CITATION: Pilot Insurance Company v. Sutherland, 2007 ONCA 492
DATE: 20070703
DOCKET: C45776

# COURT OF APPEAL FOR ONTARIO

ROSENBERG, GILLESE and LANG JJ.A.

BETWEEN:

PILOT INSURANCE COMPANY

(Defendant) Appellant

and

EVERETT SUTHERLAND, ANGES SUTHERLAND and SONYA SUTHERLAND by her litigation guardian, ANGES SUTHERLAND

Plaintiffs (Respondents)

Steven Stieber and Elizabeth Bowker for the appellant

James L. Vigmond and Brian M. Cameron for the respondent

Heard: May 22, 2007

On appeal from the order of Justice Margaret P. Eberhard of the Superior Court of Justice dated June 30, 2006.

LANG J.A.:

[1] This appeal raises the question of whether the territorial limitation contained in an automobile insurance policy and in the *Insurance Act*, R.S.O. 1990, c. I.8 (the Act) apply to restrict coverage provided in the underinsured motorist endorsement.

[2] The motion judge, Eberhard J., held that the territorial limitations did not apply with the result that the respondents are entitled to coverage for the automobile accident that occurred in Jamaica and which left the respondent, Everett Sutherland, with quadriplegia.

[3] On appeal, the appellant argues that the motion judge erred in her interpretation of the relevant policy and statutory provisions. Specifically, the appellant submits that the motion judge ought to have concluded that the territorial limitation contained in the standard Ontario Automobile Policy No. 1 (the Policy) restricted coverage under the Family Protection Coverage set out in the Ontario Policy Change Form 44R Endorsement (the Endorsement). The appellant also argues that the territorial restriction imposed on uninsured coverage in the Act also precludes coverage because underinsured coverage is simply a subset of uninsured coverage. The respondents disagree. They argue that the Endorsement is not subject to the Policy's territorial limitation and that the Act's territorial limitation cannot apply because it is not specific to underinsured coverage. Moreover, the respondents argue that any ambiguity should be resolved in their favour.

[4] For the reasons that follow, in my view, the motion judge erred in her interpretation of the insurance contract. I conclude that the territorial limitation in the Policy forecloses coverage for the accident in Jamaica. Further, since the Act does not address a territorial restriction for underinsured coverage directly or indirectly, the insurance contract cannot be said to be in conflict with the Act, nor to raise any ambiguity. Accordingly, I would allow the appeal and declare that the respondents do not have coverage for the accident that occurred in Jamaica.

**Background**

[5] The respondents are Everett Sutherland and his wife and daughter, all of whom live in Ontario. They were insured under the Policy issued by the appellant, Pilot Insurance Company. As insureds under that Policy, the respondents purchased the optional Endorsement, which provided additional coverage equal to what they would have received if the inadequately insured motorists at fault for the accident had $1,000,000 of coverage.

[6] The potential at-fault parties in the Jamaica accident both had insurance coverage limited to about $18,400.00 CDN per policy. For this reason, they came within the Endorsement's definition of an "inadequately insured motorist", since their insurance was less than the family protection coverage provided by the Endorsement. It was agreed that the money payable under the Jamaican policies would be payable ahead of coverage under the Endorsement, but that it would be inadequate to cover Mr. Sutherland's injuries.

[7] By way of a special case, the respondents requested the court to determine whether the Endorsement provides coverage to the respondents for the Jamaican accident.

**Issues**

[8] I will deal first with the question regarding whether the Endorsement is subject to the Policy. I will then deal with the question regarding whether the Act imposes a territorial restriction on underinsured coverage or raises any ambiguity.

**Analysis**

*1. The Policy and the Endorsement*

[9] This issue turns on the wording of the Policy and the Endorsement. The Policy, which provides basic automobile insurance, contains this territorial limitation[1]:

> 1.2 Where You Are Covered
>
> This policy covers you and other insured persons for incidents occurring in Canada, the United States of America and any other jurisdiction designated in the *Statutory Accident Benefits Schedule*, and on a vessel travelling between ports of those countries. …

[10] Although the Endorsement does not include a specific territorial limitation for underinsured coverage, it provides:

> **22.** … Except as otherwise provided in this change form, all limits, terms, conditions, provisions, definitions and exclusions of the Policy shall have full force and effect.

[11] Thus, the Endorsement appears to state that the terms of the Policy apply "[e]xcept as otherwise provided in" the Endorsement.

[12] The motion judge concluded that s. 22 of the Endorsement failed to incorporate the territorial limitation set out in the Policy.

[13] In coming to that conclusion, the motion judge distinguished the "[e]xcept for" language in the Endorsement from the language considered in *Pickford Black Ltd. v.*

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[1] The wording of the territorial limitation in the Policy mirrors the language of s. 243(1) of the Act.

*Canadian General Insurance Co.*, [1977] 1 S.C.R. 261. In *Pickford*, the Supreme Court of Canada held that wording making an endorsement "subject to" a policy's limitations had effectively incorporated the relevant terms of the policy into the endorsement. In this case, the motion judge held the view that, "[e]xcept as otherwise provided in this change form" was not sufficient to conclude that the Policy was the dominant document over the Endorsement.

[14] In support of her interpretation, the motion judge relied on *Szela v. Gore Mutual Insurance Co.*, [1987] O.J. No. 1047 (H.C.J.). In that case, Austin J. found that the words "[e]xcept as otherwise provided" did not succeed in incorporating the policy's quantum maximum into the endorsement because the endorsement was "almost a self-contained code and policy".

[15] Finally, the motion judge reasoned in this case that the absence of express language about a territorial limitation "left the question in a state of ambiguity" and that principles of insurance contract interpretation required her to resolve that ambiguity in favour of the insured.

[16] With respect, I am unable to agree with the analysis of the motion judge.

[17] In my view, on a plain reading, s. 22 of the Endorsement incorporates the territorial limitation set out in s. 1.2 of the Policy because the Endorsement specifically provides that the limits in the Policy are in full force and effect "[e]xcept as otherwise provided in this change form". Since the Policy explicitly sets out a territorial limitation, and the change form or Endorsement does not set out a territorial limitation, it follows that the Policy's territorial limitation governs.

[18] Unlike the motion judge, I do not see a significant difference between the "[e]xcept as otherwise provided" language employed in the Policy in this case and the "[s]ubject to all … limitation[s]" terminology employed in the policy in *Pickford*. Both clauses adequately express the same goal: the provisions of the Policy govern unless the Endorsement provides otherwise or, to put it the other way, the provisions of the Endorsement are subject to the limitations in the Policy. Thus, the Endorsement, aptly entitled the "Change Form", may change the Policy, but only to the extent set out in the Endorsement. Since, in my view, *Pickford's* reasoning applies to this case, the territorial limitation in the Policy must be read as though it forms part of the Endorsement.

[19] I am not persuaded to a contrary conclusion by *Szela, supra*, where Austin J. referred to a predecessor of the Endorsement as "almost a self-contained code and policy." That description of an underinsured endorsement was given in the context of circumstances quite different from those in this case. In *Szela*, the court considered an apparent conflict between the endorsement's $1,000,000 underinsured motorist coverage and limits on the quantum of coverage for uninsured motorist coverage contained in the

policy. Austin J. correctly concluded that the specific wording of the endorsement dealing with a specific change in coverage trumped the conflicting wording of the policy.

[20] Considering his reasons in their entirety, I read Austin J.'s reference to a self-contained code, to say no more than that an endorsement dealing with a specific subject matter can "change" the terms of the original policy. *Szela* turned not on what policy terms were incorporated into the endorsement, but rather on what the endorsement "otherwise provided". In any event, I do not read *Szela* as holding that an endorsement is a self-contained policy for all purposes; indeed, Austin J. restricted his statement about a self-contained code to *Szela's* facts by adding the words "insofar as the present question is concerned".

[21] In any event, in my view, an endorsement is generally not understood to be a self-contained policy. As I have noted, the title of the Endorsement describes it as a "change form". An endorsement changes or varies or amends the underlying policy. While it may be comprehensive on the subject of the particular coverage provided in the endorsement, it is built on the foundation of the policy and does not have an independent existence. In any event, the Endorsement in this case is clearly not a stand-alone policy because it specifically provides that the policy terms remain in full force and effect, unless its terms are changed by the Endorsement.

[22] In her reasons, the motion judge was influenced by the fact that other provisions of the Endorsement refer to jurisdictional limitations, while the insuring provision of the Endorsement does not. For example, while the Endorsement specifically precludes coverage for certain accidents that occur in Quebec, the coverage section of the Endorsement simply provides indemnification related to an inadequately insured motorist without specifying any territorial restriction. However, in my view, this reasoning is not available because it ignores the specific "[e]xcept as" wording of s. 22 of the Endorsement. In light of s. 22, it was unnecessary to repeat the territorial limitation for coverage in the Endorsement.

[23] Since I conclude that the insurance contract is clear on its face, it is unnecessary to consider tools of insurance interpretation designed to resolve any ambiguity. In my view, however, the interpretation adopted in these reasons is a logical one that accords with the reasonable expectations of the parties.

[24] I note that since the release of the motion judge's decision in this case, another Superior Court judge has determined that the Policy's territorial limitation applies to underinsured coverage. In *Radu v. Hartford Fire Insurance Co*., [1997] O.J. No. 6356 (Gen. Div.), Morin J. considered the applicability of an Ontario policy's territorial limitation on a family protection endorsement. In circumstances very similar to those in the case before this court, the motion judge in *Radu* rejected the argument that a person

who purchases such an endorsement is entitled to worldwide coverage because such coverage "clearly flies in the face" of the territorial limitation plainly set out in the policy. I agree.

*2. The Policy and the Act*

[25] I turn to the issue of whether the Act imposes a territorial restriction for underinsured coverage or raises an ambiguity about the issue.

[26] Subsection 265(1) of the Act provides that all automobile insurance policies must provide basic coverage for damage caused by uninsured and unidentified automobiles. The Act does not address underinsured coverage.

[27] At the time of the accident in this case, a territorial limitation on basic coverage was imposed by s. 243(1) of the Act:

> 243(1) Insurance under sections 239 and 241 applies to the ownership, use, or operation of the insured automobile in Canada, the United States of America and any other jurisdiction designated in the *Statutory Accident Benefits Schedule*,[2] and on a vessel plying between ports of Canada, the United States of America or a designated jurisdiction.

[28] In 2001, this court determined in *Ortiz v. Dominion of Canada General Insurance Co.*, [2001] O.J. No. 27, that the territorial restriction of s. 243(1), which was reflected in the insurance policy in that case, applied to preclude coverage with respect to an uninsured automobile. Although s. 243(1) did not specifically refer to s. 265, s. 265(1) provided that coverage regarding an uninsured automobile is subject to the limits prescribed by Regulation. Section 10 of the *Uninsured Automobile Coverage Regulation*, R.R.O. 1990, Reg. 676 explicitly provided that the general provisions of the policy govern the recovery of benefits under s. 265(1). For this reason, Sharpe J.A. concluded that there was no ambiguity or conflict between the policy limitation and the terms of the legislation. The territorial limitation applied.

[29] After *Ortiz*, s. 243(1.1) of the Act was enacted to specifically extend the territorial limitation to s. 265 coverage dealing with uninsured or unidentified vehicles.

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[2] Jamaica is not a jurisdiction designated in the *Statutory Accident Benefits Schedule*.

[30] The appellant argues that the same reasoning applies to underinsured coverage because that coverage is only a subset of uninsured coverage. In other words, too little coverage is a subset of having no coverage. However, this court noted in *Chomos v. Economical Mutual Insurance Co.*, [2002] O.J. No. 3164 at para. 35, that there are important distinctions between uninsured and underinsured coverage:

> Underinsured motorist coverage is different, and separate, from Ontario's compulsory uninsured motorist coverage. It is available only at additional premium cost, on election by the consumer. It is concerned with an insured motorist's shortfall in damages recovery, not recovery in the first instance.

[31] Underinsured coverage is additional coverage provided by an insurer to a willing insured prepared to pay an additional premium. Accordingly, in my view, underinsured coverage is not a subset of uninsured coverage, at least for the purpose of the issue raised on this appeal.

[32] As I have said, the appellant submits, since underinsured coverage is not dealt with by the Act at all, the insurer is at liberty to offer additional coverage to an insured that is subject to a territorial limitation. The respondents argue, however, that because the Act permits a territorial limitation only for third party, uninsured and unidentified driver coverage, by implication such a limitation is not available for underinsured coverage, or at least the Act is ambiguous about whether such a limitation is available.

[33] However, as I have pointed out, there is a fundamental difference between underinsured motorist coverage on the one hand and uninsured or unidentified motorist coverage on the other. Underinsured coverage, which the parties agree has been offered by insurers for more than twenty years, is extra coverage not mandated by the Act. It is coverage that goes above and beyond the basic coverage that the Act requires must be provided by insurers for insureds.

[34] Although the Act does not address underinsured coverage, automobile insurance in Ontario is regulated by the Financial Services Commission of Ontario (FSCO). No insurer is permitted to make a contract of insurance inconsistent with the Act (s. 126(1)) or to use a form of policy or endorsement unless that form has been approved by the Superintendent of FSCO (s. 227(1)). Accordingly, even though underinsured coverage is not regulated by the Act, the form of endorsement providing that coverage is a FSCO-approved standard industry-wide contract that permits little, if any, scope for amendment. Subject to that oversight, insurers are not precluded from offering additional underinsured or other optional coverage (with or without territorial limits) to their insureds.

[35] The absence of regulation for underinsured coverage was recently discussed in *LaPierre v. General Accident Assurance Co. of Canada*, [2007] N.S.J. No. 12 (N.S.S.C.), where, regarding the Nova Scotia legislation, Warner J. explained at para. 35:

> The Act and Regulations stipulate the minimum requirements for, and in instances such as auto policies approval of the form of, policies, but legislation has not removed the ability of insurers to offer coverage that is beyond the requirements of legislation, such as, in this case, contained in the Endorsement.

[36] Since the Act neither precludes additional underinsured coverage nor prohibits a territorial limitation, at most it can be said that the Act is silent on the issue. In this case, silence does not amount to a conflict. There is no reason to infer that a territorial limitation is prohibited for underinsured coverage from the fact that one is mandatory for uninsured and unidentified coverage.

[37] I agree with Warner J. in *LaPierre, supra*, at para. 38, who could "not accept, as a principle of statutory interpretation that, because the Act mandates that third party liability (Section A) coverage shall be subject to a territorial limit, the SEF 44 Endorsement coverage cannot include a territorial limit".

[38] Thus, in my view, the provisions of the Policy impose a permissible territorial limitation on the coverage provided by the Endorsement. That limitation is not in conflict with the provisions of the Act. There is no ambiguity.

**Conclusion**

[39] Before concluding, I pause to recognize that Mr. Sutherland suffered very tragic consequences as a result of the accident in Jamaica and it is regrettable that he does not have coverage for the extent of his injuries. However, in my view, coverage is simply not available on the explicit terms of the Policy and the Endorsement.

[40] In summary, I conclude that the territorial limit in the Policy applies to the Endorsement by virtue of the plain and unambiguous language set out in both documents, which together evidence the complete insurance contract. As well, the inclusion of a territorial limit on underinsured coverage does not conflict with the provisions of the Act.

[41] Accordingly, I would allow the appeal, set aside the order below and declare that the OPCF 44R Endorsement does not provide coverage, subject to its terms and conditions, for the accident that occurred in Jamaica on December 31, 2001 and further declare that the appellant is not required to indemnify the respondents for any amounts that the drivers of the vehicles (Ian Hogg and Leon Hinds) are legally required to pay.

[42] As this appeal raised a novel interpretive point, and considering all the circumstances of this case, I would make no order as to costs.

RELEASED: "M.R."
JUL 02 2007

"S.E. Lang J.A."
"I agree M. Rosenberg J.A."
"I agree E.E. Gillese J.A."