Striking Claims Against Insurance Adjusters

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In the recent decision of *Burns v. RBC Life Insurance Co.*[1], Justice Perell dismissed a claim against employees of RBC that were involved in the denial of the plaintiff's disability claim. The case provides insight as to when claims against insurance adjusters may be struck on a rule 21 motion for a failure to disclose a reasonable cause of action.

Allegations

The statement of claim in this case advances various allegations regarding the termination of disability benefits by RBC. Aside from specifying that it was one employee that denied the benefits and one that denied the appeal, the various causes of action are an undifferentiated collective of alleged misconduct on the part of RBC and the two employees. This includes reference to "they" in 38 of the specific allegations.

In a matter of foreshadowing, Justice Perell states at the outset that these allegations could be pleaded singularly as the misconduct of RBC. Furthermore, the misconduct alleged against the employees does not constitute any independent interest they may have outside of their role as employees and the allegations do not manifest a separate identity or interest from their employer.

Test on Motion to Strike

In order to be successful on a motion to strike on the grounds that the claim does not disclose a reasonable cause of action, the defendant must show that "it is plain, obvious, and beyond doubt that the plaintiff cannot succeed in the claim." For the purposes of such a motion, the facts in the pleading are assumed to be true.

Justice Perell explains that a failure to establish a cause of action usually arises when either the allegations in the statement of claim do not come within a recognized cause of action or the allegations do not plead all the elements necessary for a recognized cause of action. In this case, the latter ground was at issue.

Personal Liability of Employees

Justice Perell outlines that personal liability is not engaged "solely because a corporation acts through human agency".

While directors, officers and employees may be liable for their own tortious conduct, the plaintiff must specifically plead a cause of action against an individual in his or her personal capacity in order to properly plead a case of personal liability against an employee.

Citing the Ontario Court of Appeal case of *Lobo v. Carleton University*,[2] Justice Perell outlines that, for employees to be personally liable in tort for conduct associated with their work, the actions of the employees must themselves be tortious or the action must exhibit a separate identity or interest from those of the employer so as to make the act or conduct complained of their own.

As such, Justice Perell states that, when a plaintiff sues both a corporation and individuals within that corporation, the plaintiff must plead the requisite particulars that disclose a basis for attaching liability to that person in his or her personal capacity.

Decision

In this case, the plaintiff relied on the decision of *Spiers v. Zurich*[3] wherein the court held that there was an implied term in a contract of insurance that adjusters (in addition to the insurer) owe a duty of good faith to the insured and can be held liable for a breach of that duty.

Justice Perell outlined that, while this decision was followed or favourably commented on in subsequent cases, it was not followed in *Burke v. Buss*[4] wherein the judge found that no authority had been cited in *Spiers* in support of the finding of an independent duty of good faith for adjusters.

Justice Perell added that apart from the absence of supporting authorities, there was no mention in *Spiers* regarding the strong line of decisions from the Ontario Court of Appeal delineating how and when an employee can be individually liable for his or her tortious conduct while engaged in employment activities.

Ultimately, Justice Perell states that he is not bound by *Spiers* and it is his opinion that it was wrongly decided on the point of the liability of employees.

Justice Perell ultimately finds that the claim must be struck without leave. While the actions of the employees in denying the claim and dismissing the appeal may make the insurer vicariously liable for the various causes of action alleged, the actions as pled are not those that would expose the employees to personal liability.

Furthermore, while the various allegations of collective misconduct may result in a breach of a duty of good faith, they do not manifest a separate entity or interest for the two employees and are not themselves the tortious acts of the employees in their personal capacity.

Conclusion

This claim is a welcome decision for insurance adjusters handling disability claims and other first party claims.

A claim may be struck if the allegations, including, for example, the denial/dismissal of a disability claim as well as numerous allegations of collective misconduct, including a breach of a duty of good faith, do not manifest a separate identity or interest for the employees and are not tortious acts of the employees in their personal capacity.

In short, it is very difficult for a plaintiff to succeed in a claim against an insurance adjuster.

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[1] 2019 ONSC 6977
[2] 2012 ONCA 498.
[3] (1999), 24 O.R. (3d) 726 (Gen.Div.), leave to appeal to Div. Ct. denied.
[4] [2002] O.J. No. 2938 (Ont. S.C.J.).