disclosure of information by plaintiffs and insurers and to provide opportunities for prompt settlement. These procedures are intended to minimize delays in resolving tort claims and to reduce transaction costs." As an explanatory note to the draft legislation indicated, "[s]ection 258.3 attempts through early notice and disclosure of the particulars of a claim to promote settlement before an action is commenced."

[3] Another explanatory note issued by the Ministry of Finance at the time Bill 59 was introduced described the scheme of s. 258.3 as follows:

> An action could not be commenced unless the plaintiff first applied for statutory accident benefits, gave notice of the intention to commence the action within a specified period after the accident, provided the defendant with information prescribed by the regulations, and, if requested by the defendant, underwent health-related examinations, provided the defendant with a statutory declaration related to the claim and provided the defendant with evidence of the plaintiff's identity. No prejudgment interest would be payable for the period prior to the service of the notice of the intention to commence the action.

[4] As enacted, the material portions of Bill 59 provide as follows:

258.3(1) An action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall not be commenced unless,

(a) the plaintiff has applied for statutory accident benefits;

(b) the plaintiff served written notice of the intention to commence the action on the defendant within 120 days after the incident or within such longer period as a court in which the action may be commenced may authorize, on motion made before or after the expiry of the 120-day period;

(c) the plaintiff provided the defendant with the information prescribed by the regulations within the time period prescribed by the regulations;

(d) the plaintiff has, at the defendant's expense, undergone examinations by one or more persons selected by the defendant who are members of the Colleges as defined in the Regulated Health Professions Act, 1991, if the defendant requests the examinations within 90 days after receiving the notice under clause (b);

(e) the plaintiff has provided the defendant with a statutory declaration describing the circumstances surrounding the incident and the nature of the claim being made, if the statutory declaration is requested by the defendant; and

(f) the plaintiff has provided the defendant with evidence of the plaintiff's identity, if evidence of the plaintiff's identity is requested by the defendant.

. . . . .

(5) An examination under clause (1)(d) shall not be unnecessarily repetitious and shall not involve a procedure that is unreasonable or dangerous.

(6) A person examined under clause (1)(d) shall answer the questions of the examiner relevant to the examination.

(7) If a person who performs an examination under clause (1)(d) gives a report on the examination to the defendant, the defendant shall ensure that the plaintiff receives a copy of the report within 60 days after the defendant receives the report.

(8) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, no prejudgment interest shall be awarded under section 128 of the Courts of Justice Act for any period of time before the plaintiff served the notice under clause (1)(b).

(9) Despite subsection (1), a person may commence an action without complying with subsection (1), but the court shall consider the non-compliance in awarding costs.

. . . . .

258.4 An insurer that receives a notice under clause 258.3(1)(b) shall promptly inform the plaintiff whether there is a motor Vehicle liability policy issued by the insurer to the defendant and, if so,

(a) the liability limits under the policy; and

(b) whether the insurer shall respond under the policy to the claim.

258.5(1) An insurer that is defending an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile on behalf of an insured or that receives a notice under clause

258.3 (1)(b) from an insured shall attempt to settle the claim as expeditiously as possible.

(5) In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, an insurer's failure to comply with this section shall be considered by the court in awarded costs.

[5] Plainly, the legislation puts in place a scheme whereby injured persons and insurers who may be liable under motor vehicle policies are encouraged to exchange information and to attempt to settle claims at the earliest possible stage. The issue on this motion is the extent to which the court can lend its assistance to that legislative intent.

Defendants' Submissions

[6] On the motion before me the defendants complained that the plaintiffs failed to serve written notice of their intention to commence an action within 120 days after the incident and that they have failed to cure that default by motion under s. 258.3(1)(b); that the plaintiffs have not provided the information required by s. 258.3(1)(c); that the injured plaintiff has not undergone the medical examination requested by the defendants under s. 258.3(1)(d); that the plaintiffs have failed to provide the defendants with the statutory declaration describing the circumstances surrounding the incident in the claim being made, as required by s. 258.3(1)(e); and that the plaintiffs have not provided the defendants with evidence of their identities, as requested by the defendants, pursuant to s. 258.3(1)(f).

[7] The defendants pointed to the language contained in the opening paragraph of s. 258.3(1) (i.e., "an action . . . shall not be commenced unless . . ."") and submitted that because of the non-compliance described above the statement of claim should be struck out. Defence counsel argued that the entire purpose of the early disclosure requirements, namely, to facilitate early settlement, would be defeated if a plaintiff were allowed to ignore them. Not only is a defendant (or, more

likely, his or her insurer) prevented from making an early assessment of the plaintiff's claim, the insurer is also prevented from discharging its duty under s. 258.5(1) to attempt to settle the claim as expeditiously as possible. For the legislative scheme to accomplish the desired result, the court should insist on compliance.

Analysis

[8] As much as one might agree with the laudable intent behind the early disclosure requirements, one cannot overlook the fact that the legislature saw fit to absolve a plaintiff from non-compliance with them. Section 258.3(9) expressly permits a person to commence an action without complying with s-s. (1); in other words, despite the prohibitory language contained in s-s. (1), in reality it is no prohibition at all.

[9] While the legislation expressly permits non-compliance with the early disclosure requirements, it also imposes sanctions upon a plaintiff who chooses this route. Under s. 258.3(8) a plaintiff is precluded from recovering prejudgment interest for any period of time prior to the service of a notice under s. 258.3(1)(b). As well, the court is directed to consider a plaintiff's failure to comply with the notice requirements when awarding costs: see s. 258.3(9).

[10] In light of the express exemption found in s-s. (9) and the sanctions for non-compliance found in s-ss. (8) and (9), I am not prepared to strike out the statement of claim for non-compliance with the early disclosure requirements of s. 258.3(1). Indeed, to do so would be contrary to the express provisions of s-s. (9). Nor do I consider it appropriate to make a declaratory order regarding the plaintiffs' entitlement or disentitlement to prejudgment interest. Subsection (8) expressly addresses that issue and dictates a particular result.

[11] If, as the defendants complain, the purpose of the legislation is not being achieved, the appropriate recourse is to seek an amendment to the statute. In the legislative forum all considerations relevant to the desirability of such a

change may be properly weighed.

[12] Turning finally to the request by the moving parties for an order requiring the plaintiffs to comply now with the early disclosure requirements, I am not prepared to grant that relief either. Once again, a party who opts not to make early disclosure is subject to the sanctions found in s-ss. (8) and (9). To that extent, by imposing those sanctions the legislature has already provided a remedy for non-compliance. Absent express authority to do so, I do not consider that the court should create a remedy that the Legislature chose not to include.

[13] More importantly, now that the action has been commenced and pleadings have been exchanged, the defendants have full rights of production and discovery of the plaintiffs, including the right to seek a medical examination under Rule 33. Any information that the defendants could have received from the plaintiffs voluntarily pursuant to s. 258.3(1), they may seek under the Rules of Civil Procedure. Given that the litigation process already provides a procedure for the information to be obtained, it is inappropriate for the court to exercise its jurisdiction to grant what is, in effect, a mandatory order directed to the plaintiffs. Once again, the defendants' ultimate recourse is to seek a costs sanction as against the plaintiffs as provided by s-s. (9).

Conclusion

[14] Accordingly, the defendants' motion is dismissed.

[15] With respect to costs, although the plaintiffs were successful, I do not consider that this is case in which they should recover costs of this motion. As I indicated at the outset, this was a novel point. I also have in mind that the reason this motion was brought was because the plaintiffs did not comply with s. 258.3(1). Section 258.3(9) requires me to consider that non-compliance in awarding costs. In keeping with that direction, I award the plaintiffs none.

Motion dismissed.