Case Summary: Merino v. ING Insurance

Defence + Indemnity

August 2019

The Ontario Court of Appeal held that an auto insurer cannot void a policy for any material misrepresentation, including as to ownership. An insurer wishing to get out of an auto policy for misrepresentation must terminate the policy on notice, which does not operate retroactively.

***Merino v. ING Insurance*, 2019 ONCA 326, per Feldman, J.A.**

Facts + Issues

The Appellant/Plaintiff Merino was catastrophically injured by an automobile as a pedestrian. She recovered judgment for substantial damages against the driver, Klue, and the owners, Klue and his wife Khalil. Merino then sued the automobile insurer (ING), the Respondent/Defendant ING to recover the judgment.

ING defended the claim on the basis that it had properly voided the policy it had issued to Klue and Khalil months before the accident based on material misrepresentations in the application for insurance.

In May 2002 Klue and Khalil visited an insurance brokerage and took out the policy for a term of one year. Klue signed the application form but Khalil did not. The application contained inaccurate information about Khalil's past driving record. A binder and later a policy were issued by ING based on the application with liability limits of $1M.

Not long afterwards, ING discovered that the application included misinformation. In early July 2002 ING sent Klue and Khalil a registered letter advising that the policy was "void from the inception date".

In September 2002 Klue drove the car and caused the accident that injured Merino. He had not reinsured the vehicle since receiving the registered letter. ING did not participate as a third party in the tort action.

ING was successful in having the claim dismissed on a summary judgment motion in the Ontario Superior Court.

The unanimous Ontario Court of appeal overturned that decision.

HELD: For the insureds.

The Court considered the absolute liability provisions of s. 258 of the *Ontario Insurance Act*, R.S.O. 1990, c. I.8 (equivalent to s. 579 of the *Alberta Insurance Act*) and found that if the contract was not validly rescinded by ING, Merino was entitled to recover and agreed with the lower court that if the contract is validly and effectively terminated before the accident date then there will be no absolute liability.

The Court held the policy had not been validly rescinded.

a. It was held that an insurer cannot resist an injured third party's claim under this provision on the basis of any misrepresentation by the insured. Prior cases holding

Industries
Insurance

People
Michael Doerksen Counsel
mdoerksen@fieldlaw.com

that an insurer could void a policy for misrepresentation as to the ownership of the vehicle have since been overruled:

26 In [***Campanaro; Laurentian Casualty Co. of Canada v. State Farm Mutual Automobile Insurance Co.*** (1998), 40 O.R. (3d) 690 (Ont. C.A.);] a five-judge panel of this court was struck to reconsider [***Ontario (Minister of Transport) v. London & Midland General Insurance Co.*** (1971) 19 D.L.R. (3d) 643 (Ont.C.A.)] and to clarify the extent of the protection the legislature intended to provide to third parties in s. 258. Osborne J.A., speaking for the court, made the following statements, at pp. 560, 562, 563:

I think that it is clear that the 1947 *Insurance Act* amendment was intended to overcome the effect of ***Bourgeois*** and preclude an insurer from defending an innocent third party judgment creditor's claim on the basis of any material misrepresentation, including a misrepresentation as to ownership of the insured automobile.

. . .

In my opinion, for the purposes of the action contemplated by s.258(1), s. 258(5) prevents the insurer from relying upon material representations made by, or on behalf of, the named insured, if the insurer issued an instrument "as a motor vehicle liability policy".

. . .

With respect, I think that in exempting one type of misrepresentation, that is a misrepresentation about ownership, from the defence-limiting provisions of s. 258(5), ***London & Midland*** was wrongly decided. In my opinion, if s. 258(5) precludes the insurer from contending that the instrument it issued as a motor vehicle liability policy is not a motor vehicle liability policy, it must follow that the insurer cannot rely on any misrepresentation which, if given effect to, would result in the instrument issued by the insurer as a motor vehicle liability policy being taken not to be a motor vehicle liability policy.

28 To summarize, the court found and clearly stated that s. 258(1) applies to give an injured third party the right to collect his or her judgment against the at-fault driver from that driver's insurer where the insurer issued an automobile insurance policy that provided for indemnity, regardless of any misrepresentation that the insured may have made in the application for insurance.

b. Accordingly, it was held that where an insurer wants to get out of the contract it can only do so by following the termination process in the Statutory Conditions which includes a notice period and is not retroactive. In this case the insurer did not follow that process and as a result the policy was still in effect when the accident happened.

The Court held that s. 258 provided for consequences flowing from an insured's misrepresentation as between the insured and the insurer.

a. The Court further stated that allowing an auto insurer to void coverage *ab initio* is inconsistent with the public policy goal embodied in the statute of compulsory auto insurance and maintaining minimum levels of liability and accident benefits coverage on all automobiles in use in the province:

37 The section does not contain the terms "void" or "voidable". It neither requires nor contemplates any action by an insurer to terminate the contract. Rather, it describes the consequences, as between the insured and the insurer, when the insured has knowingly misrepresented or omitted a fact in a signed application. Those consequences are three-fold: 1) a claim by the insured (for own property damage or own loss due to injury) is invalid; 2) the right of the insured to recover indemnity (from a claim by a third party who suffered damage where the insured was at fault) is forfeited; but 3) the insured remains entitled to certain statutory accident benefits under the *Statutory Accident Benefits Schedule*: see O. Reg. 403/96, s. 30.

. . .

41 The motion judge's conclusion on this issue is inconsistent with the statutory scheme created by the *Compulsory Automobile Insurance Act* and the *Insurance Act*. If an insurer were permitted to rescind an insurance contract at common law ab initio, a person who believed they were operating a vehicle with insurance could have that contract rescinded with retroactive effect, putting the person in automatic contravention of the *Compulsory Automobile Insurance Act*, a result which is clearly inconsistent with the intent of the legislature.

42 The termination and renewal provisions of the Act and regulations provide notice periods to allow an insured time and opportunity to obtain alternate coverage when they receive notice that their insurance is going to be terminated or not renewed. There are also restrictions on when an insurer may refuse to renew: *Compulsory Automobile Insurance Act*, s. 12(1); O. Reg. 777/93, ss. 11(1.1), (1.2); *Insurance Act*, ss. 236(1), (2). The purpose of these requirements is to ensure that a person who drives a car always knows whether they

are insured, so that they can take steps to bridge any gap in their coverage, both for their own benefit and for the benefit of other drivers. If they are not able to secure alternate coverage, they must not drive the vehicle or allow it to be driven.

43 The scheme of the Act and its regulations prescribes the rights and obligations of the insured and the insurer under the automobile provisions, requires strict compliance, and provides an orderly and predictable set of consequences for compliance and non-compliance. For example, if a notice of termination does not comply with s. 11 of the Regulation, then the insurance contract remains in force: Ontario (Finance) v. Traders General Insurance (Aviva Traders), 2018 ONCA 565, 142 O.R. (3d) 45 (Ont. C.A.), at para. 43. That predictable set of consequences would be undermined if an insurer could circumvent the requirements of the Act by rescinding the contract at common law, making it void ab initio.

. . .

46 Appellate cases interpreting the pre-1932 version of the misrepresentation provision held that untrue statements in the application for insurance rendered the policy void and, in first-party claims, insureds were unable to recover under the policy: ***Rocco v. Northwestern National Insurance Co.*** (1929), [1930] 1 D.L.R. 472 (Ont. C.A.); ***Holdaway v. British Crown Assurance Corp.***, [1925] 3 D.L.R. 269 (Ont. C.A.).

47 That is no longer the law. Under s. 233, a misrepresentation does not render the contract void; it is neither terminated, nor rescinded as void ab initio: see Craig Brown and Thomas Donnelly, ***Insurance Law in Canada*** (Toronto: Thomson Reuters Canada Ltd., 2002) (loose-leaf updated 2019, release 1), at p. 5-14, n. 63. The contract remains in effect, but the insured's rights are limited to his or her right to receive certain statutory accident benefits; the insurer is not obligated to compensate the insured for other losses, or to indemnify the insured's obligation to third parties. Also, because the automobile insurance contract remains in effect, third parties injured by the insured or the insured's automobile retain the right to recover the losses they suffer from the insured's insurer under s. 258 of the Act.

48 Consequently, allowing an insurer to rescind at common law for misrepresentation would undermine the policy of the legislature in ss. 233 and 258 to provide certain statutory accident benefits to every person who obtains a policy of insurance, including by misrepresentation, and to provide protection to innocent third parties.

Feldman, J.A. held that ING had not met the requirements to prove a material misrepresentation on the facts, entitling it to deny indemnity to the insured and deny recovery to Merino above the statutory minimum of $200,000. The Court noted the insurer's onus to prove a breach of the statute section and that the statute requires the misrepresentation to be proven by the signed written application form. In this instance the application form was signed by Klue only. There was no evidence that he signed as an agent for Khalil or that Klue knew that the information about Khalil's driving record was untrue. Khalil not having signed the application form herself ING was unable to meet the proof requirements of the statute and could not maintain any off-coverage position. Accordingly, the full policy limits were available to satisfy Merino's judgment.

COMMENTARY

The *Merino* decision is significant particularly because it calls into question the practice of insurers voiding automobile policies upon discovering a material misrepresentation or nondisclosure in the application for insurance. The case also underscores the strict application of the proof requirements of a signed, written application form (s. 554(2) of the Alberta Insurance Act). It remains to be seen if the Alberta courts will be persuaded by the reasoning of the Court of Appeal in *Merino*. The legislative provisions considered in *Merino* are substantially the same as the Alberta legislative provisions suggesting the decision may not necessarily be distinguished in this province.