CITATION: Lauzon v. Taticek, Allstate Insurance Company of Canada 2013 ONSC 6449
COURT FILE NO.: 11-50556

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Jean-Guy Lauzon, Marie Parisé, Nathalie Lauzon, Camille Gauthier, Services Financiers Jean-Guy Lauzon Financial Services Inc., and 15149955 ONTARIO INC. – Plaintiffs v. Annemarie Taticek, By Her Litigation Guardian, The Public Guardian and Trustee – Defendant v. Allstate Insurance Company of Canada – Third Party

BEFORE: Mr. Justice Robert L. Maranger

COUNSEL: William G. Scott, for the Plaintiffs

Miriam Vale Peters, for the Defendant Litigation Guardians

Michael Van Dusen, for the Third Party, Allstate Insurance Company of Canada

HEARD: October 7, 2013

REASONS FOR DECISION

[1] This was a motion brought by the third-party, Allstate Insurance Company of Canada, for a summary judgment asking the court to dismiss the claim against Annemarie Taticek on the basis that it is statute barred by the *Limitations Act, 2002*, S.O. 2002, c. 24 Schedule B. The legislation provides that a claim must be started within two years of the date that the cause of action arose.

[2] The motion arises in the context of an action relating to a motor vehicle accident. The central issue to be determined is when the plaintiff discovered or should have discovered that his injuries met the threshold as defined under section 267.5 (5) of the *Insurance Act,* R.S.O 1990, c.I8.

Background:

[3] The accident occurred on February 11, 2008, when a vehicle being driven by the plaintiff Mr. Jean Guy Lauzon was struck by a motor vehicle owned by the defendant, Mrs. Annemarie Taticek. At the time of the accident Mrs. Taticek's vehicle was being driven by Mr. Mark Taticek. The plaintiffs were advised within six weeks of the accident that Mr. Taticek was not a properly licensed driver at the time of the accident and that insurance coverage was an issue.

[4] The plaintiffs commenced an action against the driver Mark Taticek within the two-year limitation period, but inadvertently failed to name Annemarie Taticek as a defendant. The action against Mrs. Taticek was only issued three years following the date of the accident. Mrs. Annemarie Taticek became incapable of managing her own affairs and as a consequence, the Public Guardian and Trustee was appointed as litigation Guardian pursuant to an order of Smith J. dated April 10, 2012.

[5] On June 8, 2012 Allstate Insurance Company of Canada obtained an order adding itself as a statutory third-party to the second action by virtue of having denied coverage.

Issues to be determined:

[6] This matter raises the following two questions. First, is this an appropriate case for the granting of summary judgment? Second, when should the plaintiff have known that his injuries could meet the definition of a threshold injury pursuant to the *Insurance Act*, so as to trigger the passage of time in calculating the limitation period?

Summary judgment issue:

[7] Rule 20 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 stipulates that a defendant may, after delivering his or her statement of defence, move with appropriate affidavit

material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. The court is mandated to grant summary judgment if it is satisfied that there is no genuine issue requiring a trial respecting a claim or defence.

[8] Rule 20.04 (2.1) provides that:

> In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
> 2. Evaluating the credibility of a deponent.
> 3. Drawing any reasonable inference from the evidence.

[9] In the decision of *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764,108 O.R. (3d) 1, the Ontario Court of Appeal set out the following principles applicable to the determination of Rule 20 summary judgment motions:

- The amended rule permits the motion judge to decide the action where he or she is satisfied that by exercising the powers that are now available on a motion for summary judgment, there is no factual or legal issue raised by the parties that requires a trial for its fair and just resolution. (Para. 37).
- In deciding if the powers under rule 20 should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of trial? (at para. 50).
- In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not any "interests of justice" requires a trial (at para. 51).

- In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues. The full appreciation test may also be met in cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues (at para. 52).

[10] In general terms, the determination of whether or not a case is prescribed by a limitation period, where the central issue to be determined is the date that the cause of action was discovered, is the type of case where the court can, without the necessity of a trial, have a "full appreciation" of the facts sufficient to determine the issue by way of summary judgment.

Discoverability issue

[11] In a motor vehicle accident a two-year limitation period begins to run on the day on which the claim was discovered. Sections 5(1)(a) and (b)of the *Limitations Act* stipulates the following:

> 5. (1) "A claim is discovered on the earlier of,
>
> (a) the date in which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused 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
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (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).

[12] The determination of when a cause of action arises and when a limitation period commences is a question of fact. The application of the discoverability principle is predicated on

a finding of these facts: when did the plaintiff learn they had a cause of action against the defendant; or when, through the exercise of reasonable diligence on the part of the plaintiff ought they have learned that they had a cause of action against the defendants. See *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (Ont. CA).

[13] In motor vehicle accident cases section 267.5 (5) of the *Insurance Act* provides :

> (5) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61 (2) (e) of the *Family Law Act*, from bodily injury or death arising directly or indirectly from the use or operation of the automobile, unless as a result of the use or operation of the automobile the injured person has died or has sustained,
>
> (a) permanent serious disfigurement; or
>
> (b) permanent serious impairment of an important physical, mental or psychological function.

[14] This particular provision of the *Insurance Act* is commonly referred to as the threshold. In motor vehicle accident cases the "cause of action accrues and limitation period begins to run on the date when the plaintiff by the exercise of reasonable diligence ought to have known the injury was actionable because it seemed to be serious and permanent." See *Mapleloft v. Service* (2008), 164 A.C.W.S (3d) 67 at para. 38.

[15] The injuries sustained by the plaintiff as a result of a motor vehicle accident, as disclosed in the hospital records and medical evidence were the following:

- A fractured right acetabulum and femoral head that required surgical intervention, including open reduction, internal fixation, bone grafting and decompression of the sciatic nerve;
- A fractured pelvis;

- Fractured ribs;
- A fractured sternum;
- A laceration to his left elbow;
- Soft tissue injuries to his cervical spine;
- A sprained right foot; and
- A sprained right knee.

[16] The plaintiff was hospitalized for about one month, he attended regular physiotherapy treatment for his various injuries throughout 2008/2009, he eventually relearned how to walk and graduated to the use of a crutch and then a cane.

[17] Five months following the accident the plaintiff described his injuries to medical professionals in general terms as still ongoing. For example he stated that: he had constant pain in the nerves and muscles on both sides of his neck; constant pain in his left leg; pain weakness and numbness in both arms; and that he was having difficulty learning how to walk.

[18] In December 2008 the plaintiff had consulted with the lawyer and an action was instituted by the lawyer on behalf of the plaintiff on February 10, 2010. The claim only named the driver Mr. Mark Taticek and not the owner of the vehicle, Mrs. Annemarie Taticek.

[19] By July 21, 2009 a report was prepared by Action Plus Physiotherapy that concluded that maximum medical recovery had likely been reached with respect to the plaintiff's injuries to his upper and lower extremities.

[20] The prognosis derived from this report included the following commentary:

> Mr. Lauzon will not likely improve any further in terms of the mobility of the neck, right hip, elbow, ankles, hands, but may see from time to time, variations in

> his level of symptoms. This is expected mostly at the neck, right hip and lower back area. At the neck, it will probably be as a result of increased use of neck rotation such as when driving his farm tractor or with a long drive or long meetings at the office or at a client's homes. This being said, we do not foresee any significant functional restrictions that would prevent him from performing his activities of daily living as well as taking part in both his occupations as a consultant in financial products as well as owner/operator of his strawberry farm. This being said, on the subject of prognosis, we would recommend also obtaining an opinion from the treating orthopedic surgeon.

[21] The lawyer representing the plaintiff and who issued the statement of claim against the driver filed an affidavit where he indicated that:

> Although the action plus report of July 21, 2009 indicated that Mr. Lauzon would continue to have some pain and impairments as a result of the accident, this evidence would not satisfy the requirements of section 4.1 and 4.3 of the regulations of the insurance act, and the issue remained as to whether it caused a substantial impairment of his ability to work or carry on his normal daily activities pursuant to section 267.5 (5) of the *Insurance Act*.

[22] The plaintiff filed an affidavit attesting that it was only on May 30, 2011 that he became aware that his injuries were permanent. This was following a consultation with his doctor who advised him that his recovery had plateaued and that it his injuries would indeed be permanent.

Analysis:

[23] Looking at the evidence as a whole, I have difficulty concluding that I have a "full appreciation" of the evidence so as to be able to make a finding relating to when the plaintiff and his counsel knew or ought to have known that the injuries seemed to meet the threshold. The difficulty arises because to answer that question, I would be required to make findings of credibility on the basis of untested affidavit evidence.

[24] While there is circumstantial evidence to support the argument that the plaintiff and/or his counsel knew or ought to have known that the injuries likely met the threshold test, that

evidence is not conclusive. There is evidence that makes the threshold issue less than clear. For example, as stated in the report dated July 21, 2009, "we do not foresee any significant functional restrictions that would prevent him from performing his activities of daily living as well as taking part in both his occupations as a consultant in financial products as well as an owner operator of his strawberry property farm."

[25] This evidence, together with the untested affidavit evidence, precludes me from saying I have an appreciation of the facts such that they permit a decision without need of a trial.

[26] Consequently, in the circumstances of this case I deny the summary judgment motion on the basis that there should be a trial on the issue of when the action was discoverable and consequently, at what point it would be appropriate to calculate the commencement of the requisite two-year limitation period, or when it may have been known or ought to have been known to the plaintiff that his injuries would seem to meet the threshold definition of the *Insurance Act*.

[27] Therefore the summary judgment motion is dismissed. The matter should proceed to trial. With respect to how the trial should proceed, it would be sensible to deal with the issue of the application of the limitation period and discoverability at the commencement of the trial.

Costs:

[28] If the parties cannot agree on the issue of costs, I will receive brief (maximum two written pages) submissions from the plaintiff within 15 days of the release of this decision; from the moving party within 10 days thereafter. I will allow a one page of reply from the plaintiff within five days thereafter.

Mr. Justice Robert L. Maranger

Date: November 8, 2013

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ONTARIO

SUPERIOR COURT OF JUSTICE

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Plaintiffs

AND

Annemarie Taticek, By Her Litigation Guardian, The Public Guardian and Trustee

AND

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REASONS FOR DECISION

Maranger J.

Released: November 8, 2013