COURT OF APPEAL FOR ONTARIO

CITATION: Rodriguez-Vergara v. Lamoureux, 2025 ONCA 620
DATE: 20250910
DOCKET: COA-24-CV-0800

Lauwers, Nordheimer and Wilson JJ.A.

BETWEEN

Manuel Rene Rodriguez-Vergara
and Robertina Alicia Olmedo Alcocer

Plaintiffs

and

Rachelle Lamoureux**, Maria D'Souza** and
Royal & Sun Alliance Insurance Company of Canada*

Defendants
(Appellant*/Respondents**)

Peter Yoo, for the appellant

Evan A. Argentino, for the respondents

Heard: March 31, 2025

On appeal from the order of Justice Jamie K. Trimble of the Superior Court of Justice, dated July 11, 2024.

Wilson J.A.:

I. BACKGROUND

[1] On February 3, 2017, the plaintiff Manuel Rodriguez-Vergara ("Vergara") was struck by a vehicle owned by the defendant Maria D'Souza ("D'Souza") and driven by her daughter the defendant Rachelle Lamoureux ("Lamoureux"). As a result, Vergara suffered injuries and commenced a lawsuit seeking damages.

[2] The D'Souza vehicle was insured by Certas under a standard automobile policy with liability limits of $300,000. Certas also insured D'Souza under a personal umbrella liability policy ("PLUP") that had limits of $1 million. Royal & Sun Alliance Insurance Company of Canada ("RSA") insured Vergara under a standard automobile policy that had liability limits of $1 million. Attached to Vergara's Standard Automobile Policy was a Family Protection Endorsement, OPCF 44R, which provides, *inter alia*, coverage if the insured is involved in an accident with an underinsured motorist.

[3] There is no dispute that the assessment of the damages of Vergara exceeds the limits of the D'Souza policy and thus, Lamoureux and D'Souza are inadequately insured motorists. The parties agree that the D'Souza automobile policy's third-party liability limits of $300,000 is primary and would respond first to the plaintiff's claims. After that, however, they disagree about whether D'Souza's PLUP or Vergara's OPCF 44R respond next in priority to the claims of the plaintiff.

[4] Certas brought a motion pursuant to r. 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, seeking a declaration that Vergara's OPCF 44R stood in priority to the PLUP. RSA brought a cross-motion seeking leave to commence a third-party claim against Certas and seeking a declaration that RSA could subrogate against Certas for any amounts it had to pay to Vergara.

[5] The motion judge determined that, after payment of D'Souza's third-party liability limits of $300,000, Vergara's OPCF 44R was to respond next up to $700,000, followed by D'Souza's PLUP.

[6] The motion judge also determined that Vergara's OPCF 44R could not deduct from its damages payment any amounts available from D'Souza's PLUP nor could it subrogate against the at-fault defendants D'Souza and Lamoureux for the payments made to Vergara. Finally, the motion judge determined that RSA could not issue a third-party claim against Certas.

II. ISSUES ON APPEAL

[7] RSA advances several grounds of appeal which I would reframe as follows:

- The motion judge erred in finding that the OPCF 44R stands in priority to the PLUP.
- The motion judge erred in finding that RSA could not deduct the PLUP policy limit from payments under Vergara's OPCF 44R.

- The motion judge erred in finding that RSA could not issue a third-party claim against Certas, and in finding that RSA could not subrogate against the Certas insured D'Souza for the amounts paid under Vergara's OPCF 44R.

[8] I do not agree that the motion judge made any of the alleged errors and would dismiss the appeal for the reasons that follow.

III. ANALYSIS

(1) The motion judge did not err in finding that Vergara's OPCF 44R stands in priority to the PLUP:

[9] The main issue for determination is which of the excess policies responds to Vergara's claims after payment of the limits of the standard automobile policy of D'Souza and Lamoureux, the at-fault driver: Vergara's OPCF 44 or D'Souza's PLUP?

[10] The parties agree that issues surrounding the interpretation of insurance policies are pure questions of law. The standard of review is one of correctness. On a correctness standard, an appellate court is free to replace the first instance judge's conclusions with its own*: Housen v. Nikolaisen* 2002 SCC 33, [2002] 2 SCR 262, at para. 8.

[11] I see no reason to do so here. The motion judge correctly interpreted the Vergara's OPCF 44R in its full legal context. His conclusions are consonant with the jurisprudence of this court.

(a) After The Primary Policy Has Paid Its Limits, Which Policy Responds First?

[12] RSA submits that the motion judge was incorrect in his interpretation of s. 7(a) of Vergara's OPCF 44R. Section 7(a) provides that coverage under the OPCF 44R is "excess to" (i.e., ranks later in priority than) "insurers of the inadequately insured motorist". Any insurance coverage included in s. 7(a) must be exhausted before anything is payable under the OPCF 44R.

[13] The motion judge found that the word "insurers" in s. 7(a) included only motor vehicle liability insurers. The PLUP is not a motor vehicle insurance policy, and the motion judge held that D'Souza's PLUP does not fall under s. 7(a). RSA submits that this was an error and s. 7(a) applies to all insurers, because in other parts of s. 7 there is reference to motor vehicle liability policies while in s. 7(a) it simply says "insurers". According to RSA, the word "insurers" ought to be given its plain meaning, including other non-motor vehicle insurance policies. RSA submits that on a plain reading of the section, D'Souza's PLUP is included in s. 7(a) and therefore ranks earlier in priority to Vergara's OPCF 44R.

[14] I do not accept this submission. I agree with the motion judge that the issues to be determined must be assessed in the context of the nature of the automobile insurance legislation in Ontario, which is highly regulated under the Act. The standard automobile policy in Ontario is subject to minimum third-party liability limits. There are statutorily mandated first party or "no fault" benefits which are set

out in the legislation. The Commissioner of Insurance approves the forms of the policies and endorsements that can be purchased by owners of automobiles. The OPCF 44R is such an endorsement and provides for indemnification to an insured who is injured or killed by an inadequately insured motorist. It is commonly referred to as the underinsured endorsement. Both the standard automobile policy and the OPCF 44R attach to a specific vehicle.

[15] A PLUP is a different kind of insurance policy that falls outside Ontario's motor vehicle insurance regime. A PLUP is not a first loss policy. Rather, a PLUP provides coverage over and above the coverage limits of certain underlying insurance policies. It is an excess policy of insurance that does not attach to a specific automobile as the OPCF 44R does. As this court concluded in *Keelty v. Bernique,* 2002, 57 O.R. (3d) 803 (C.A.) CanLII 22040 (ONCA), at para. 25, while a PLUP may, in some circumstances, provide coverage for motor vehicle accident injuries, it is not a motor vehicle insurance policy. This context must inform the interpretation of the OPCF 44R.

[16] The relevant sections of the OPCF 44R provide as follows:

> LIMITS OF COVERAGE UNDER THIS CHANGE FORM
>
> 4. The insurer's maximum liability under this change form, regardless of the number of eligible claimants or insured persons injured or killed or the number of automobiles insured under the Policy, is the amount by which the limit of family protection coverage exceeds the total of all limits of motor vehicle liability insurance, or bonds, or cash deposits, or other financial guarantees as

required by law in lieu of such insurance, of the inadequately insured motorist and of any person jointly liable with that motorist.

[…]

AMOUNT PAYABLE PER ELIGIBLE CLAIMANT […]

7. The amount payable under this change form to an eligible claimant is excess to an amount received by the eligible claimant from any source, other than money payable on death under a policy of insurance, and is excess to amounts that were available to the eligible claimant from

> (a) the insurers of the inadequately insured motorist, and from bonds, cash deposits or other financial guarantees given on behalf of the inadequately insured motorist;
>
> (b) the insurers of a person jointly liable with the inadequately insured motorist for the damages sustained by an insured person;
>
> (c) the Société de l'assurance automobile du Québec;
>
> (d) an unsatisfied judgment fund or similar plan in a jurisdiction other than Ontario, or which would have been payable by such fund or plan had this change form not been in effect;
>
> (e) the uninsured automobile coverage of a motor vehicle liability policy;
>
> (f) an automobile accident benefits plan applicable in the jurisdiction in which the accident occurred;
>
> (g) a law or policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;

> (h) any applicable Workers' Compensation Act or similar law of the jurisdiction in which the accident occurred;
>
> (i) the family protection coverage of another motor vehicle liability policy.[Emphasis added.]

[17] I agree with the interpretation of the motion judge that s. 7 refers to matters covered in the automobile regulations or motor vehicle liability policies. The language of s. 7 makes it clear that amounts available to the claimant from "insurers of the inadequately insured motorist" mean amounts from the total motor vehicle liability insurance or funds in lieu of insurance, not any and all types of insurance such as a PLUP. The motion judge made no error in his interpretation of s. 7 (a).

[18] The motion judge's interpretation of s. 7(a) is supported by *Smith v. Taylor* 2024 ONCA 223, 495 D.L.R. (4th) 104. In *Smith*, at para. 60, this court held that the words "insurance in any policy in the name of the eligible claimant" in s. 18(a)(ii) of the OPCF 44R included only motor vehicle insurance policies, and not an excess liability endorsement under a homeowner's insurance policy. The homeowner's insurance therefore did not fall within the s. 18(a)(ii) priority scheme: "[t]he intent of para. 18 in the OPCF 44R is to govern priorities among OPCF 44R endorsements or similar automobile policies. Unlike the OPCF 44R, [the homeowner's insurance policy] is not part of the automobile liability policy regulatory scheme." [Emphasis added.] *Smith*, at para. 64. Like s. 18, s. 7(a)

governs priorities between the OPCF 44R and other insurance policies. The motion judge correctly applied the reasoning in *Smith* when he interpreted s. 7(a).

[19] The motion judge's interpretation is consistent with s. 4 of the OPCF 44R, which makes reference to the maximum liability of an insurer pursuant to a family protection endorsement having regard to "the total of all limits of motor vehicle liability insurance" available to respond to the claims of an inadequately insured motorist. It makes no sense that the OPCF 44R's maximum coverage under s. 4 would include only motor vehicle insurance policies, while the priority of the OPCF 44R under s. 7 would rank behind any insurance policy available to respond to a loss.

[20] Furthermore, the motion judge did not err in finding that a PLUP responds only after the limits of the motor vehicle liability policy have been exhausted or if the underlying insurance policy does not provide coverage for the loss. This approach has been confirmed by this court in *Benson v. Walt* 2018 ONCA 172, 141 O.R. (3d) 220, at para. 13, where the court held that a PLUP did not fall within the priority scheme of motor vehicle insurance policies under the *Insurance Act*:

> [The PLUP] does not fall within … Ontario's "highly regulated" scheme of motor vehicle insurance. It only responds after the limits of the required underlying policy are exhausted, or if the underlying insurance does not provide coverage for the loss. Subsection 277(1) deals with the priorities as between primary motor vehicle insurance policies and its reach does not extend to any and every other type of policy that might have to respond

> once the policy limits of applicable motor vehicle policies are exhausted. [Emphasis added.]

(2) The motion judge did not err in finding that RSA could not deduct the PLUP policy limit from the amounts paid under the OPCF 44R:

[21] The motion judge was correct in his determination that the OPCF 44R insurer RSA could not reduce its limits by or deduct from its payment any amounts under D'Souza's PLUP. This argument also ultimately hinges on whether the PLUP falls within s. 7(a) of the OPCF 44R. For the reasons noted above, s. 7(a) refers to motor vehicle liability insurance policies. The PLUP is not such a policy and therefore cannot be deducted by the OPCF 44R. To accede to the appellant's argument would render the sections of the Act regulating automobile insurance meaningless.

(3) The motion judge did not err in finding that RSA could not issue a third-party claim or subrogate against Certas for payments under Vergara's OPCF 44R held by RSA

[22] There is no merit to RSA's submission that it can subrogate against Certas or issue a third-party claim for payments made under its policy with. The motion judge made no error in dismissing these submissions. What RSA seeks to do by way of this submission is to pay its limits to Vergara, the injured party, pursuant to the RSA OPCF 44R, and then claim against D'Souza's PLUP for the $700,000 it paid. I agree with the motion judge that this approach would lead to an absurd finding, with the reversal of the OPCF 44R's priority to respond to the claims of the injured party as set out in the statute. To accede to RSA's argument would enable RSA as the OPCF 44R carrier to "get through the back door of subrogation what it

cannot get through the front door of priority." para. 46. The OPCF 44R can subrogate against the at-fault party D'Souza, who was inadequately insured, for its payout to Vergara, to the extent that their liability to Vergara exceeds the defendant's $300,000 limit and the PLUP's liability limit.

[23] RSA has no cause of action in tort or in contract against Certas as the motion judge correctly observed. It cannot bring itself within r. 29.01(c) of the *Rules of Civil Procedure* and as a result, as the motion judge found, it has no right to issue a third-party claim against Certas.

IV. DISPOSITION

[24] The appeal is dismissed. Costs are awarded to Lamoureux and D'Souza in the agreed-upon sum of $7,500.

Released: September 10, 2025 "P.D.L."

"D.A. Wilson J.A."
"I agree. P. Lauwers J.A."
"I agree. I.V.B. Nordheimer J.A."