

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
HER MAJESTY THE QUEEN IN RIGHT) John Friendly, for the Plaintiff
OF ONTARIO AS REPRESENTED BY THE)
MINISTER OF FINANCE)
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Plaintiff)
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- and -)
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PILOT INSURANCE COMPANY) Chad Townsend, for the Defendant
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Defendant)
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) **HEARD:** October 16, 2007 and December
6, 2007

2008 CanLII 8611 (ON S.C.)

Nolan J.

INTRODUCTION

[1] Pilot Insurance Company (Pilot) brought a motion for summary judgment against Her Majesty the Queen in the Right of Ontario, as represented by the Minister of Finance, who is responsible for the administration of the Motor Vehicle Accident Claims Fund (the Fund). Pilot seeks an order dismissing the Fund’s claim for restitution of accident benefits paid to John Taggart (Taggart) by the Fund on the ground that the action is barred and should have been instituted pursuant to the procedural code of Regulation 283/95 (the Regulation) under the *Insurance Act* R.S.O. 1990, c.I.8 (the Act). These provisions require in sections (3) and (7) that:

- (3) “Insurers” give written notice of its intention to dispute its obligation to pay benefits within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay; and

- (7) That the insurer paying benefits must give notice within one year from the time the insurer paying benefits first gives notice under section (3) of its intention to initiate arbitration.

BACKGROUND

[2] The Fund has brought a restitution action arising out of a single motor vehicle accident which occurred on September 3, 1995. Taggart was a passenger in a car owned by Nancy Jean Pickering and driven by Cory Simmons. Neither the owner nor the driver was insured. Taggart was catastrophically injured when the car went off the road. At the time of the accident, Taggart was living with a Thomas Tessier (Tessier) who had assumed the role of surrogate father in relation to Taggart and financially supported him.

[3] The Fund pays Statutory Accident Benefits (“SAB”) under the *Act* in instances where there is no valid insurance available to victims of motor vehicle accidents. Taggart’s completed application for accident benefits to the Fund is dated March 13, 1996 and was date stamped by the Fund as received on March 19, 1996. The Fund commenced payment of SAB to Taggart on May 29, 1996. The Fund has paid more than \$1,500,000 to Taggart in SAB while pursuing Pilot for repayment under a valid policy issued to Tessier.

[4] The Fund investigated the possibility that Taggart had coverage for accident benefits from another insurer. It was agreed by the Fund at discovery that by July 16, 1996 the Fund was aware that Pilot was the insurer of Tessier and that Taggart may have been dependent on Tessier. Whether or not Taggart was a dependent of Tessier is an issue that may require determination at trial.

[5] The Fund did not put Pilot on notice that it was taking the position that Pilot was the insurer responsible for payment of accident benefits to Taggart until March 12, 1997. This notice date is in excess of 90 days past both the date of receipt of the application for accident benefits (March 19, 1996) and the date when it is acknowledged the Fund was aware that Pilot insurance was possibly an insurer of Taggart (July 16, 1996).

[6] Although the Fund had put Pilot on notice of its intention to dispute payment of the SAB by March 12, 1997, it did not give notice to Pilot to initiate arbitration proceedings until August 18, 1998. The Fund’s notice to initiate arbitration occurred in excess of one year from the date notice was provided.

[7] On the grounds that the Fund had breached the notification requirements pursuant to sections (3) and (7) of the Regulation, Pilot refused to participate in arbitration. Meanwhile in 2000, Taggart, with Tessier as his litigation guardian, sued the owner and driver of the car as well as Pilot who insured Tessier. Tessier argued that his policy with Pilot provided coverage to his “dependant relatives” and since Taggart was financially dependant on him, a fair and liberal interpretation of that term should include Taggart.

[8] Pilot brought a successful motion for summary judgment, reported at [2000] O.J. No. 355, dismissing the claim against it. The decision of the motion's judge was appealed to the Ontario Court of Appeal [2001] O.J. No. 642, leave to appeal to the Supreme Court of Canada was dismissed October 18, 2001. The appeal was allowed on the basis that the term "relative" was broad enough to include a *de facto* parent-child relationship. Tessier and Taggart were living together as family and, provided that it could be established at trial that a dependency existed as required by the policy, the claim for indemnity should not have been dismissed on a summary judgment motion.

[9] Meanwhile, the Fund brought this restitution action in Toronto in 2002. It was transferred to Chatham where the Taggart action had been commenced. The Taggart action against Pilot was settled before trial and after leave to appeal to the Supreme Court of Canada was dismissed.

[10] Following the enactment of the Regulation in 1995, lower courts did not always consider the Fund, the payor of last resort, to be an insurer in the strict sense of the term and did not always strictly apply the procedural requirements of the Regulation against the Fund. In *Kalinkine v. Ontario (Superintendent of Financial Services)*, [2004] O.J. No. 1525, (*Kalinkine*) Tulloch J. of the Superior Court of Justice held that the Fund could seek restitution from an insurer for accident benefits paid by the Fund to an accident victim in appropriate cases. Further, Tulloch J. held that the Fund was not strictly bound by the procedural requirements of the Regulation.

[11] On appeal, the Ontario Court of Appeal at [2004] O.J. No. 5138 confirmed that the Fund could pursue an action for restitution from an insurer in a proper case. The court also acknowledged that the Fund, being the payor of last resort, was not strictly speaking an insurer regarding the procedural requirement of the Regulation.

[12] In 2007, a five judge panel of the Court of Appeal in *Allstate Insurance Co. of Canada v. Motor Vehicle Accident Claims Fund*, [2007] O.J. 292 (*Allstate*) reversed the finding in *Kalinkine* that the Fund was not bound by the Regulation. The Court of Appeal, however, said that in the proper case, the Fund retains the right to seek restitution of accident benefit payments through the courts, although it did not explain what could be considered a proper case. The Court of Appeal did not provide any direction on how this reversal of *Kalinkine* was to be applied to pending cases in which there had not been compliance with the Regulation by the Fund and the Fund had already commenced restitution actions against insurers.

[13] Since *Kalinkine*, there have been two cases which have considered these issues, *Her Majesty the Queen in Right of Ontario As Represented By The Minister of Finance v. Progressive Casualty Insurance Company of Canada* [2007] Toronto Court File No. 02-CV-234033 CM2 and *Ontario (Minister of Finance) v. Ward*, [2007] O.J. No. 4062. In the former, D. Brown J. proceeded with the trial of a restitution action in which there had not been compliance by the Fund with the Regulation. In the latter, Thorburn J. dismissed a motion for summary judgment brought by an insurer against the Fund finding that it was a "proper case" to proceed to trial.

[14] In the case before me, the Fund brought its action for restitution in 2002. In its Statement of Defence, Pilot pleaded the failure of the Fund to meet the time limits set out in the Regulation. The action was commenced in Toronto and therefore subject to the provisions of Rule 77 of the *Rules of Civil Procedure*. At a case conference in 2003, at which time the issue of the missed time limits was reviewed, Master Dash made an order that Pilot bring its motion for summary judgment by December 23, 2003. Pilot did not comply with that order.

ISSUES

[15] The issues in this motion are:

1. Does the *Allstate* decision apply retrospectively and consequently justify an order for summary judgment against the Fund?
2. Is this "a proper case" in which to allow the Fund to seek restitution by way of a court action rather than by arbitration in accordance with the decisions of the Superior Court of Justice in *Progressive* May 2007 and in *Ward* in October 2007?

POSITION OF MOVING PARTY, PILOT

[16] Pilot argues that the decisions in *Allstate* and *Kingsway* apply to disputes that were commenced before these decisions were released in January 2007. Further, Pilot asserts that given the restatement of the law by the Ontario Court of Appeal in *Allstate* and *Kingsway*, the law that was in effect at the time that this proceeding arose has been clarified and that there is no longer any genuine issue for trial.

[17] Pilot argued that the decision in the Ontario Court of Appeal in *Allstate* and the companion case *Kingsway*, should be applied both prospectively and retrospectively. The Court of Appeal said that *Kalinkine* was wrongly decided. Pilot asserts that the decision in *Allstate* was not a change to the law but rather a correction of a previous error. *Allstate* declared the law as it should be. Pilot relied on a number of cases in support of its position that, even before the decisions in *Allstate* and *Kingsway* were released in 2007 the Fund had reason to believe that *Kalinkine* may not have been correctly decided and that the Fund must comply with the Regulation.

[18] By applying the decision of the Ontario Court of Appeal in *Allstate* and in *Kingsway*, it was Pilot's position that there was no longer any genuine issue for trial and that summary judgment should be granted. Pilot relied on *Guarantee Co. of North America v. Gordon Capital* [1999] S.C.J. No. 60 in which the Supreme Court of Canada said:

The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. ... Once the

moving party has made this showing, the respondent must then “establish his claim as being one with a real chance of success.”

[19] It was Pilot’s submission that from shortly after the Fund received the application for accident benefits on behalf of Taggart the Fund knew that there was a possibility that Pilot was an insurer of Taggart by virtue of his possible dependency on Tessier.

[20] Pilot also argued that the Fund was aware or should have been aware that Pilot would assert the obligation of the Fund to comply with the Regulation. In fact the Fund did not comply with the time requirement set out in sections 3 and 7 of the Regulation. The Fund was aware of the various cases that had been decided against it and the argument that *Kalinkine* was wrongly decided. In the circumstances, it was Pilot’s view that the Fund has suffered no prejudice. The Fund has also taken the position in other cases that it is an insurer who is entitled to the protection of s. 3 of the Regulation. It would therefore be inconsistent and unfair for the Fund to deny financial obligations on the basis of s. 3 but then successfully assert in a different case that the Fund is not bound by s. 3.

[21] Pilot urged that I find that the Fund was an insurer and as a result it had obligations as an insurer prior to the decisions in *Allstate* and *Kingsway*. If that is the case, the dispute between Pilot and the Fund would need to be arbitrated except that arbitration would be precluded by virtue of a breach of s. 7 of the Regulation. Pilot urged that I find that the Fund is precluded on the basis of sections 3 and 7 of the Regulation from having either an arbitrator or the court decide these issues. Pilot also urged that I find that, in light of the long history in this matter, and the certainty of the facts, it is appropriate to grant summary judgment on the basis that the Fund failed to comply with both sections 3 and 7 of the Regulation and there is no genuine issue for trial. It is further the position of Pilot that the decisions in *Progressive* and in *Ward* were wrongly decided. Even if they were not wrongly decided, the facts in *Progressive* can be distinguished from the case before me. The decision to complete the trial may have been appropriate since the parties were already in an advanced stage of litigation and it would be inefficient and duplicative to remit the case back to arbitration

POSITION OF RESPONDING PARTY, THE FUND

[22] It was the position of the Fund that the motion for summary judgment should be dismissed. It argued that the proceeding before me falls squarely within the exception of *Kalinkine* as enunciated by the Court of Appeal in 2004 and reaffirmed by the Court of Appeal in *Allstate*. The Fund argues that the action for restitution has been properly constituted for adjudication on the issue of liability before the court and should be allowed to proceed.

[23] It was also the position of the Fund that it would be unfair if I were to apply the *Allstate* decision retroactively, with the resulting effect that the Fund’s action for restitution would be defeated by a procedural requirement of the Regulation. The Fund argued that the court, pursuant to the *Rules of Civil Procedure*, would not render a proceeding a nullity on account of a procedural irregularity or on the grounds that the proceeding should have been commenced by a

different originating process. I was urged by the Fund to find that this restitution action was commenced at a time when it was sanctioned by the judicial interpretation of the Regulation as being properly constituted. The Fund urged that I take into account the equitable jurisdiction of the court and find that it would be a proper case for determination under the circumstances by a court at trial. The Fund argued that such a finding would not impose any hardship, unfairness or prejudice to Pilot. Pilot would have an equal and ample opportunity to argue the principle issue in the litigation in a forum in which it originally agreed to proceed on the very same issues.

[24] It is the position of the Fund that there is a genuine issue for trial which is identical to the issue in the tort action between the parties. This is whether Taggart was a dependant of Tessier, the insured of Pilot Insurance at the time of the accident. A determination of this issue will require an assessment of credibility of the witnesses, an evaluation of circumstantial evidence and a weighing of the adverse inference to be drawn from the fact that Taggart most probably will not testify at trial due to the nature of the injuries he sustained in the accident. The court has all the legal tools including the right to summons witnesses, compelling disclosure of documents and productions from third parties, all of which are not available to arbitrators under the Regulation. The parties' interests would best be served by having the outstanding issues tried and determined by a court.

[25] The Fund also argued that since the inception of the Regulation in 1995, lower courts considered the Fund not to be an insurer, in the strict sense of the term, and did not apply strictly the procedural requirements of the Regulation against the Fund.

[26] It was also the position of the Fund that the model constructed and adopted by Brown J. in *Progressive* is sound and fair to all litigants and should be applied to the case before me. Brown J. determined that an appropriate remedy must be fashioned to deal fairly with pending cases that were commenced prior to the decisions in *Allstate* and *Kingsway*. The Fund would be seriously prejudiced if it was unable to proceed with a valid claim for restitution because of a subsequent decision.

[27] With respect to the test for summary judgment, the Fund referred me to the case of *Sera G.M.B.H. v. Sera Aquaristik Canada Ltd.*, [2007] O.J. No. 318 in which the Court of Appeal said with respect to a Rule 20 motion:

The moving parties must establish that there is no genuine issue requiring a trial. The onus on the moving parties is a heavy one. In response to a motion for summary judgment, the responding party is to put his "best foot forward" and is required to "lead, trump or lose". That is an accurate statement of the law and that is precisely the test the motion judge applied.

[28] In addition, the Fund referred me to the case of *Romano v. D'Onofrio*, [2005] O.J. No. 4969 in which the Court of Appeal held that where a party seeks summary judgment based on the interpretation of a statute or question of law, a motion's judge should not decide a significant

question of law involving the definitive interpretation of a section of a statutory instrument. The Court of Appeal has also made it quite clear that a novel question of law should not be decided on a Rule 20 motion.

[29] Finally, the Fund argued that it would be inequitable if, at this late date, it was to be denied an opportunity to reclaim significant amounts paid to a catastrophically injured young man who was at all material times an “insured” under Pilot’s policy for which it collected premiums. To deny them the opportunity to be heard at trial would ensure in the circumstances that Pilot would be hugely and unjustly enriched at public expense.

ANALYSIS

The Law

[30] As stated earlier in these reasons, the Ontario Court of Appeal released its decision in *Allstate*, and the companion appeal, *Kingsway General Insurance Co. v. Ontario (Minister of Finance)*, 2007 O.J. No. 290 (*Kingsway*) on January 31, 2007. Laskin J.A. writing on behalf of a five judge panel stated the issue to be determined as follows: “[t]he principal issue on these two appeals is whether the Fund is an “insurer” under regulation 283”. The Fund had paid benefits to the family of an accident victim and sought reimbursement either from Allstate Insurance or Manitoba Public Insurance. Both insurers denied coverage. The Fund then commenced arbitration. Allstate objected to the arbitrator’s jurisdiction on the ground that the Fund was not an insurer and was, therefore, precluded from commencing arbitration pursuant to the Regulation.

[31] The court found that the Fund was an “insurer” under the Regulation and was thus bound by all the provisions in the Regulation:

Both its title and section 1 stipulate that the regulation applies to disputes between “insurers”. Under section 7(2) of the regulation, only an “insurer” can initiate arbitration. Thus, I think that Allstate’s position on this appeal is correct: either the Fund is an insurer under the regulation and bound by all its provisions, or it is not an insurer and cannot take advantage of any of the provisions of the regulation. If it is an insurer, it must arbitrate, not litigate, any dispute. If it is not an insurer, absent any agreement to arbitrate, it must litigate disputes with licensed insurers over the payment of accident benefits.

For reasons I will outline, I have concluded that the Fund is an insurer under regulation 283. It must arbitrate disputes over the payment of accident benefits, and in doing so, is bound by all the provisions of the regulation. I have also concluded that in the rare case, such as *Kalinkine* itself, where there is no dispute to be arbitrated, the Fund may sue for restitution in the courts.

[32] The court held that the Fund was an insurer for the purpose of resolving disputes over the payment of accident benefits. Laskin J.A. found that “[b]oth the overall context and purpose of the legislative and regulatory scheme, and the immediate context, the wording of regulation 283, support this conclusion”. Finally, Laskin J.A., after referring to his earlier decision in *Kalinkine* stated that “[i]n its reasons, however, this court did say that the Fund was not an insurer under regulation 283. I consider that statement to be incorrect. The Fund is an insurer under regulation 283 and, where it disputes its obligation to pay benefits, it must resolve that dispute, not in the court, but in accordance with the arbitration process under the regulation”.

[33] The issue then becomes whether the decision in *Allstate* should have retrospective or only a prospective effect.

Retrospective versus Prospective Application of the Allstate Decision

[34] In *Canada (Attorney General) v. Hislop*, [2007] S.C.C. No. 10, the Supreme Court of Canada dealt with ‘retrospective and prospective remedies’. Although that case involved the *Charter* and dealt with the interplay between the courts and the legislature regarding *Charter* issues, the majority decision indicated approval of William Blackstone’s *Commentaries on the Law of England* which states “judges do not create the law, but merely discover it”. The Court stated that the declaratory approach as pronounced by Blackstone reflects a traditional and widespread understanding of the role of the judiciary in a democratic state governed by strong principles of separation of powers between courts, legislatures, and executives. In this perspective, courts grant retroactive relief applying existing law or rediscovered rules which are deemed to have always existed. On the other hand, legislators fashion new laws for the future.

[35] The Court stated that Blackstone’s declaratory approach has not remained unchallenged in modern law. However, the Court stated that “[t]he critique of the Blackstonian approach applies only to situations in which judges are fashioning new legal rules or principles and not when they are applying the existing law”. The Court went on:

In instances where courts apply pre-existing legal doctrine to a new set of facts, Blackstone’s declaratory approach remains appropriate and remedies are necessarily retroactive. Because courts are adjudicative bodies that, in the usual course of things, are called upon to decide the legal consequences of past happenings, they generally grant remedies that are retroactive to the extent necessary to ensure that successful litigant with have the benefit of the ruling. There is, however, an important difference between saying that judicial decisions are *generally* retroactive and that they are *necessarily* retroactive. When the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm. In those situations, it may be appropriate for the court to issue a prospective rather than retroactive remedy. The question then becomes what kind of change and which conditions will justify the crafting of judicial prospective remedies.

The House of Lords recently adopted this view in the course of its discussion of prospective overruling in *re Spectrum Plus Ltd. (in liquidation)*, [2005] 2 A.C. 680, [2005] UHKL 41. The words of Lord Nicholls of Birkenhead at para. 34 are particularly apt:

[Blackstone's declaratory] theory is still valid when applied to cases where a previous decision is overruled as wrong when given. Most overruling occurs on this basis. These cases are to be contrasted with [those] where the later decision represents a response to changes in social conditions and expectations. Then, on any view, the declaratory approach is inapt. In this context [this] approach has long been discarded. It is at odds with reality.

Although Lord Nicholls' statement arose in the common law context, the Court implicitly adopted a similar line of reasoning to constitutional law. Despite this Court's endorsement of the Blackstonian declaratory approach, in its development of the law of constitutional remedies, it has frequently seen fit to temper the retroactive effect of s. 52(1) remedies and adopt a position similar to that of Lord Nicholls.

[36] What is clear from the foregoing is that Blackstone's declaratory theory is still good law in Canada and applies to cases where a "previous decision is overruled as wrong when given". The Court did, however, carve out an exception to the theory where the decision represents a response to changes in social conditions and expectations through judicial intervention. More specifically, the Supreme Court stated under what circumstances the Blackstonian approach would be inapplicable:

"[w]hen the law changes through judicial intervention, courts operate outside of the Blackstonian paradigm".

[37] The Court then reviewed formulas that examined both the nature of the change and of some of its consequences including a 'clear break with the past' "which can best be identified with those situations where, in Canadian law, the Supreme Court departs from its own jurisprudence by expressly overruling or implicitly repudiating a prior decision. Such clear situations would justify recourse to prospective remedies in a proper context".

[38] The Court found that a substantial change in the law is necessary, but not sufficient to justify purely prospective remedies. The Court enunciated a non-exhaustive list of other factors to be taken into account when considering whether a restatement of the law has a retrospective effect such as reasonable or in good faith reliance by governments on the law as it had been understood in the past, the fairness of the retroactivity to the litigants and a careful examination of the reliance interest. Ultimately, the Court found that once the substantial change threshold criterion is met, it may be appropriate, on a case by case basis, to limit the retroactive effect of the remedy based on a balancing of these other factors.

[39] Whether or not the application of judicial decisions have retrospective or prospective effect outside of the context of the Constitution was examined by the Saskatchewan Court of Appeal in *Edward v. Edward Estate*, [1987] S.J. No. 423. Specifically, the court was asked to determine whether the overruling of a precedent should be given retrospective effect. The Court had to determine whether the 1967 case of *Indyka v. Indyka*, [1967] 3 W.L.R. 510 applied and operated retrospectively to affect the validity of a divorce in 1957.

[40] After a review of precedents that applied the *Indyka* decision retrospectively, Bayda C.J.S. stated the following:

In all of the cases cited above, there is no mention by the courts that they are giving retrospective application to the common law. It may be taken that in keeping with the attitude of the English and Canadian courts generally, the courts in these cases assumed that the retrospective principle is so basic and inherent in the law, that it may be applied without mention or acknowledgment.

[41] Bayda C.J.S. went on to examine the concept of prospective overruling and found that the concept has not been “totally over-looked in Canada and England”. He acknowledges that there are attractive arguments in favour of it and convincing arguments against the use of such a power by Canadian and English courts. Ultimately, the Saskatchewan Court of Appeal found that the correct approach was to retrospectively apply the *Indyka* case.

[42] With respect to the cases that have been decided post-*Allstate* the facts in *Progressive* are similar to the facts in the case before me, although the decision of Brown J. followed a trial as opposed to a motion for summary judgment. In that case, the Fund had commenced an action for restitution on August 7, 2002. Nevertheless, the Fund sent a notice of dispute between insurers to Progressive on February 6, 2007 following the release of the *Allstate* decision. The case involved an accident which occurred on August 11, 1997. Mr. Huu Thang Nguyen was driving with three friends when his car swerved off the road and struck a tree. Mr. Nguyen and two of his passengers were killed. The fourth occupant of the car, Mr. Cuong Ngo, survived although he suffered serious injuries. Progressive claimed that the insurance policy it had issued to Mr. Nguyen was cancelled prior to the accident. As in the case before me, the issue was whether the Fund or Progressive bore the ultimate responsibility for paying Mr. Ngo’s accident benefits on account of the injuries he suffered in the accident. The Fund had paid the SAB and sought restitution from Progressive who denied responsibility for payment.

[43] Progressive advanced several threshold arguments as to why the Fund could not seek restitution through the court to recover accident benefits paid to Mr. Ngo. Those arguments were similar to the arguments being made by Pilot in the case before me: first, the decision in *Allstate* which stated that the Fund is an ‘insurer’ for the purpose of Regulation 283/95 and is thus bound by the provisions of the Regulation, prohibits the Fund from now seeking recovery through the courts because the Regulation requires disputes between insurers to be resolved by arbitration.

Secondly, Progressive contended that the Fund had failed to comply with the procedural requirements of the Regulation and, therefore, was now barred from seeking recovery against Progressive for accident benefits paid. Thirdly, Progressive contended that the Fund failed to comply with section 3(1) of the Regulation in that it did not give timely written notice of its dispute about responsibility for payment of accident benefits to Progressive within 90 days of receipt of a completed application for benefits from the injured party. The Fund gave notice one week after the release of the *Allstate* decision.

[44] In *Progressive*, Brown J. found that the law regarding the status of the Fund as an ‘insurer’ changed on the eve of trial. He stated in para. 42 that “in the circumstances of this case, I have significant concerns about applying the Dispute Regulation strictly as against the Fund since, up until three months ago, courts had proceeded on the basis that the Fund was not an ‘insurer’ and not bound by the arbitral regime in the Dispute Regulation”. He held at para. 47 that the Court of Appeal in *Allstate* did not intend for its decision to apply retroactively and further at para. 48 he said that it was not appropriate to measure the Fund’s conduct in 1997 against the procedural obligations contained in the Regulation and which were declared in 2007 to be binding on the Fund. In addition, Brown J. found that the Fund relied on the law as it was understood at that time. To apply the new statement of the law to a case that started years ago would be “unfair”.

[45] At para. 49 Brown J. found that between the enactment of the Regulation in 1995 and the 2004 decision of the Court of Appeal in the *Kalinkine* case, the Fund did not employ a consistent approach towards the procedural regime set out in the regulation. At paragraph 50, he stated:

“Notwithstanding this inconsistency in approach, the simple fact remains that at the time of adjusting the accident in 1997, and at the time the Fund commenced this action in 2002, the Fund was acting in accordance with the prevailing interpretation of the Dispute Regulation, as confirmed in *Kalinkine*, that the Fund was not an insurer within the meaning of the regulation and was not bound by its arbitral regime. Absent some express direction that the conduct of the Fund in 1997 should be judged by procedural standards only applied to it in early 2007, I think it would be unfair to the Fund, and to the contributors to the Fund, to deny the Fund an opportunity to decide this case on its merits because in 1997 it did not comply with the procedural requirements of the Dispute Regulation...”

[46] Brown J. found that this result (allowing the restitution action to proceed and not retroactively applying the *Allstate* decision) was not “unfair” to Progressive for two reasons. First, the Fund gave notice to Progressive in a letter on October 9, 1997 that claims arising from the accident should be made through the Progressive Insurance Policy (this letter dealt with a different passenger in the car in the same accident and concerned the same insurance policy). Second, Progressive should have been paying at first instance but deflected the matter to the Fund.

[47] In *Ward*, the Fund had not given notice to TD within the required notification period that it intended to proceed by way of arbitration as required by s. 3 of the Regulation or notice pursuant to s. 7 of its intention to initiate arbitration. The Fund's position was that there was nothing to arbitrate and, therefore, this was a proper case to proceed to the courts for restitution (pursuant to the exception in the *Allstate* decision) and that it would be unfair to retroactively apply the *Allstate* decision. In *Ward*, unlike Pilot in the case before me, TD did not plead the defence that the court did not have jurisdiction to adjudicate the restitution action. In addition, TD argued that *Allstate* permits the Fund to proceed by way of court action only where there is nothing to arbitrate. In its Statement of Defence in the restitution action, TD did not raise any of the issues it raised on the motion, namely: jurisdiction of the court, the applicability of the Regulation or that the Fund was not entitled to proceed by way of action rather than arbitration.

[48] There are significant similarities between the facts in *Ward* and in the case before me. The Fund commenced an action against an insurance company for restitution of accident benefits paid to the injured party. The insurance company brought a motion for summary judgment to dismiss the Fund's claim. There was an issue as to whether or not the injured party had another avenue for insurance coverage other than the statutory accident benefits paid by the Fund. The Fund breached the notification requirements in sections 3 and 7 of the Regulation. The position of the parties is essentially the same, except that in the case before me Pilot expressly pleaded the lack of jurisdiction of the court to adjudicate the matter because of the Fund's failure to give timely notice to commence arbitration while in *Ward* the insurance company did not plead that defence but advanced it at the motion.

[49] As well, the Fund in *Ward*, as in this case, advanced the argument that it would be unfair to prevent the Fund from recovering funds it would have otherwise been entitled to recover, solely because of the retroactive effect of a change in the law. Thorburn J. stated in paragraph 34 as follows:

The Fund says it would be unfair and contrary to the interests of the court's inherent equitable jurisdiction to prevent The Fund from proceeding with a claim that was underway at the time the 2007 decision of the Ontario Court of Appeal in *Allstate* was rendered. This Court should take into account that when this restitution action was commenced, The Fund was permitted under the prevailing judicial interpretation of the *Insurance Act* and Regulation 283/95. This Court should therefore exercise its equitable jurisdiction to preside over restitution actions involving The Fund that were commenced before the interpretation of the law changed.

[50] The Fund in *Ward* and in the case before me advanced the argument that it was a "proper case" to be commenced by court action even if there were arbitral issues to be determined. For its part, Progressive in the *Ward* case and Pilot in this case advanced the position that the matter must proceed by arbitration pursuant to the Regulation but that the Fund is no longer entitled to pursue its claim through arbitration because the time allocated to commence arbitration in the Regulation has expired. As well, the motion in *Ward* was heard after the release of the *Allstate*

decision by the Ontario Court of Appeal which found that the Fund is an “insurer” within the meaning of s. 268 of the *Insurance Act* and the Regulation. Thus, in both cases, the Fund would ordinarily be required to arbitrate the dispute with other insurers. However, the Court in *Allstate* held that an action for restitution could be commenced by the Fund “in a proper case”: In *Ward* at para.43 Thorburn J. stated:

The Court of Appeal in *Allstate* went on to say however, that:

...in the rare case, such as *Kalinkine* itself, where there is no dispute to be arbitrated, the Fund may sue for restitution in the courts.... In *Kalinkine*, this court said that Regulation 283 did not preclude the Fund from seeking restitution in the courts, in a ‘proper case’. I agree. *Kalinkine* itself was a proper case because there was nothing to arbitrate. Whether there are other proper cases need not be decided on these appeals.

[51] A tort action was commenced in both *Ward* and in the case before me. However, in the latter, the tort action was settled prior to the summary judgment motion being brought in the restitution action. In *Ward*, the tort action was still outstanding at the time of the hearing of the summary judgment motion.

[52] In *Ward*, Thorburn J. concluded that although in *Allstate*, the Court of Appeal determined that the Fund is an insurer for the purpose of the Regulation, *Allstate* did not remove the Fund’s right to seek restitution through the courts. This included but was not limited to cases where there are no arbitral issues. Thorburn J. declined to decide whether there were arbitral issues. She also concluded that in *Allstate*, the Court was not faced with a situation where its determination that the Fund was an insurer would prevent the Fund from obtaining relief that was otherwise available to it. Thorburn J. also found that the Fund conducted its affairs based on its understanding of the law as it existed at the time the action for restitution was commenced. The Fund was not considered an insurer for the purpose of obtaining relief pursuant to s. 268 of the *Insurance Act* and was, therefore, free to and did commence a court action and was not required to proceed to arbitration, given the state of the law at the time the action was commenced. As in the case before me, the Fund could no longer proceed to arbitration as the notification requirements in the Regulation have expired.

[53] If there are no arbitral issues then the case will clearly fit into the exception pronounced in *Kalinkine* and adopted by Justice Laskin in *Allstate*. In *Ward*, the Fund argued that there was no arbitral dispute as the only outstanding issue to be determined was whether *Ward* was the driver of the other car involved the night of the accident. The Fund also argued that the parties agreed that *Ward* was in possession of the car the evening of the accident, that it was insured by TD at the time, and the parties agreed on the quantum sought to be reimbursed. As such, the Fund should not be required to resolve this issue by arbitration. Even though the Fund maintained there were no arbitral issues and, therefore, the case fell into the exception in

Kalinkine, the Fund maintained, in the alternative, that it was a ‘proper case’ to be commenced by court action even if there were arbitral issues.

[54] TD countered that there were arbitral issues as TD did not agree that Ward was at the scene, or that his car directly caused damage, or that it agreed on the quantum of damages. Progressive in *Ward* and Pilot in the case before me advanced the position that the matter must proceed by arbitration pursuant to the Regulation but that the Fund is no longer entitled to pursue its claim in that manner or by court action because the time to commence arbitration in the Regulation had expired.

[55] With respect to whether or not there were arbitral issues, Thorburn J. stated:

The Fund states that there is no arbitral dispute between The Fund and TD. I need not make that determination as I accept that whether or not the outstanding issues in this case (as outlined above) are arbitral issues, the Court should allow this action for restitution to proceed.

CONCLUSION

[56] Applying the law set out above to the facts in the case before me, I find that the motion for summary judgment must be dismissed. I agree with the reasoning of Brown J. and Thorburn J. that it would be unfair to apply the law as it was declared in 2007 to a proceeding that was commenced in 2002.

[57] In *Progressive* Brown J. reviewed the *Kalinkine* decision and concluded that the holding of the Court that the Fund was not an “insurer” under the Regulation reflected the decisions by lower courts in earlier cases about the Fund’s status. He cited *Ontario (Minister of Finance) v. Allstate Insurance Co.*, [2001] O.J. No. 1181 (S.C.J.) at paras. 12 and 14 and *Lombard Canada Inc. v. Saskatchewan Government Insurance*, [2002] O.J. No. 4257. While there are other cases that stand for the opposite position the law was unclear whether from 1995 to the time the *Allstate* decision the Fund was an “insurer” for all purpose of the Regulation.

[58] Like Brown J., I find that the Court of Appeal left the door open for the Fund to seek restitution in the courts in the proper case and that this is a proper case. Further, as Brown J. did, I find that the Court of Appeal did not intend for its decision to have retroactive effect. I accept and apply his review of the *Hislop* decision and his comments about the application of retroactivity to statutory interpretation and common law decisions. He concluded, as do I, that the *Hislop* decision supports a finding that a cautious approach is required when “attempting to ascertain whether an appellate decision that changes the law intends to subject other outstanding cases to obligations newly articulated by the appellate court. Caution is particularly called for when a judicial decision recasts the procedural requirements that a person must satisfy.” I further accept and apply Brown J.’s finding that the Court of Appeal in *Allstate* did not “advert to the implications of its decision on cases pending before the courts” because the facts on which the decision was based could be distinguished. In *Allstate*, the Fund had initiated arbitration, and

there was no issue before the Court as to whether the Fund had complied with any applicable procedural requirements.

[59] Brown J. also found that he did “not think it appropriate to measure the Fund’s conduct in 1997 against the procedural obligations contained in the Dispute Regulation”. ... “[i]n Hislop, the Supreme Court of Canada observed that “people generally conduct their affairs based on their understanding of what the law requires” and that in 1997 the Fund did that. Brown J. cited Professor Sullivan’s text, *Statutory Interpretation* which dealt with the unfairness of retroactively applying statutes. Brown J. states that the comments of Professor Sullivan apply with equal force to changes in procedural obligations resulting from a judicial re-interpretation of a statute or regulation. Brown J. accepted the Fund’s equitable argument that it would be unfair to retroactively apply *Allstate*.

[60] Brown J went on to cite two reasons why it was not unfair to *Progressive* to refuse to retroactively apply *Allstate*. First, *Progressive* had notice of the accident in a letter on October 9, 1997 indicating that claims arising from the accident should be made through the policy and second, *Progressive* should have paid at first instance because they received the application of benefits “virtually contemporaneously with the Fund”.

[61] In *Ward*, the Fund had not given any notice to TD that it intended to proceed by way of arbitration as required by s. 3 of the Regulation. In addition, the Fund did not give notice, pursuant to s. 7, of its intention to initiate arbitration. In the case before me, the Fund breached this notification requirement as well. Notice was given but not in accordance with the time frames in the Regulation.

[62] The Fund claimed that there was nothing to arbitrate and therefore it was a proper case to proceed to the courts for restitution pursuant to the exception in the *Allstate* decision and that it would be unfair to retroactively apply the *Allstate* decision. Thorburn J. reviewed the main principles enunciated in *Allstate* and stated:

The Fund states that there is no arbitral dispute between The Fund and TD. I need not make that determination as I accept that whether or not the outstanding issues in this case (as outlined above) are arbitral issues, the Court should allow this action for restitution to proceed.

[63] The issue of what constitutes a "proper case" was addressed by Brown J. in *Progressive*. In that case, like the one before me, the law regarding the status of The Fund as an insurer changed long after the action had been commenced. Although both parties wanted the action to proceed before the courts at that point, Brown J. was asked to determine whether he had jurisdiction to allow the action to proceed. Brown J. permitted the action to proceed as,

... to compel the parties to pay for this trial without obtaining a decision, and then to crank up an arbitration proceeding that would only duplicate their efforts to date, in my view would be impractical and run counter to the public policy governing civil litigation in this province the Court of Appeal in

Allstate left the door open for some restitution actions by the Fund in respect of disputes over accident benefits. In my opinion this is a proper case in which to walk through that door.

[64] Thorburn J. found that *Ward* was a proper case to allow the Fund to proceed through the court for restitution and effectively deny retroactively applying *Allstate*. Her reasoning for this conclusion is found at paragraph 46, "The Court of Appeal envisaged that there would be some cases that would be considered proper cases including but not restricting those cases to circumstance where there are no arbitral issues." Thus, Thorburn J. denied the retroactive application of *Allstate* and created an exception as did Brown J. in *Progressive* by stating that the case at bar was a "proper case".

[65] Thorburn J. reviewed the *Hislop* decision and said:

The Court in *Hislop* held that, "When the law changes through judicial intervention ... it may be appropriate for the court to issue a prospective rather than a retrospective [or retroactive] remedy." The Court then addressed the application of its decision to change the law where there has been detrimental reliance by the parties. In that case, the court held that the normal retroactive effect of judgments may need to be tempered where there has been among other things, reasonable reliance on the part of the party seeking not to invoke the retroactive effect of a judgment and where it would therefore be unfair to litigants to invoke the retroactive effect of a judgment.

[66] In considering the effect that a retroactive application of *Allstate* would have on matters already in the system, Thorburn J. said at paragraphs:

In *Allstate*, The Fund had commenced arbitration proceedings and the Court was therefore not faced with a situation where its determination that the Fund was an insurer would prevent The Fund from obtaining relief otherwise available to it. As such, the reliance of the parties on the interpretation of the law that prevailed at the time the action was commenced, was not considered.

Thorburn J. found that the Fund relied on the law as it was at the time between 1995 to 2007.

[67] In the case before me, I have found that this is not a case in which summary judgment should be granted. The Fund reasonably relied on the law in existence at the time the action was commenced. While unlike the situation in *Ward*, Pilot did plead the breach of the Regulation in its Statement of Defence, Master Dash ordered that Pilot was required to bring any motion for summary judgment on that issue by December 23, 2003. Pilot did not bring the motion within the time, which I find leads to a reasonable inference that Pilot was aware of the unsettled state of the case law as to the Fund's obligations as an insurer under the Regulation and would likely have been unsuccessful at that time on a motion for summary judgment. It was not until after the release of *Allstate* that Pilot brought its motion for summary judgment on the basis of the retroactive effect of that decision.

[68] I find that given the length of time this matter has been before the court without the main issue in dispute, that being whether Taggart was a dependant of Tessier at the time of the accident, being determined by a trial judge is not an equitable result. In *Hislop*, the Supreme Court of Canada made specific reference at para. 100 to circumstances in which a substantial change in the law should not preclude a proper case going forward. The court said that these circumstances could include reasonably or in good faith reliance by governments on the law as it was or the fairness of the limitation on the retroactivity of the remedy to the litigants.

[69] With respect to the issue of dependency of Taggart on Tessier, there is no dispute between Pilot and the Fund that Pilot was an insurer of Tessier at the time of the accident under a valid contract of insurance. Back in 2001 when the Ontario Court of Appeal overturned the order granting Pilot summary judgment against Taggart and Tessier, Gauge J.A. writing for himself as well as Laskin and Feldman JJ.A. found that the issue of whether Taggart was covered under Tessier's insurance policy could not be determined on the basis of an interpretation of s. 265(2) of the Act without reference to s. 224(1) of the Act. Without such a consideration, it could not be determined on a motion that the policy did not include Taggart. While acknowledging that the issue of dependence still had to be established at trial, the Court of Appeal found that it was not appropriate to determine such an issue by way of summary judgment. The issue of Taggart's dependency has still not been the basis of a finding at trial. The action commenced in 2000 was settled.

[70] In addition to the issue of dependency at trial, no doubt Pilot will continue to argue that the decision in *Allstate* is applicable to the facts of this case. If so, such a determination can be made on proper evidence at trial. Accordingly, I find that the motion for summary judgment brought by Pilot is dismissed with costs to the Fund on a scale and in an amount to be agreed upon by the parties or determined by me after written submissions no longer than five pages in length by both parties within 30 days.

"original signed by Nolan J."

Mary Jo Nolan
Justice

Released: March 5, 2008

COURT FILE NO.: 3188/05 (Chatham)
DATE: 20080305

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN IN RIGHT OF
ONTARIO AS REPRESENTED BY THE
MINISTER OF FINANCE

Plaintiff

- and -

PILOT INSURANCE COMPANY

Defendant

REASONS FOR JUDGMENT

Nolan J.

Released: March 05, 2008