Roque v. Pilot Insurance Company

[Indexed as: Roque v. Pilot Insurance Co.]

110 O.R. (3d) 21

2012 ONCA 311

Court of Appeal for Ontario,
Juriansz, Laforme and Epstein JJ.A.
May 14, 2012

Insurance -- Automobile insurance -- Underinsured motorist coverage -- Quantification of insured's damages by judgment or settlement not required before limitation period for commencing action against insured's own insurer under underinsured coverage provisions of automobile insurance policy starts to run -- Limitation period starting to run when insured has accumulated body of evidence that would give [page22]him reasonable chance of persuading judge that his claims would exceed minimum coverage.

The plaintiff was injured by a motorist in December 1996. He brought an action against the motorist claiming damages in the amount of $1,750,000. In 2002, the plaintiff learned that the defendant had only $200,000 in insurance coverage and commenced an action against his own insurer, the defendant, under the underinsured motorist endorsement (OPCF 44) of his automobile insurance policy. The motion judge dismissed the action on the basis that it was not commenced within 12 months of the date that the plaintiff knew or ought to have known that the quantum of his claim exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred, as required by s. 17 of OPCF 44. The plaintiff

appealed, arguing that s. 17 of OPCF 44 should be interpreted to mean that the limitation period begins to run when the plaintiff's damages have been quantified by settlement or judgment.

Held, the appeal should be dismissed.

The interpretation suggested by the plaintiff is inconsistent with the text of s. 17. If the limitation period begins when the plaintiff knows the quantum of the claim with certainty, the phrase "or ought to have known" in s. 17 is meaningless. The limitation period also does not begin to run when the plaintiff knows that the quantum of the claim is greater than the tortfeasor's insurance coverage. The motion judge correctly held that the limitation period begins to run when the plaintiff has a body of evidence accumulated that would give him a reasonable chance of persuading a judge that his claim would exceed $200,000.

Cases referred to

McCook v. Subramaniam, [2008] O.J. No. 4583, 2008 CanLII 59323, 172 A.C.W.S. (3d) 344 (S.C.J.), apld

Hampton v. Traders General Insurance Co. (1996), 27 O.R. (3d) 285, [1996] O.J. No. 41, 22 M.V.R. (3d) 165, 60 A.C.W.S. (3d) 406 (Gen. Div.), not folld

Statutes referred to

Insurance Act, R.S.O. 1990, c. I.8, ss. 258.3(1)(b), 258.4

APPEAL by the insured from the judgment of Henderson J. of the Superior Court of Justice dated October 28, 2010 dismissing the action against the insurer.

William G. Scott, for appellant.

Stephen Brogden, for respondent.

The judgment of the court was delivered by

[1] JURIANSZ J.A.: -- This appeal requires the court to

decide when the limitation period begins to run for commencing an action against an insured's own insurer under the inadequately insured motorist endorsement of an automobile insurance policy.

[2] On December 5, 1996, the appellant was injured by a motorist. He commenced an action against the motorist, claiming $1 million in general damages and $750,000 in special damages. The appellant is insured by the respondent. His insurance [page23]policy includes OPCF 44, the Family Protection Endorsement. OPCF 44 provides an insured person with coverage against harm caused by an inadequately insured motorist. Section 17 of OPCF 44 reads as follows:

> Every action or proceeding against the insurer for recovery under this change form shall be commenced within 12 months of the date that the eligible claimant or his or her representative knew or ought to have known that the quantum of claims with respect to an insured person exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred, but this requirement is not a bar to an action which is commenced within 2 years of the date of the accident.

[3] The appellant submits that s. 17 of OPCF 44 should be interpreted to mean that the limitation period begins to run when the plaintiff's damages have been quantified by settlement or judgment. Only then can it be said that the plaintiff "knows" for certain that the available insurance under the defendant's policy is less than that available under his own coverage.

[4] This interpretation was adopted by Gordon J. in Hampton v. Traders General Insurance Co. (1996), 27 O.R. (3d) 285, [1996] O.J. No. 41 (Gen. Div.). Gordon J. explains why it is difficult to apply the limitation period from the date the plaintiff knew or ought to have known that the quantum of the claim exceeded the minimum limits in the jurisdiction, at p. 288 O.R.:

> The application, in my view, would be difficult indeed. The

> progression of a personal injury action produces not unusually a series of crests and troughs on quantum and liability as evidence becomes known and medical reports unfold. It may be quite elusive, vague and blurred as to what point on this sine curve a reasonably competent civil litigator objectively or subjectively fixes as probably that where minimum limits are attracted. Nor can the complications introduced by subsequent highs and lows be disregarded.

[5] On this reasoning, Gordon J. found, at p. 288 O.R., that "[t]he discoverability application in all but catastrophic cases of clear liability must, in my view, be the date of the judicial determination of award as against the primary tortfeasor".

[6] While applying discoverability in this way has some advantages, it is inconsistent with the text of the provision. If the limitation period begins when the plaintiff knows the quantum of the claim with certainty, the phrase "or ought to have known" in the provision is left without meaning.

[7] In his factum, the appellant advances a different argument. That argument is the limitation period does not begin to run until the plaintiff knows that the quantum of the claim is greater than the tortfeasor's insurance coverage. This interpretation would avoid creating a multiplicity of proceedings, as it would reduce the need for injured parties to sue their own insurers. [page24]

[8] I do not accept either of the plaintiff's submissions. The words of the provision are clear. The motion judge was correct to find that that proper approach was expressed by Master Dash in McCook v. Subramaniam, [2008] O.J. No. 4583, 172 A.C.W.S. (3d) 344 (S.C.J.), at para. 5:

> The plaintiff's case runs from when he has a body of evidence accumulated that would give him a "reasonable chance" of persuading a judge that his claims would exceed $200,000.

[9] In this case, the appellant does not take issue with the motion judge's finding that more than two years had passed

since he knew or ought to have known that the quantum of his claims exceeded $200,000, the minimum coverage allowed in Ontario. The motion judge noted that the appellant had medical reports, a DAC assessment report and an economic loss report going back to June 1998. Unfortunately, the plaintiff's solicitors did not learn until April or May of 2002 that the defendant had only $200,000 of coverage. The appellant commenced an action against the respondent on March 28, 2002.

[10] The inevitable conclusion is that the plaintiff's action against the respondent was not brought in time and was properly dismissed.

[11] In my view, the appellant overstates the concern that applying the limitation period in s. 17 of OPCF 44 according to its ordinary grammatical meaning will lead to a multiplicity of proceedings. Section 258.4 of the Insurance Act, R.S.O. 1990, c. I.8 obligates an insurer who receives a notice under s. 258.3(1)(b) to promptly inform the plaintiff whether there is a motor vehicle liability policy issued by the insurer to the defendant and, if so, the liability limits under the policy, as well as whether the insurer will respond under the policy to the claim. Section 258.4 is intended to avoid the situation that arose in this case, where the defendant's insurer did not comply with s. 258.4. Where a defendant's insurer fails to comply with its obligations under s. 258.4, it would be prudent for plaintiffs' counsel to commence an action against their own insurer and discontinue it later if necessary.

[12] I would therefore dismiss the appeal with costs to the respondent fixed in the amount of $7,500, all inclusive, as agreed by counsel.

Appeal dismissed.