CITATION: Jones v. Doe et al., 2018 ONSC 4780
BARRIE COURT FILE NO.: CV-14-0749
DATE: 20180827

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Reginald Wayne Jones Plaintiff	S. Pickering, for the Plaintiff/Moving Party
– and –	
John Doe and Traders General Insurance Company Defendants	No one appearing for the Defendants
	P. Pollack, for the Proposed Defendant, Primmum Insurance Company/Responding Party
	HEARD: July 20, 2018

RULING ON MOTION TO SUBSTITUTE A PARTY

SUTHERLAND J.:

Introduction

[1] This motion is brought by the plaintiff for:

(a) an order to substitute Zachary M. Taylor for the defendant, John Doe;

(b) an order adding the defendant, TD Insurance Meloch Monnex a.k.a. Primmum Insurance Company (the proposed defendant) as a named defendant in this action;

(c) granting the plaintiff leave to Amended Amended Statement of Claim according to the draft Amended Statement of Claim marked as Schedule "A" in the Amended Notice of Motion dated July 9, 2018;

(d) costs for the motion.

[2] The proposed defendant opposes this motion on the basis that the limitation dates has expired pursuant to the provisions of the *Limitations Act, 2002*[1] (*the Act*).

[3] No one appeared for the proposed substitute defendant, Zachery M. Taylor. The proposed defendant did not oppose the relief requested substituting Zachary M. Taylor for the defendant, John Doe. As set out in my endorsement dated July 20, 2018, an order was given per the relief claimed in (a) above, that is, substituting Zachery Taylor for the defendant, John Doe.

Background

[4] The action arises from alleged injuries suffered by the plaintiff in a motor vehicle accident on July 5, 2012 in Shelburne, New Hampshire, USA (the accident). The plaintiff was driving his brother, Allan Jones' vehicle. The vehicle driven by Zachary Taylor crossed the centre line and collided with the vehicle driven by the plaintiff.

[5] At the time of the accident, Zachary M. Taylor was uninsured.

[6] The action was commenced on July 3, 2014.

[7] The original named insurance defendant was Aviva Canada Insurance (Aviva). Aviva was named as the insurer for the plaintiff.

[8] On July 22, 2015, Aviva was changed to Traders General Insurance Company (Traders) as the insurance company for the plaintiff, relying on the OPCF 44 coverage under the said policy of insurance.

[9] Traders defended the action and filed a Statement of Defence and Crossclaim dated August 17, 2015. In its pleading, Traders admitted that it issued a policy of insurance which contained an OPCF 44 endorsement.

[10] The plaintiff put the proposed defendant on notice of his intention to add the proposed defendant as a named defendant in the action per a letter dated November 23, 2016.

[11] As described in paragraph 5 of the proposed Amended Amended Statement of Claim, the plaintiff, as an insured person under the insurance policy issued to Allan Jones, is requesting to add the proposed defendant as a party to this action to compensate the plaintiff for injuries arising from the negligence of an uninsured driver. The plaintiff is seeking relief from the proposed defendant based on OAP 1 coverage.

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[1] S.O. 2002 C. 24, Sch. B

Issue

[12] The issue on this motion is: should the court grant the relief requested to add the proposed defendant as a named defendant in this action?

Position of the Parties

[13] The plaintiff asserts that, based on the reasoning of cases presented[2] that dealt with *the Act* and the adding of an insurer defendant based on OPCF-44R coverage the proposed defendant must be added as a named defendant based on OAP-1 coverage. The plaintiff argues that the law is clear and settled. The limitation date commences the day after the demand for coverage of the claim is made. The question to ask is: "when the plaintiff either knew or ought to have known he suffered a loss caused by an omission of the unidentified coverage insurer."[3]

[14] The proposed defendant submits that the plaintiff has miscategorized the issue. The cases that dealt with the adding of an insurer in the OPCF-44R cases presented do not apply. Those cases are factually distinguishable. The OPCF-44 cases deal with the situation where the insured has a contract of insurance, i.e. a policy, with the insurer. In the case at bar, the plaintiff does not have a contract or policy with the proposed defendant. The contract or policy is with Allan Jones.

[15] The proposed defendant further argues that the plaintiff knew or ought to have known that the OAP-1 endorsement was material at either the time of the accident or the issuance of the Statement of Claim, when the plaintiff included a claim under OPCF-44R. In either case, the two year limitation date prescribed by *the Act* has expired. The plaintiff is simply out of time and is statute barred from the relief requested.

Analysis

[16] There is no dispute between the parties that section 265(1) of *the Insurance Act*[4] deals with uninsured or unidentified automobile coverage and section 265(2) defines a "person insured under the contract". This definition is in respect of a claim for bodily injuries or death of "any person while an occupant of the insured automobile". Thus, there is no dispute that the plaintiff qualifies as an insured person under the contract of insurance held by the proposed defendant's brother.

[17] There is further no dispute that section 4 of *the Act* dictates that "... a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered". Section 21 of *the Act* confirms that: "If a limitation period in

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[2] *Federation Insurance Co. of Canada v. Markel Insurance Co. of Canada*, 2012 ONCA 218; *Schmitz (Litigation Guardian of) v. Lombard General Insurance Co. of Canada*, 2014 ONCA 88; *Chahine v. Grybas*, 2014 ONSC 4698; *Platero v. Pollock*, 2015 ONSC 2922.

[3] Statement of Law of the plaintiff, para. 13.

[4] R.S.O. 1990, c. I.8

respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to an existing proceeding."

[18] Section 5 of *the Act* sets out when a claim is "discovered" for the purpose of the statute. Section 5 reads:

> 5. (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
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> (iv) that, having regard to the nature of the injury, loss or damages a proceeding would be an appropriate means to seek to remedy it; and
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> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause 1(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.
>
> ...

[19] Is the claim against the proposed defendant, in the circumstances of this case, discovered the day after the plaintiff sent the notice to the proposed defendant (November 23, 2016) or, is the discovered date the date of the accident (July 5, 2012) or the date of the commencement of the action (July 3, 2014)?

[20] The Ontario Court of Appeal in *Markel*[5] and *Schmitz*[6] had the opportunity to determine the effect of *the Act* on an OPCF 44 endorsement.

[21] *Markel* involved the appeals of two arbitration decisions involving loss transfer claims pursuant to section 275 of the *Insurance Act*, that are fault based claims available as

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[5] Supra, footnote 2
[6] Supra, footnote 2

between insurers. In *Federation v. Kingsway*, the arbitrator held that the limitation period begins to run in "loss transfer claims" after the insurer seeking indemnification makes a demand for loss transfer. In *ING v. Markel*, the arbitrator found that the date that the limitation period starts to run is the date the second insurer definitively refuses to indemnify. In the appeal to a Superior Court Judge, the Judge found that the arbitrator in *Federation v. Kingsway* was correct and the arbitrator in *ING v. Markel* was not. In dismissing the appeal, the Court of Appeal reviewed subsections 5(1) (a) (ii) and (iii) of *the Act* and found:

> ... the second party insurer must have done or omitted to do something that can be said to have caused a loss. The second party insurer cannot be said to have omitted to indemnify if there was no request for indemnification. It follows that items (ii) and (iii) cannot be satisfied until the first party insurer has asserted the loss transfer claim against the second party insurer to trigger a legally enforceable claim or obligation.[7]

[22] *Schmitz* addressed the limitation period for claims dealing with underinsurance. *Schmitz* involved an automobile accident. Mr. Schmitz had a policy of insurance with Lombard General Insurance Company of Canada (Lombard) which included an optional endorsement of OPCF 44R. Mr. Schmitz and his family members sued for damages for more than one million dollars. The limits of the defendant driver's insurance was one million dollars. The plaintiffs commenced an action against Lombard for indemnity based on the OPCF 44R endorsement.

[23] In *Schmitz*, the Ontario Court of Appeal found that the reasoning of *Markel* "applies with equal force to the issue on this appeal"[8] and concluded:

> Finally, as in *Markel*, the limitation period applicable for indemnity under the OPCF does not start to run when the demand for indemnity is made. Rather, as held in *Markel*, default must first occur. Thus, following *Markel*, the limitation period starts to run the day after the demand for indemnity was made and paragraph two of the motion judge's order should be amended accordingly.[9]

[24] However, the court in *Schmitz* did state at paragraph 24:

> Starting the limitation with reference to when the demand for indemnification is made does not limit when that demand can or should be made. If, as Lombard argues, the limitation period should begin to run when the claimant knew or ought to have known that he was underinsured, then surely a claimant can, at that point, make

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[7] Supra, footnote 2, at para 24.
[8] *Schmitz*, supra, footnote 2, at para. 20.
[9] Ibid. at para. 26.

> a demand for indemnification and need not wait until the outcome of the trial is known."[10] (emphasis added)

[25] Lofchik J. in *Chahine v. Grybas*[11] dealt with the situation where the plaintiffs in that matter brought a motion to add their own insurer Primmum Insurance Company, as a named defendant under the unidentified motor vehicle coverage provisions of the policy and made the corresponding amendments to the Statement of Claim. The plaintiffs were relying on the OPCF 44R endorsement in the policy to make the claim against their insurer. *Chahine* involved a rear end accident where the plaintiff had no knowledge that the defendant driver he sued that rear ended the plaintiff was first hit from behind by another vehicle which caused the defendant's vehicle to hit the plaintiff's vehicle. After the collision, the plaintiff was taken to the hospital by ambulance.

[26] Lofchik J. reviewed *Markel* and *Schmitz*. He found that in *Markel*, the Court of Appeal did not "limit when that demand can and should be made."[12] He found that the reasoning in *Schmitz* is "that unlike the claim of an injured party against a tortfeasor when the limitation period commences to run when the injury occurs or when the Plaintiff knew or ought to have known of the injury, the claim of an insured against his own insurer is a claim under contract. There is no claim until the insurer has breached its contract to indemnify by refusing to pay the Plaintiff's claim."[13] (emphasis added)

[27] Thus, Lofchik J. rejected the argument of Primmum that the limitation period commences when the plaintiffs knew or ought to have known about the unidentified driver. Lofchik J. framed the proper question to ask "is not when the Plaintiff either knew or ought to have known, about the unidentified driver, but when did the Plaintiff either know or ought to have known it suffered a loss, "caused" by and "omission" of Primmum".[14]

[28] *Platero v. Pollock*[15] was a summary judgment motion. The action involved injuries sustained by the plaintiff as a passenger in a bus operated by the defendant, Pollock who was employed by London Transit Commission. The bus in which the plaintiff was a passenger was struck from behind by another vehicle that left the scene of the accident. This other vehicle was unidentified. The plaintiff did not have her own vehicle or her own automobile insurance. L.C. Leitch J. reviewed *Markel* and *Schmitz* and came to the conclusion that the reasoning in *Markel* and *Schmitz* was applicable to his situation. L.C. Leitch J. agreed with the reasoning of Lofchik J in *Chahine* that the plaintiff suffers a loss when St. Paul Fire and Marine Insurance Company, the bus company's insurer, "fails to satisfy its legal obligation under the policy."[16] L.C. Leitch J. founded his decision on that

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[10] *Schmitz*, footnote 2. I also note that the proposed defendant in their factum at paragraph 25 misquoted this paragraph of *Schmidt*. This misquote left an erroneous impression to the meaning of this paragraph.
[11] Ibid.
[12] Ibid. at para. 34.
[13] Ibid. at para. 35.
[14] Ibid. at para. 38.
[15] Supra, footnote 2.
[16] Ibid. at para 35.

the plaintiff was an occupant of the vehicle and falls within the definition of a "person insured under the contract".[17]

[29] In the circumstances of this case, I agree with the submissions of the proposed defendant that there are significant factual differences between what Reginald Jones knew and that of the plaintiffs in the cases cited. Mr. Jones knew that his brother was the owner of the vehicle he was operating and that his brother had vehicle insurance. Mr. Jones knew that there was an issue of uninsured when the Statement of Claim was issued. Mr. Jones, at the time of issuing the Statement of Claim, did not know the name of the negligent driver. In addition, the policy coverage that is relevant in this case is OPA 1 and not OPCF 44R endorsement.

[30] But are these factual differences material? Is the question to be asked, as submitted by the proposed defendant: when did Mr. Jones know or ought to have known of the need to have the insurer of his brother, the proposed defendant named in his action?

[31] I do not accept the submissions of the proposed defendant on the question to be asked. Having reviewed the cases above, I agree with Lofchik J. and L.C. Leitch J. that the proper question is when did the Plaintiff either know or ought to have known he suffered a loss, "caused" by and "omission" of the proposed defendant?

[32] I come to this conclusion in that the plaintiff is a "person insured under the contract" as being an occupant in an insured vehicle. The insured vehicle was that of his brother. The insurer of the brother's vehicle is the proposed defendant. The amendment requested is not against a tortfeasor but against the insurer of the vehicle that the plaintiff was a driver/occupant.

[33] The Ontario Court of Appeal in *Schmitz* indicated that the plaintiff "can" make a demand for indemnification at the time the plaintiff knew or ought to have known that the negligent driver was underinsured and need not wait until the outcome of the trial.

[34] Consequently, I find it not material that the policy terms relied upon are not the same. What is relevant is that the endorsement, OAP 1, is contained within a valid policy of insurance of the plaintiff's brother. I see no reason, and have not been directed to a reason, why there should be a different scheme of reasoning between an OPCF 44R endorsement and that of OAP 1 when both are valid obligations within a legally enforceable policy of insurance.

[35] Accordingly, using the reasoning of *Markel* and *Schmitz*, the answer to the question posed is that the date of discovery, in the circumstances of this case, is the day after the plaintiff delivered the letter to the proposed defendant thus putting the proposed defendant on notice of the claim.

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[17] Ibid. at para. 34.

[36] The proposed defendant, therefore, cannot use the expiry of a limitation period to bar it being added as a named defendant and the amendment to the Amended Statement of Claim the plaintiff seeks. The limitation date has not yet expired.

Disposition

[37] I therefore make the following order:

(a) TD Insurance Meloch Monnex a.k.a. Primmum Insurance Company be added as a defendant in this action.

(b) The plaintiff is granted leave to amend his Amended Statement of Claim according to the draft Amended Amended Statement of Claim attached as Schedule "A" to the Amended Notice of Motion dated July 9, 2018.

Costs

[38] The plaintiff seeks costs in the amount of $7,366.67 on a partial indemnity basis and the proposed defendant seeks cost in the amount of $8,529.70.

[39] The plaintiff was the successful party on the motion and per rule 57.01(2) of the *Rules of Civil Procedure* has the presumption that he is entitled to costs.

[40] In *Serra v. Serra*,[18] the Court of Appeal has confirmed that the modern costs rules are designed to encourage and foster three fundamental purposes, namely to partial indemnify successful litigants for the costs of litigation, to encourage settlement and to discourage and sanction inappropriate behaviour by litigants, bearing in mind that the award should reflect what the court views as a fair and reasonable amount that should be paid by the unsuccessful party.

[41] Further, the Court of Appeal also confirmed[19] that when assessing costs it is not simply a mechanical exercise. It is not simply a calculation of hour's spent and hourly rates but the court is to take a proportional methodology. The overall objective is to fix an amount of costs that is fair and reasonable for the unsuccessful party to pay in the particular circumstances of the case.

[42] The proposed defendant submits that the plaintiff should not be entitled to costs. Costs "should be a wash". The proposed defendant argues that in limitation date cases, when the plaintiff, is successful, the plaintiff is obtaining an indulgence from the court and should not be entitled to costs.

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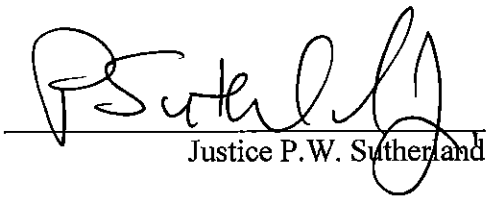
[18] *Serra v. Serra,* [2009] O.J. 1905 (C.A.).
[19] *Boucher et al. v. Public Accountants Council for the Province of Ontario*, [2004] No. 2634 (C.A.); *Delellis v. Delellis*, [2005] O.J. No. 4345; *Fong v. Chan*, [1997] OJ 949 (CA).

[43] I do not agree with the submissions of the proposed defendant. The limitation date, I found, has not yet expired. Thus, this is not a case where the plaintiff is obtaining an indulgence. The proposed defendant took the position that the limitation date had expired and argued that the numerous cases cited in this decision did not apply. That argument was not successful. I find that the plaintiff was the successful party and as such, I find is entitled to costs.

[44] After review of the Costs Outline filed by the parties on this motion, I find that a reasonable and fair amount for the proposed defendant to pay in the circumstances of this case is $7,000.

[45] I therefore order that the proposed defendant pay to the plaintiff the sum of $7,000 for costs in thirty days.



Justice P.W. Sutherland

Released: August 27, 2018