Case Name:

McNaughton Automotive Ltd. v. Co-Operators General Insurance Co.

PROCEEDING UNDER The Class Proceedings Act, 1992
Between
McNaughton Automotive Limited, applicant, and
Co-Operators General Insurance Company, respondent
And between
Giuliano, plaintiff, and
Allstate, defendant
And between
Mrozinski, plaintiff, and
Allianz, defendant
And between
James, plaintiff, and
AXA, defendant
And between
Mathews, plaintiff, and
Belair, defendant
And between
O'Donnell, plaintiff, and
CAA, defendant
And between
Jory, plaintiff, and
Canada Life (Primmum), defendant
And between
Veley, plaintiff, and
CGU, defendant
And between
White, plaintiff, and
Citadel, defendant
And between
Ross, plaintiff, and
Coseco, defendant
And between
D. Polowin R.E. Ltd., plaintiff, and
Dominion, defendant

And between
Big Canoe, plaintiff, and
Economical, defendant
And between
Johnston, plaintiff, and
Federation, defendant
And between
Beh, plaintiff, and
Federated, defendant
And between
Grosso, plaintiff, and
Guarantee, defendant
And between
Woods, plaintiff, and
ING Halifax, defendant
And between
Farquhar, plaintiff, and
Liberty Mutual, defendant
And between
Somerset, plaintiff, and
Lloyd's, defendant
And between
Venturi, plaintiff, and
Lombard, defendant
And between
Sharma, plaintiff, and
Motors, defendant
And between
927417 Ontario Inc., plaintiff, and
Old Republic, defendant
And between
Marra, plaintiff, and
Personal, defendant
And between
McAlister, plaintiff, and
Pilot, defendant
And between
Segnitz, plaintiff, and
Royal & SunAlliance, defendant
And between
Empke, plaintiff, and

Security National, defendant
And between
Johnston, plaintiff, and
State Farm, defendant
And between
Hornick, plaintiff, and
TD General, defendant
And between
Hayner, plaintiff, and
Trafalgar, defendant
And between
Duclos, plaintiff, and
Wawanesa, defendant
And between
Morreel, plaintiff, and
York Fire, defendant
And between
Shaw, plaintiff, and
Zurich, defendant

[2003] O.J. No. 2914

Court File No. Y30273/99,

Court File No. 20668/A1, Court File No. 20688/A1,

Court File No. 37165, Court File No. 02-CV-226093CM,

Court File No. 20908/A1, Court File No. S1966/2001,

Court File No. 01-555, Court File No. 37278,

Court File No. 02-CV-238158CP, Court File No. 01-CV-18969,

Court File No. 39025, Court File No. 20996/A1,

Court File No. 39180, Court File No. 02-CV-238156CP,

Court File No. 21283/A2, Court File No. 21091/A1,

Court File No. 993/02, Court File No. 20998/A1,

Court File No. 01-CV-217562CP, Court File No. 31766,

Court File No. 02-CVC-22652OCP,

Court File No. 38733, Court File No. 37188/01,

Court File No. CP-01-B2990, Court File No. 01-CV-017941,

Court File No. 02-GD-53485, Court File No. 995/02,

Court File No. 20809/A1, Court File No. 37202,

Court File No. 01-CV-213320CP

Also reported at: 66 O.R. (3d) 112

Ontario Superior Court of Justice

Haines J.

Heard: September 17-20, 23-27, 30, October 1, 2002,
February 5, 17-18, 24, April 7-10, 14-16, 22-24, May 28 and
June 10, 2003.
Judgment: July 14, 2003.

(148 paras.)

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Court File No. Y30273/99
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Court File No. 20668/A1
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Court File No. 20688/A1
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Court File No. 37165
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Court File No. 02-CV-226093CM
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Court File No. 20908/A1

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Court File No. S1966/2001
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
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Court File No. 01-555
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Court File No. 37278
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Court File No. 02-CV-238158CP
K.M. Baert, for the plaintiff.
T.P. Charney, for the defendant.
Court File No. 01-CV-18969
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J. Campion, for the defendant.
Court File No. 39025
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
A.L.W. D'Silva, for the defendant.
Court File No. 20996/A1
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
A.L.W. D'Silva, for the defendant.
Court File No. 39180
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
H.B. Kohn, for the defendant.
Court File No. 02-CV-238156CP
K.M. Baert, for the plaintiff.
T.R. Shillington, for the defendant.
Court File No. 21283/A2
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
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Court File No. 21091/A1

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Court File No. 993/02
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Court File No. 20998/A1

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Court File No. 01-CV-217562CP
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
J.C. Blouin, for the defendant.
Court File No. 31766
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
B.R. Mitchell, for the defendant.
Court File No. 02-CVC-22652OCP
K.M. Baert, for the plaintiff.
E. Cherniak, Q.C., K. Ross and I. Leach, for the defendant.
Court File No. 38733
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
E. Cherniak, Q.C., K. Ross and I. Leach, for the defendant.
Court File No. 37188/01
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
E. Cherniak, Q.C., K. Ross and I. Leach, for the defendant.
Court File No. CP-01-B2990
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
T.P. Charney, for the defendant.
Court File No. 01-CV-017941
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
M. Gelowitz, for the defendant.
Court File No. 02-GD-53485
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
T.P. Charney, for the defendant.
Court File No. 995/02
K.M. Baert, for the plaintiff.
E. Cherniak, Q.C., K. Ross and I. Leach, for the defendant.
Court File No. 20809/A1
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
P. Martin, for the defendant.
Court File No. 37202
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
P. Tushinski, for the defendant.
Court File No. 01-CV-213320CP
M. McGowan, M.P. Downs and G. Pop-Lazic, for the plaintiff.
L. La Horey, for the defendant.

HAINES J.:--

INTRODUCTION

1 This matter came before me initially in August, 2000. At that time, I concluded that the applicant had no cause of action and dismissed the proceeding. The applicant appealed and was successful. The matter was then remitted to me for determination of the motion for certification. The respondent insurer sought leave to appeal to the Supreme Court of Canada. Leave was refused March 7, 2002. In the interim, a number of other intended class actions were commenced against various automobile insurers. Subsequent to leave to appeal being refused, I was designated, pursuant to r. 37.15, to hear all of the motions in all such actions.

2 Given the common issues and interests of the many parties I decided that I would hear all of the parties on all of the issues before making any orders. It was also thought that by proceeding in this manner any appeals could go forward together. It has turned out to be a much more protracted process than originally anticipated but has now progressed to the stage where I am satisfied that all of the parties have had an opportunity to address the common issues that will impact their respective actions and am therefore releasing my Reasons with respect to the following motions:

I. Rule 21 - jurisdiction;
II. Rule 21 - limitation period;
III. Rule 21 - conversion;
IV. Rule 21 - OPCF 43 Endorsement;
V. Rule 21 - actual cash value;
VI. Rule 20 & 21 - statutory interpretation.

3 Most of these rulings will have general application although there are outstanding motions for judgment, both under reserve and as yet not heard, which, once determined, may well affect the disposition of those cases.

I - JURISDICTION

4 Each of these proceedings is an intended class action in which the plaintiff is alleging that the defendant insurer breached the following statutory condition found in their respective policies of automobile insurance:

> 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.

(See for example, statutory condition 6(7) of O. Reg. 777/93 made under Insurance Act, R.S.O. 1990, c. I.8, as amended.)

5 It is alleged that the insurers breached this statutory condition when they took possession of the subject automobiles and paid the insureds the actual cash value minus the amount of the deductible designated in the policies. As an alternative theory of liability, it is alleged that the defendant insurers are liable for conversion of the vehicles.

6 All of the plaintiffs rely on McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 54 O.R. (3d) 704 (C.A.) where the Court held that when the insurer elects to take title to the damaged vehicle pursuant to the subject statutory condition, the insurer is required to pay its insured the actual cash value with no reduction for the amount of the deductible under the policy. For the most part, the deductibles of the plaintiffs and the proposed class members range from $300.00 to $1,000.00.

7 Each of the plaintiffs is seeking certification of their respective action on behalf of a class of insureds whose claims were allegedly handled in the same manner as that proscribed by McNaughton. The putative classes include all such persons in Ontario, Alberta, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Yukon, Northwest Territories and Nunavut. It is accepted that certain insurers do not carry on business in all of these jurisdictions and therefore, if certified, the class in those actions would be circumscribed accordingly.

8 In those actions where the representative plaintiff is a resident of Ontario and the defendant insurer carries on business in Ontario and other jurisdictions, the defendants are challenging the extra-provincial scope of the pleadings and are seeking an order pursuant to r. 21.01(1)(a) and (b) striking out those portions of the pleadings that refer to the claims of any extra-provincial members of the proposed class. In three of the actions the representative plaintiffs are residents of Alberta and the defendants have moved pursuant to r. 21.03(3)(a) for a dismissal of these claims on the basis that the court has no jurisdiction over the subject matter of those actions.

Rule 21 Test

9 It is accepted, for the purposes of a motion under r. 21.01(1)(a) and (b), that the facts alleged in the statement of claim must be taken to be proven unless they are patently ridiculous or incapable of proof and that the motion will only be granted if, having accepted those facts, it is plain and obvious that the statement of claim discloses no reasonable cause of action: see Hunt v. Carey, [1990] 2 S.C.R. 959; Nash v. Ontario (1995), 27 O.R. (3d) 1 (C.A.); Abdool v. Anaheim Management Ltd. (1993), 15 O.R. (3d) 39 (Gen. Div.), aff'd (1995), 21 O.R. (3d) 453 (Div. Ct.); and MacDonald v. Ontario Hydro (1994), 19 O.R. (3d) 529 (Gen. Div.), aff'd (1995), 26 O.R. (3d) 401 (Div. Ct.).

The Law Relating to the Assumption of Jurisdiction

10 Jurisdiction was recently considered by the Ontario Court of Appeal in Muscutt v. Courcelles, (2002), 60 O.R. (3d) 20. The particular issue and fact situation in that case are set out in paras. 1 and 2 of the judgment:

> This appeal, argued together with four other appeals, involves the important issue of whether the Ontario courts should assume jurisdiction over out-of-province defendants in claims for damage sustained in Ontario as a result of a tort committed elsewhere.
>
> The fact situation common to these appeals is as follows. An Ontario resident suffers serious personal injury in another province or in another country. The injured party returns home to Ontario, endures pain and suffering, receives medical treatment and suffers loss of income and amenities of life, all as a result of the injury sustained outside the province. The question is whether the courts of Ontario should entertain the injured party's suit against the out-of-province defendants who are alleged to be liable in tort for damages.

11 The issue in these actions is whether, in the context of a class proceeding, an Ontario court should assume jurisdiction over out-of-province plaintiffs and putative class members with respect to claims for damages sustained outside Ontario for alleged breaches of contract and conversion that occurred elsewhere in Canada.

12 The statements of claim disclose a fact situation that is common to all proposed extra-provincial class members. A motor vehicle, owned or leased by an out-of-province resident, was damaged beyond repair in another province or territory. The lessee or owner of the vehicle was insured under a policy of insurance issued in that province or territory by an insurer licenced to carry on business in that jurisdiction as well as in Ontario. The subject policies were issued in accordance with the laws of the province or territory where the claimant was residing and the damage was sustained. When the claim was resolved, the insurer took title to the salvage and paid the insured an amount of money that was reduced by the amount of the deductible designated in the policy.

13 In Muscutt, Sharpe J.A. noted the significant and relatively recent changes in the law relating to jurisdiction at para. 14:

> In four seminal decisions between 1990 and 1994, the Supreme Court of Canada radically changed the entire area of law. The decisions recognized that a new approach was necessary for a modern federal state with integrated national markets and a justice system that featured closely-shared values, a common appointment process for judges and a single final court of appeal for all courts.

14 In Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077 and Hunt v. T & N Plc., [1993] 4 S.C.R. 289, the Supreme Court of Canada stated and explained the principles upon which the proper exercise of jurisdiction rests. The first is "order and fairness", and the second is the need for a "real and substantial connection". LaForest J. proposed a flexible approach in Morguard that requires an examination of the circumstances against the backdrop of these principles. However, as

Sharpe J.A. points out at para. 56 in Muscutt, the precise nature of the connection to the jurisdiction is not defined:

> ... While certain passages in Morguard suggest that the connection must be with the defendant, others suggest that the connection must be with the subject matter of the action or with the damages suffered by the plaintiff.

Sharpe J.A. examines a number of cases that have addressed the issue of jurisdiction using the "personal subjection approach" where a substantial degree of connection between the defendant and the forum has been deemed a requirement for the assumption of jurisdiction and then considers the broader "administration of justice approach" which accepts the concept of order and fairness as integral to the real and substantial connection inquiry.

15 In expressing his preference for the administration of justice approach, Sharpe J.A. states at paras. 75 and 76:

> It is apparent from Morguard, Hunt and subsequent case law that it is not possible to reduce the real and substantial connection test to a fixed formula. A considerable measure of judgment is required in assessing whether the real and substantial connection test has been met on the facts of a given case. Flexibility is therefore important.
>
> But clarity and certainty are also important. As such, it is useful to identify the factors emerging from the case law that are relevant in assessing whether a court should assume jurisdiction against an out-of-province defendant on the basis of damage sustained in Ontario as a result of a tort committed elsewhere. No factor is determinative. Rather, all relevant factors should be considered and weighed together.

16 The following factors are then listed and discussed:

> (i) The connection between the forum and the plaintiff's claim.
> (ii) The connection between the forum and the defendant.
> (iii) Unfairness to the defendant in assuming jurisdiction.
> (iv) Unfairness to the plaintiff in not assuming jurisdiction.
> (v) The involvement of other parties to the suit.
> (vi) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis.
> (vii) Whether the case is interprovincial or international in nature.
> (viii) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

17 The plaintiffs and defendants both rely on Muscutt and contend that an application of the foregoing factors to the circumstances of the actions now before the court supports their respective positions.

(i) Connection Between the Forum and the Plaintiff's Claim

18 The plaintiffs concede that the non-resident class members have little connection with Ontario apart from the alleged similarity of their claims with those being advanced in the Ontario class actions.

19 The defendants submit that this factor is based on the premise that the forum has an interest in protecting the legal rights of its residents. Applied in a strict sense, this factor would exclude non-Ontario plaintiffs since the province has no interest in protecting the legal rights of non-Ontario residents who are claiming pursuant to contracts governed by the law of another jurisdiction for damages occasioned in that jurisdiction.

(ii) The Connection Between the Forum and the Defendant

20 The plaintiffs rely on the fact that the defendants carry on business in Ontario and, for most of them, Ontario is the single largest insurance market in Canada.

21 The defendants submit that the question to be asked in relation to this factor is whether the "defendant has done anything within the jurisdiction that bears upon the claim advanced by the plaintiff", (Muscutt, at para. 82). The defendants maintain that they have done nothing in Ontario that has any bearing on the claims of the out-of-province plaintiffs and proposed class members. The defendants contend that no such connection can exist between Ontario and residents of other jurisdictions who sustained damages in those jurisdictions as a result of alleged breaches to policies issued pursuant to the laws of such jurisdictions.

(iii) Unfairness to the Defendant in Assuming Jurisdiction

22 The plaintiffs submit that there is no element of unfairness in permitting the defendants to be sued in Ontario by non-resident class members since the defendants will be required to defend the claims of the Ontario class members whether or not non-residents are included in the class. The plaintiffs point out that there can be no issue as to unfair treatment by the court since, as LaForest J. stated in Morguard at p. 1103, "fair process is not in issue within the Canadian federation" and, at p. 1100, "any concerns about differential quality of justice among the provinces can have no real foundation". The plaintiffs also contend that the subject policies of insurance contemplate a risk of harm to extra-provincial parties by providing coverage for damages sustained in another province.

23 The defendants raise no concern about fair treatment by the court but maintain that the question to be asked in the circumstances of these actions is whether the defendant insurers, carrying on business in Canadian jurisdictions outside Ontario and issuing automobile insurance

policies in those jurisdictions, were engaged in any activity in those jurisdictions that gave rise to the risk of harm in Ontario. The defendants maintain that there is no reciprocal risk of harm that arises in the circumstances of these cases and therefore, there is no reasonable expectation by any party that an action would lie in any jurisdiction other than the one in which the insured was resident.

(iv) Unfairness to the Non-Resident Plaintiffs and Non-Resident Class Members in Not Assuming Jurisdiction

24 The plaintiff submits that if non-resident class members are not permitted to participate in the class actions, they may have no effective access to justice since the amount of each claim is modest and individual lawsuits would be prohibitively expensive.

25 The defendants agree that the issue here is "access to justice" but submit that class action proceedings are available for all non-resident class members in their home provinces since the Supreme Court of Canada ruled in Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 that it was incumbent upon the courts to fashion appropriate procedures to accommodate class actions in those provinces where comprehensive class proceedings legislation has not yet been enacted. In this regard, it is noted that an identical representative action has been commenced in Alberta and the court there has determined it is a convenient forum for the determination of such claims: see Pauli v. Ace Ina Insurance, [2003] A.J. No. 175 (Q.B.).

(v) The Involvement of Other Parties to the Suit

26 In considering this factor, the court is required to bear in mind the goals of avoiding multiplicity of proceedings and inconsistent results. These goals are the foundation of the "judicial economy" objective of class actions. The plaintiffs maintain that excluding non-resident class members would be contrary to the advancement of these goals and inconsistent with the broader "administration of justice" approach to jurisdiction that was preferred by Sharpe J.A. in Muscutt.

27 The defendants acknowledge that the inclusion of extra-territorial class members would reduce the number of proceedings but submit that the assumption of such jurisdiction in these cases would not serve the administration of justice because of the significant differences between the statutory provisions in Ontario and those in the other jurisdictions that apply to the common circumstances that give rise to these claims. It may well be that the putative class members in Ontario are entitled to the relief claimed while similarly situated persons in other provinces are not. The defendants, therefore, contend that the preferable course of action is for potential class members to initiate properly constituted representative actions in each jurisdiction. This would permit the courts of each jurisdiction to interpret and apply their own statutes and would eliminate the potential for inconsistent interpretations of the same provisions by courts in different jurisdictions.

(vi) The Court's Willingness to Recognize and Enforce an Extra-Provincial

Judgment Rendered on the Same Jurisdictional Basis

28 The plaintiffs submit that Ontario courts would recognize and enforce a judgment from a sister province in analogous circumstances and should anticipate that other provinces would have a reciprocal response to an Ontario judgment.

29 The defendants maintain that the key words here are "the recognition of a judgment rendered on the same jurisdictional basis". Given the differences in the statutory foundations for the extra-provincial claims, the defendants suggest that the question to be asked in these cases is whether an Ontario court would be willing to enforce authoritative judicial interpretations of Ontario legislation rendered in jurisdictions other than Ontario. The defendants contend that the degree of reciprocity required to support an affirmative answer to this question was not contemplated in Morguard and represents a profound surrender of provincial sovereignty.

(vii) Whether the Case is Interprovincial or International in Nature

30 The plaintiffs rely on the views expressed by Sharpe J.A. in Muscutt at paras. 95 and 96 where he stated that jurisdiction is more easily assumed in interprovincial cases than international matters because of the federal structure of the Constitution and an absence of concern for the parties being treated fairly by the courts within the Canadian federation.

31 The defendants accept this point of view but refer to the judgment of LaForest J. in Morguard at p. 1103 where he states that "fairness to the defendant requires that the judgment be issued by a court acting through fair process and with properly restrained jurisdiction". The defendants, therefore, maintain that heightened interprovincial comity is procedurally, rather than substantively, premised and properly restrained jurisdiction requires respect for the sovereignty of the legislative function of each provincial jurisdiction. The defendants suggest that this respect should render courts reticent to embark upon a first instance interpretation of another jurisdiction's legislation.

(viii) Comity and the Standards of Jurisdiction, Recognition and Enforcement Prevailing Elsewhere

32 The plaintiffs and defendants are both agreed that since this is an interprovincial case, this factor has no application.

Analysis

33 National and extra-provincial class certification has been granted in a number of cases including: Nantais v. Telectronic Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331 (Gen. Div.), leave to appeal to the Div. Ct. denied, (1995), 40 C.P.C. (3d) 263; Harrington v. Dow Corning Corp. (2000), 193 D.L.R. (4th) 67 (B.C. C.A.); leave to appeal to S.C.C. denied, [2001] S.C.C.A. No. 21; Carom v. Bre-X (1999), 43 O.R. (3d) 441 (Gen. Div.), varied, (2000), 51 O.R. (3d) 236 (C.A.), leave to appeal to S.C.C. denied, (2000), 157 O.A.C. 399; Webb v. K-Mart Canada Ltd.

(1999), 45 O.R. (3d) 389 (S.C.J.), leave to appeal to S.C.J. denied, (1999), 45 O.R. (3d) 638.

34 It appears from a review of these cases that a substantial connection was found where the subject matter of the extra-provincial claims was the same as those of the domestic members of the class and resolution of the claims on a national basis was not only consistent with the general principles of order and fairness but served the specific objectives of the applicable class proceedings legislation. It is also noted that the legal principles pleaded in support of both the domestic and extra-provincial claims were similar in all the jurisdictions being embraced. The defendants suggest that Muscutt has altered the jurisdictional landscape to the extent that those cases might well be decided differently today. I disagree. It seems to me that the results in those cases are entirely consistent with the administration of justice model approved in Muscutt. Nonetheless, I have concluded this court should not assume jurisdiction over the extra-territorial claims in these actions.

35 In Ontario the claims of the representative plaintiffs and the proposed members of the class are based on McNaughton where the Court of Appeal found that statutory conditions are to be accorded priority over other contractual terms in the insurance policy by operation of s. 234(2) of the Insurance Act, R.S.O. 1990, c. I.8, as amended, which stipulates that "no variation or omission of or addition to a statutory condition is binding on the insured". In all of the other provinces and territories referred to in the statements of claim, with the exception of Newfoundland and Labrador, the equivalents of s. 234(2) are made "subject to" the statutory provision that permits the application of deductibles. For example, in New Brunswick the relevant statutory condition is identical to Ontario statutory condition 6(7), however, ss. 230(1) and 253 of the Insurance Act, R.S.N.B. 1973, c. I-12 read as follows:

> 230(1) Subject to subsection 226(3), section 231 and section 253,
>
> a) the conditions set forth in this section are statutory conditions and shall be deemed to be part of every contract and shall be printed in every policy with the heading "Statutory Conditions", and
> b) no variation or omission of or addition to a statutory condition is binding on the insured.
>
> ...
>
> 253(1) A contract or part of a contract providing insurance against loss of or damage to an automobile and the loss of use thereof may contain a clause to the effect that, in the event of loss, the insurer shall pay only,
>
> a) an agreed portion of any loss that may be sustained, or

b) the amount of the loss after deduction of a sum specified in the policy

and in either case not exceeding the amount of the insurance.

(2) Where a clause is inserted in accordance with subsection (1), there shall be printed or stamped upon the face of the policy in conspicuous type the words: "This policy contains a partial payment of loss clause".

36 It therefore appears that in those jurisdictions with similar statutory provisions, the legislatures have qualified the priority afforded to statutory conditions. In addition to this significant difference in the pertinent statutory provisions, the other provinces and territories subscribe to a different process for the resolution of claims. Statutory condition 4(8) in the New Brunswick Insurance Act provides:

> 4(8) In the event of disagreement as to the nature and extent of the repairs and replacements required, or as to their adequacy, if effected, or as to the amount payable in respect of any loss or damage, those questions shall be determined by appraisal as provided under the Insurance Act before there can be recovery under this contract, whether the right to recover on the contract is disputed or not, and independently of all other questions. There shall be no right to an appraisal until a specific demand therefor is made in writing and until after proof of loss has been delivered.

Although there are currently no such provisions in Ontario, prior to 1994 the Ontario Insurance Act did have a similar statutory condition that provided for appraisals and also contained a provision that made s. 234(2) "subject to" s. 261 which permitted partial payment of loss clauses in insurance policies.

37 The plaintiffs submit that it is open to an Ontario court to interpret and apply the laws of other jurisdictions. It is acknowledged that this can be done and that there may be circumstances where it would be appropriate. However, in these intended class actions where: (1) the contract was made outside of Ontario pursuant to the laws of another jurisdiction that are materially different; (2) the defendant is licensed under and subject to the laws of the other jurisdiction; (3) the alleged breach occurred outside Ontario; (4) the claimants reside outside of Ontario; (5) the events which gave rise to the claim occurred outside Ontario; and (6) the damages were sustained outside Ontario, it seems to me the administration of justice would not be served by this court undertaking the task of interpreting the legislation of other provinces to determine whether the residents of those provinces have sustainable claims. In my view, that is a task for the courts of those jurisdictions in these circumstances. Of some interest is the fact that since these motions were argued Rooke J. has rendered judgment in Pauli, supra, and has held that the applicable Alberta legislation permits the

taking of a deductible on total loss claims.

38 Therefore, having due regard for the relevant factors listed in Muscutt, I find there is a demonstrated absence of any real connection between potential out-of-province class members and this forum and conclude that order and fairness would not be served by assuming jurisdiction over claims of persons in those provinces and territories where the relevant statutory provisions are materially different from those in Ontario.

Newfoundland and Labrador

39 The current automobile insurance regime in Newfoundland and Labrador is governed by the Automobile Insurance Act, R.S.N.L. 1990, c. A-22. The statutory conditions are set out in s. 8 of the Act and s. 8(2) provides:

> A variation or omission of or addition to a statutory condition is not binding on the insured.

This language is almost identical to that found in s. 234(2) of the Ontario Insurance Act and Newfoundland and Labrador statutory condition 4(7) is almost identical to Ontario statutory condition 6(7). The Newfoundland and Labrador legislation also contains a partial payment of loss provision (s. 31) that permits deductibles. Like Ontario, that statute does not make the statutory conditions "subject to" the partial payment of loss clause.

40 Prior to the 1990 statutory revision, s. 8(1) of the Automobile Insurance Act, R.S.N. 1970, c. 17 provided:

> 8(1) Subject to subsection (3) of section 4, section 9 and section 29,
>
> (a) the conditions set forth in this section are statutory conditions and shall be deemed to be part of every contract and shall be printed in every policy with the heading "Statutory Conditions"; and
> (b) no variation or omission of or addition to a statutory condition is binding on the insured.

41 Section 29 of the 1970 Act referred to in s. 8 was the partial payment of loss clause that was the predecessor to s. 31 of the current Act. There has been no specific amendment to the 1970 Act removing the words "[s]ubject to subsection (3) of section 4, section 9 and section 29" from s. 8(1) of the 1970 Act. The apparent change in the 1990 Act came about as part of a revision of all of the public statutes of Newfoundland and Labrador that was carried out under the authority of the Statutes and Subordinate Legislation Act, R.S.N.L. 1990, c. S-27. The 1990 revision was prepared by legislative counsel whose statutory mandate was to prepare a "draft consolidation and revision of the statutes of the province". Legislative counsel is a division of the Department of Justice. In

preparing the revision, s. 5(1)(g) of the Statutes and Subordinate Legislation Act gives legislative counsel the power to "make minor amendments to the statutes that are necessary in order to state more clearly what is considered to have been the intention of the Legislature". The defendants submit that the deletion of the "subject to" wording was a substantive amendment which legislative counsel had no authority to make. They contend, therefore, that s. 8 of the current Automobile Insurance Act is ultra vires, improperly enacted, and otherwise of no force and effect.

42 Although counsel for the defendants were unable to find any relevant case law from Newfoundland and Labrador on these particular issues, they did refer to Bedford (Town) v. Nova Scotia (Law Amendments Committee) (1994), 147 N.S.R. (2d) 161 (C.A.) where the Nova Scotia Court of Appeal considered a revision to a provincial electoral boundary that was made in the Revised Statutes of Nova Scotia 1989. The revision was made pursuant to Nova Scotia's equivalent of Newfoundland and Labrador's Statutes and Subordinate Legislation Act. The Court held that the change was a substantive amendment as opposed to a mere revision and therefore the purported amendment was declared to be inoperative.

43 Although the defendants submit that the omission of the "subject to" wording in the current Automobile Insurance Act is of no force and effect, they do not ask this court to make that declaration. It is their position that since this is a determination that will require an adjudication on the Newfoundland and Labrador legislative amendment process, it is one which ought to be undertaken by a Newfoundland and Labrador court.

44 The plaintiffs submit that the amended statute is valid. They refer to s. 9 of the Revised Statutes, 1990 Act, S.N.L. 1991, c. 41, which provides that when a revised statute is not the same as the previous enactment, the revised statute applies to all transactions on and after the date that the revised statute comes into force. Section 9 of that Act states in part:

> 9(1) The revised statutes shall not be held to operate as new laws but they shall be construed and have effect as a consolidation of the law contained in the enactments for which the revised statutes are substituted.
>
> (2) The various provisions of the revised statutes corresponding to and substituted for the enactments previously in force shall, when they are the same in effect as those of the previous enactments, operate retrospectively as well as prospectively and shall be considered to have been passed respectively on the days on which the corresponding previous enactments came into force.
>
> (3) If on any point the provisions of the revised statutes are not in effect the same as the previous enactments for which they are substituted, then with respect to all transactions, matters and things on and subsequent to the day on which the revised statutes came into force, the provisions contained in them prevail, but with respect to all

> earlier transactions, matters and things the provisions of the previous enactments prevail. [Emphasis added.]

45 The plaintiffs submit that the Newfoundland and Labrador Automobile Insurance Act is, in all material aspects, the same as Ontario's Insurance Act. There should, therefore, be no concern relating to the interpretation of different legislation and this court should be prepared to assume jurisdiction with respect to the claims of any putative class members in Newfoundland and Labrador.

46 The defendants have raised issues with respect to the legislative process in Newfoundland and Labrador. An amendment was made to the Automobile Insurance Act which may have exceeded the mandate given to legislative counsel under the Statutes and Subordinate Legislation Act. This is an issue that will have to be determined in order to address the entitlement of any putative class members in Newfoundland and Labrador and, in my opinion, is one which ought to be addressed by a Newfoundland and Labrador court. I, therefore, conclude as I did with respect to the other provinces and territories, that it would not be appropriate for this court to assume jurisdiction over the claims of potential class members in Newfoundland and Labrador.

Out-of-Province Representative Plaintiffs

47 Rule 21.01(3)(a) and (c) of the Ontario Rules of Civil Procedure provides:

> 21.01(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> (a) The court has no jurisdiction over the subject matter of the action;
>
> ...
>
> (c) Another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter;

The proposed representative plaintiffs in Hayner v. Trafalgar Insurance Company of Canada, Marra v. The Personal Insurance Company of Canada and Somerset v. Lloyd's are all residents of Alberta. When this fact is considered in conjunction with my findings above, I conclude that their claims have no connection with this forum and therefore this court has no jurisdiction over the subject matter of these actions. Although there may be putative class members in these actions who do have claims in Ontario, it is my view that it is incumbent upon a proposed representative plaintiff in a class proceeding to establish, as a threshold issue, that the court has jurisdiction over his or her claim just as it is necessary for a representative plaintiff to plead an identifiable cause of action

against a named defendant in order to sustain that action: see Ragoonanan Estate v. Imperial Tobacco Canada Ltd. (2000), 51 O.R. (3d) 603 (S.C.J.) and Hughes v. Sunbeam Corp. (Canada) Ltd. (2002), 61 O.R. (3d) 433 (C.A.). In addition, as noted above, a representative action raising identical claims on behalf of Alberta policy holders has been commenced in that province.

Disposition

48 The question before the court pursuant to r. 21.01(1)(a) is:

> Should an Ontario court assume jurisdiction over the extra-territorial parties and matters to which reference is made in the plaintiffs' statements of claim?

49 For the reasons given, the answer is no. In my opinion it is plain and obvious that this court should not entertain the claims of putative class members outside of Ontario. An order will go staying the proceedings and respective claims of those persons who are not claiming in relation to a policy of automobile insurance issued pursuant to the law of Ontario.

50 There will also be an order pursuant to r. 21.01(3)(a) dismissing the Hayner, Marra and Somerset actions.

II - LIMITATION PERIOD

51 This issue is before the court as a motion for the determination of a question of law before trial pursuant to r. 21.01(1)(a). The court is asked to determine the limitation period that is applicable to the claims in these intended class proceedings.

The Plaintiffs' Position

52 The plaintiffs submit that the standard limitation periods of six years for contract and tort apply. The plaintiffs also submit that the discoverability principle applies.

53 In making these submissions, the plaintiffs contend that the one year limitation period specified in statutory condition 9(4) of O. Reg. 777/93 does not apply.

54 Statutory condition 9(4) states:

> (4) Every action or proceeding against the insurer under this contract in respect of loss or damage to the automobile or its contents shall be commenced within one year next after the happening of the loss and not afterwards, and in respect of loss or damage to persons or other property, shall be commenced within two years next after the cause of action arose and not afterwards.

55 The plaintiffs maintain that this provision contains two qualifications that must be satisfied

before that limitation period can apply. First, the action must be "under this contract" and second, the action must be "in respect of loss or damage to the automobile or its contents".

56 The plaintiffs concede that the claim for breach of contract (i.e. breach of Ontario statutory condition 6(7)) may be a claim "under this contract" but is not, they submit, a claim "in respect of loss or damage to the automobile or its contents". The plaintiffs agree that loss or damage occurred when their vehicles were involved in collisions but argue that the cause of action upon which they base their claims did not arise until some time later when the defendants elected to take title to the salvage and paid them the actual cash value less the deductible. They, therefore, contend that the breach of statutory condition 6(7) is independent of any loss or damage to the automobile. In making this submission, the plaintiffs rely on the findings of the Court of Appeal in McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 54 O.R. (3d) 704 where Sharpe J.A. identifies the time when the claims arose at para. 32:

> Thirdly, the terms of the proof of loss left the insurer with various options. After the appellant had completed the proof of loss, it remained open to the insurer to decide whether or not it wished to take title to the damaged vehicle. The cause of action asserted by the appellant arose later when the respondent elected to take the salvage. Accordingly, even if the terms of the proof of loss were sufficient to bar the claim now asserted, that claim did not exist at the time the appellant signed the proof of loss. [Emphasis added.]

57 The plaintiffs also submit that their alternative claims, based on the tort of conversion, are not subject to the limitation period contained in statutory condition 9(4). They contend that the claim for conversion is not a claim for indemnity under the policy but one that arises from an independent wrong committed outside the reach of the policy. Therefore, even if the plaintiffs' claims for breach of contract are subject to the one year limitation period, the plaintiffs are entitled to assert their claims for the tort of conversion for up to six years.

58 The plaintiffs rely on Northern Assurance Company Ltd. v. Brown, [1956] S.C.R. 658 to support this contention. In that case, the plaintiff was awarded a judgment against the driver of an insured automobile but was unable to recover. The plaintiff sued the insurer under s. 214 of the Insurance Act, R.S.O. 1950, c. 183, which permitted an action against the insurer to recover unsatisfied judgments. The insurer raised the one year limitation period set out in the statutory conditions as a defence claiming that the action was "in respect of loss or damage to persons or property". In holding that the limitation period did not apply, the Court found that the plaintiff was not a person insured by the insurance contract and therefore the action brought against the insurer was not brought "under the contract" but pursuant to the statutory provision that created the right of action against the insurer. It is this finding that the plaintiffs rely upon to support their submission that their claims for conversion are based on a substantive common law right that is not subject to the terms of the policy and, therefore, not subject to the one year limitation period.

The Defendants' Position

59 The defendants submit that the limitation period set out in statutory condition 9(4) applies to all of the plaintiffs' claims. In making this submission they refer to the wording of the statutory condition which makes it applicable to "every action or proceeding ... in respect of loss or damage" to the insured automobile. In Arsenault v. Dumfries Mutual Insurance Company (2002), 57 O.R. (3d) 625 (C.A.) at p. 628, Abella J.A. adopts the opinion of Dickson J. in Nowegijick v. R., [1983] 1 S.C.R. 29 at p. 39 where he states that the phrase "in respect of" is "probably the widest of any expression intended to convey some connection between two related subject matters". The defendants therefore maintain that any and all disputes having some connection with loss or damage to the insured vehicle fall within the ambit of statutory condition 9(4).

60 The defendants also argue that statutory condition 9(4) must be read in conjunction with the other statutory conditions. If that is done, they contend, it becomes apparent that the legislature has propounded a comprehensive scheme for the resolution of all claims and disputes that have their genesis in any loss or damage to the insured vehicle. The claims as pleaded allege that the plaintiffs were paid an amount of money that was less than they were entitled to pursuant to statutory condition 6(7). In each case, the deficiency is alleged to be equal to the amount of the deductible designated in the policy. The insured's entitlement to recover under statutory condition 6(7) arose from loss or damage to the automobile. Therefore, any action or proceeding commenced against the insurer to recover a deficiency in a payment made pursuant to statutory condition 6(7) is an action "under this contract in respect of loss or damage to the automobile".

Analysis

61 For the reasons that follow, I accept the defendants' submissions and conclude that statutory condition 9(4) applies to any loss sustained by the insured as a result of the insurer's breach of statutory condition 6(7). In my view, that also includes the claims for conversion. The taking of the salvage is but one part of a transaction authorized by statutory condition 6(7) and the failure to comply with any aspect of that provision is an actionable breach of the contract of insurance.

62 The facts as pleaded in the statements of claim are the same in each case. An insured's vehicle was damaged beyond repair. The insured made a claim to the insurer of the vehicle. The insurer took title to the damaged vehicle and paid the insured the actual cash value less the deductible designated in the insurance policy. The insurer then disposed of the salvage.

63 The basis of liability as pleaded is the same in each case. The plaintiffs rely on statutory condition 6(7) or its equivalent in the other jurisdictions and then allege:

> The defendant, as the insurer, was under a contractual duty of utmost good faith to the class members. The defendant breached its contractual duty of utmost good faith to the class members by:

(a) failing to disclose to the class members that, if the defendant elected to take the salvage, the aforesaid statutory condition required the defendant to pay the actual cash value of their automobiles without deduction for the deductible, and

(b) failing to pay to the class members the amount recovered for the salvage of their automobiles.

64 The alternative relief is pleaded as follows:

> In the alternative, Class Members had property interests in the vehicles. The defendant is liable for conversion of those property interests by disposing of the vehicles without paying the Class Members the amounts recovered for salvage.

65 In Arsenault, supra, the plaintiff claimed damages from the defendant for its "bad faith" conduct in prematurely terminating her weekly benefits. The defendant moved under r. 21.01(1)(a) for a determination of whether the claim was barred by operation of the two year limitation period provided for in s. 281(5) of the Insurance Act, R.S.O. 1990, c. I-8. After noting that the applicable statutory provision states that a proceeding "in respect of no fault benefits" must be commenced within two years after the insurer's refusal to pay the benefits claimed, Abella J.A. concludes as follows at paras. 17, 18 and 19 of her judgment:

> ... That means that any and all disputes about an insurer's refusal to pay no-fault benefits, including disputes which allege the insurer's bad faith in connection with that refusal, must be brought within two years of the refusal.
>
> I am prepared to assume, without deciding, that there can be an independent claim for bad faith conduct in respect of the insurer's refusal to pay or continue to pay no-fault benefits. In order to establish such a claim, the appellant would first have to establish that the insurer's termination of her benefits was improper. Such a claim must comply with the requirements outlined in ss. 280-283 of the Insurance Act, one of which is the two-year limitation period for the institution of proceedings to determine this question. The appellant cannot, by the device of a claim for bad faith damages, extend three-fold the length of that limitation period. [Emphasis added.]
>
> If I am wrong in concluding that bad faith claims in connection with no fault benefits refusals are subject to the procedures and time limits set out in ss. 280-283 of the Insurance Act, I am nonetheless of the view, based on the pleadings, that this appellant's claim is not an independent, actionable wrong, but is in fact exactly the kind of dispute over no-fault benefits entitlements contemplated by the dispute resolution scheme in the Insurance Act. [Emphasis

added.]

66 This reasoning is consistent with that of Iacobucci J. in Heredi v. Fensom (2002), 213 D.L.R. (4th) 1 (S.C.C.). In Heredi the plaintiff was injured while riding on a bus that was designed to accommodate people with physical disabilities. The parties agreed that the driver had operated the bus in such a manner as to cause the plaintiff injury. About two years following the incident the plaintiff sued the owner and driver alleging both negligence and breach of contract, an implied term of which was safe passage of the plaintiff from her home to her destination. The Saskatchewan Highway Traffic Act, S.S. 1986, c. H-3.1 provides for a 12 month limitation period for the recovery of "damages occasioned by a motor vehicle". The question on the appeal to the Supreme Court of Canada was whether the 12 month limitation period or the general six year limitation period applied to the plaintiff's claim.

67 In finding that the 12 month limitation period applied, Iacobucci J. held at paras. 31 and 34 that the court should "depart from the sharp distinction ... between cases framed in contract and cases framed in tort" and focus on "the fundamental nature of the action" so that "if ... the dominant feature of the damages is their relation to a motor vehicle accident, the limitation period ought to be applied".

68 In order to determine whether an action is subject to a particular limitation period, Iacobucci J. suggests that a substantive approach should be taken and at para. 37 explains the impact of such an approach:

> In the light of the substantive approach herein adopted, it can also be seen that there will be some claims in contract that the statute will bar. Where a claim brought in contract is, essentially, an attempt to frame what is really a tort action in terms that mean to evade the operation of the limitation period, the period will operate nevertheless. Although there are a number of legitimate reasons to frame an action in both contract and in tort, with sufficient ingenuity almost any action in tort can be artificially converted into an action in contract by hypothesizing an implied contract with implied terms. Where the framing of the action in contract is a tendentious characterization of this sort, a court must not be afraid to interfere with alleged contract rights. While I agree in principle with the view expressed by Estey J.A. in Bruell, [1975] 1 S.C.R. 9, that Parliament would have had to manifest a very clear intention to interfere with rights in contract by this section, this is no license to frame actions in a less than natural manner merely to avoid the section's operation.

The reach of any statutory limitation period, therefore, depends on a determination of the essential character of the claim and whether it falls within the intended scope of the statute.

69 Although the plaintiffs suggest that the application of Heredi is restricted to its particular facts, and is dependant on the language of the limitation clause in issue, the Ontario Court of Appeal has

expressed a different view in Hernandez v. 1206625 Ontario Inc. (2002), 61 O.R. (3d) 584 at para. 45:

> While the facts and legislative provisions in Heredi, [and other cases cited] differ from the present appeal, these cases endorse a substantive approach to limitation and exclusion provisions in an automobile insurance context that is of general application. Essentially, these cases hold that courts should not rigidly apply past interpretations of a given legislative phrase, but rather should look to the nature of the cause of action and the purpose of the legislative provision, and determine whether the provision should be applied on the facts of the case. This approach is perfectly in keeping with the principles of statutory interpretation.

70 The plaintiffs also rely on a series of cases from New Brunswick where the courts of that province have held that the following limitation provision does not operate to bar claims against an insurer for bad faith:

> Every action or proceeding against the insurer for the recovery of any claim under or by virtue of this contract shall be absolutely barred unless commenced within one year next after the loss or damage occurs.

71 In Norris v. Lloyds of London (1998), 205 N.B.R. (2d) 29 (C.A.), the plaintiffs sued the defendant insurer for its denial of coverage under a homeowner's policy for certain petroleum contamination found on their property. The action was commenced two years after the problem was discovered and the insurer relied on the above limitation provision as a defence to the claim. The Court held that the claim was not barred by the one-year limitation period because that provision did not apply to the plaintiffs' claim in tort for bad faith which is a cause of action that has a limitation period of six years. See also Cayoutte v. Co-operators General Insurance Co., [2000] N.B.J. No. 296 (C.A.) which followed Norris.

72 I wish to make two observations in relation to these cases. Firstly, the relevant limitation provision which the New Brunswick courts found to be ambiguous in its scope does not contain the "in respect of" language that appears in Ontario statutory condition 9(4). Secondly, in my view, the results reached in the New Brunswick cases may well have been different had those claims been subjected to the analysis now required by Heredi.

73 In any event, I consider myself bound by both Arsenault and Heredi and find that both are applicable to the actions now before me. In my opinion, the dispute identified in the subject statements of claim is exactly the type of dispute contemplated by the dispute resolution scheme in the relevant statutory conditions, which includes a limitation period that does not distinguish between different forms of action.

74 Leaving aside, for the moment, any application of the doctrine of discoverability, this conclusion means that any action or proceeding in which such claims are made would have to be

commenced "within one year next after the happening of the loss and not afterwards".

The Loss

75 The defendants submit that the "happening of the loss" is referable to the accident or other incident that gave rise to the loss or damage to the insured vehicle. In Palatine Insurance Co. v. Burnett, (1965), 54 D.L.R. (2d) 378, the New Brunswick Court of Appeal was called upon to interpret and apply the New Brunswick equivalent of Ontario's statutory condition 9(4). The action against the insurer in that case was commenced more than one year after the date of the accident. After finding that the plaintiff was clearly entitled to recover damages from the defendant insurer for its failure to make adequate repairs, the Court held at p. 381 that the action was barred because it "was not commenced within one year after the collision in which the plaintiff's car was damaged".

76 The defendants maintain that this interpretation is consistent with other statutory conditions that apply to the resolution of claims. For example, statutory condition 6(1) obliges the policy holder, within 90 days after the date of the loss or damage, to deliver to the insurer a statutory declaration stating the "place, time, cause and amount of the loss or damage", which infers that the loss or damage is referable to the accident. They contend the use of "place" and "time" indicates the happening of a fixed, historical event, namely, the accident.

77 In disputing this interpretation, the plaintiffs refer to the excerpt from McNaughton, quoted earlier in these reasons, where Sharpe J.A. found that the cause of action being asserted by the applicant in that proceeding arose when the insurer elected to take the salvage. Given that finding, I conclude that the "loss" in "happening of the loss" may mean the collision in which the vehicle was damaged, but may also refer to some other loss that arises out of the claims resolution process. See also Risorto v. State Farm Mutual Insurance Company (2002), 60 O.R. (3d) 730 (S.C.J.), which I refer to below, where Winkler J. held that the relevant "loss" was the alleged defective repairs and not the accident that gave rise to the damage.

Discoverability

78 The last aspect of the limitation period issue that requires consideration is the potential application of the discoverability rule. The principle of reasonable discoverability was articulated as a general rule by LeDain J. in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 at p. 224:

> ... [A] cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence ... .

79 In Peixeiro v. Haberman, [1997] 3 S.C.R. 549 at p. 564, Major J. commented on the application of the discoverability rule in these words:

> In this regard, I adopt Twaddle J.A.'s statement in Fehr v. Jacob (1993), 14

C.C.L.T (2d) 200 (Man. C.A.) at p. 206, that the discoverability rule is an interpretative tool for the construing of limitations statutes which ought to be considered each time a limitation provision is in issue:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event, which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

80 The defendants submit that the discoverability rule does not apply in these cases because the limiting time runs from a fixed event unrelated to the injured party's knowledge of the material facts upon which the cause of action is based. They refer to Waschkowski v. Hopkinson Estate (2000), 47 O.R. (3d) 370 (C.A.) where it was held that the discoverability rule did not apply to s. 38(3) of the Trustee Act, R.S.O. 1990, c. T-23 because the limitation period set out therein runs from the date of a death, a fixed event that was unrelated to the plaintiff's knowledge. The defendants contend that statutory condition 9(4) prescribes two limitation periods. One that applies to loss or damage to an automobile or its contents, and one that applies to loss or damage to persons or other property. Where an action is brought with respect to loss or damage to an automobile or its contents, the statutory condition provides that the action must be commenced "within one year next after the happening of the loss and not afterwards". Where an action is brought to seek compensation for loss or damage to persons or other property, the statutory condition states that an action must be commenced "within two years next after the cause of action arose and not afterwards". The defendants submit that the legislature utilized different language in the same limitations provision to avoid the application of the discoverability principle with respect to certain losses and to permit its application with respect to others. It is submitted that, just as Abella J.A. noted that s. 38(3) of the Trustee Act permitted no "temporal elasticity" when the pivotal event is the date of death, no "temporal elasticity" is available when the legislature states a limitation period begins to run within a specified period of time "after the happening of the loss" as it has done in statutory condition 9(4).

81 The plaintiffs maintain that the discoverability principle does apply and rely on Risorto, supra, where Winkler J. rejected the same argument. In Risorto the plaintiffs were alleging that the defendant insurer used substandard parts in repairing their vehicles and, as a result, they suffered a loss. Winkler J. found that the loss sustained related to the alleged defective repairs and not the collision. He then noted at para. 10:

> Repairs which are said to be defective could be patent or latent and thus not come to the knowledge of the plaintiff until some later date or event brings them to light. This is precisely the kind of injustice that the discoverability rule is intended to relieve against.

82 If one accepts as I have, that "the loss" in statutory condition 9(4) may refer to a number of different events, then the limitation period will start to run upon the happening of the event that precipitates the loss and gives rise to the claim. In this case, based on the view expressed by Sharpe J.A. in McNaughton, that event is the insurer taking title to the salvage in circumstances that violated statutory condition 6(7). Assuming then that the discoverability rule applies, is it engaged on the facts as pleaded?

83 Although the basis for the application of the discoverability rule is not particularly well defined in the pleadings, the two principal allegations that emerge are:

> (i) The insurer failed to reveal or deliberately concealed statutory condition 6(7); and
> (ii) The insurer failed to disclose and account for the proceeds from the sale of the salvage.

84 The defendants submit that the allegation that the defendants concealed or failed to disclose statutory condition 6(7) is untenable in that the very insurance policy relied upon by the plaintiffs in their statements of claim contains a full recitation of statutory condition 6(7) as required by s. 234(1) of the Insurance Act. A court is required to accept the facts alleged as proven on a r. 21 motion unless those facts are patently ridiculous or incapable of proof. The defendants contend that in the circumstances it is patently ridiculous to allege that the defendant insurers failed to reveal statutory condition 6(7) to the insured plaintiffs. In any event, the defendants submit that this is a plea of ignorance of the law and that such a plea does not postpone the running of any limitation period. See Hill v. Alberta (South Alberta Land Registration District) (1993), 100 D.L.R. (4th) 331 (Alta. C.A.), leave to appeal refused, [1993] S.C.C.A. No. 292, [1994] 1 S.C.R. viii and Canadian Microtunnelling Ltd. v. Toronto (City), [2002] O.J. No. 1399 (S.C.J.) at para. 110.

85 The defendants also contend that the alleged failure of the defendant insurers to disclose the proceeds of the sale of the salvage is irrelevant. I agree. It is noted in Peixeiro at p. 563 that discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it. The defendants argue, therefore, that as a matter of law, once a plaintiff knows that its insurer subtracted a deductible in an automotive total loss claim, the cause of action is complete in that the plaintiff has the material facts on which to base a cause of action. The insured only needs to know that the salvage was taken by the insurer, not the amount received upon disposition. In Peixeiro, Major J. held that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue and at p. 557 stated:

> Once the plaintiff knows that some damage has occurred and has identified the

> tortfeasor ... the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of damages may not be ascertained for an extended time beyond the general limitation period.

86 However, the substance of the plaintiff's position is that they were misled by the defendants who had a duty to act in good faith. The plaintiffs rely on the recent decision of the Ontario Court of Appeal in Halloran v. Sargeant and Crown Cork and Seal Canada Inc. (2002), 217 D.L.R. (4th) 327 to support their contention that the application of the doctrine of fraudulent concealment will postpone the running of the limitation period.

87 Mr. Halloran was employed by Crown Cork for 31 years as a senior sales representative. As a result of a corporate reorganization, his employment was terminated by a letter which set out two compensation options and contained the following representation:

> The above provisions are inclusive of all amounts payable under any provincial legislation or otherwise, including, payment in lieu of notice, severance pay and vacation pay. For your information, the above provisions exceed provincial requirements.

Mr. Halloran relied upon the representation of his employer that its offer exceeded what he was entitled to under provincial law. That representation was not accurate. Some time later a group of former Crown Cork employees who had accepted the same offer pursued a claim under the Employment Standards Act, R.S.O. 1990, c. E-14. A referee under that statute held that the employees were entitled to the relief they sought and that decision was upheld on appeal to the Divisional Court. Upon reading about these proceedings in a newspaper report, Mr. Halloran consulted a lawyer and filed a similar claim under the Employment Standards Act. The matter eventually came before another referee who held that Mr. Halloran's claim was statute barred pursuant to the applicable two year limitation period. The employer appealed to the Court of Appeal following a successful appeal to the Divisional Court by Mr. Halloran. In dismissing the employer's appeal, the Court of Appeal gave effect to the doctrine of concealment. At para. 31 of his reasons for judgment, Armstrong J.A. refers to the following excerpt from Guerin v. The Queen, [1984] 2 S.C.R. 335 at p. 390:

> It is well established that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud or until the time when, with reasonable diligence, he ought to have discovered it. A fraudulent concealment necessary to toll or suspend the operation of the statute need not amount to deceit or common law fraud. Equitable fraud, defined in Kitchen v. Royal Air Force Association, [1958] 1 W.L.R. 563, as "conduct which having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do

> towards the other", is sufficient.

And then, after defining unconscionable as "not in accordance with what is right or reasonable", Armstrong J.A. states at para. 33:

> ... In my view, it was not in accordance with what is right or reasonable for the company to make an unqualified statement containing a misrepresentation which caused its employee to act to his detriment.

88 Inherent in the misrepresentation made to Mr. Halloran was the message that there was no sense in him disputing what was being offered because it represented more than he was entitled to receive. The employer was, with its misrepresentation, dissuading Mr. Halloran from seeking legal advice or taking any legal action within the prescribed time. This appears to be what the plaintiffs are suggesting was done by the defendant insurers in these intended class proceedings. Implicit, if not obvious, in the plaintiffs' pleadings is the allegation that the defendants assured them that they were receiving all that they were entitled to and I am aware that, on a motion of this nature, the court is required to read the pleadings generously: see Nash v. Ontario (1995), 27 O.R. (3d) 1 (C.A.).

Conclusion

89 I am, therefore, satisfied that the pleadings raise the issue of fraudulent concealment which will, if proven, postpone the running of the one year limitation period until such time as the plaintiffs discovered the alleged fraud or, with the exercise of reasonable diligence, ought to have discovered it.

III - CONVERSION

90 A number of defendants have moved pursuant to r. 21.01(1)(b) for an order striking out certain portions of the statements of claim on the basis that they disclose no reasonable cause of action in conversion.

91 The allegations that give rise to these claims are the same in all the actions. In general terms, the plaintiffs allege that the defendant insurers took title to their damaged vehicles but failed to pay them the full amount that they were entitled to pursuant to statutory condition 6(7), O. Reg. 777/93, Insurance Act, R.S.O. 1990, c. I.8. In each case, the deficiency is alleged to be equal to the amount of the deductible designated in the policy. The plaintiffs allege that since the defendants paid less than the actual cash value of the vehicle, they were not entitled to the salvage. The plaintiffs allege that they have property interests in the damaged vehicles and claim that the defendants are liable for conversion of those property interests because they disposed of the vehicles without paying the putative class members the amounts recovered for the salvage.

92 Statutory condition 6(7) is, by virtue of s. 234 of the Insurance Act, a part of every policy of

automobile insurance. Statutory condition 6(7) provides that the salvage vests with the insurer upon payment of the actual cash value. Failure to pay the actual cash value upon taking title to the salvage is a breach of the policy. In such circumstances, it is trite law that the party in default must pay an amount in damages that will restore the injured party to the position that the injured party would have been in had the breach not occurred. This amount, according to the pleadings, is the amount of the designated deductible.

93 The usual measure of damages in conversion is the market value of the goods converted: see L.N. Klar et al. Remedies in Tort, looseleaf, ed. by L.D. Rainaldi (Toronto: Carswell, 1987) vol. 1 at paras. 62-63. However, in my view, the value of the salvage is irrelevant in these cases as pleaded. The value of the salvage was included in the amounts the plaintiffs were paid. It is accepted that, if the insureds had retained the salvage, the amount they would have been entitled to receive upon settlement of their claims was the actual cash value less the value of the salvage and the deductible. It is not alleged in the statement of claim that anything more than the deductible was subtracted when the insurers elected to take title to the salvage. The plaintiffs therefore, received full indemnification except to the extent of the deductible. The facts as pleaded disclose no other loss.

94 The plaintiffs submit that they are entitled to plead in the alternative and pursue whichever cause of action is more beneficial. That is acknowledged but in order to do so, the plaintiffs must plead facts that disclose an alternative cause of action.

95 The tort of conversion "involves a wrongful interference with the goods of another, such as taking, using or destroying these goods in a manner inconsistent with the owner's right of possession": Boma Manufacturing Ltd. v. Canadian Imperial Bank of Commerce, [1996] 3 S.C.R. 727 per Iacobucci J. at para. 31. The statement of claim discloses no such interference. On the facts as pleaded, the insurer paid the insured the total amount of the loss less the designated deductible and then took title to the salvage. The wrong as disclosed in the pleadings is not the interference with the damaged vehicle, it is the failure to pay the full amount required by the terms of the contract. Breach of contract is the cause of action disclosed in the pleadings and the remedy is the recovery of the amount not paid.

96 In my view, on a generous reading of the pleadings, it is plain and obvious that they do not disclose a cause of action in conversion. These motions are therefore granted and there will be an order striking those portions of the statements of claim that relate to the alternative claim for conversion.

IV - OPCF 43 ENDORSEMENT

97 On this motion the defendants are seeking a determination as to whether the statements of claim disclose a reasonable cause of action for part of the proposed class of plaintiffs. The court is being asked to decide whether insureds who have coverage under an Ontario Policy Change Form 43 Endorsement (OPCF 43 Endorsement) qualify as members of the proposed class.

98 The putative class is defined to include all insureds "who suffered a total loss of [their] motor vehicle" and "with respect to whose loss [the insurer] applied a deductible sum provided by the applicable insurance policy". It is alleged in the statements of claim that these claims were resolved contrary to the provisions of statutory condition 6(7) of O. Reg. 777/93, Insurance Act, R.S.O. 1990, c. I.8, when the insurer took title to the damaged vehicle and paid the insured an amount equal to the actual cash value less the deductible. Statutory condition 6(7) provides:

> 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.

99 In McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 54 O.R. (3d) 704 (C.A.), the Court held that the insurer was required to pay the actual cash value without deduction if it elected to take title to the salvage. The actual cash value is, generally speaking, the depreciated market value of the vehicle before it was damaged.

100 An OPCF 43 Endorsement changes the standard form policy by removing the insurer's right to deduct depreciation from the value of the insured vehicle when settling a claim for loss or damage. This coverage is only available if the insured is the original purchaser and the automobile was new at the time of delivery. In the event of a loss, the insurer is required to pay the lowest of the following amounts:

> (i) The actual purchase price of the automobile and its equipment;
> (ii) The manufacturer's suggested list price of the automobile and its equipment on the original date of purchase; or
> (iii) The cost of replacing the automobile with a new automobile of the same make and model, similarly equipped.

The OPCF 43 Endorsement also provides that "this coverage is subject to the deductible shown on the Certificate of Automobile Insurance".

101 The defendants maintain that since the actual cash value is determined by taking depreciation into account, it is difficult to envisage a scenario where the payment on an OPCF 43 Endorsement total loss claim would be less than the actual cash value of the vehicle even though a deductible was applied. They contend that notwithstanding the fact that such insureds were paid more than the actual cash value of their vehicles and, therefore, suffered no loss as a result of any breach of statutory condition 6(7), they would still fall within the proposed class definition because they suffered a total loss of their motor vehicle and a deductible was applied.

102 The plaintiffs concede that in most cases where replacement cost coverage applies, the insured will receive an amount equal to or greater than the actual cash value thereby entitling the insurer to take title to the salvage. However, the plaintiffs submit that there will be some instances

when a combination of a very new vehicle and/or a high deductible will result in the insured receiving less than the actual cash value. For example, consider a new vehicle which costs $20,000.00 that is insured with a $5,000.00 deductible and is damaged beyond repair while being driven from the dealer's lot. If the subject policy contained an OPCF 43 Endorsement, the insured would be entitled to be paid $15,000.00 ($20,000.00 minus $5,000.00) which in those circumstances might be less than its actual cash value.

103 I am satisfied that it is plain and obvious that almost all insureds with OPCF 43 Endorsement coverage will have received more than the actual cash value upon settlement of their total loss claims but accept that there may be some, probably very few, who did not and therefore have a potential claim. I agree that the class as currently defined is too broad. However, in my view, the concerns that raises can be addressed with an amendment to the class definition which simply makes the qualifying event a failure by the insurer to pay the actual cash value upon taking title to the salvage and not the application of the deductible.

104 The motion pursuant to r. 21.01(a) and (b) is therefore allowed. I am satisfied that most of the potential class members with OPCF 43 Endorsements have no reasonable cause of action, and that the defendants have demonstrated that the class definition, as it is currently constituted, includes proposed class members who have no claim.

V - ACTUAL CASH VALUE

105 The defendant insurers move for an order declaring that the actual cash value as contemplated by statutory condition 6(7) of O. Reg. 777/93 made under the Insurance Act, R.S.O. 1990, c. I.8 is not necessarily the same as the value agreed upon for the purpose of adjusting the claim. They submit that the amount the parties negotiated and agreed to as the vehicle value during the adjustment process may have been more than, less than or equal to the "actual cash value" as legally defined and objectively determined.

106 The plaintiffs bring cross-motions for an order declaring that the court has a discretion under s. 25(3) of the Class Proceedings Act, 1992, S.O. 1992, c. 6 to direct that the actual cash value of a class member's motor vehicle may be proved by means of information in the defendants' files such as the amounts used by the defendants as the actual cash value when paying a class member's original claim.

107 The defendants submit that the real issue in these intended class proceedings is not whether a deductible was taken but whether the amount paid was the actual cash value. They maintain that, in order to establish their claims, each plaintiff will have to prove that the amount they received was less than the actual cash value, which they contend is a term that has an accepted meaning in law. In this regard, the defendants refer to Canadian National Fire Insurance Company v. Colonsay Hotel Co., [1923] S.C.R. 688 and Re Barrett v. Elite Insurance Co. (1987), 59 O.R. (2d) 186 (C.A.), leave to appeal to S.C.C. dismissed, [1987] S.C.C.A. No. 315, [1987] 2 S.C.R. v, where it was held that "actual cash value" means the actual value of the property to the insured at the time of the loss and

not its replacement value. In Ghaffari v. Co-operators General Insurance Co. (1996), 30 O.R. (3d) 144 (Gen. Div.) aff'd. (1988), 41 O.R. (3d) 254 (C.A.), Cumming J. refers to these earlier cases and at p. 152 states:

> In my opinion, "actual cash value" is synonymous with the "market value" to the insured as determined on an objective test basis. "Actual cash value" means the amount that a mythical reasonable person, situated in all the circumstances of the insured, would be prepared to pay in the marketplace for the particular property. As with every "reasonable person" test employed by the courts, the "reasonable person" is, in reality, simply a juristic construct. In truth, the court is the "reasonable person", which fixes the "actual cash value" on the basis of the relevant evidence available.

108 Section 131(2) of the Insurance Act provides:

> Neither the insurer nor the insured shall be deemed to have waived any term or condition of a contract by any act relating to the appraisal of the amount of loss or to the delivery and completion of proofs or to the investigation or adjustment of any claim under the contract.

109 In making the submission that the plaintiffs cannot prove the actual cash value by simply referring to the amount agreed to as the "total amount of loss or damage" in the proof of loss, the defendants rely on McNaughton where the Court rejected the insurer's submission that s. 131(2) simply permits negotiations to proceed without prejudice so that, if the process does not culminate in settlement, the parties are able to maintain their rights. In answering the question of whether the insured was precluded from asserting a claim by reason of accepting an amount in settlement and executing a proof of loss that contained a release, the Court stated the following at paras. 29 and 30:

> The respondent submits that by agreeing to terms that plainly took the deductible into account, the appellant released any claim. The argument rests on the terms of the proof of loss, signed by the appellant.

> In my view, the respondent's submission on this point must be rejected. I do not see how the respondent can overcome the protective language of the Insurance Act that alters the result that would follow at common law. Section 131(2) provides that neither the insured nor the insurer shall be deemed to have waived any term or condition by virtue of the adjustment of a claim. This provision allows both the insured and the insurer to engage in the adjustment process without risking the loss of their respective contractual rights. As the legislation specifically protects the contractual rights of the parties during the adjustment process, I fail to see how the appellant can be said to have waived or surrendered its contractual rights. [Emphasis added.]

110 The defendants submit therefore that, by the same token, they cannot be said to have waived or surrendered their contractual rights by anything done in the adjustment process. The defendants contend that McNaughton establishes their right to take possession of the salvage if they paid the actual cash value. Therefore, in any given case, the fact that a deductible was applied to the agreed upon value does not preclude a defendant from taking title to the salvage if, in fact, the amount paid to the insured was at least equal to the "actual cash value" in law.

111 The defendants maintain that the making of the declaration as requested prior to determination of the certification motions will assist both the court and the parties. In particular, if such a finding is made it will confirm that an individual inquiry will be required into the particular circumstances of each putative class member in order to determine the vital issue of the "actual cash value" of each damaged vehicle and whether that amount was paid, notwithstanding the application of a deductible.

112 The plaintiffs agree with the defendants, at least in part. They appear to concede that, in light of the interpretation given to s. 131(2) of the Insurance Act by the Court in McNaughton, the amount agreed to by the insured and insurer as being the total value of the loss cannot necessarily be accepted as the actual cash value for the purpose of determining whether there has been a breach of statutory condition 6(7). However, the plaintiffs maintain that this presents no impediment to certification because the determination of such individual issues can be readily accommodated within a class action given the procedural flexibility of the Class Proceedings Act, 1992 and, with their cross-motions, are seeking a declaration to that effect.

113 Subsequent to certification and the determination of the common issues, s. 25(1) of the Class Proceedings Act, 1992 gives the court a general power to order hearings or direct a reference to determine individual issues. The court is also, pursuant to s. 25(2) and (3), authorized to give "any necessary directions relating to the procedures" as are required for "the least expensive and most expeditious method of determining the issues".

114 The plaintiffs submit that the issue of whether the insurer paid the actual cash value can be resolved by simply accessing relevant information from files and records that are maintained by the defendants. However, those documents are not part of the record on these r. 21 motions and, in the absence of such evidence, any assessment of the soundness of the plaintiffs' position is not possible. For this reason, I conclude that the cross-motions cannot succeed.

115 I do accept that the number, significance and complexity of the individual issues will have to be considered on the motions for certification. I also accept, based on the interpretation of s. 131(2) in McNaughton, that the determination of the actual cash value of the damaged vehicles will have to be one such issue and, as part of the certification inquiry, it will be necessary to consider whether the adjudication of that individual issue can be reasonably accommodated within a class action. In doing so, stock will have to be taken of the available procedural tools, which will include consideration of the discretion conferred under s. 25.

116 For the foregoing reasons, the defendants' motions are granted and a declaration will go as requested. The cross-motions are dismissed.

VI - STATUTORY INTERPRETATION

117 Certain defendants move pursuant to r. 21 for an order striking the plaintiffs' claims as disclosing no cause of action and for summary judgment pursuant to r. 20.

118 They submit, with respect, that the conclusion reached by the Court of Appeal in McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 54 O.R. (3d) 704 is wrong and that this court is not bound to follow it. They contend:

(i) As a matter of law they, as insurers, were entitled to apply the policy deductible when indemnifying the plaintiffs in respect of loss or damage to an insured vehicle where that vehicle was a total loss;

(ii) As a matter of statutory interpretation the application of the deductible is authorized by s. 261 of the Insurance Act and by the Ontario Automobile Owners' Policy which is a standard form of policy approved by the Superintendent of Financial Services.

119 Statutory condition 6(7) of O. Reg. 777/93 made under the Insurance Act, R.S.O. 1990 c. I.8 provides:

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

Under section 234(2) of the Insurance Act, "no variation or omission of or addition to a statutory condition is binding on the insured."

120 The statutory conditions are mandatory and are included in every automobile insurance policy: s. 234(1). In McNaughton, the Court held that the Legislature had created a hierarchy with the enactment of s. 234(2), which accorded priority to statutory conditions over other terms in the policy. Therefore, notwithstanding the provisions of the insurance policy, which provided for the application of a deductible to total loss claims, a deductible could not be applied if the insurer elected to take title to the salvage pursuant to statutory condition 6(7). In those circumstances, the statutory condition requires the payment of the actual cash value with no deduction.

121 The defendants submit that the Court in McNaughton failed to properly identify the purpose of statutory condition 6(7) within the statutory scheme that the legislature had designed for the resolution of all claims arising from loss or damage to motor vehicles and also failed to consider the significance of s. 261 of the Insurance Act, which provides statutory authority for partial payment of loss clauses in automobile insurance policies.

Legislative History

122 Provisions respecting automobile insurance were first added to the Ontario Insurance Act in S.O. 1922, c. 61. Those provisions contained statutory conditions that are, in many respects, similar to those in force today, but at that time variations of the statutory conditions by an insurer were permitted on proper notice to their insureds. The Act also contained a provision that provided for partial payment of loss clauses (deductibles) in automobile policies.

123 In 1932 the Insurance Act was amended to prohibit any variation to the statutory conditions. Section 174, S.O. 1932, c. 25 provided as follows:

> Subject to ss. 175 and 183j:
>
> (a) The conditions set forth in this section shall be statutory conditions and deemed to be part of every contract of automobile insurance and shall be printed on every policy with the heading "Statutory Conditions".
>
> (b) No variation or omission of a statutory condition shall be valid nor shall anything contained in any addition to a statutory condition or in the description of the subject-matter of the insurance be effective in so far as it is inconsistent with, varies or avoids any such condition.

Section 183j, one of the provisions to which s. 174 was subject, permitted deductibles.

124 In 1935 a further amendment gave the Superintendent of Insurance certain powers to vary the statutory conditions where the policy limited or restricted use of the automobile. Otherwise, s. 174 remained unchanged until 1957 when the provisions that had conferred the powers to vary the statutory conditions on the Superintendent were repealed and broader powers relating to the approval of policies were enacted. The prohibition against any variation, omission or addition to the statutory conditions continued but was still "subject to" the section that permitted the application of deductibles. After the 1957 amendments, the relevant provisions and statutory conditions remained the same until 1966 when an Act to Amend the Insurance Act, S.O. 1996, c. 71 introduced a number of changes to streamline the Act while preserving the original structure.

125 Prior to 1966 the relevant statutory conditions read as follows:

> 7(3) The insurer shall not be liable beyond the actual cash value of the automobile at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value with proper deduction for depreciation, however caused, and shall in no event exceed what it would cost to repair or replace the automobile or any part thereof with material of like kind and quality; provided that in the event of any part of the automobile

being obsolete and out of stock, the liability of the insurer in respect thereof shall be limited to the value of such part at the time of loss or damage not exceeding the maker's last list price.

7(4) Except where an appraisal has been had the insurer, instead of making payment, may, within a reasonable time, repair, rebuild or replace the property damaged or lost with other of like kind and quality, giving written notice of its intention so to do within seven days after the receipt of the proofs of loss; but there can be no abandonment of the automobile to the insurer without its consent. In the event of the insurer exercising such option, the salvage, if any, shall revert to it. [Emphasis added.]

126 In 1966 the statutory conditions were amended with the subject matter previously addressed in statutory conditions 7(3) and (4) being dealt with in statutory conditions 4(5), (6) and (7) which provided:

(5) The insurer shall not be liable for more than the actual cash value of the automobile at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to that actual cash value with proper deduction for depreciation, however caused, and shall not exceed the amount that it would cost to repair or replace the automobile, or any part thereof, with material of like kind and quality, but, if any part of the automobile is obsolete and out of stock, the liability of the insurer in respect thereof shall be limited to the value of that part at the time of loss or damage, not exceeding the maker's latest list price.

(6) Except where an appraisal has been made, the insurer, instead of making payment, may, within a reasonable time, repair, rebuild or replace the property damaged or lost with other of like kind and quality if, within seven days after the receipt of the proof of loss, it gives written notice of its intention to do so.

(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. [Emphasis added.]

At that time the statutory conditions were introduced by s. 204 which stated:

204(1) Subject to subsection 3 of section 200, section 205 and section 225,

(a) the conditions set forth in this section are statutory conditions and shall be deemed to be part of every contract and shall be printed in

every policy with the heading "Statutory Conditions"; and
(b) no variation or omission of or addition to a statutory condition is binding on the insured.

Section 225, to which the statutory conditions were made subject by s. 204(1), provided:

> 225(1) A contract or part of a contract providing insurance against loss of or damage to an automobile and the loss of use thereof may contain a clause to the effect that, in the event of loss, the insurer shall pay only,
>
> (a) an agreed portion of any loss that may be sustained; or
> (b) the amount of the loss after deduction of a sum specified in the policy,
>
> and in either case not exceeding the amount of the insurance.
>
> (2) Where a clause is inserted in accordance with subsection 1, there shall be printed or stamped upon the face of the policy in conspicuous type the words: "This policy contains a partial payment of loss clause."

127 Apart from section numbering, the relevant provisions remained unchanged until 1993 when the provisions with respect to appraisals were eliminated and the statutory conditions were removed from the Act and made a schedule to O. Reg. 777/93. Section 17 of S.O. 1993, c. 10 provided:

> Section 234 of the Act, including the statutory conditions set out in Section 234, is repealed and the following substituted:
>
> 234(1) The conditions prescribed by the regulations made under paragraph 15.1 of subsection 121(1) are statutory conditions that shall be deemed to be part of every contract to which they apply and shall be printed in English or French in every policy to which they apply with the heading "Statutory Conditions" or "Conditions légales", as may be appropriate.
>
> (2) No variation or omission of or addition to a statutory condition is binding on the insured.
> (3) Except as otherwise provided in the contract, the statutory conditions

referred to in subsection (1) do not apply to the insurance required by section 265 or 268.

(4) In subsection (1), "policy" does not include an interim receipt or binder.

128 Notably, there is no provision in the 1993 amendment that makes the statutory conditions "subject to" the deductible clause provision, nor does O. Reg. 777/93 have any such provision. For its part, O. Reg. 777/93 provides:

> 1.(1) The conditions set out in the schedule are prescribed as statutory conditions for the purpose of s. 234 of the Act.
>
> (2) Subject to subsection 234(3) of the Act, the statutory conditions apply to all contracts of automobile insurance entered into or renewed on or after January 1, 1994.

Significantly, however, the deductible clause provision, although renumbered as s. 261, continued in its same form until S.O. 1996, c. 21 when it was amended to add the following mandatory deductible clause provision:

> (1.1) Despite subsection (1), in circumstances prescribed by the regulations, a contract or part of a contract providing insurance against loss of or damage to an automobile and the loss of use thereof shall contain a clause to the effect that, in the event of loss, the insurer shall pay only the amount of the loss after deduction of a sum specified in the policy not exceeding the amount of the insurance.
>
> (2) Subsection 261(2) of the Act is amended by striking out "subsection (1)" in the second line and substituting "subsection (1) or (1.1)".

129 The only change since the 1996 amendments that affects the relevant provisions or statutory conditions is the addition of the following statutory condition pursuant to O. Reg. 277/03 which comes into force on October 1, 2003:

> Deductible amounts
>
> 10.1(1) Despite anything in this contract,
>
> (a) the insurer shall be liable only for amounts in excess of the applicable deductible amount, if any, mentioned in this contract; and
>
> (b) any provision in this contract relating to an obligation of the insurer to pay

an amount or to repair, rebuild or replace property that is damaged or lost shall be satisfied by paying the amount determined by deducting any applicable deductible amount from,

i. the amount the insured would otherwise be entitled to recover, or
ii. the cost of repairing, rebuilding or replacing the property.

Deemed deductible amount

(2) For the purposes of subcondition (1), an amount that an insurer is not liable to pay by reason of subsection 261(1) or (1.1) or 263(5.1) of the Insurance Act shall be deemed to be a deductible amount under this contract.

Defendants' Position

130 The defendants submit that not only did the Court in McNaughton fail to acknowledge s. 261, it failed to consider the public policy rationale for permitting the application of deductibles to all losses. The defendants contend that deductibles combat the "moral hazard" inherent in insurance. They argue that where there is a promise of complete indemnification the insured is more likely to engage in loss causing behaviour. A deductible, or self-insured retention, effectively renders the insured a co-insurer of any loss, thereby negating the insured's indifference to the loss. The defendants submit that this rationale is one that the Legislature continues to embrace as evidenced by the legislative adoption of mandatory deductibles for personal injury claims in addition to the deductibles that have long been permitted with respect to loss or damage to property.

131 Deductibles also reduce the premiums paid. The defendants therefore contend that where an insured has agreed to the application of a deductible, but is subsequently exempted, as in McNaughton, the insured has effectively received a windfall or benefit for which he has not paid.

132 The defendants maintain that it is illogical to distinguish between partial and total loss events. However, in McNaughton, the Court held at para. 27 that policy deductibles may be properly applied where the damaged vehicle is repaired under statutory condition 6(5):

> The respondent argues that accepting the appellant's argument would lead to the elimination of the deductible in other situations. Particular concern was expressed with respect to statutory condition 6(5) which provides that "... the insurer shall not be liable for more than the actual cash value of the automobile at the time any loss or damage occurs ...". That statutory condition imposes a limit on liability and, unlike statutory condition 6(7), does not require the insured to

> pay actual cash value. By adopting the appellant's interpretation of statutory condition 6(7), we would not eliminate the deductible from situations falling under statutory condition 6(5). [Emphasis in original.]

133 The defendants contend that the purpose of statutory condition 6(7) is to give the insurer an election. The insurer can elect to pay the claim based on the value of the vehicle and take back the salvage, or pay the insured the difference between the vehicle's value and the salvage value. They submit that there is no principled basis upon which to distinguish these two ways the insurer is permitted to discharge its indemnity obligation, although according to McNaughton, the insurer is entitled to apply the deductible in the latter but not the former.

134 I expressed sympathy for this point of view as the motions court judge in McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2000), 50 O.R. (3d) 300 (S.C.J.). However, the Court of Appeal concluded that I had taken the wrong approach and held at para. 20:

> I agree with the submission of the appellant that s. 234(2) is a form of consumer protection legislation. By mandating certain policy terms and by expressly providing that an insured is not bound by other conflicting or limiting policy terms, the Legislature has limited the extent to which commercial efficacy or the apparent intention of the parties are determinative. In this setting, consumer protection is the controlling principle of interpretation and the statutory conditions are "paramount": Curtis's & Harvey Ltd. v. North British & Mercantile Insurance Co. (1920), 55 D.L.R. 95 at pp. 99-100 (P.C.).

135 In Curtis's & Harvey Ltd., Lord Dunedin explained the purpose of statutory conditions at p. 99:

> The primary object of the statutory conditions is to prevent the insurer by means of exceptions skilfully worded and not particularly brought to the notice of the assured, avoiding liability which it is only just and reasonable he should undertake in a fire policy.

The defendants maintain that when statutory condition 6(7) is read in conjunction with all other relevant statutory provisions, it is apparent that it is neither just nor reasonable that they should bear the risk for the full amount of the loss when s. 261 permits them to make provision for deductibles in their policies and the premium paid for the coverage is based, in part at least, on the amount of that deductible.

Pauli v. Ace Ina Insurance

136 The interpretation of the Alberta equivalent of Ontario statutory condition 6(7) was undertaken in Pauli v. Ace Ina Insurance, [2003] A.J. No. 175 (Q.B.). Pauli is an action brought by a representative plaintiff against numerous insurers carrying on business in Alberta. The claims are

identical to those made on behalf of the putative class in McNaughton. The defendants moved at the outset for a determination of the following question of law:

> Does statutory condition 4(7) of s. 614 of the Alberta Insurance Act permit an insurance company to charge a deductible against the actual cash value in a total loss situation and keep the salvage?

In answering the question in the affirmative, Rooke J. refused to follow the earlier Alberta decision of Mueller v. Western Union Insurance Co., [1974] 5 W.W.R. 530 (Alta. Dist. Ct.) which had held the contrary and which the Court of Appeal in McNaughton had referred to as supporting authority. Rooke J. held that the language of the Alberta legislation which made the Alberta equivalent of s. 234(2) of the Ontario Insurance Act "subject to" the deductible provision of the Alberta statute, was decisive. He explained at para. 34:

> Here, the introductory "subject to" language of s. 614(1) unequivocally subordinates the prohibition against variation of statutory conditions, including Statutory Condition 4(7), to the operation of certain named sections, including s. 638(2). Thus, Statutory Condition 4(7) is made subject to variation by way of a deductible clause.

137 The defendants submit that notwithstanding the absence of the "subject to" language in the Ontario legislation since January 1, 1994, the proper interpretation of statutory condition 6(7) permits the application of a deductible. They accept that the general provisions of the policy must give way to the statutory conditions when they conflict but contend that the statutory conditions are not paramount to other statutory provisions and must be read in conjunction with such provisions in order for the court to discern the true legislative intention.

Analysis

138 The following approach to statutory interpretation is suggested in Driedger On The Construction of Statutes, 3d ed. (Toronto: Butterworths, 1994) at p. 131:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, the presumptions and special rules of interpretation, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of: (a) its plausibility, that is, its compliance with legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

See also Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002) at p. 3.

139 The defendants contend that if statutory condition 6(7) is approached with these factors in mind, the only reasonable conclusion is that the application of deductibles is implicit in the processing of all claims pursuant to the statutory conditions. The defendants maintain that the interpretation given to statutory condition 6(7) in McNaughton defeats the legislative purpose of s. 261 and produces an outcome that is inconsistent with a legislative scheme for the resolution of claims that has remained fundamentally intact since its inception.

140 On the r. 20 motions the defendants have provided extensive evidentiary records relating to:

(i) The legislative history of the pertinent statutory provisions.
(ii) Regulatory practice concerning the interpretation and implementation of these provisions.
(iii) Industry practice in the setting of rates based on the application of deductibles to at fault total loss claims.

141 The defendants submit that this evidence demonstrates a legislative intention that is consistent with the industry practice of applying deductibles on the settlement of total loss claims. An intention, they contend, that continued beyond 1993 notwithstanding the amendments made to the Insurance Act at that time which eliminated the "subject to" provision that had been part of s. 234. The evidence indicates that, notwithstanding the extensive consultation and vigorous debate that accompanied the statutory overhaul of the personal injury regime during the 1990s there was no debate or discussion relating to the curtailment of deductibles in any situation. On the contrary, the evidence demonstrates that the legislation was amended to provide for mandatory deductibles where none had previously existed and the insurers continued to set their rates based on a continuing practice of applying deductibles to at fault total loss claims. The insurers also continued to issue policies with explanatory notes to alert policyholders to the fact that a deductible would be taken in such circumstances and the regulators, pursuant to their duties under the Act, continued to review and approve those policies and rate structures as submitted. Indeed, there appears to be no question that the regulators have continued to accept the insurer's entitlement to apply the deductible on total loss claims. As of August 29, 2002, a document entitled "Claiming For Damage To Your Automobile" was still posted on the website of the Financial Services Commission of Ontario (FSCO) and included the following explanation:

> Companies use actual cash value to decide whether to treat your car as a total loss or whether to repair it. The amount you receive if your car is a total loss (actual cash value, less deductible, with the company assuming ownership of the car) may not be what you consider the real value.

142 The defendants therefore submit that since the Court of Appeal did not have the benefit of this expanded evidentiary record and legislative history, I should put McNaughton aside and

re-examine the question of whether an insurer is permitted to apply the policy deductible if it elects to take title to the damaged vehicle. I have concluded it would be wrong to do that.

143 The defendants' basic complaint is that they should not have to bear the burden of the conclusion in McNaughton since they had no opportunity to make submissions and present evidence which they contend would have produced a different result.

144 Since the defendants were not parties in McNaughton, the plaintiffs do not suggest that the issue is res judicata. What the plaintiffs do submit is that the arguments raised by the defendants cannot succeed given the findings in McNaughton and the application of the principle of stare decisis. Although adaptability is one of the great features of the common law, stability is one of its great strengths. Its predictability is derived from precedent and is preserved by the principle of stare decisis.

145 This rule requires courts to follow the ratio decidendi in the judgments of other courts of higher or co-ordinate jurisdiction unless it is demonstrated that the decision being proffered as binding was made per incuriam. Where, for example, binding authority was overlooked or a statute that would have affected the subject decision was not considered, then a court of co-ordinate jurisdiction may reconsider the matter.

146 The ratio decidendi or "reason for deciding" is defined in Black's Law Dictionary, 7th ed. as "the principle or rule of law on which a court's decision is based". The plaintiffs submit and I agree that the ratio decidendi in McNaughton is found at para. 28 which reads:

> Accordingly, I conclude that as the respondent elected to take title to the damaged vehicle, the terms of statutory condition 6(7) required the respondent to pay the appellant the actual cash value, with no reduction for the amount of the deductible under the policy.

147 The question is whether this court can decline to follow that conclusion on the basis of the expanded evidentiary record and the absence of any reference to s. 261 of the Insurance Act in the decision of the Court of Appeal. It may be open to the Court of Appeal to reconsider its decision in McNaughton on these grounds but in my opinion, I am bound by that decision for the reasons articulated by Zuber J.A. in R. v. 517653 Ontario Ltd. (1985), 35 M.V.R. 161 (C.A.):

> The fact that the argument now made by [counsel] was not made in the previous cases does not diminish the effect of the doctrine of stare decisis. Unless the prior decision is the product of a clear oversight (per incuriam) that decision must stand. In R. v. Bell (1977), 15 O.R. (2d) 425, MacKinnon J.A. (as he then was) said at p. 430:
>
> > The binding effect of precedent, where the Court has made a clear

> statement of principle, cannot depend on whether, in the opinion of succeeding Courts on an examination of the available record, the case was properly argued or not.

This is particularly so when the succeeding court is a lower court being asked to review the decision of a higher court.

Disposition

148 In the result, these motions are dismissed. I will hear counsel's submissions with respect to costs in all the motions dealt with in these reasons in due course.

HAINES J.

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