CITATION: Elaiathamby v. State Farm Mutual Automobile Insurance Company, 2016 ONSC 2258
COURT FILE NO.: CV-09-373238
DATE: 20160420

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
SANMUGANATHAN ELAIATHAMBY Plaintiff	*David S. Wilson*, for the Plaintiff
– and –	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY Defendant	*David Zarek*, for the Defendant
	HEARD: April 1, 2016

FAIETA, J

REASONS FOR DECISION

INTRODUCTION

[1] The Plaintiff, Sanmuganathan Elaiathamby, was involved in a motor vehicle accident on July 18, 2006. The Defendant, State Farm Mutual Automobile Insurance Company, is his automobile insurer. The Defendant denied the Plaintiff's claim for accident benefits as it did not believe that the accident occurred as he had reported. The Plaintiff chose to commence arbitration proceedings to dispute the Defendant's denial of benefits. The arbitration was held and a decision was rendered. No other evidence regarding the Arbitrator's decision was provided to the Court by the parties. The Plaintiff subsequently commenced this action for general damages and punitive damages arising from the Defendant's purported failure to deal in good faith with the plaintiff's application for accident benefits and its breach of the *Human Rights Code*, R.S.O. 1990, c. H.19 ("*Human Rights Code*").

[2] On this motion for summary judgment, the Defendant submits that the Plaintiff's claim should be dismissed on the basis that it is barred by the *Insurance Act* because: (1) the Plaintiff

cannot proceed with a civil action when it has chosen to arbitrate this dispute and such arbitration has been completed; (2) this action is commenced after the expiry of the two year limitation period. The Defendant also asks this Court to strike out the Plaintiff's claim that is based on the Defendant's alleged breach of the *Human Rights Code*. For the reasons described below, I have granted the Defendant's motions.

BACKGROUND

[3] The Plaintiff submitted an application for accident benefits under the *Insurance Act*, R.S.O. 1990, c. I.8, as amended (the "*Act*") to the Defendant on February 16, 2006. He reported that he had been injured as a result of his motor vehicle being struck from behind by another motor vehicle on January 15, 2006.[1] The Plaintiff attended an Examination under Oath, pursuant to the Statutory Benefit Regulations on April 18, 2006. The Plaintiff served an application for mediation on April 25, 2006.

[4] The Defendant denied the Plaintiff's application by letter dated July 18, 2006. The letter states:

> …Our investigation has revealed a number of inconsistencies with your evidence and the evidence obtained from other sources. Furthermore, a report completed by an independent engineer in this matter concluded that damage claimed by yourself to your 1990 Toyota Camry was not caused by collision with the third party vehicle in the manner in which you reported. It is the conclusion of State Farm Insurance that this loss did not occur as it was reported. …

[5] The mediation was held on July 28, 2006. The Plaintiff's dispute was not resolved at mediation.

[6] On May 8, 2007, the Plaintiff applied for arbitration. The application identified the following issues in dispute:

> Income Replacement: Insurer has refused to pay any income replacement benefits, nor has it taken steps to calculate the amount of the benefit which would be payable to the insured once entitlement to benefits is established. Insured claims entitlement to benefit of $400.00 weekly.
>
> Housekeeping and Home Maintenance: Weekly amount in dispute: $75.00
>
> Cost of examinations…

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[1] For the convenience of the reader, the relevant provisions of the Act are reproduced in Appendix "A" given that many provisions of the Act related to accident benefits were substantially amended and proclaimed in force on April 1, 2016.

Interest…

Expenses of the Hearing…

Special Award: Insurer has denied any liability based upon engineering evidence allegedly justifying its position that no motor vehicle accident occurred.

[7] The arbitration was heard during the period January 14-22, 2008. An Arbitrator issued a decision in October, 2008. As noted above, no other evidence regarding the Arbitrator's decision was provided to the Court by the parties.

[8] The Plaintiff commenced this action against the Defendant on February 26, 2009 for "tort damages" under the uninsured and Family Protection Endorsement of the insurance policy held by the Plaintiff.

[9] On May 29, 2009 the Statement of Claim was amended to add a claim at paragraphs 1, 4 and 11-18 ("Added Claim") for:

> Punitive damages in the amount of $1,000,000.00 as a result of the defendant's breach of its obligation to deal in good faith with the claims of the plaintiff, and for breaches of the *Ontario Human Rights Code*, R.S.O. 1990, in its capacity as the plaintiff's accident benefit insurer;
>
> Alternatively, punitive damages arising from the defendant's negligence in the manner of its treatment of the plaintiff's claim for benefits in the sum of $1,000,000,00., and general damages in the sum of $1,000,000.00. [Emphasis added]

[10] The Added Claim does not claim damages for the Defendant's failure to pay accident benefits but rather only claims damages for the manner in which the Defendant managed the Plaintiff's claim for accident benefits.

[11] This motion for summary judgment, brought by the Defendant, raises the following issues:

a. Is the Added Claim a claim "in respect of" the Plaintiff's entitlement to statutory accident benefits?

b. Is the Added Claim barred pursuant to section 281(1) of the Act because the Plaintiff chose to refer the issues in dispute to an arbitrator who has rendered his decision?

c. Is the Added Claim barred because it was issued two years after the Defendant's refusal to pay the benefit claimed by the Plaintiff?

d. Should the allegations regarding the Defendant's alleged breach of the *Human Rights Code* be struck or dismissed?

ANALYSIS

[12] A Court shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence.[2] The onus is on the moving party to show that there is no genuine issue requiring a trial. The parties have provided sufficient evidence to adjudicate the issues in a timely, affordable and proportionate manner. This motion is an appropriate case for summary judgment.

ISSUE #1: IS THE ADDED CLAIM A CLAIM "IN RESPECT OF" THE PLAINTIFF'S ENTITLEMENT TO ACCIDENT BENEFITS?

[13] The Plaintiff submits that the Added Claim seeks relief in respect of "the conduct of the defendant [which] took place…more than 18 months after termination of benefits".[3] The Plaintiff seeks general damages and punitive damages. The Plaintiff alleges that the Defendant breached: 1) its obligation to deal in good faith with the Plaintiff's claims; 2) the *Human Rights Code* in its capacity as the Plaintiff's accident benefit insurer. The Plaintiff also alleges that the Defendant was negligent in the manner of its treatment of the Plaintiff's claim for benefits.

[14] Subsection 279(1) of the Act states:

> Disputes in respect of any insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled shall be resolved in accordance with sections 280 to 283 and the Statutory Accident Benefits Schedule. [Emphasis added]

[15] In *Arsenault v. Dumfries Mutual Insurance Co.* (2002), 57 O.R. (3d) 625, at para. 15, the Ontario Court of Appeal stated that as a result of s. 279(1) of the Act, there "…is no option for an insured but to proceed in accordance with the scheme outlined in ss. 280 to 283 if the dispute is in respect of entitlement issues." The Ontario Court of Appeal found, at para. 17, that the scope of s. 279(1) of the Act includes 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…". In arriving at this conclusion, the Ontario Court of Appeal noted that the phrase "in

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[2] Rule 20.04, *Rules of Civil Procedure*.
[3] Plaintiff's Factum, para. 23.

respect of" is to be attributed the widest possible scope and is the widest of any expression intended to convey some connection between two related subject matters.

[16] In *Mader v. South Easthope Mutual Insurance Co*. 2014 ONCA 714, 123 O.R. (3d) 120, the Plaintiff brought an action for breach of contract, mental distress, breach of the duty to act in good faith and conspiracy. The Plaintiff alleged that the insurer acted in bad faith for seven years after it stopped paying benefits to the Plaintiff. The Ontario Court of Appeal found that the Plaintiff's claims came within the scope of section 279(1) of the Act. It stated, at paras. 49-51:

> The claims asserted by the appellant all flow from the denial of benefits. At their essence, they amount to nothing more than a claim that the appellant was wrongly denied benefits to which she believes that she is entitled to receive. This is precisely the type of claim contemplated for resolution by the procedure in ss. 280 to 283 of the Insurance Act.
>
> Indeed, s. 282(10) of the Insurance Act provides that if the parties proceed to arbitration and the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator shall award, in addition to the benefits to which an insured person is entitled, a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award. This subsection makes clear that the procedure in ss. 280 to 283 is not restricted solely to claims for benefits, but is also designed to include claims related to the manner in which benefits were administered.
>
> The pleading of a conspiracy does not transform the appellant's claim into an independent actionable wrong. The facts underlying the appellant's conspiracy claim are the same as those underlying the rest of her claims. The object of the alleged conspiracy was to deny the appellant her benefits.

[17] In my view, the allegations of bad faith, negligence and contravention of the *Human Rights Code* in the Added Claim are, to use the words of Justice Abella (as she then was) in Arsenault, at para. 21, "an attempt to circumvent the mandatory requirements of the dispute resolution scheme in the *Insurance Act* through the guise of linguistic reformulation".

[18] In my view, the essence of the Added Claim is that the Defendant wrongfully denied the Plaintiff's accident benefits claim. Accordingly, the Added Claim must comply with the requirements of s. 279(1) of the Act. The Defendant submits that the Added Claim is barred for failure to comply with subsections 281(1) and 281.1(1) of the Act. It is to this issue I now turn.

ISSUE #2: IS THE ADDED CLAIM BARRED BY SUBSECTION 281(1) OF THE ACT BECAUSE THE PLAINTIFF CHOSE TO REFER THE ISSUES IN DISPUTE TO AN ARBITRATOR WHO HAS RENDERED ITS DECISION?

[19] The Defendant submits that the Plaintiff chose to seek arbitration regarding the Defendant's refusal of his accident benefits claim and accordingly, now that the arbitrator's decision has been issued, the Plaintiff cannot bring this action. The Defendant submits that the

Plaintiff had the option under subsection 281(1) of the *Insurance Act* of either proceeding by way of arbitration or litigation to adjudicate his claims.[4]

[20] Subsection 281(1) of the Act states:

> Litigation or arbitration
>
> 281. (1) Subject to subsection (2),
>
> (a) the insured person may bring a proceeding in a court of competent jurisdiction;
>
> (b) the insured person may refer the issues in dispute to an arbitrator under section 282; or
>
> (c) the insurer and the insured person may agree to submit any issue in dispute to any person for arbitration in accordance with the Arbitration Act, 1991. [Emphasis added]

[21] The Plaintiff submits that there is no judicial authority that supports the Defendant's position. The Plaintiff submits that an insured is not barred from pursuing a bad faith claim against its automobile insurer because it has sought a "special award" from an arbitrator when an insurer has unreasonably withheld or delayed payments.[5]

Principles of Statutory Interpretation

[22] In *Wawanesa Mutual Insurance Co. v. Axa Insurance (Canada*), 2012 ONCA 592, [2012] O.J. No. 4196, at para. 32, the Ontario Court of Appeal stated that a purposive approach is to be applied when interpreting legislation. It stated, at paras. 33-35:

> The Supreme Court of Canada has consistently endorsed Elmer Driedger's purposive approach to statutory interpretation…As Driedger explains, at p. 87 of his Construction of Statutes, 2d ed., (Toronto: Butterworths, 1983):
>
> [T]he words of an Act are to read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> The purposive approach to statutory interpretation requires the court to take the following three steps: (1) it must examine the words of the provision in their ordinary and grammatical sense; (2) it must consider the entire context that the

[4] Defendant's Factum, paras. 70-73.
[5] Plaintiff's Factum, paras. 27-31.

> provision is located within; and (3) it must consider whether the proposed interpretation produces a just and reasonable result.
>
> The factors comprising the "entire context" include the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and the legislature's intent in enacting the Act as a whole and the particular provision at issue…A just and reasonable result promotes applications of the Act that advance its purpose and avoids applications that are foolish and pointless. [Citation references omitted]

Ordinary and Grammatical Meaning

[23] "Or" is defined in the Concise Oxford Dictionary, 12th Edition, as a conjunction that is "used to link alternatives".

Entire Context

[24] Subsection 281(1) of the Act was added to the Insurance Act in 1990 by the *Insurance Law Statute Amendment Act, 1990,* S.O. 1990, c. 2:

> Litigation or Arbitration
>
> 242c.(1) If mediation fails, the insured person may bring a proceeding in a court of competent jurisdiction or may refer the matter to an arbitrator.

[25] The above provision of the Act was repealed in 1996.[6] Subsection 281(1) was substituted in its present form. The 1996 amendment to the *Act* provided an insured with the option of selecting the services of a private arbitrator under the *Arbitration Act, 1991,* S.O. 1991, c. 17 in addition to arbitration before an arbitrator with the Ontario Insurance Commission (now the Financial Services Commission of Ontario).

[26] While one of the main objectives of insurance law, particularly in the field of automobile insurance, is consumer protection,[7] the main purpose of the amendments made to the Act in 1990 was to control the cost of insurance. In *Meyer v. Bright* (1993), 110 D.L.R. (4th) 354, at 357,, the Ontario Court of Appeal stated:

> In our view, the Ontario legislature enacted s. 266 and other related amendments to the Act for the purpose of significantly limiting the right of the victim of a motor vehicle accident to maintain a tort action against the tortfeasor. The scheme of compensation provides for an exchange of rights wherein the accident victim loses the right to sue

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[6] *Automobile Insurance Rate Stability Act, 1996,* S.O. 1996, c.21, s.37.
[7] *Smith v. Co-operators General Insurance Co*., 2002 SCC 30, [2002] S.C.J. No. 34, , at para. 11.

unless coming within the statutory exemptions, but receives more generous first-party benefits, regardless of fault, from his or her own insurer. The legislation appears designed to control the cost of automobile insurance premiums to the consumer by eliminating some tort claims. At the same time, the legislation provides for enhanced benefits for income loss and medical and rehabilitation expenses to be paid to the accident victim regardless of fault. [Emphasis added]

Discussion

[27] The Plaintiff relies on *Simpson v. Trafalgar Insurance Co. of Canada*, 1999 CarswellOnt 4757 (Ont. Gen. Div.), a decision that suggests that related, but distinct claims related to the denial of accident benefits, can be litigated to a final determination in different forums. The short endorsement states, in part, at paras. 2-5, that:

> At the outset, Trafalgar abandoned its request for an Order to dismiss the claim on the grounds of another proceeding pursuant to the Insurance Act. …
>
> The remainder of Trafalgar's motion is denied. To permit it to succeed would cause a great injustice to the plaintiff. The claims and remedies claimed in the arbitration and in this action are different. In particular, the Special Award has nothing to do with the conduct of the insurer except with respect to only one matter and that is the termination of weekly benefits in October 1997. Specifically, the allegations in subparagraph 18 (a) to (d) and (i) to (p) and (r) are completely distinct from the issues that were determined by the arbitrator. While the other subparagraphs — that is (e) to (h) and (q) are tangentially related, they deal with a claim for damages that could not have been made in the proceedings before the Financial Services Commission.
>
> A Special Award under the Insurance Act is not the same as an award for bad faith or for punitive damages. Specifically, the arbitrator has no choice but to provide an award if the arbitrator finds that the insurer either unreasonably withheld or delayed payments. The only discretion open to the arbitrator is in the quantum of the award up to a maximum of 50% of the amount of which the insured person was entitled at the time, together with interest. This is considerably narrower than the test for punitive damages. In this case, the Special Award was for less than $2,000.00.
>
> Having said that, the plaintiff is not entitled to a windfall nor should Trafalgar be required to pay twice for exactly the same issues under determination. To the extent that there is any duplication in the amount that has been or may end up being awarded to the plaintiff in the arbitration and in this action, it is open to Trafalgar to argue before the trial judge that an amount awarded by an arbitrator, on facts identical to those in this action, may be reduced accordingly by the trial judge, if the plaintiff is successful in this action. [Emphasis added]

[28] *Simpson* is distinguishable for two reasons.

[29] First, the motion judge found that a claim for bad faith was not barred. However, the Ontario Court of Appeal in *Arsenault* has subsequently ruled that a claim for bad faith is caught by s. 279(1) of the Act and thus the resolution of such dispute must be in accordance with the forum requirement found in s. 281(1) of the Act.

[30] Second, several other decisions of this Court have held that once an insurer has elected under section 281 to proceed by way of arbitration, there is no right under the Act to re-elect in favour of another forum or to stay arbitration proceedings in order to pursue a court action, see *Citadel General Assurance Co. v. Gogna,* [1992] O.J. No. 1996 (Gen. Div.)*;Christakos v. Dominion of Canada General Insurance,* [1997] O.J. No. 1279 (Gen. Div.); *Botsis v. Unifund Assurance Co.*, [1998] O.J. No. 2346 (Gen. Div.). It does not appear that these cases were brought to the court's attention in *Simpson*.

[31] In *Nazari v. OTIP/RAEO Insurance Co*. [2003] O.J. No. 3442 the Ontario Divisional Court ruled that an insured could commence a court proceeding where the proceeding before an arbitrator was a nullity because the parties had dismissed that proceeding on consent. The Divisional Court upheld the motion judge's decision for different reasons than expressed by the motion judge, which were described as follows:

> MacFarland J. noted that there is an "or" after subparagraph (b), but not after subparagraph (a). From this she concluded that legislature could not have intended these paragraphs to be disjunctive. For this reason, she held that this section did not prevent the plaintiff from issuing a statement of claim for accident benefits when the plaintiff had initially proceeded to arbitration with the FSCO.

[32] The Divisional Court disagreed with the motion judge's views regarding the meaning of section 281 of the Act and stated, at para. 22:

> My review of the s. 281 jurisprudence indicates that when an insured has instituted proceedings in one forum, he or she is not permitted to re-elect in favour of another forum while the first proceedings are ongoing. There may have been some reason to doubt the correctness of MacFarland J.'s decision if she had relied solely on her interpretation of s. 281 as the basis for her determination.[Emphasis added]

[33] The Plaintiff distinguishes *Nazari* and the cases cited therein on the basis that the arbitration has been completed, rather than pending, and thus he is free to pursue the Added Claim in this court. In my view, that is a distinction without a difference.

[34] Under s. 281(1) of the Act an insured is entitled to choose the forum for the resolution of a dispute in respect of the insured's entitlement to accident benefits. Arbitration is quicker and cheaper than a court action. However, a court action provides the prospect of greater compensation in respect of bad faith claims arising from the insurer's handling of the insured's

claim as such claims are not limited to 50% of the value of the accident benefits as is the case under s. 282(1) of the Act.[8] Once made, the insured's choice of forum is not easily changed.

[35] The ordinary meaning of the word "or" in s. 281(1) indicates that only one of the alternatives for dispute resolution can be used by an insured. The history of s. 281(1) shows that a civil proceeding or arbitration before a government arbitrator were the two alternatives open to an insured when the forerunner to s. 281(1) was added to the Act in 1990. These options remained mutually exclusive when a third alternative, private arbitration, was added in 1996.

[36] If an insured chooses to proceed by arbitration, it is open to the insured to commence a court proceeding only in the event that it abandons the arbitration prior to its conclusion, as was the case in *Nazari*. When an insured proceeds with an arbitration to its conclusion, as in this case, it is not open to the insured to commence a civil proceeding for damages in respect of the same denial of accident benefits.

[37] Accordingly, I find that the Added Claim is barred by s. 281(1) of the Act.

ISSUE #3: IS THE ADDED CLAIM BARRED BY SUBSECTION 281.1(1) OF THE ACT BECAUSE IT WAS NOT ISSUED WITHIN TWO YEARS AFTER THE DEFENDANT'S REFUSAL TO PAY THE BENEFIT CLAIMED BY THE PLAINTIFF?

[38] The Defendant denied the Plaintiff's application for accident benefits on July 18, 2006. The Plaintiff's Claim was amended to add the Added Claim on May 29, 2009.

[39] The Defendant submits that the Plaintiff's claim is barred because it was not issued within two years after the Defendants' refusal to pay the benefit claimed by the Plaintiff.

[40] The Plaintiff states in an affidavit that:

> At some point following the denial of my entitlement to benefits by the defendant, I came to suspect that it had employed racial considerations in its denial of my claim, since both the operator of the other vehicle and myself were Tamil. Although I am unable to recall precisely when I first began to have these suspicions, when I did first have them, I had no way of determining whether or not my suspicions were appropriate. Other than having received one or more letters from State Farm in respect of which I understood that State Farm was telling me that the accident had not taken place in the manner I described, there were no other documents that I received which led me to believe that State Farm's handling of my accident benefit claim might have been racially motivated, or improperly handled. I knew only that my claim for accident benefits had been denied. …

[8] *Liberty Mutual Insurance Co. v. Fernandes* (2006), 82 O.R. (3d) 524, at para. ?

> By correspondence dated December 12, 2007, … the firm of Regan Desjardins forwarded its arbitration document brief. … With respect to [the documents referenced in the brief] … these appear to be the log notes of the insurer, alleged "red flags" in relation to my claim, and notes of the Auto Claim Committee which considered my application. For the first time, I was receiving notification that the insurer had considered that the accident in which I had been involved fit the profile of a staged accident ring. I am uncertain as to when I was first advised of the contents of these documents, however, it certainly was not before December 6, 2007, being the earliest date that they could have been received by my lawyer.
>
> Even upon receipt of these documents, the manner in which my claim had been hanlded had not yet been fully revealed. …[9] [Emphasis added]

[41] Contrary to the uncertainty described in his affidavit, at his examination for discovery held more than three years earlier, the Plaintiff testified that he believed that his claim was denied for reasons based on his race when he read the Defendant's letter dated July 18, 2016 that denied his application for accident benefits. He came to this conclusion because the Defendant did not believe that the collision had occurred as he had reported.[10] There were no other documents, aside from the letter, that the Plaintiff could recall that led him to believe that the Defendant's denial of his application was racially motivated.[11]

Discoverability Principle

[42] Section 281.1(1) of the Act states:

> Limitation period
>
> 281.1 (1) A mediation proceeding or evaluation under section 280 or 280.1 or a court proceeding or arbitration under section 281 shall be commenced within two years after the insurer's refusal to pay the benefit claimed.

[43] Section 281.1 of the Act is listed in the Schedule to the *Limitations Act, 2002*, S.O. 2002, c. 24, as amended. As a result, the limitation period found in s. 281.1 of the Act continues to apply by operation of section 19 of the *Limitations Act, 2002* which states:

> Other Acts, etc.
>
> > 19. (1) A limitation period set out in or under another Act that applies to a claim to which this Act applies is of no effect unless,

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[9] Affidavit of Sanmuganathan Elaiathamby, sworn July 29, 2015, at paras. 12, 27, 28, 29.
[10] Transcript, Examination for Discovery, October 27, 2011, page 186.
[11] Transcript, Examination for Discovery, October 27, 2011, pages 190-191.

(a) the provision establishing it is listed in the Schedule to this Act; or

(b) the provision establishing it,

(i) is in existence on January 1, 2004, and

(ii) incorporates by reference a provision listed in the Schedule to this Act.

Act prevails

(2) Subsection (1) applies despite any other Act.

Interpretation

(3) The fact that a provision is listed in the Schedule shall not be construed as a statement that the limitation period established by the provision would otherwise apply to a claim as defined in this Act.

Same

(4) If there is a conflict between a limitation period established by a provision referred to in subsection (1) and one established by any other provision of this Act, the limitation period established by the provision referred to in subsection (1) prevails.

Period not to run

(5) Sections 6, 7 and 11 apply, with necessary modifications, to a limitation period established by a provision referred to in subsection (1).

[44] In my view, the limitation period provided by section 281.1 of the Act is not subject to the discoverability principle for the following reasons.

[45] First, the words used in s. 281.1(1) of the Act do not reflect a legislative intention to make the limitation period subject to the discoverability principle. In *Waschkowski v. Estate of Rosalie Hopkinson* (2000), 47 O.R. (3d) 379, the Ontario Court of Appeal held that the discoverability principle did not apply to the limitation period under section 38(3) of the *Trustees Act* which provided that an action could not be brought after the expiration of two years "from the death of the deceased".[12] Justice Abella (as she then was) stated that there was no "temporal elasticity" in the words chosen by the Legislature as the triggering event for the commencement of the limitation period. The limitation period ran "… from a fixed event rather than from the

[12] Also see *Bikur Cholim Jewish Volunteer Services v. Langston*,2009 ONCA 196 [2009] O.J. No. 841, at paras. 25-26.

injured party's knowledge or the basis of the cause of action". Similarly, there is no 'temporal elasticity" in the words chosen by the Legislature in respect of section 281.1(1) of the Act which provides that the limitation period commences at the time of "the insurer's refusal to pay the benefit claimed". The only elasticity provided by the Legislature is in the two exceptions found in s. 281.1(2) of the Act. However, they provide no assistance to the Plaintiff on the facts of this case.

[46] Second, by s. 19(5) of the *Limitations Act, 2002*, certain provisions of the *Limitations Act, 2002* apply to the limitation periods that are enumerated in its Schedule A. However, the discoverability provisions found in section 5 of the *Limitations Act, 2002* are not included in s. 19(5). Accordingly, there is no legislative intention under the *Limitations Act, 2002* for the discoverability principle to apply to s. 281.1(1) of the Act.

[47] Even if the discoverability principle applied, it is my view that the Plaintiff has not discharged the presumption that he had knowledge of the matters referred to in clause 5(1)(a) of the Limitations Act, 2002 at the time that the received the Defendant's letter that denied his application for accident benefits.

[48] The Plaintiff submits that he did not discover that the Defendant had breached its obligation of good faith and had breached the *Human Rights Code* until after his lawyer had received the document brief on December 12, 2007. In my view, the following statement made by the Ontario Court of Appeal in *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 36, applies here:

> [The Plaintiff] … confuses the issue of when a claim is discovered with the process of assembling the necessary evidentiary support to make the claim "winnable". To discover a claim, the plaintiff need only have in her possession sufficient facts upon which she could allege negligence. Additional information will support the claim and help to assess the risk of proceeding, but it is not needed to discover the claim.

[49] I also adopt Justice Belobaba's statement in *Beaton v. Scotia iTrade,* 2012 ONSC 7063, [2012] O.J. No. 6166, at para. 13:

> The claimant only has to know enough material facts on which to base a legal allegation. Once the plaintiff knows that some damage has occurred and has identified the alleged wrongdoer, "the cause of action has accrued". Neither the extent nor the type of damage need be known. The claimant also need not know the details of the wrongdoer's conduct or how the wrongdoer caused the loss. The question of "how it happened" will be revealed through the legal proceeding.

[50] The evidence is that following receipt of the Defendant's letter dated July 18, 2006 the Plaintiff knew that his claim had been denied because the Defendant believed that the collision had been staged and the Plaintiff believed that such denial was racially motivated. It was unnecessary for the Plaintiff to know the details of the Defendant's alleged bad faith or racist conduct for the commencement of the limitation period to be triggered. In my view, the limitation period for the Plaintiff's Added Claim commenced on or about July 18, 2006.

Special Circumstances

[51] The Plaintiff submits that the doctrine of special circumstances applies to the limitation period found in s. 281.1 of the Act.

[52] In *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801, the Supreme Court of Canada acknowledged that whether the doctrine of special circumstances continues to be available with respect to limitation periods is not settled in Ontario.

[53] In that case, the Court explained the equitable doctrine of special circumstances as follows, at paras. 113-117:

> In essence, the doctrine allows a court to temper the potentially harsh and unfair effects of limitation periods by allowing a plaintiff to add a cause of action or a party to the statement of claim after the expiry of the relevant limitation period. I hasten to add that, as the Court recognized in *Basarsky v. Quinlan*, [1972] S.C.R. 380, and as the word "special" -- or "peculiar" -- suggests, the circumstances warranting such an amendment will not often occur.
>
> As an offspring of equity, the doctrine of special circumstances is naturally concerned with fairness to the parties. Indeed, this concern was at the forefront of Lord Esher's mind in *Weldon*. Unsurprisingly, no exhaustive list of the circumstances that qualify as "special" has been proposed by the courts, and I believe it would be risky and unwise to do so. I note however that, concerned with not prejudicing a defendant, this Court has paid particular attention to whether the facts relevant to the extinguished action were pleaded in the original statement of claim and whether the defendant was aware of them during discovery: *Basarsky*; see also *Dugal*, at paras. 60-68. The factors enumerated by the Ontario Court of Appeal in *Frohlick v. Pinkerton Canada Ltd.*, 2008 ONCA 3, 88 O.R. (3d) 401, at para. 23, which were reiterated by van Rensburg J. in IMAX, are also helpful guides:
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> > As such, "special circumstances" include factors such as: the relationship between the proposed claim and the existing action; the true nature of all of the claims; the progress of the action; and the knowledge of the parties ... [IMAX, at para. 71]
>
> Here, the legislature specifically barred a plaintiff from commencing a statutory action under s. 138.3 OSA without first obtaining leave of the court. This leave requirement, and its interaction with the limitation period, is central to the delicate balance which Part XXIII.1 OSA strikes between the various participants in the market.
>
> The doctrine of special circumstances is of no avail to any of the plaintiffs in the three cases before us. This is because neither the limitation period in s. 138.14 OSA nor the leave requirement in s. 138.8 OSA can be defeated by amending the pleadings to include a statutory claim under s. 138.3. In all three cases, this doctrine does not provide the plaintiffs with an effective remedy, since it cannot on its own overcome the leave requirement of s. 138.8 OSA.

> In the case of Celestica, in which the limitation period expired before a motion for leave was even brought, applying the special circumstances doctrine to grant relief to the plaintiffs would necessarily provide judges with general authority to extend limitation periods, which would frustrate the purpose of s. 138.14 OSA. It is also striking that Perell J., in discussing the "special circumstances" justifying this discretionary remedy, did not conclude that the plaintiffs had been diligent, but focused instead on the absence of prejudice to the defendants. [Emphasis added]

[54] In my view, the *Limitations Act, 2002* was designed to comprehensively govern limitation periods in Ontario. There is nothing in the *Limitations Act, 2002* that references and gives effect to the doctrine of special circumstances. It is suggested that section 20 of the *Limitations Act, 2002* is the basis for the application of the doctrine of special circumstances to the limitation period in section 281.1 of the Act. Section 20 states:

> This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act. [Emphasis added]

[55] The doctrine of special circumstances is a creature of equity. It is not a doctrine "by or under" another Act. The doctrine is neither created by statute nor is a statute the source of the doctrine.[13]

[56] In any event, the application of the doctrine of special circumstances would undermine the legislative objective of having the limitation period under s. 281(1) being triggered by the commencement of a fixed event.

[57] If the doctrine of special circumstances had been available, it is my view that it would have been of no assistance to the Plaintiff. The facts relevant to the Added Claim action were not pleaded in the original statement of claim. There is no relationship between the pleadings in the original statement of claim, which is an action based in tort against the Defendant relying on the underinsured and uninsured provisions of the automobile policy, and the Added Claim which is a claim for damages related to how the Defendant handled the Plaintiff's application for accident benefits. In my view, there are no peculiar or special circumstances that would justify allowing the Plaintiff to commence this Added Claim action after the two year limitation period found in s. 281.1 of the Act.

[58] In summary, I conclude that the Added Claim is barred by s. 281.1(1) of the Act. The discoverability principle does not apply. Even if the discoverability applied, it is my view that the Plaintiff was aware of the material facts governing the Added Claim more than two years before the Added Claim was commenced. Further, the doctrine of special circumstances is not

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[13] In *Bensol Customs Brokers v. Air Canada*, [1979] 2 F.C. 575, the Federal Court of Appeal stated, at para. 9, that "a claim is made under a statute, in my view, when that statute is the law which, assuming the claim to be well founded, would be the source of the plaintiff's right".

available in respect of section 281.1 of the Act. In any event, the circumstances do not justify the use of the doctrine to extend the limitation period.

ISSUE #4: SHOULD THE CLAIM FOR BREACH OF THE *HUMAN RIGHTS CODE* BE STRUCK OUT ON THE GROUND THAT IT DISCLOSES NO REASONABLE CAUSE OF ACTION UNDER RULE 21.01(1)(b) OF THE RULES OF CIVIL PROCEDURE?

[59] The Added Claim alleges that the Defendant breached the *Human Rights Code* in the manner in which it managed the Plaintiff's application for accident benefits and, as a result, the Defendant:

- is asked to pay punitive damages in the amount of $1,000,00.00 as a result of the defendant's breach of its obligation to deal in good faith with the claims of the plaintiff, and for breach of the *Human Rights Code* (para. 1(e));

- allegedly breached its obligation to deal with the claims of the Plaintiff in good faith (paras. 13(a), 13(c), 13(f)),and,

- was negligent with respect to the obligation of the Defendant to treat and administer the claims of the Plaintiff with the care to which he was entitled in light of the alleged breaches of the *Human Rights Code* (para. 17);

- is liable to pay general damages for the mental anguish suffered by the Plaintiff arising from the conduct of the Defendant which allegedly constituted an infringement of his rights pursuant to the *Human Rights Code* (para. 16).

[60] In *Seneca College of Applied Arts and Technology v.* Bhadauria [1981] 2 S.C.R. 181, at 195, the Supreme Court of Canada held "that not only does the Code foreclose any civil action based directly upon a breach thereof but it also excludes any common law action based on an invocation of the public policy expressed in the Code."

[61] The Plaintiff also submitted that section 46.1 of the *Human Rights Code* establishes a civil cause of action. However, section 46.1 came into force on June 30, 2008 and is of no assistance to the Plaintiff as: 1) it is not pleaded; 2) more importantly, the allegations in the Claim related to the Defendant's allegedly discriminatory handling of the Plaintiff's application for accident benefits pre-dated the coming into force of section 46.1 of the *Human Rights Code.*

[62] Accordingly, the allegations related to the *Human Rights Code* disclose no reasonable cause of action and are struck without leave to amend.

CONCLUSIONS

[63] The Defendant's motion for summary judgment is granted. Had I not granted the motion for summary judgment, I would have struck the pleadings in the Added Claim in respect of the *Human Rights Code*.

[64] The Defendant claims its costs of this motion on a partial indemnity basis in the amount of $48,877.69 inclusive of disbursement and taxes. The Plaintiff submitted a claim for costs on a partial indemnity basis in the amount of $16,002.89. The Plaintiff does not dispute the hourly rates charged by counsel for State Farm. However, the Plaintiff submits that the costs incurred by the Defendant are excessive given that it spent far more than the 23 hours spent by the Plaintiff's counsel. In my view, it is fair and reasonable, and within his reasonable contemplation, for the Plaintiff to pay costs of this motion in the amount of $30,000.00, inclusive of disbursements and HST, to the Defendant within 30 days.

Mr. Justice M. Faieta

Released: April 20, 2016

APPENDIX "A"

DISPUTE RESOLUTION — STATUTORY ACCIDENT BENEFITS

Dispute resolution

279. (1) Disputes in respect of any insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which an insured person is entitled shall be resolved in accordance with sections 280 to 283 and the Statutory Accident Benefits Schedule. R.S.O. 1990, c. I.8, s. 279 (1); 1993, c. 10, s. 1.

Opting out

(2) Any restriction on a party's right to mediate, litigate, appeal or apply to vary an order as provided in sections 280 to 284, or on a party's right to arbitrate under section 282, is void except as provided in the regulations. 1996, c. 21, s. 34 (1).

Meaning of "insured person", ss. 279 to 284

(3) For the purposes of this section and sections 280 to 284,

"insured person" includes a person who is claiming funeral expenses or a death benefit under the Statutory Accident Benefits Schedule. R.S.O. 1990, c. I.8, s. 279 (3); 1993, c. 10, s. 1.

Orders

(4) The Director and every arbitrator appointed by the Director shall determine issues before them by order and may make an order subject to such conditions as are set out in the order. R.S.O. 1990, c. I.8, s. 279 (4); 1996, c. 21, s. 34 (2).

Interim orders

(4.1) The Director and every arbitrator appointed by the Director may make interim orders pending the final order in any matter before the Director or arbitrator. 1993, c. 10, s. 32 (2); 1996, c. 21, s. 34 (3).

Power to bind parties

(5) If an insurer or an insured is represented in a mediation under section 280, an evaluation under section 280.1, an arbitration under section 282, an appeal under section 283 or a variation proceeding under section 284, the mediator, person performing the evaluation, arbitrator or Director, as the case may be, may adjourn the proceeding, with or without conditions, if the representative is not authorized to bind the party he or she represents. 1996, c. 21, s. 34 (4).

Mediation

280. (1) Either the insured person or the insurer may refer to a mediator any issue in dispute in respect of the insured person's entitlement to statutory accident benefits or in respect of the amount of statutory accident benefits to which the insured person is entitled. R.S.O. 1990, c. I.8, s. 280 (1); 1993, c. 10, s. 1; 1996, c. 21, s. 35 (1).

Starting the process

(2) The party seeking mediation shall file an application for the appointment of a mediator with the Commission.

Mediator's appointment

(3) The Director shall ensure that a mediator is appointed promptly.

Mediation

(4) The mediator shall enquire into the issues in dispute and attempt to effect a settlement of as many of the issues as possible within the time prescribed in the regulations for the settlement of the type of dispute in question.

Extension of time

(5) The parties may by agreement extend the time for the completion of the mediation process, even if the time for completion has expired.

Notice of failure

(6) If at any time before a settlement is effected the mediator is of the opinion that mediation will fail, he or she shall forthwith notify the parties.

Idem

(7) Mediation has failed when the mediator has given notice to the parties that in his or her opinion mediation will fail, or when the prescribed or agreed time for mediation has expired and no settlement has been reached. R.S.O. 1990, c. I.8, s. 280 (2-7).

Report

(8) If mediation fails, the mediator, in addition to any notice required to be given, shall prepare and give to the parties a report,

(a) setting out the insurer's last offer and the mediator's description of the issues that remain in dispute;

(b) containing a list of materials requested by the parties that have not been produced and that, in the opinion of the mediator, were required for the purpose of discussing a settlement of the issues; and

(c) containing a recommendation as to whether or not the issues in dispute should be referred for an evaluation under section 280.1.

Same

(9) The mediator may give his or her report to a person performing an evaluation under section 280.1 or an arbitrator conducting an arbitration under section 282. 1996, c. 21, s. 35 (2).

Neutral evaluation

280.1 (1) If mediation fails, the parties jointly or the mediator who conducted the mediation may, for the purpose of assisting in the resolution of the issues in dispute, refer the issues in dispute to a person appointed by the Director for an evaluation of the probable outcome of a proceeding in court or an arbitration under section 282.

Evaluator's appointment

(2) The Director shall ensure that a person is appointed promptly to perform the evaluation.

Information

(3) The insurer and the insured person shall provide the person performing the evaluation with any information that he or she requests.

Opinion and report

(4) The person performing the evaluation shall give the parties,

(a) an oral opinion on the probable outcome of a proceeding in court or an arbitration under section 282; and

(b) a written report,

(i) stating that the issues in dispute were evaluated by the person,

(ii) identifying the issues that were evaluated,

(iii) identifying the issues that remain in dispute,

(iv) setting out the insurer's last offer, and

(v) containing a list of materials requested by the person performing the evaluation that were not provided by the parties.

Same

(5) The person who performed the evaluation may give his or her written report to an arbitrator conducting an arbitration under section 282. 1996, c. 21, s. 36.

Litigation or arbitration

281. (1) Subject to subsection (2),

(a) the insured person may bring a proceeding in a court of competent jurisdiction;

(b) the insured person may refer the issues in dispute to an arbitrator under section 282; or

(c) the insurer and the insured person may agree to submit any issue in dispute to any person for arbitration in accordance with the Arbitration Act, 1991. 1996, c. 21, s. 37.

Limitation

(2) No person may bring a proceeding in any court, refer the issues in dispute to an arbitrator under section 282 or agree to submit an issue for arbitration in accordance with the Arbitration Act, 1991 unless mediation was sought, mediation failed and, if the issues in dispute were referred for an evaluation under section 280.1, the report of the person who performed the evaluation has been given to the parties. 1996, c. 21, s. 37.

Payment pending dispute resolution

(3) Subject to subsection (4), if mediation fails, the insurer shall pay statutory accident benefits in accordance with the last offer of settlement that it had made before the failure until otherwise agreed by the parties or until otherwise ordered by a court, by an arbitrator acting under this Act or the Arbitration Act, 1991, or by the Director. 1996, c. 21, s. 37.

Same

(4) If a dispute involves a statutory accident benefit that the insurer is required to pay under subsection 268 (8) and no step authorized by subsection (1) has been taken within 45 days after the day mediation failed, the insurer shall pay the insured in accordance with the last offer made by the insurer before the failure until otherwise agreed by the parties or until otherwise ordered by a court, by an arbitrator acting under this Act or the Arbitration Act, 1991, or by the Director. 1996, c. 21, s. 37.

281.1 (1) A mediation proceeding or evaluation under section 280 or 280.1 or a court proceeding or arbitration under section 281 shall be commenced within two years after the insurer's refusal to pay the benefit claimed. 2002, c. 24, Sched. B, s. 39 (6).

Exception

(2) Despite subsection (1), a proceeding or arbitration under clause 281 (1) (a) or (b) may be commenced,

(a) if there is an evaluation under section 280.1, within 30 days after the person performing the evaluation reports to the parties under clause 280.1 (4) (b);

(b) if mediation fails but there is no evaluation under section 280.1, within 90 days after the mediator reports to the parties under subsection 280 (8). 2002, c. 24, Sched. B, s. 39 (6).

Arbitration

282. (1) An insured person seeking arbitration under this section shall file an application for the appointment of an arbitrator with the Commission. R.S.O. 1990, c. I.8, s. 282 (1); 1996, c. 21, s. 38 (1).

Arbitrator's appointment

(2) The Director shall ensure that an arbitrator is appointed promptly. R.S.O. 1990, c. I.8, s. 282 (2).

Determination of issues

(3) The arbitrator shall determine all issues in dispute, whether the issues are raised by the insured person or the insurer. 1996, c. 21, s. 38 (2).

Procedures

(4) The arbitration shall be conducted in accordance with the procedures and within the time-limits set out in the regulations. R.S.O. 1990, c. I.8, s. 282 (4).

(5)-(9) REPEALED: 1996, c. 21, s. 38 (3).

Special award

(10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the Statutory Accident Benefits Schedule, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the Schedule. R.S.O. 1990, c. I.8, s. 282 (10); 1993, c. 10, s. 1.

Expenses

(11) The arbitrator may award, according to criteria prescribed by the regulations, to the insured person or the insurer, all or part of such expenses incurred in respect of an arbitration

proceeding as may be prescribed in the regulations, to the maximum set out in the regulations. 1996, c. 21, s. 38 (4).

Interim award of expenses

(11.1) The arbitrator may at any time during an arbitration proceeding make an interim award of expenses, subject to such terms and conditions as may be established by the arbitrator. 1993, c. 10, s. 33.

Liability of representative for costs

(11.2) An arbitrator may make an order requiring a person representing an insured person or an insurer for compensation in an arbitration proceeding to personally pay all or part of any expenses awarded against a party if the arbitrator is satisfied that,

(a) in respect of a representative of an insured person, the representative commenced or conducted the proceeding without authority from the insured person or did not advise the insured person that he or she could be liable to pay all or part of the expenses of the proceeding;

(b) in respect of a representative of an insured person, the representative caused expenses to be incurred without reasonable cause by advancing a frivolous or vexatious claim on behalf of the insured person; or

(c) the representative caused expenses to be incurred without reasonable cause or to be wasted by unreasonable delay or other default. 2002, c. 22, s. 127.

Non-application to solicitors

(11.3) Clause (11.2) (a) does not apply to a barrister or solicitor acting in the usual course of the practice of law. 2002, c. 22, s. 127.

Opportunity to make representations

(11.4) An order under subsection (11.2) shall not be made unless the representative is given a reasonable opportunity to make representations to the arbitrator. 2002, c. 22, s. 127.

Bias

(12) A party may apply to the Director for the appointment of a new arbitrator if the party believes that the arbitrator is biased and the Director shall determine the issue. R.S.O. 1990, c. I.8, s. 282 (12).

Copies of decision

(13) The arbitrator, forthwith upon making a decision in an arbitration, shall deliver a copy of his or her order together with a copy of the arbitrator's written reasons, if any, to the

insured person, the insurer and the Director. R.S.O. 1990, c. I.8, s. 282 (13); 1996, c. 21, s. 38 (5).

(14), (15) REPEALED: 1996, c. 21, s. 38 (6).

Non-application of the Arbitration Act, 1991

(16) The Arbitration Act, 1991 does not apply to arbitrations under this section. 2002, c. 18, Sched. H, s. 4 (24).

Appeal against arbitration order

283. (1) A party to an arbitration under section 282 may appeal the order of the arbitrator to the Director on a question of law. 1996, c. 21, s. 39 (1).

Notice of appeal

(2) A notice of appeal shall be in writing and shall be delivered to the Commission within thirty days after the date of the arbitrator's order and the appellant shall serve the notice on the respondent. R.S.O. 1990, c. I.8, s. 283 (2).

Extension of time for appeal

(3) The Director may extend the time for requesting an appeal, before or after the time for requesting the appeal has expired, if the Director is satisfied that there are reasonable grounds for granting the extension, and the Director may give such directions as he or she considers proper as a condition of granting the extension.

Nature of appeal

(4) The Director may determine the appeal on the record or in such other manner as the Director may decide, with or without a hearing. 1996, c. 21, s. 39 (2).

Power of the Director

(5) The Director may confirm, vary or rescind the order appealed from or substitute his or her order for that of the arbitrator. R.S.O. 1990, c. I.8, s. 283 (5); 1996, c. 21, s. 39 (3).

Order not stayed

(6) An appeal does not stay the order of the arbitrator unless the Director decides otherwise. R.S.O. 1990, c. I.8, s. 283 (6).

Medical reports, special awards, expenses

(7) Subsections 282 (10) to (11.2) apply with necessary modifications to appeals before the Director. R.S.O. 1990, c. I.8, s. 283 (7); 1993, c. 10, s. 34; 1996, c. 21, s. 39 (4).

Interventions

(8) The Director may permit persons who are not parties to the appeal to make submissions on issues of law arising in an appeal. R.S.O. 1990, c. I.8, s. 283 (8).

CITATION: Elaiathamby v. State Farm Mutual Automobile Insurance Company, 2016 ONSC 2258
COURT FILE NO.: CV-09-373238
DATE: 20160420

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SANMUGANATHAN ELAIATHAMBY

Plaintiff

– and –

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Defendant

REASONS FOR DECISION

Mr. Justice M. D. Faieta

Released: April 20, 2016