

CITATION: Schmitz and Lombard General Insurance, 2013 ONSC 7140
COURT FILE NO.: Ottawa File 10-48631
DATE HEARD: January 18, 2013

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Schmitz and Lombard General Insurance

BETWEEN: ECKHART SCHMITZ, LOUISE DARLING and ERIKA SCHMITZ and
KRISTIAN SCHMITZ by their litigation guardian, LOUISE DARLING and
LOMBARD GENERAL INSURANCE COMPANY OF CANADA

BEFORE: Honourable Mr Justice Martin James

COUNSEL: William Zener, Counsel for the Plaintiff

Richard Horak, Counsel for the Defendant

ENDORSEMENT

- [1] The issue raised by this motion is whether the limitation period contained in OPCF 44R continues in force or whether this contractual limitation is displaced by the provisions of section 4 of the *Limitations Act*, 2002.
- [2] OPCF 44R is an optional endorsement available to an insured person under his or her automobile policy. This endorsement insures against the risk that the monetary limit of the tortfeasor's insurance may not be sufficient to indemnify the insured for his or her losses ("underinsured motorist coverage").
- [3] The plaintiff says that the limitation of actions contained in OPCF 44R, being contractual in nature, is governed by section 22. Section 22 provides that the applicable statutory

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limitation period applies despite any agreement to vary or exclude it if the agreement was made after January 1, 2004.

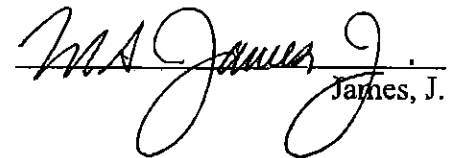
- [4] The defendant says the endorsement in its present form was made before January 1, 2004 and is unaffected by section 22.
- [5] The plaintiffs' rely on *Patterson v. Gallant* [1994] 3 S.C.R. 1080 as authority for the proposition that automobile insurance contracts renew annually and therefore section 22 applies. In my view, the fact that the terms of OPCF 44R are the result of a consultative process and predate the *Act* does not determine the issue. I prefer to view the underinsured motorist coverage endorsement as a component or part of the larger, comprehensive agreement between the insurer and the insured that renews annually. It appears to me that the contractual limitation period in this case is caught by section 22.
- [6] The defendant says that the interpretation suggested by the plaintiff may have the effect of compromising the ability of the insurer to participate in the timely assessment of the insured's claims, thereby creating potential prejudice to the underinsured motorist coverage insurer. Counsel for the plaintiff says that there are means available to the insurer to address this concern. One example is that the insurer has access to information by way of its participation as the accident benefits provider. Also, there are various provisions contained in OPCF 44R (see paras. 9, 11 and 14 for example) that ameliorate potential prejudice.
- [7] I would distinguish the decision in *Roque v. Pilot Insurance Co.* 2012 ONCA 311 on the basis that the precise point raised by this motion was not addressed.
- [8] The enactment of the *Limitations Act*, 2002 marks an important point of departure from the past practice of using the accrual of causes of action as the point of commencement for the calculation of limitation periods. The notion of discoverability is an overarching policy

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consideration implicit in the legislation even though its application may occasionally be awkward in particular circumstances.

[9] Therefore an order will issue that paragraph 17 of OPCF 44R cannot operate as a limitation defence and that the limitation period applicable to a claim pursuant to OPCF 44R is to be determined in accordance with section 4 of the *Limitations Act*, 2002.

[10] Respecting costs, my preliminary view is that the issue is sufficiently novel that there should be no order as to costs. However, if the plaintiffs seek a costs order, they may deliver a costs outline and bill of costs within 10 days of the date hereof and the defendants shall have 10 days to respond.


James, J.

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