

2012 ONSC 4737
Ontario Superior Court of Justice

Hunter v. Richardson

2012 CarswellOnt 10142, 2012 ONSC 4737, 220 A.C.W.S. (3d) 514

Hunter v Richardson

Master Rona M. Brott

Judgment: August 16, 2012

Docket: 00-CV-196563

Counsel: Tammy Ring, for Plaintiff / Moving Parties

Stan J. Sokol, for Defendant, Richardson represented by the Motor Vehicle Accident Claims Fund

Anna-Marie Musson, for Proposed Defendant, **Dominion**

Derek Greenside, for Proposed Defendant, Royal SunAlliance

Subject: Civil Practice and Procedure; Torts; Insurance

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

III Parties

III.6 Adding or substituting parties

III.6.b Adding defendant

Civil practice and procedure

VII Limitation of actions

VII.5 Actions in tort

VII.5.b Statutory limitation periods

VII.5.b.iii When statute commences to run

VII.5.b.iii.A Actions involving infant

Insurance

XII Automobile insurance

XII.7 Uninsured automobile coverage

XII.7.d Practice and procedure

Headnote

Civil practice and procedure --- Parties — Adding or substituting parties — Adding defendant

Plaintiff pedestrian, now 15, was struck by motor vehicle when she was two years old — Defendant motorist admitted to driving vehicle in question and admitted to operating vehicle without insurance — At time of accident, pedestrian's mother was insured by D Co. and pedestrian's maternal grandmother was insured by L Co., now R Co. — Application for accident benefits was made under accident claims fund in 1998 — Application was never denied, but was abandoned in 2000 — Pedestrian brought motion to amend statement of claim to include D Co. and R Co., proposed insurers, as parties for purposes of accident benefits coverage and purposes of underinsured/uninsured coverage — Motion granted — Pedestrian's failure to mediate was not fatal in this case — As claim under accident

claims fund was never denied, pedestrian did not have opportunity to mediate — Pedestrian had opportunity to abandon claim and start fresh, which would include proposed insurers — To deny pedestrian's motion would be denial of procedural fairness — Serious and triable issues existed as to whether pedestrian was dependent under policies issued by proposed insurers — It was premature to deny pedestrian opportunity to advance claims against proposed insurers.

Civil practice and procedure --- Limitation of actions — Actions in tort — Statutory limitation periods — When statute commences to run — Actions involving infant

Plaintiff pedestrian, now 15, was struck by motor vehicle when she was two years old — Defendant motorist admitted to driving vehicle in question and admitted to operating vehicle without insurance — At time of accident pedestrian's mother was insured by D Co. and pedestrian's maternal grandmother was insured by L Co., now R Co. — Application for accident benefits was made under accident claims fund in 1998 — Application was never denied, but was abandoned in 2000 — Pedestrian brought motion to amend statement of claim to include D Co. and R Co., proposed insurers, as parties for purposes of accident benefits coverage and purposes of underinsured/uninsured coverage — Motion granted — Limitation period to add proposed insurers had not expired and would not expire until pedestrian reached age of 20.

Insurance --- Automobile insurance — Uninsured automobile coverage — Practice and procedure

Plaintiff pedestrian, now 15, was struck by motor vehicle when she was two years old — Defendant motorist admitted to driving vehicle in question and admitted to operating vehicle without insurance — At time of accident pedestrian's mother was insured by D Co. and pedestrian's maternal grandmother was insured by L Co., now R Co. — Application for accident benefits was made under accident claims fund in 1998 — Application was never denied, but was abandoned in 2000 — Pedestrian brought motion to amend statement of claim to include D Co. and R Co., proposed insurers, as parties for purposes of accident benefits coverage and purposes of underinsured/uninsured coverage — Motion granted — Pedestrian's failure to mediate was not fatal in this case — As claim under accident claims fund was never denied, pedestrian did not have opportunity to mediate — Pedestrian had opportunity to abandon claim and start fresh, which would include proposed insurers — To deny pedestrian's motion would be denial of procedural fairness — Serious and triable issues existed as to whether pedestrian was dependent under policies issued by proposed insurers — It was premature to deny pedestrian opportunity to advance claims against proposed insurers — Limitation period to add proposed insurers had not expired and would not expire until pedestrian reached age of 20.

Table of Authorities

Cases considered by *Master Rona M. Brott*:

Amorini v. Select Coffee Roasters Inc. (2001), [2001] I.L.R. 1-3929, 143 O.A.C. 363, 2001 CarswellOnt 523, 25 C.C.L.I. (3d) 236 (Ont. Div. Ct.) — considered

Chambo v. Musseau (1993), 49 M.V.R. (2d) 111, 65 O.A.C. 291, 19 C.C.L.I. (2d) 66, 15 O.R. (3d) 305, 1993 CarswellOnt 63, 106 D.L.R. (4th) 757 (Ont. C.A.) — considered

Foster v. Young (January 4, 2002), Doc. 96-CU-109568 (Ont. S.C.J.) — considered

Foster v. Young (2002), 2002 CarswellOnt 3225 (Ont. C.A.) — referred to

Taggart (Litigation Guardian of) v. Simmons (2001), 26 C.C.L.I. (3d) 218, 11 M.V.R. (4th) 25, [2001] I.L.R. 1-3962, 2001 CarswellOnt 484, 52 O.R. (3d) 704, 141 O.A.C. 315, 197 D.L.R. (4th) 522 (Ont. C.A.) — considered

Taggart (Litigation Guardian of) v. Simmons (2001), 285 N.R. 393 (note), 158 O.A.C. 197 (note), 2001 CarswellOnt 3617, 2001 CarswellOnt 3618 (S.C.C.) — referred to

Statutes considered:

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

s. 265 — referred to

s. 265(2) "person insured under the contract" (c)(i) — considered

s. 265(2) "person insured under the contract" (c)(ii) — considered

s. 268 — referred to

s. 268(8) — considered

s. 281(2) — considered

Motor Vehicle Accident Claims Act, R.S.O. 1990, c. M.41

s. 22 — considered

Rules considered:

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

R. 1.04 — considered

R. 26 — considered

R. 26.01 — considered

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Disputes Between Insurers, O. Reg. 283/95

Generally — referred to

s. 2(1) — considered

MOTION by pedestrian to amend statement of claim to include potential insurers as parties for purposes of accident benefits coverage and purposes of underinsured/uninsured coverage.

Master Rona M. Brott:

1 This is a motion by the plaintiffs for leave to amend the Statement of Claim to add W. Emerson Richardson, Royal SunAlliance Group Canada ("RSA") and the **Dominion** of Canada General Insurance ("**Dominion**") as party defendants.

2 The plaintiffs also seek leave to amend the Statement of Claim to include declaratory relief that either **Dominion** or RSA be required to provide statutory accident benefits ("SABS"), uninsured motorist coverage and underinsured

motorist coverage to the Plaintiffs or in the alternative a declaration that the plaintiffs be entitled to recover from the Motor Vehicle Accident Claims Fund ("MVACF").

3 This motion is opposed by **Dominion** and RSA. The MVACF which represents the interest of the defendant Alan Keith Richardson consents to the relief sought except that it seeks to have W. Emerson Richardson referred to as the Estate of W. Emerson Richardson as he passed away in July 1995.

4 This is an action for personal injuries suffered by Shanice Clarke Hunter ("Shanice"), born December 13, 1995, when she entered the roadway from between two parked cars and she was struck by a motor vehicle owned by W. Emerson Richardson on September 30, 1998. It was a single vehicle accident. Shanice is currently 15 years of age.

5 At the time of the collision, Shanice was being 'watched' by her cousin Teniesha who was 12 years old. Teneisha was playing frisbee with friends. Alan Richardson failed to remain at the scene but attended at the police station the following day and admitted to being the driver of the vehicle. He also admitted to operating the vehicle without insurance.

6 The solicitors for the plaintiffs served the MVACF with an application for accident benefits in 1998. The claim was never denied. In 2000 the application was withdrawn.

7 The Statement of Claim was issued on August 31, 2000. The MVACF requested information from the Insurance Search Bureau which revealed that Ann Clarke, Shanice's mother, was apparently insured with **Dominion** under policy number 408261 in effect from April 1993 to October 2000. Ann Clarke's driver's licence is cited. In January 2003 **Dominion** advised the MVACF that "the insureds under the policy were Hurbert and Delores Clarke and there were no additional drivers listed on the policy".

8 Insurance Search Bureau documentation also reveals that Delores Clarke, mother of Ann Clarke, had a policy of insurance under number MAV025359 with Lumbermen's Mutual which was renewed for the period August 2000 to August 2001. Ann Clarke is listed as one of the insured persons under the policy. RSA together with Western Assurance Company purchased the Canadian business of Lumbermen's Mutual Casualty Company in May 2001.

The Issues

9 Pursuant to Rule 26.01 the court shall grant leave to amend a pleading on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment. Although Rule 26 uses mandatory language, the courts have held that there is no absolute right to amend pleadings. The court has a residual right to deny amendments where appropriate. Proposed amendments must contain sufficient particulars, raise an issue worthy of trial and be prima facie meritorious and should be allowed unless it would cause an injustice that is not compensable in costs. If the amendment is untenable in law, the amendment should be refused.

10 On this motion the plaintiffs seek the following amendments:

- a) The addition of the proposed insurers for the purposes of Accident Benefits coverage;
- b) The addition of the proposed insurers for the purposes of underinsured/uninsured coverage.

Accident Benefits Coverage

11 Recourse to the MVACF is a last resort when there is no other available insurance. Section 22 of the *Motor Vehicle Accident Claims Act* provides a statutory bar to recovery out of the Fund in those instances where there is a policy of insurance in existence at the time of the motor vehicle accident. Section 22 states:

No payment shall be made out of the Fund in respect of a claim or judgment for damages or in respect of a judgment against the Superintendent of an amount paid or payable by an insurer by reason of the existence of a policy of insurance within the meaning of the *Insurance Act*, other than a policy of life insurance, and no amount sought to

be paid out of the Fund shall be sought in lieu of making a claim or receiving a payment that is payable by reason of the existence of a policy of insurance within the meaning of the *Insurance Act*, other than a policy of life insurance.

12 Ont Regulation 283/95 sets out a comprehensive scheme which governs the resolution of disputes between insurers to determine which insurer is required to pay accident benefits. Under s. 2(1) of the Regulation, the first insurer that receives a completed application for accident benefits is responsible for the payment of statutory accident benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the *Insurance Act*.

13 A "completed application" means an application in the OCF-1 form, except in rare circumstances where, because of waiver, estoppel, delay or deflection — an insurer who has not received the OCF-1 form — will nonetheless be treated as the 'first insurer'.

14 Section 281(2) of the *Insurance Act* states that a plaintiff cannot proceed to issue a Statement of Claim against an insurer unless a mediation has been sought and failed.

15 Section 268(8) of the *Insurance Act* requires that all disputes between insurers involving priority must be resolved through arbitration.

16 The proposed insurers submit that the MVACF was obliged to process the plaintiff's application for accident benefits, pay the plaintiff any benefits she was entitled to receive and then initiate arbitration proceedings if they believed that there was a priority dispute. They did not do so nor did they request an extension for 90 days to conduct further investigation. Accordingly, the proposed insurers assert that the plaintiff is precluded from seeking the declaration that one of the insurers is responsible for payment of accident benefits. Alternatively they submit that the plaintiff's claim is premature and cannot proceed until the MVACF disputes priority and an arbitrator makes a determination that one of the insurers is the priority insurer and is therefore obliged to respond to the plaintiff's claim for SABS.

Underinsured/Uninsured Coverage

17 Section 265 (2)(c)(i) and (ii) of the *Insurance Act* states:

'Person insured under the contract' for the purposes of uninsured automobile coverage means in respect of a claim for bodily injuries or death;

(i) Any person while an occupant of the insured automobile;

(ii) The insured and his or her spouse and any dependent relative of either,

A. while an occupant of an uninsured automobile; or

B. while not the occupant of an automobile or of railway rolling stock that runs on rails, who is struck by an uninsured or unidentified automobile.

18 Section 1.2 of the OPCF-Family Protection Coverage Endorsement states:

'Dependent relative' for purposes of uninsured coverage and underinsured coverage under OPCF 44R — Family Protection Coverage, means

a) A person who is principally dependent for financial support upon the named insured or his or her spouse, and who is;

i) Under the age of 18 years;

ii) 18 years or over and is mentally or physically incapacitated;

- iii) 18 years or over and in full time attendance at a school, college or university;
- b) A relative of the named insured or of his or her spouse, who is principally dependant on the named insured or his or her spouse for financial support;
- c) A relative of the named insured or of his or her spouse, who resides in the same dwelling premises as the named insured; and
- d) A relative of the named insured or of his or her spouse, while an occupant of the described automobile, or temporary substitute automobile, as defined in the Policy.

BUT — subsections 1.2(c) and 1.2(d) apply only where the person injured or killed is not an insured person as defined in the family protection coverage of any other policy of insurance or does not own, or lease for more than 30 days, an automobile which is licensed in any jurisdiction of Canada where family protection coverage is available.

19 **Dominion** and RSA assert that the plaintiff's proposed amendment for uninsured/underinsured coverage cannot succeed in the absence of any evidence that Shanice was a dependent relative of Delores (her grandmother) or that Ann Marie (her mother) was insured under a Lumberman's Mutual Insurance Company/RSA group policy at the time of the motor vehicle accident of September 30, 1998.

20 RSA's evidence is that they have, on numerous occasions, requested evidence to support the plaintiff's assertion that she was principally dependent upon Delores but no such evidence has been provided.

23 Furthermore and specifically submitted by RSA, it asserts that the plaintiff was not a named insured under their policy at any time and simply because Ann Clarke was a listed driver does not amount to being an 'insured driver' under the policy and therefore does not qualify the plaintiff for uninsured/underinsured benefits under the RSA policy.

Analysis

Accident Benefits Coverage

24 In *Amorini v. Select Coffee Roasters Inc.*, [2001] O.J. No. 581 (Ont. Div. Ct.) on a motion for summary judgment to dismiss the plaintiff's claim, the court held that the failure to mediate is fatal. The insured could not be saved by the relief from forfeiture provisions in the *Insurance Act*.

25 It is true that there is caselaw holding that the failure to mediate is fatal but in this action, the plaintiff could never mediate as there was never a denial. Furthermore, from a practical standpoint, Shanice could have chosen to completely abandon her action in 1998 and start afresh today. The addition of parties and the amendments sought would form part of the 'fresh claim'. To today deny the plaintiff her right to pursue a claim for accident benefits is to deny her procedural fairness.

Underinsured/Uninsured Coverage

26 It has been declared by the Court of Appeal in *Chambo v. Musseau* (1993), 19 C.C.L.I. (2d) 66 (Ont. C.A.) that the uninsured motorist coverage legislation is remedial and should be given a broad and liberal interpretation.

27 Subsequent to the decision in *Chambo v. Musseau*, supra, the courts have embraced the concept that the legislative intent of the uninsured motorist coverage provision is to "internalize costs to the activity (driving a motor vehicle) which created them". In other words, the cost of administrating the uninsured motorist coverage provisions should be borne by the insurance industry.

28 In *Taggart (Litigation Guardian of) v. Simmons* (2001), 52 O.R. (3d) 704, 141 O.A.C. 315, 197 D.L.R. (4th) 522, 26 C.C.L.I. (3d) 218, 11 M.V.R. (4th) 25, [2001] I.L.R. 1-3962 (Ont. C.A.); leave to appeal to S.C.C. dismissed [*Taggart*

(*Litigation Guardian of*) v. *Simmons*, 2001 CarswellOnt 3617 (S.C.C.)], the Court of Appeal acknowledged that the purpose of section 265 of the *Insurance Act* was to extend uninsured coverage to those insured by the policy including any dependent relative of 'the insured'.

29 In *Foster v. Young*, [2002] O.J. No. 5251 (Ont. S.C.J.) ;aff'd., *Foster v. Young*, [2002] O.J. No. 3774 (Ont. C.A.) the Court of Appeal confirmed the lower court decision that a listed driver, (and in the case the plaintiff was also a claimant who had qualified for accident benefits, as she fell under the 'insured person' provisions) was entitled to uninsured coverage under her mother's policy even though she was an occupant of another uninsured vehicle.

30 At trial, the plaintiffs will certainly put forth all evidence possible to demonstrate that the plaintiffs were dependent relatives in order to qualify for coverage. Although the insurers submit a paucity of evidence on the part of the plaintiff at this time, in my view the evidence on this motion from all parties demonstrates that on the facts currently known, there are serious and triable issues as to whether the plaintiffs are entitled to coverage under the policies of insurance that were in effect at the time of the accident. Those issues include (principal) dependency, listed/insured driver and financial dependency, residence and others. The evidence surrounding these issues is critical to make a fair determination of the issues. It is therefore premature at this stage to deny the plaintiff the ability to advance the claims against the proposed insurers.

Limitation Issues

31 The insurers submit that the limitation period has expired to permit Shanice to now qualify for Family Protection through her mother and grandmother who were the persons allegedly insured under the **Dominion** and Lumbermens' (RSA) motor vehicle policies at the time of the accident.

32 The limitation period to add **Dominion** and RSA has not expired due to the preservation of a minor's rights until she attains the age of 20. Shanice will turn 20 on December 15, 2015.

Order

33 Rule 1.04 requires that parties be entitled to a just resolution of issues. The merits of the submissions of all parties must be further investigated and at examinations for discovery additional information will certainly become available. Full and complete disclosure is necessary. Clearly there are triable issues. Accordingly, for the reasons set out, the plaintiff's motion for leave to amend the Statement of Claim as proposed as Schedule "A" to the Notice of Motion Record is allowed.

34 If the parties are unable to agree on the issue of costs within 30 days, then they shall, within 30 days thereafter, submit brief (1 — 2 pages) submissions and costs outlines. Reply costs submissions will not be permitted without leave.

Motion granted.