

Case Name:
Blow v. Brethet

Between
David Blow, Plaintiff, and
Bryon Brethet, Huronia Insurance Group Ltd., and
The Dominion of Canada General Insurance Company, Defendants

[2010] O.J. No. 2911

2010 ONSC 3771

87 C.C.L.I. (4th) 213

2010 CarswellOnt 4846

Barrie Court File No. 09-0688

Ontario Superior Court of Justice

J.R. McIsaac J.

Heard: May 25-27, 2010.

Judgment: June 29, 2010.

(13 paras.)

Contracts -- Breach of contract -- Action by insured for damages from insurance brokers for their failure to obtain insurance coverage on his borrowed trailer that was damaged in an accident -- Judgment for plaintiff for \$20,772 -- Failure constituted breach of implied contract between parties -- Portion of award related to storage costs reduced by half for failure of plaintiff to mitigate -- Claim for loss of income was dismissed.

Insurance law -- Brokers -- Liability -- Negligence, obtaining adequate coverage -- Action against insurance brokers for their failure to obtain insurance coverage on plaintiff's borrowed trailer that was damaged in an accident -- Judgment for \$20,772 -- Defendants were professionally negligent -- Failure also constituted breach of implied contract between parties -- Portion of award related to storage costs reduced by half for failure of plaintiff to mitigate -- Claim for loss of income was dismissed.

Professional responsibility -- Self-governing professions -- Duties -- Contractual duties -- Agreeing to act -- Negligence -- Liability -- Damages -- Professions -- Insurance brokers -- Action against insurance brokers for their failure to obtain insurance coverage on plaintiff's borrowed trailer that was damaged in an accident -- Judgment for \$20,772 -- Defendants were professionally negligent -- Failure also constituted breach of implied contract between parties -- Portion of award related to storage costs reduced by half for failure of plaintiff to mitigate -- Claim for loss of income was dismissed.

Action by Blow for damages for failure to obtain insurance coverage on his borrowed tri-axle trailer that was damaged along with his tractor on October 14, 2008. He alleged negligence and breach of contract by the Brethet et al, insurance brokers. Blow testified that he had arranged with Brethet on March 28, 2008 to obtain coverage for the trailer that he had borrowed from his friend Duivenvoorden. Brethet denied that he was ever given such instructions. The version of events described by Blow was supported by the testimony of his wife and Duivenvoorden. Alicia Blow testified that she photocopied the ownership for the trailer and then delivered it to the defendants' office, on the understanding that this was all that was needed to obtain coverage. The defendants contended that Blow and the witnesses had colluded. Blow sought \$18,200 for the damaged trailer, \$4,987 for towing, storage and GST, and damages for loss of income.

HELD: Judgment for Blow in the amount of \$20,772. Brethet et al were professionally negligent when they failed to obtain coverage on the trailer. This failure also constituted a breach of the contract implied between the parties. There was no evidence of collusion between Blow and the two supporting witnesses. The defendants did not challenge the valuation of loss of \$18,200. However, the period of storage calculated at \$50 per day by Blow could have been significantly reduced if he had mitigated these damages through the sale of the trailer earlier than the three months claimed for its salvage value. Accordingly, the award for the storage part of his claim was reduced by one-half for a total of \$2,572. The claim for loss of income was dismissed.

Counsel:

P.J. Daffern, for the Plaintiff.

D. Service, for the Defendants Bryon Brethet and Huronia Insurance Group Ltd.

1 J.R. McISSAC J.:-- This is a claim for damages for failure to obtain insurance coverage on the plaintiff's borrowed tri-axle trailer that was damaged along with his tractor on October 14, 2008. The plaintiff has proceeded under rule 76 and alleges negligence and breach of contract by the defendant insurance brokers. The action has been discontinued against the defendant insurer.

2 The issues for consideration are:

- (1) liability;

- (2) damages; and
- (3) contributory negligence.

LIABILITY

3 The plaintiff insists that he had arranged with the defendant Bryon Brethet on March 28, 2008 to obtain coverage for the trailer that he had borrowed from his friend John Duivenvoorden. Mr. Brethet denies that he was ever given such instructions. It is trite that a failure by an insurance broker to comply with such a request is a breach of contract and negligent: see *232 Kennedy Street Ltd. v. King Insurance Brokers (2002) Ltd.*, 2007 MBQB 291. The version of events described by the plaintiff is supported by the testimony of his wife and John Duivenvoorden. Alicia Blow testified that she photocopied the ownership for the trailer and then delivered it to the defendants' office. She did so because she understood that this was all that was needed to obtain coverage.

4 John Duivenvoorden's company owns the trailer in question. He confirmed that the plaintiff was using this trailer for a period of time in early 2008. His company originally insured it but the plaintiff, his lifelong friend, insisted that he pay for his own coverage. In the result, he requested and received confirmation of the cancellation of his own coverage: see exhibits 8 and 9 both dated March 28, 2008. This action was taken because the plaintiff had telephoned him confirming that he had arranged for his own coverage.

5 Counsel for the defendants asks me to discount the testimony of these two supporting witnesses because of their connection to the plaintiff and the obvious motive they have to confirm his version of the events. The defendants did not challenge the two exhibits filed by Mr. Duivenvoorden. In particular, it was not suggested to him that these documents were forgeries. It was also suggested that the estimate by Alicia Blow of the time she arrived at the defendants' office did not conform with the "fax" time on exhibit 8. I do not believe her overall credibility is compromised by this discrepancy which flowed from her attempts to reconstruct those events from a morning over two years before she testified before me. Having considered the potential of these two witnesses to collude with the plaintiff, I am prepared to accept their version of these events. I am satisfied that the defendants were professionally negligent in failing to obtain coverage on the trailer in question. As well, I am satisfied that this failure also constituted a breach of the contract implied between the parties.

DAMAGES

6 The defendants do not contest the valuation of \$25,000 for this trailer which is clearly established in the evidence before me. On the other hand, the same documentation supporting this minimum valuation, which was filed by the plaintiff, Exhibit 4, shows a salvage appraisal for the damaged trailer in the amount of \$6,800. I find no reason to dispute this amount. Accordingly, I fix the amount of the loss for the damaged trailer at \$18,200.

7 The plaintiff also seeks the amount of \$4,987.50 for towing, storage and GST. The defendants suggest that the period of storage calculated at \$50/day could have been significantly reduced if they had mitigated these damages by selling the trailer earlier than the three months claimed for its salvage value. I agree with this submission. Accordingly, the award for the storage part of the plaintiff's claim is reduced by one-half resulting in an amount of \$2,450 plus \$122.50 for GST making a total of \$2,572.50.

8 The plaintiff has advanced a claim for loss of income flowing from this event. He suggests that he lost \$2,400 based on four days at \$600 per day. There are two problems with this part of the plaintiff's claim. First, his reported income for income tax purposes for the year of the accident and the previous year in no way support the quantum of this claim. Second, and perhaps more importantly, it ignores the fact that he was without his tractor as well as this trailer as a result of this accident. In the result, I am not satisfied that there should be any award on the basis of this factor. It is disallowed.

9 The damages herein can be summarized as follows:

Loss of trailer (less salvage)	\$18,200.00
Towing and storage	\$ 2,572.50
Loss of income	<u>nil</u>
Total	\$20,772.50

CONTRIBUTORY NEGLIGENCE

10 The defendants did not specifically plead s.3 of the *Negligence Act*, R.S.O. 1990, c. N.1. The only contributory negligence pleaded in these defendants' Statement of Defence was in relation to the causation of the accident: see para. 10. There is no suggestion that the plaintiff was negligent in failing to realize that the sought coverage had never been arranged by the defendants. In those circumstances, I am persuaded that this plaintiff would be prejudiced by an application of contribution principles in this case: see *Cudmore v. Desroches* (1985) 61 N.B.R. (2d) 313 (Q.B.) at paras. 93-102. There shall be no deduction for the contributory negligence alleged on the part of the plaintiff.

11 In any event, I would have been hard-pressed to assess any more than 10% contribution on the part of the plaintiff for failing to notice that the statements delivered to him following the presumed start of coverage as of March 28, 2008 did not contain a separate endorsement for his trailer. This degree of blameworthiness pales in my view in comparison to that of the defendants.

CONCLUSION

12 In the result, the plaintiff will have judgment against the defendants herein in the amount of \$20,772.50. Pre-judgment interest will be awarded on that amount from November 3, 2008 which is the date notice of this claim was forwarded to them.

13 I am prepared to consider the parties' costs submissions, those of the plaintiff to be filed within 15 days of the release of these reasons and those of the defendants, 15 days thereafter.

J.R. McISAAC J.

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