

**Giuliano v. Allstate Insurance Co.  
Johnston v. State Farm Insurance Co. of Canada  
Morreel v. York Fire & Casualty Insurance Co.  
Hornick v. TD General Insurance Co.**

**[Indexed as: Giuliano v. Allstate Insurance Co.]**

66 O.R. (3d) 238  
[2003] O.J. No. 3266  
Court File Nos. 20668/A1, 01-CV-017941, 37202  
and 02-GD-53Y85

**Ontario Superior Court of Justice,  
Haines J.**

August 14, 2003

*Civil procedure — Representative actions — Proposed representative plaintiff having no tenable claim against defendant — Defendant moving for summary judgment dismissing claim — Plaintiff moving to substitute another plaintiff who did have tenable cause of action — Plaintiff's motion granted — Class proceeding commenced in name of [page239] person with no tenable claim can continue in name of another with tenable claim.*

*Insurance — Actions against insurer — Owner/lessor of vehicle not named as insured in automobile insurance policy — In absence of privity of contract, lessor not having status to bring action against insurer for damages for breach of statutory condition 6(7) — O. Reg. 777/93, statutory condition 6(7)*

In four proposed class actions, the plaintiffs claimed that the defendant insurers failed to comply with statutory condition 6(7), O. Reg. 777/93 under the Insurance Act, R.S.O. 1990, c. I.8. In each instance, it was alleged that the motor vehicle was damaged beyond economical repair and the claim was resolved with the insurer taking title to the salvage and paying the insured the actual cash value, less the amount of the deductible designated in each insured's case. The plaintiffs alleged that an insurer is not entitled to apply the deductible if it elects to take title to the salvage. They claimed damages for breach of statutory condition 6(7) or, alternatively, damages for conversion of the salvage. The defendants brought motions for summary judgment dismissing the actions. The plaintiffs brought motions to add or substitute other plaintiffs.

**Held**, the motions were granted in part.

The plaintiff G clearly had no cause of action himself, as he received the full amount to which he was entitled within the time prescribed under the terms of his policy, with no subtraction of the deductible. The proposed class action could not proceed with him as the representative plaintiff. However, an action commenced in the name of a person with no tenable claim can continue in the name of another with a tenable claim. The commencement of this action, defective though it may have been, put the defendant on notice with respect to potential claims on behalf of numerous past and current policyholders. If the substitution of a plaintiff with a tenable claim was not permitted, many claims might be lost to a limitation defence. Special circumstances existed to support the granting of the amendment requested.

The plaintiff G sought to add J Co. and B as plaintiffs. B leased a vehicle from J Co. and insured the

vehicle with the defendant. She was the named insured on the policy and J Co. was named as lessor. The vehicle was damaged beyond economical repair. The defendant paid J Co. the actual cash value of the vehicle minus the deductible and took title to the salvage. Under the terms of the lease, B was required to pay J Co. the amount of any deductible taken, and she eventually did so. J Co. had, then, received the full amount of the actual cash value of the vehicle and had no claim against the defendant. J Co. did not qualify as an appropriate representative plaintiff. B qualified as an appropriate representative plaintiff and should be added as a substitute plaintiff for G.

The plaintiff J conceded that no deductible was subtracted when his claim was paid and admitted to having no cause of action. He sought to substitute J Co. as the representative plaintiff and to amend the statement of claim accordingly. J Co. was the lessor of a vehicle that was involved in a motor vehicle accident. The lessees obtained insurance from the defendant, but, contrary to the lease agreement, J Co. was not named as an insured. After the accident, the defendant issued a cheque payable jointly to the lessees and J Co. for the actual cash value of the vehicle minus the deductible. J Co., as owner of the vehicle, had an insurable interest and could have been named as an insured. However, in the event, J Co. did not have a contract with the defendant. This intended class action was based on a breach of statutory condition 6(7), which is, by operation of s. 234(1) of *[page240]* the Insurance Act, a term of every contract of automobile insurance. J Co. was not a party to the insurance contract and had no status to sue on that contract. The provision in the policy that in a claim for damages to the automobile, "the owner of the automobile is covered for damage" did not give J Co. status to enforce the policy and did not qualify it as a member of the proposed class. J Co. had no cause of action against the defendant and could not be a substitute plaintiff. The action was dismissed.

The plaintiff M financed the purchase of a truck by Z. The loan was secured by a promissory note. Although M was registered as the owner, Z was entitled to exclusive use of the vehicle so long as the loan remained in good standing. Z arranged for the insurance on the vehicle and was the named insured on the policy. M was not shown in the policy as having any interest in the vehicle. When the vehicle was damaged, Z owed M more than \$11,000. As M was not a party to the insurance contract, he had no recourse against the defendant. The passing on issue was not engaged on these facts since Z had a demonstrated loss for which he did not have recourse. Z had a tenable claim and would be an appropriate plaintiff. M's claim should be dismissed and the substitution of Z as plaintiff should be permitted.

The plaintiff H was the lessee and named insured of a vehicle that was vandalized and damaged beyond economical repair. B Ltd. was the owner of the vehicle and named as lessor on the policy of insurance. The defendant applied the deductible to the loss and took title to the salvage. Under the terms of the lease, H was obliged to pay B Ltd. the amount of any deductible and agreed to assign any insurance proceeds to B Ltd. H had not yet paid the amount of the deductible to B Ltd. The defendant applied the deductible contrary to statutory condition 6(7). Both H and B Ltd. had a cause of action in contract for breach of that term of the policy. H, as lessee, was interested in recovering the deductible in order to fund her obligation to the lessor, and B Ltd. was entitled pursuant to s. 262(1) of the Insurance Act to seek redress as a "person having an interest indicated in the contract". Both had a right to pursue the claim. The motion for judgment should be dismissed, and the motion to add B Ltd. should be allowed.

### Cases referred to

Hughes v. Sunbeam Corp. (Canada) Ltd. (2002), 61 O.R. (3d) 433, 219 D.L.R. (4th) 467, 28 B.L.R. (3d) 1, 25 C.P.C. (5th) 230, [2002] O.J. No. 3457 (QL) (C.A.), affg (2000), 11 B.L.R. (3d) 236, 2 C.P.C. (5th) 335 (Ont. S.C.J.); Ladouceur v. Howarth, [1974] S.C.R. 1111, 41 D.L.R. (3d) 416; Law Society of Upper Canada v. Ernst & Young (2003), 227 D.L.R. (4th) 577, [2003] O.J. No. 2691 (QL) (C.A.), revg

(2002), 59 O.R. (3d) 214 (S.C.J.); Logan v. Canada (Minister of Health), [2003] O.J. No. 418 (QL) (S.C.J.); Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 56 O.R. (3d) 768, 207 D.L.R. (4th) 492, 15 C.P.C. (5th) 235, 152 O.A.C. 201, [2001] O.J. No. 4567 (QL) (C.A.); McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2003), 66 O.R. (3d) 112, [2003] I.L.R. A1-4217, [2003] O.J. No. 2914 (QL) (S.C.J.); McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 54 O.R. (3d) 704, 200 D.L.R. (4th) 449, [2001] I.L.R. A1-3997, 15 M.V.R. (4th) 179, 10 C.P.C. (5th) 1 (C.A.), revg (2000), 50 O.R. (3d) 300, 6 M.V.R. (4th) 297 (S.C.J.); Stone v. Wellington (County) Board of Education (1999), 29 C.P.C. (4th) 320, [1999] O.J. No. 1298 (QL), 120 O.A.C. 296 (C.A.); Williamson v. Headley, [1950] O.W.N. 185 (H.C.J.); Yu v. St. Paul Fire & Marine Insurance Co., [1996] O.J. No. 127 (QL) (Gen. Div.)

### **Statutes referred to**

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1)(e), 12, 14, 28

Insurance Act, R.S.O. 1990, c. I.8, ss. 234(1), 239, 241, 244, 262(1), 263 [page241]

### **Rules and regulations referred to**

O. Reg. 777/93, statutory conditions 6(7), 9(1), (4)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 5.04(2), 20, 26

MOTIONS by defendants for summary judgment dismissing actions and by plaintiffs for orders adding or substituting plaintiffs.

Michael McGowan, M. Paul Downs and Gabrielle Pop-Lazic, for plaintiffs.

Sheldon A. Gilbert, Q.C., for defendant Allstate Insurance Company.

Mark A. Gelowitz, for defendant State Farm Insurance Company of Canada.

Paul Tushinski, for defendant York Fire & Casualty Insurance Company.

Ted Charney, for defendant TD General Insurance Company.

---

### **HAINES J.: —**

#### Introduction

[1] The defendants move for summary judgment pursuant to Rule 20 [of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194], while the plaintiffs move to add or substitute other plaintiffs.

[2] These four actions are intended class proceedings commenced under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"), which each of the plaintiffs has brought on behalf of a proposed class of insureds who claim the defendants failed to comply with statutory condition 6(7), O. Reg. 777/93, Insurance Act, R.S.O. 1990, c. I.8, as amended. Statutory condition 6(7) provides:

6(7) There shall be no abandonment of the automobile to the insurer without the insurer's consent. If the insurer exercises the option to replace the automobile or pays the actual cash value of the automobile, the salvage, if any, shall vest in the insurer.

[3] In each instance it is alleged that the subject motor vehicle was damaged beyond economical repair and the claim was resolved with the insurer taking title to the salvage and paying the insured the actual cash value less the amount of the deductible designated in each insured's policy.

[4] The plaintiffs rely on *McNaughton Automotive Ltd v. Co-operators General Insurance Co.* (2001), 54 O.R. (3d) 704, 200 D.L.R. (4th) 449 (C.A.), which held that an insurer is not entitled to apply the deductible if it elects to take title to the salvage. The plaintiffs claim damages for breach of statutory condition 6(7) or, in the alternative, damages for conversion of the salvage. *[page242]*

Giuliano v. Allstate

[5] The defendant's position on its motion for summary judgment is straightforward. It contends that it paid the plaintiff the actual cash value of his vehicle without subtracting any deductible and, therefore, the plaintiff has no cause of action.

[6] The plaintiff's motor vehicle was damaged beyond repair on November 29, 1998. The plaintiff submitted a proof of loss on December 18, 1998, claiming damages for the total loss of his vehicle of \$4,044.60 plus GST of \$262.25 for a total of \$4,306.75. A deductible was applied and a cheque bearing the same date was made payable to the plaintiff for \$3,806.75. The defendant subsequently determined that the plaintiff was not liable for the collision that gave rise to the loss and, therefore, no deductible should have been taken. As a result, a further cheque for \$500, representing the amount of the deductible was issued to the plaintiff on January 13, 1999. The plaintiff was accordingly paid the full amount of his claim.

[7] The plaintiff admits these facts but contends that there is still a triable issue with respect to the tort of conversion since the defendant took title to the salvage before the full amount of the loss was paid. The defendant responds to this submission by pointing out that statutory condition 9(1) gives the insurer 60 days to make payment following submission of the proof of loss.

[8] In my view, it is clear on the facts that the plaintiff received the full amount to which he was entitled within the time prescribed under the terms of his policy of insurance and has no claim against the defendant. I find, therefore, that the defendant has demonstrated there is no genuine issue for trial with respect to Mr. Giuliano's claim.

[9] The plaintiff seeks to add Japetco Corporation and Cheryl Barash as plaintiffs. Cheryl Barash leased a motor vehicle from Japetco Corporation in February 1998 and insured the vehicle with the defendant insurer. Cheryl Barash was the named insured on the Certificate of Insurance and Japetco Corporation was named as lessor. The vehicle was damaged beyond economical repair on January 14, 2000. On January 25, 2000, the defendant paid Japetco Corporation the sum of \$8,585, representing the actual cash value of the vehicle minus the deductible of \$250, and took title to the salvage. Under the terms of the lease, Ms Barash, as lessee, was required to pay Japetco Corporation, as lessor, the amount of any deductible taken and eventually did so on February 15, 2001. This was acknowledged by the representative of Japetco at her cross-examination on the affidavit filed in support of this motion: *[page243]*

97. Q. So may I take it then, having agreed that the actual cash value of the vehicle was

\$8,835.00 and that the only deduction that was made by the insurer was \$250.00 then when you received the \$275.00 on February 15, 2001, you had in fact received the actual cash value of the vehicle that you had agreed to plus an additional \$25 00 for some NSF cheque which Mr. Barash had given you?

A. That's right.

[10] The motions to add Japetco Corporation and Cheryl Barash are brought pursuant to rule 5.04(2), which provides:

5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[11] Counsel for the plaintiff relies firstly on *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (QL) (S.C.J.). In *Logan*, the representative plaintiff commenced an intended class proceeding alleging regulatory negligence arising from the wrongful approval of certain temporomandibular joint implants. The plaintiff then decided she wished to withdraw as a representative plaintiff for the class so that she could proceed with an individual action and a motion was brought to substitute two others as proposed representative plaintiffs. Winkler J. concluded that Ms Logan had advanced a legitimate reason for wanting to withdraw and, upon being satisfied that the proposed substitutes had tenable claims, granted the motion to add them. In deciding that an amendment to the existing action was more appropriate than requiring the commencement of a new action by the substitute representative plaintiffs, Winkler J. made the following observations with respect to the nature and character of a class proceeding, at paras. 11 and 13:

The Attorney General, mistakenly in my view, asserts that a class proceeding is not commenced until the action is certified and until that time the proceeding is merely an individual action. This cannot be so. Rule 12 of the Rules of Civil Procedure states that the style of cause must state that the proceeding is commenced under the Class Proceedings Act, 1992. The statute applies with full force and effect from that time forward, triggering the case management functions of the designated class proceedings judge. Indeed, section 7 of the CPA provides that "where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties" [emphasis added by Winkler J.] subject to such terms as the court may impose. This provision supports the interpretation that a class proceeding is not simply an individual action until certification is granted. Rather it is a special type of action, that may be converted, at the court's discretion into a regular individual proceeding. If the Attorney General were correct in stating that the proceeding were an individual proceeding at the time it is commenced, such a provision would be unnecessary because the action would simply continue as an individual proceeding if certification were denied.  
[page244]

An intended class proceeding is brought by a proposed representative plaintiff pursuant to the CPA on behalf of a putative class of plaintiffs. In other words, it is a claim brought pursuant to the procedural mechanism of the CPA on behalf of a group of people similarly situated claiming relief in respect of a common wrong. It originates from the time of the issuance of the claim or notice of action. It is not an individual action that metamorphoses to a class

proceeding when certified

[12] Counsel for the plaintiff, therefore, submits that if Mr. Giuliano's claim is not tenable, the action should be continued with other class members as substitute representative plaintiffs. He maintains that the substitution of parties in these circumstances would serve to advance the objectives of the CPA and would represent a proper exercise of the court's discretion under ss. 12 and 14, which provide:

12. The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate

14(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

[13] Counsel for the plaintiff also relies on *Mazucca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768, 207 D.L.R. (4th) 492 (C.A.). That was an individual action where the plaintiff sued the defendant in negligence. It was only after the limitation period had expired that the plaintiff learned that the proper claimant was a corporation, of which the named plaintiff was the sole shareholder, director and officer. The plaintiff then moved pursuant to rule 5.04(2) to have the corporation substituted as the plaintiff. Cronk J.A., writing for the majority, held at para. 37 "that where a change of parties to a proceeding is sought, amendment requests are to be assessed with regard both to evidence of actual prejudice to the party opposing the amendment and in light of any special circumstances which may justify the amendment". This interplay between demonstrated prejudice and special circumstances is then explained, at paras. 41 and 42:

The established principles concerning rules 26.01 and 5.04(2) confirm the continuing importance, as a base consideration, of the issue of actual prejudice [page 245] in determining applications to amend pleadings, including those designed to add, delete or substitute parties, after the expiry of a limitation period. The centrality of this issue is also confirmed by the express language of rules 26.01 and 5.04(2) in their current form. Both the related jurisprudence and the rules themselves thus underscore a simple, common sense proposition: that a party to litigation is not to be taken by surprise or prejudiced in non-compensable ways by late, material amendments after the expiry of a limitation period. If such surprise or actual prejudice is demonstrated on the record, an amendment generally will be denied.

At the same time, proof of the absence of prejudice will not guarantee an amendment. Rather, when a change of parties is sought after the expiry of a limitation period, the circumstances of all affected parties should be examined to determine, on the facts of the individual case, whether sufficient special circumstances are present to support the requested amendment. In those cases where leave is sought to add, delete or substitute a new party, the examination of special circumstances involves consideration of the knowledge of both the moving party and her agents at the time of the commencement of the proceedings regarding the proper parties to be named and of the opposing party in relation to the nature of the true claim intended to be advanced.

[14] Counsel for the defendant submits that in a proposed class action the representative plaintiff must have a cause of action against a named defendant in order to sustain the action as a class proceeding: see *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 O.R. (3d) 433, 219 D.L.R. (4th) 467 (C.A.). Therefore, he contends, that if Mr. Giuliano has no claim, there is no action to which Japetco Corporation and Cheryl Barash can be added as plaintiffs. It is also submitted that this case is distinguishable from *Logan* because that action was properly constituted with a representative plaintiff who had a tenable claim. There was then no concern in *Logan* about offending the rule in *Hughes*.

[15] Counsel for the defendant further submits that there is an important policy consideration which should militate against granting the motion to add plaintiffs in this case. He contends that allowing these motions would be an invitation to class counsel generally to commence class proceedings in the names of nominee plaintiffs in order to suspend the operation of the limitation period pursuant to s. 28 of the CPA pending the installment of a "proper" plaintiff with a tenable claim.

[16] The defendant also disputes the plaintiff's contention that *Mazzuca* supports the proposition that a new representative plaintiff can be added to a class proceeding even though the original plaintiff has no cause of action. Indeed, the proposition that a proposed representative plaintiff cannot maintain an action without a claim is not particularly startling. In *Stone v. Wellington (County) Board of Education* (1999), 29 C.P.C. (4th) 320, [1999] O.J. No. 1298 (QL) (C.A.), the court held, at para. 10: **[page246]**

Where a representative plaintiff, for reasons personal to that plaintiff, is definitively shown as having no claim because of the expiry of a limitation period, he or she cannot be said to be a member of the proposed class. The continuation of the action in those circumstances would be inconsistent with the clear legislative requirement that the representative plaintiff be anchored in the proceeding as a class member, not simply a nominee with no stake in the potential outcome.

It is clear then that since Mr. Giuliano has no claim against the defendant this proposed class action cannot proceed with him as the representative plaintiff.

[17] However, I do not agree with the defendant's contention that a finding that Mr. Giuliano has no cause of action ends the matter. Indeed, the reason for seeking the amendment pursuant to r. 5.04(2) is to sustain the action. Although the motions to add or substitute plaintiffs in *Mazzuca* and the other cases referred to therein were apparently not heard in conjunction with motions for summary judgment, there is little doubt that those actions would have perished had the amendments been refused. The issue here is whether this action, commenced in the name of a person with no tenable claim, can continue in the name of another with a tenable claim. In my opinion, the substance of the inquiry required is captured in the following statement of Middleton J. in *Williamson v. Headley*, [1950] O.W.N. 185 (H.C.J.), quoted by Spence J. in *Ladouceur v. Howarth*, [1974] S.C.R. 1111, 41 D.L.R. (3d) 416 and reproduced in *Mazzuca*, at para. 60:

The general principle underlying all the cases is that the court should amend, where the opposite party has not been misled, or substantially injured by the error.

[18] The potential prejudice to the defendant in this case arises from the operation of s. 28 of the CPA, which suspends the running of any applicable limitation period against class members when the proceeding is commenced but provides, subject to a right of appeal, that the limitation period will resume running upon termination of the class proceeding. While it is clear from *Mazzuca* that potential prejudice must be considered, it is also clear that the intervention of a limitation period is not determinative. Special circumstances may outweigh any prejudice and require [that] the amendment be

allowed. I see no reason why this approach should not apply to class proceedings.

[19] Further, I do not see that considering a motion to add or substitute a party in tandem with a motion for summary judgment offends any principle enunciated in either Hughes or Stone. Obviously, if there is a finding that the named plaintiff has no cause of action against the named defendant, and no substitute plaintiff with a tenable claim is being proffered, then the action [page247] must be dismissed. However, where there is a viable alternative plaintiff, circumstances may dictate that the action be continued with appropriate amendments.

[20] In this case, Mr. Giuliano's counsel (not class counsel) delivered an affidavit in which he indicated Mr. Giuliano had assured him that his recovery on the total loss of his motor vehicle was net the deductible. Mr. Giuliano confirms in his affidavit that this was the information he provided to his counsel and, although he still has no recollection of receiving the cheque for the deductible, accepts that he did. It may be that more prudence could have been exercised by counsel before commencing the action, but I do not find in his or Mr. Giuliano's conduct anything that should in itself preclude the granting of the relief being sought.

[21] The action was commenced subsequent to the decision of the Court of Appeal in McNaughton. I think it would be safe to conclude that this defendant and any other motor vehicle insurer in Ontario who had followed the condemned practice of applying a deductible to total loss claims when they took title to the salvage was less than surprised when they were named as a defendant in a similar class proceeding. The claim of each putative class member is relatively small, the facts giving rise to the losses are strikingly similar in nature and the information relating to these losses and their payment is all within the knowledge of the defendant. The commencement of this action, defective though it may have been, put the defendant on notice with respect to potential claims on behalf of numerous past and current policyholders. If the substitution of a plaintiff with a tenable claim is not permitted, many claims may be lost to a limitation defence. I am satisfied, therefore, that special circumstances do exist to support the granting of the amendment requested, provided it is established that the proposed plaintiffs have a tenable cause of action.

[22] Before moving on to consider the specific claims of both Japetco Corporation and Cheryl Barash, I should deal with the defendant's legitimate concern about the naming of token representative plaintiffs to toll the limitation period. I agree that such a practice would constitute an abuse of process, but there is no evidence to support any finding that that was the intention of counsel in this case. In my view, the presence of such evidence might well constitute sufficient grounds for refusing to add or substitute a party and could also attract appropriate costs consequences for the offending counsel.

[23] Japetco Corporation, through its representative, has acknowledged that it received the full amount of the actual cash [page248] value of the vehicle. The plaintiff submits that the defendant, in arguing that Japetco has no claim because it sustained no loss, is relying on a passing on defence which raises a triable issue: see *Law Society of Upper Canada v. Ernst & Young*, [2003] O.J. No. 2691 (QL), 227 D.L.R. (4th) 577 (C.A.), revg (2002), 59 O.R. (3d) 214 (S.C.J.). In *Law Society of Upper Canada*, the plaintiffs alleged that they sustained damages as a result of the defendants' breach of contract or negligence, and the issue was whether the plaintiffs were precluded from recovering the damages because their losses were passed on to the members of the Law Society of Upper Canada by way of supplemental and increased levies. The motions judge decided the defendants could not rely on the passing on defence because it had not been judicially recognized in Canada. However, in the Court of Appeal, it was decided that the law with respect to the passing on defence was unsettled and the matter should therefore proceed to trial.

[24] The argument against the passing on defence is based on public policy. A wrongdoer should not

be immune from liability simply because the person harmed has been able to recoup his or her losses by accessing other sources of revenue or exercising contractual or statutory rights. In my view, that consideration does not arise on the facts of this case since the finding that Japetco Corporation sustained no loss and therefore has no claim does not prevent Cheryl Barash, the person who is actually out of pocket, from pursuing her claim against the defendant.

[25] Nonetheless, it is submitted by the plaintiff's counsel that Japetco Corporation maintains an interest in the claim because, as owner, it is at least entitled to nominal damages if there is an ultimate finding that this vehicle was converted by the defendant. It was made clear by Winkler J in Logan that any party being added as a representative plaintiff must have a tenable claim. There is little sense in making the amendment today and discovering tomorrow that the added party has no claim. I have already determined in a related proceeding that the statement of claim discloses no cause of action in conversion. (See reasons released in *McNaughton v. Co-operators*, July 14, 2003 [*McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2003), 66 O.R. (3d) 112, [2003] O.J. No. 2914 (QL), [2003] I.L.R. 4217 (S.C.J.)], paras. 90-96). It follows, therefore, that Japetco Corporation has no claim. However, if I am wrong in this conclusion, it is, in my view, also important on a motion to add or substitute a plaintiff in a class proceeding to determine that the proposed representative plaintiff is able to withstand the requisite scrutiny under s. 5(1)(e) of the CPA, which requires, among other things, a finding that the representative plaintiff will be **[page249]** able to fairly and adequately represent the interests of the class. Inherent in this requirement is the need for the proposed representative plaintiff to have a meaningful claim that can be identified with those of other potential class members. In my opinion, Japetco Corporation, as a plaintiff with no real prospect of any meaningful recovery, does not qualify as an appropriate representative plaintiff.

[26] On the other hand, Cheryl Barash, the lessee of the vehicle, has sustained an apparent loss equal to the deductible applied upon settlement of the claim. I conclude that she does have a tenable claim, does qualify as an appropriate representative plaintiff and may, therefore, be added as a substitute plaintiff for Mr. Giuliano.

[27] In the result, there will be an order adding Cheryl Barash as a plaintiff and permitting the necessary amendments to the statement of claim. There will also be a further order dismissing both the claim of Mr. Giuliano and the motion to add Japetco Corporation as a plaintiff.

#### Johnston v. State Farm

[28] The plaintiff in this intended class action now concedes that no deductible was subtracted when his claim was paid and admits to having no cause of action. He moves instead pursuant to Rules 26 and 5.04(2) to substitute Japetco Corporation as the representative plaintiff and to amend the statement of claim accordingly.

[29] Japetco leased a 1989 Dodge Caravan to Sam and Kimberly Tiffen by agreement dated July 18, 1996. The agreement required the lessee to maintain insurance for collision or upset on the vehicle. The agreement also provided that the insurance policy as issued should show both lessee and lessor as named insureds. The Tiffens did obtain insurance from the defendant, but Japetco was not named as an insured.

[30] On June 5, 1999, the subject vehicle was involved in an accident and damaged beyond repair. On June 22, 1999, the defendant issued a cheque payable jointly to the Tiffens and Japetco for \$3,500, representing the actual cash value of the vehicle minus the deductible.

[31] For the reasons stated in *Giuliano v. Allstate*, above, I am satisfied that another member of the

proposed class can be substituted as a representative plaintiff in this action, provided such class member has a tenable claim.

[32] In opposing the motion to add or substitute Japetco as the representative plaintiff in this proposed class proceeding, the defendant submits that Japetco has no claim because it does not *[page250]* have a contract with the defendant. The application for insurance was made by the Tiffens alone and the policy was issued with them as the only named insureds. There is no evidence that the defendant was asked to add Japetco as an insured or failed to honour any promise or agreement to do so.

[33] It is accepted that Japetco, as owner of the vehicle, has an insurable interest and could have been named as an insured. However, the plaintiff maintains it is not necessary for Japetco to be named in order to be covered under the policy since para. 6.3 of the policy provides:

In a claim for damages to the automobile, the owner of the automobile is covered for damage.

He contends that this provision gives Japetco status to enforce the policy and qualifies it as a member of the proposed class. I disagree.

[34] The plaintiff submits that s. 244 of the Insurance Act dispenses with the need for privity of contract and permits the plaintiff to maintain an action against the defendant even though he is not named as an insured party in the policy of insurance. Section 244 appears in Part VI of the Insurance Act and provides:

244. Any person insured by but not named in a contract to which section 239 or 241 applies may recover indemnity in the same manner and to the same extent as if named therein as the insured, and for that purpose shall be deemed to be a party to the contract and to have given consideration therefor.

[35] Section 241 refers to coverage under "non-owner's policies" and therefore has no application here since the policy issued to the Tiffens was an owner's policy. Section 239 does apply to owner's policies and provides that not only is the person named in the policy insured, but also:

239(1) . . . every other person who with the named person's consent drives, or is an occupant of, an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage,

- (a) arising from the ownership or directly or indirectly from the use or operation of any such automobile; and
- (b) resulting from bodily injury to or the death of any person and damage to property.

(Emphasis added)

[36] However, it is apparent that s. 239 applies to coverage for third party liability. It does not apply to direct compensation for property loss, which is addressed in s. 263, or coverage for collision. *[page251]* Section 263 permits an insured to recover from its own insurer depending on the degree of fault. It provides:

263(1) This section applies if,

- (a) an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of one or more other automobiles;
- (b) the automobile that suffers the damage or in respect of which the contents suffer damage is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this section; and
- (c) at least one other automobile involved in the accident is insured under a contract evidenced by a motor vehicle liability policy issued by an insurer that is licensed to undertake automobile insurance in Ontario or that has filed with the Superintendent, in the form provided by the Superintendent, an undertaking to be bound by this section.

(2) If this section applies, an insured is entitled to recover for the damages to the insured's automobile and its contents and for loss of use from the insured's insurer under the coverage described in subsection 239(1) as though the insured were a third party.

(3) Recovery under subsection (2) shall be based on the degree of fault of the insurer's insured as determined under the fault determination rules.

(6) This section does not affect an insured's right to recover in respect of any physical damage coverage in respect of the insured automobile.

[37] Collision coverage that is not dependent on fault is optional. Where it has been purchased, as in this case, the coverage provided is found in paragraph 7.1.1 of the standard form insurance policy, which provides:

... We agree to pay for direct and accidental loss of, or damage to, a described automobile and its equipment caused by a peril such as fire, theft, or collision if the automobile is insured against these perils.

[38] It is significant to note that s. 262(1) does require the insurer to adjust the amount of any claim with both the insured and "any person having an interest indicated in the contract". However, in this case, the plaintiff's interest does not appear in the contract and there is no provision similar to s. 244 that applies to either direct compensation for property damage or collision coverage. Absent such a provision, a person who is not a party to the contract has no recourse against the insurer. In my view, the explanation provided by Borins J. in *[page252] Yu v. St. Paul Fire & Marine Insurance Co.*, [1996] O.J. No. 127 (QL) (Gen. Div.), at para. 4, applies in this case:

... At common law, a person who derives a benefit under a contract of insurance, such as the plaintiff, has no legal right to enforce the contract, even though the object of the insurance is to protect him or her from claims arising from his or her negligence. It is for this reason that, in certain situations, the legislature has intervened to provide such a person recourse against the insurer, even though there is no privity of contract. An

example can be found in s. 244 of the Insurance Act, R.S.O. 1990, c. I 8, which gives to an unnamed insured, in a contract of automobile insurance, the right to recover indemnity from the insurer in the same manner as if a named insured, and, for this purpose, is deemed to be a party to the insurance contract. The insurance contracts in this case come within Part III of the Act, which does not contain a provision similar to s. 244. It follows, therefore, that the plaintiff has no right of action against St. Paul at common law, or under statute.

[39] The Tiffens' insurable interest in the subject vehicle arises from their obligation under the lease agreement to pay Japetco, the owner, for any damage to the vehicle. Japetco's entitlement to be paid arises from the lease agreement, not the insurance contract. Therefore, upon the leased vehicle being damaged, Japetco has a claim against the Tiffens, but it is only the Tiffens, as the named insureds, who have a claim against the insurer. In fact, it appears from reviewing the leasing agreement that Japetco appreciated the necessity of it being named as an insured in order for it to make a claim on the policy. The leasing agreement is very specific in requiring the lessee "to deliver to the Lessor the S.C.F.-No. 1 Lessee's Insurance Undertaking, naming the Lessor as insured in the policy". This, of course, was not done and there is no evidence to indicate Japetco took any steps to ensure it was done between July 18, 1996, the date of the lease, and July 5, 1999, the date of the accident.

[40] Further, I do not see that the fact the defendant knew the vehicle was leased, and did, in accordance with its usual practice, issue the settlement cheque to the lessee and lessor jointly, confers any entitlement on Japetco pursuant to the policy or operates as any acknowledgement by the defendant that it considered Japetco a party to the contract. In his affidavit sworn March 24, 2003, the representative of the defendant, Raymond G. Kearns, offers the following explanation as to why the defendant often settles claims in this manner even though the lessor is not named in the policy:

State Farm understands that, by the very nature of a lease, lessees are not the legal owners of the vehicle and they have contractual obligations to repay the value of the vehicle when it is rendered a total loss. To facilitate those obligations, simplify the tax treatment of the payment and avoid potential claims by lessors who might take the position that because of State **[page253]** Farm's knowledge of the lease, it has an obligation to "protect" the lessor's right to be repaid by the lessee, State Farm may make a cheque co-payable to the lessees and lessors. State Farm also has sound business reasons for facilitating good business relationships with automobile lessors.

[41] This intended class action is based on a breach of statutory condition 6(7), which is, by operation of s. 234(1) of the Insurance Act, a term of every contract of automobile insurance. Japetco was not a party to the subject contract and has no status to sue on that contract. As such, Japetco has no cause of action against the defendant and cannot therefore be a substitute plaintiff.

[42] In the event I am wrong in reaching this conclusion, I should also address the alternative contentions of the defendant that, first, Japetco suffered no loss since it recovered the amount of the deductible from the lessee and, second, its claim is out of time in any event.

[43] After this claim was paid by the defendant, the Tiffens still owed Japetco the \$500 that had been deducted from the settlement. When the Tiffens negotiated the lease of another vehicle with Japetco, this indebtedness was factored into the monthly payments on the new lease. The Tiffens defaulted after seven months, but up to that time, had paid approximately \$1,500 in lease payments to Japetco. The defendants take the position that the \$500 has therefore been paid and Japetco has no loss that can be related to the application of the deductible. I disagree. The evidence indicates that arrangements were made for the Tiffens to retire their indebtedness for the \$500 over the course of the lease. Although it is

not clear from the evidence, it seems to me that the best that can be said is that some portion of the \$500 debt was retired before default. I, therefore, do not conclude that Japetco recovered the deductible from the Tiffens.

[44] The motor vehicle accident that gives rise to the loss occurred on June 5, 1999, and the defendant took title to the salvage on June 22, 1999. This intended class proceeding was commenced on July 20, 2001. Therefore, any claim for loss or damage is out of time by virtue of the one-year limitation period provided for in statutory condition 9(4). This period could be extended by operation of the doctrine of fraudulent concealment upon it being established that the defendant misled or deceived the plaintiff and thereby deprived the plaintiff of money to which [it] was entitled.

[45] As indicated above, a party seeking to be added or substituted as a representative plaintiff must demonstrate it has a tenable claim. The proposed plaintiff is not required to prove that claim at this stage of the proceedings, but, in my view, must offer [page254] some evidence to demonstrate there is a triable issue. There is, on this motion, no evidence of any fraudulent concealment on the part of the defendant, and therefore nothing to toll the running of the one-year limitation period. In the absence of such evidence, I conclude that any action by Japetco against this defendant arising from this loss is barred by [the] operation of statutory condition 9(4).

[46] In the result, the motion for judgment is allowed and the motion to add or substitute Japetco Corporation as a new representative plaintiff is dismissed. This action is, therefore, dismissed without prejudice to a new action being commenced by an appropriate representative plaintiff.

#### Morreel v. York Fire

[47] The plaintiff, Roger Morreel, is a businessman who lends money to those who are unable to obtain conventional financing. In April 2001, the plaintiff financed the purchase of a 1994 GMC pickup truck to John Zeiser. The loan was secured by a promissory note dated April 27, 2001. Although the plaintiff was registered as the owner, Mr. Zeiser was entitled to exclusive use of the vehicle so long as the loan remained in good standing. It was Mr. Zeiser who arranged for the insurance and was the named insured on the policy. The plaintiff did not sign the application for insurance, he was not shown in the issued policy as having any interest in the vehicle and no request was made of the defendant to add the plaintiff as a named insured.

[48] On June 2, 2001, the vehicle was involved in a collision and was damaged beyond repair. The defendant negotiated the settlement of the claim with Mr. Zeiser and on June 15, 2001, issued a cheque for \$10,516 payable to John Zeiser and Roger Morreel jointly in accordance with the proof of loss, which did disclose the plaintiff's interest. A further sum of \$714 was paid to Mr. Zeiser by the defendant in September 2001 so that the claim was ultimately resolved on the following basis:

Amount of the loss:	\$11,730
Less deductible:	\$ 500
	-----
Amount paid:	\$11,230

[49] As of the date the truck was damaged, Mr. Zeiser owed the plaintiff \$11,103.13. A further interest payment of \$259.07 for June 2001 brought the total indebtedness to \$11,362.20. The insurance proceeds of \$10,516 reduced that amount to \$846.20 [page255] Mr. Zeiser then retired the balance owing together with accrued interest when he received the additional payment from the defendant in September 2001. The plaintiff seeks to add John Zeiser as a plaintiff.

[50] The defendant maintains the plaintiff has no cause of action because he was not a party to the contract of insurance and, in any event, has suffered no loss. The plaintiff contends he was an unnamed insured and makes the same arguments as those made by the proposed plaintiff in *Johnston v. State Farm*, above. It is my opinion, for the reasons given in *Johnston v. State Farm*, that Mr. Morreel was not a party to the insurance contract and therefore has no recourse against the defendant.

[51] The defendant also contends that the plaintiff has no cause of action against it because he was repaid in full by Mr. Zeiser and therefore sustained no loss. The plaintiff submits that by making this argument the defendant is relying on a passing on defence which raises a triable issue. For the reasons given in *Giuliano v. Allstate*, above, it is my view that the passing on issue is not engaged on these facts since Mr. Zeiser has a demonstrated loss for which he does have recourse.

[52] It is also my view, for the reasons stated in *Giuliano v. Allstate*, that another member of the proposed class can be substituted or added as a representative plaintiff if that person has a tenable claim.

[53] I am satisfied that Mr. Zeiser does have a tenable claim and would be an appropriate representative plaintiff. The motion to substitute him as the representative plaintiff in this intended class action is therefore granted.

[54] In the result, there will be an order dismissing the claim of Roger Morreel and a further order permitting the substitution of John Zeiser as plaintiff.

#### Hornick v. ID General Insurance Company

[55] The plaintiff, Lorri Hornick, was the lessee and named insured of a vehicle that was insured by the defendant. The leasing company, BDM Motor Cars Ltd., was the owner of the automobile and named as lessor on the policy of insurance. The plaintiff is seeking to add the leasing company as a plaintiff.

[56] The vehicle was vandalized and damaged beyond economical repair on February 15, 2002. The parties ultimately agreed that the total amount of the loss was \$3,500. A deductible of \$300 was applied and a cheque for \$3,200 payable to the plaintiff and BDM Motor Cars Ltd. was issued. The defendant took title to the salvage and subsequently sold it for \$100 [page256]

[57] Under the terms of the lease, the plaintiff was obliged to pay the leasing company the amount of any deductible and agreed to assign any insurance proceeds to the lessor.

[58] The defendant submits that the plaintiff, as lessee, has no cause of action in conversion because she had no property interest in the salvage. Furthermore, the defendant contends the lessor suffered no loss because it was entitled to recover the full value of the vehicle from the lessee pursuant to the terms of the lease.

[59] The defendant points out that nowhere in any of the material filed on these motions has anyone deposed that BDM Motor Cars Ltd. received anything less than the actual cash value. The plaintiff does, however, state in her affidavit sworn April 2, 2003 that "she appreciates that any amount recovered in these proceedings may have to be paid to BDM Motor Cars Ltd." I infer from that statement that she has not yet paid the amount of the deductible to the lessor pursuant to her obligation under the lease.

[60] It is established that a deductible was applied contrary to statutory condition 6(7). In my view, both the plaintiff and the lessor have a cause of action in contract for breach of that term of the policy.

The plaintiff, as lessee, is interested in recovering the deductible in order to fund her obligation to the lessor, and BDM Motor Cars Ltd., as the named lessor, is entitled, pursuant to s. 262(1) of the Insurance Act, to seek redress as a "person having an interest indicated in the contract". I find that both lessee and lessor have a demonstrated interest in recovering the loss claimed and both, therefore, have a right to pursue that claim.

[61] In the result, the motion for judgment is dismissed and the motion to add BDM Motor Cars Ltd. is allowed.

#### Costs

[62] I will hear counsel's submissions with respect to costs on all of these motions in due course.

Motions granted in part.