

**Foster v. Citadel General Assurance Company**  
**[Indexed as: Foster v. Citadel General Assurance Co.]**

**36 O.R. (3d) 750**

[1997] O.J. No. 4667

Court File No. 96-CU-101210CM

Ontario Court (General Division)

**Kiteley J.**

November 19, 1997

*Civil procedure -- Pleadings -- Amendment -- Plaintiff bringing action against defendant insurer as beneficiary of personal accident insurance policy issued by defendant to her husband -- Master not erring in allowing amendment to statement of claim to add claim for declaration that plaintiff entitled to payment of accidental death benefits under policy -- Possibility that plaintiff might move to strike jury notice an irrelevant consideration under Rule 26 of Rules of Civil Procedure -- Master exceeding jurisdiction in imposing condition that plaintiff not move to strike jury notice -- Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 26.*

The plaintiff was the beneficiary of a personal accident insurance policy issued by the defendant to her husband. When coverage under the policy was denied following the husband's death, the plaintiff brought an action against the defendant for damages for breach of contract or negligence. Both parties delivered jury notices. The plaintiff moved under Rule 26 of the Rules of Civil Procedure for leave to amend the statement of claim by adding a claim for a declaration that she was entitled to payment of accidental death benefits under the policy. The master granted the motion, but imposed a condition that the plaintiff not bring a motion to strike the jury notices. Both parties appealed. The plaintiff argued that the condition should not have been imposed; the defendant pointed out that s. 108(2), para. 10 of the Courts of Justice Act excludes actions for declaratory relief from those to be heard by a jury, and argued that, following the amendment, a motion to strike the jury notices was inevitable and that the striking of its jury notice would amount to non-compensable prejudice.

Held, the plaintiff's appeal should be allowed; the defendant's appeal should be dismissed.

The master correctly held that the request for leave to amend was to be decided on its own merits without regard to an uncertain future motion. The prospect of such a motion by the plaintiff was irrelevant.

While the defendant argued that the amendment was unnecessary, the necessity of an amendment does not figure in the analysis under rule 26.01 once the legal soundness of the amendment is established. A plaintiff ought to be able to amend to add what might appear to be a claim for superfluous relief, so long as it is tenable.

The master exceeded his jurisdiction in imposing the condition on the amendment. If allowing an amendment was not prejudicial to the defendant, as the master found, then imposing a condition on the plaintiff designed to avoid the alleged prejudice could not be characterized as "just". Moreover, Rule 26 permits conditions that are "just" to be imposed as they relate only to costs and to an adjournment. There is no discretion in the Rules to impose a condition restricting the rights of the litigants. The master did not have enhanced jurisdiction to impose such a condition simply by his appointment as a case management master. The condition should be set aside.

#### Cases referred to

Constitution Insurance Co. of Canada v. Coombe (1992), 11 O.R. (3d) 783, 14 C.P.C. (3d) 322, [1993] I.L.R. 1-2897, 98 D.L.R. (4th) 573 (Gen. Div.); Gloucester Organization Inc. v. Canadian Newsletter Managers Inc. (1995), 21 O.R. (3d) 753, 37 C.P.C. (3d) 111 (Gen. Div.); Keneber Inc. v. Midland (Town) (1994), 16 O.R. (3d) 753 (Gen. Div.); Miller v. King (Township) Public School Board, [1942] O.W.N. 541 (H.C.J.) [affd loc. cit. at p. 546 (H.C.J.)]

#### Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 86.1(6) [enacted 1996, c. 25, s. 1], 108(2), para. 10  
Insurance Act, R.S.O. 1990, c. I.8, s. 195

#### Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 25.11, 26.01, 47.02, 48.04, 77.02, 77.04(1), 77.11(1)

APPEAL by the defendant from an order granting a motion to amend a statement of claim;  
APPEAL by the plaintiff from the imposition of a condition on amendment.

Hilik Y. Elmaliah, for plaintiff.  
J. Sebastian Winny, for defendant.

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**KITELEY J.:** -- The plaintiff and defendant have both appealed from the order of Master Polika which order granted the plaintiff's motion to amend the statement of claim, but imposed a condition. The plaintiff's notice of appeal challenges the condition. The defendant's notice of appeal challenges the granting of leave to amend.

### Background

The plaintiff's husband died in April 1995 following a motor vehicle accident. The plaintiff issued a statement of claim in which she alleged (and it is admitted) that she was the beneficiary of a personal accident insurance policy issued by the defendant, insuring the life of her husband. The claim issued in April 1996 was for judgment for \$250,000, damages for breach of contract or negligence and breach of the defendant's covenant of good faith, as well as exemplary and punitive damages. The defence is that the death was "caused or contributed to by intentionally self-inflicted injury" and that coverage is therefore not available.

Both plaintiff and defendant delivered jury notices. In September 1996, the plaintiff set down the action for trial. The trial is scheduled to begin in April 1998. In August 1997, the plaintiff served a motion for leave to amend the statement of claim by adding the following to the prayer for relief:

A Declaration that she is entitled to payment of accidental death benefits under a group policy of insurance issued by the defendant, the Citadel General Assurance Company.

The affidavit of an associate in the firm representing the plaintiff includes the belief that the amendment "is necessary to enable the court to adjudicate effectively and completely with respect to the [sic] all issues herein". Counsel agree that the amendment will not result in further examinations for discovery.

### The Reasons for Decision of Master Polika

Master Polika noted that the original claim was based on contract. Since the plaintiff was not a party to the contract of insurance, the solicitor for the plaintiff was of the view that the proposed amendment was necessary to address the issue of entitlement. Master Polika identified the mandatory provisions of Rule 26 of the Rules of Civil Procedure. He considered the prejudice alleged by the defendant, namely, that the defendant's right to trial by jury would be lost if the amendment were granted. He held that the request for leave to amend had to be decided on its own merits and without regard to an uncertain future motion possibly launched by the plaintiff to strike the jury notice.

Master Polika considered the second submission by the defendant, namely, that the amendment

amounted to an abuse of process. The Master held that the possibility of the motion being brought by the plaintiff to strike the jury notice would not prejudice or delay the fair trial of the action. And he added that the amendment, which might subsequently attract a motion to strike the jury, could not be said to be scandalous, frivolous or vexatious nor an abuse of the process.

The Master concluded that the amendment would insure that the condition precedent to the plaintiff's monetary claims is pleaded, namely, a declaration that notwithstanding that she is not a party to the contract she is entitled to the monetary claims she has advanced. And he concluded that s. 195 of the Insurance Act, R.S.O. 1990, c. I.8, does not take away from this position as it does not address entitlement, it merely gives a beneficiary a right to sue.

Master Polika granted the amendment. However, pursuant to the discretion in rule 26.01 of the Rules of Civil Procedure to grant leave to amend a pleading on "such terms as are just", he imposed a condition on the plaintiff that she must proceed "to the conclusion of trial without bringing a motion to strike the jury notices".

#### Appeal by the Plaintiff

The plaintiff appeals from the imposition of the condition on two grounds. Firstly that the Master exceeded his jurisdiction in attaching such a condition in that it pre-empts the plaintiff from potentially moving under rule 47.02 of the Rules of Civil Procedure (relying upon the mandatory statutory provisions of s. 108(2) of the Courts of Justice Act, R.S.O. 1990, c. C.43, and requirements of the common law), to strike the jury notices. And secondly, that the order is contrary to the mandatory statutory provisions of s. 108(2) of the Courts of Justice Act.

#### Appeal by the Defendant

The defendant appeals from the granting of leave to amend on four grounds. Firstly, that the amendment prejudices the defendant's right to a trial by jury, which prejudice cannot be compensated by costs or an adjournment. Secondly, the Master erred in law in failing to dismiss the plaintiff's motion on the basis that the amendment is irrelevant, unnecessary and vexatious. Thirdly, the Master erred in law in failing to dismiss the plaintiff's motion on the basis that the proposed amendment constitutes an abuse of process. And finally, the Master erred in law in failing to dismiss the plaintiff's motion on the basis that the proposed amendment may prejudice the fair trial of the action.

#### The Standard of Review of the Decision of the Master

In allowing the amendment, the decision of the Master was based on the exercise of discretion and, accordingly, counsel agree that I ought not to interfere with it unless it was clearly wrong or based on wrong principles. However, counsel agree that the standard of review of the order imposing the condition should be correctness and whether the Master exceeded his jurisdiction.

Analysis:

Was the Order Granting Leave to Amend Clearly Wrong or Based on Wrong Principles?

In *Keneber Inc. v. Midland (Town)* (1994), 16 O.R. (3d) 753 (Gen. Div.), Howden J. reviewed various authorities and concluded that, in a motion pursuant to rule 26.01, the court must address non-compensable prejudice and the legal soundness of the proposed pleading, both of which I now consider.

#### A. Prejudice

The defendant has reiterated the fundamental right to a trial by jury but points out that s. 108(2), para. 10 of the Courts of Justice Act excludes actions for declaratory relief from those to be heard by a jury. The defendant alleges that, following this amendment, a motion to strike is inevitable and the success of that motion is also inevitable. The defendant points to the ultimate striking of the jury notice as non-compensable prejudice.

I agree with Master Polika and the passage which he quoted from *Miller v. King (Township) Public School Board*, [1942] O.W.N. 541 (H.C.J.), where at p. 542 the Master held that the request for leave to amend is to be decided on its own merits without regard to an uncertain future motion. The prospect of such a motion by the plaintiff is irrelevant. The plaintiff may never bring such a motion. And if brought, the motion may not be successful, for example if the court finds that in pith and substance, the claim is for damages and the declaratory relief requested does not constitute grounds to strike the jury notice as was the case in *Constitution Insurance Co. of Canada v. Coombe* (1992), 11 O.R. (3d) 783, 14 C.P.C. (3d) 322 (Gen. Div.). The argument in a case such as this one, where the insurance contract in issue is for life insurance, not disability insurance, is even stronger. In this aspect of his decision, I find that the Master did not err.

#### B. Is the amendment tenable in law?

The plaintiff's claim is framed in contract. The request to amend is based on her solicitor's opinion that it is necessary to add a request for declaratory relief because there is no privity of contract and the plaintiff needs to establish entitlement in order to be successful. The plaintiff argues that s. 195 of the Insurance Act does not confer entitlement, only status to sue. Just because the solicitor expresses those opinions, does not mean that the court is precluded from considering the issue of legal soundness.

The many cases cited deal with whether the amendment discloses a cause of action. That is not the issue here. A beneficiary who seeks a declaration of entitlement under a contract of insurance to which she was not a party is pursuing a tenable cause of action. The defendant's argument really boils down to whether the pleading is necessary. The defendant asserts that it is unnecessary for four reasons. Firstly, the defendant argues that the plaintiff's counsel agreed in cross-examination on his affidavit filed in this motion that the plaintiff became "entitled" on the death of her husband and

that the issue of entitlement as a rationalization for declaratory relief is irrelevant and, therefore, the declaratory relief adds nothing to the action. Secondly, s. 195 is a complete answer and the Master erred in adopting what counsel referred to as the illusory distinction between entitlement and status to sue. Thirdly, Mr. Winny conceded that, subject to any appeal rights, a judgment against his client would be paid even in the absence of a declaration. Finally, the only defence relevant to this motion is that the death of the deceased was "caused or contributed to by intentionally self-inflicted injury" in which case, there is no coverage. In other words, the defendant did not raise the issue of privity of contract or of entitlement in the pleading.

Once the legal soundness is established, whether the pleading amendment is necessary, does not figure in the analysis under rule 26.01. A plaintiff ought to be able to amend to add what might appear to be a claim for superfluous relief, so long as it is tenable. A plaintiff should have the comfort of knowing all appropriate prayers for relief are pleaded. The Master found that it was a tenable plea. I find that he did not err in that regard.

The defendant also submitted that the amendment should not be permitted because, pursuant to rule 25.11, the amendment was irrelevant, unnecessary and vexatious, or it constituted an abuse of process of the court or it would prejudice a fair trial. The defendant attacked the amendment on the basis that the "true purpose" was to enable the plaintiff to subsequently bring a motion to strike the jury. There is no evidence on which such a purpose could be found. In the absence of such evidence, and assuming for the moment such evidence would support an allegation of abuse of process or prejudicing a fair trial, having found that the amendment is tenable, I agree with the Master in his rejection of those submissions. Furthermore, "irrelevant" and "unnecessary" are not grounds for striking a pleading pursuant to rule 25.11, even if I were inclined to find the amendment could be so described. Accordingly, the appeal from the order allowing the amendment is dismissed.

Analysis:

Was the Master within his Jurisdiction in Imposing the Condition?

Before considering this issue, a preliminary matter must be addressed. On September 23, the plaintiff's counsel amended the statement of claim in accordance with the order of Master Polika. The plaintiff's notice of appeal was delivered on September 24. The defendant's notice of appeal was delivered on September 25. I raised with Mr. Elmaliah how the plaintiff could appeal from the condition imposed by the Master, when the plaintiff had already taken advantage of part of the same order, namely, the order granting leave to amend, and particularly when the defendant, in its notice of appeal, sought to set aside the order permitting the amendment.

It would have been preferable for the plaintiff not to have made the amendment pending its own appeal. However, the standard of review of this aspect of the order is correctness. The court ought not to be inhibited by the conduct of the litigant when the prospect of jurisdictional error is the subject-matter of the appeal.

Turning to the substantive point, I find that the Master did err in imposing the condition for the following three reasons. Firstly, the Master found that the possibility of a successful challenge by the plaintiff to the jury notice was not "prejudice" to the defendant which would deprive the plaintiff of her amendment. Yet, by imposing a condition designed to protect the defendant from such a successful challenge, the Master found that it was "just" to afford the defendant such protection. If allowing an amendment was not prejudicial to the defendant, then imposing a condition on the plaintiff designed to avoid the alleged prejudice cannot be characterized as "just".

Secondly, Rule 26 includes parameters within which an order which is "just" can be made, namely, costs and adjournments. In the absence of prejudice, the Rule affords considerable latitude to the judge or to the master to impose conditions such as adjournments for amendment of pleading, for further documentary disclosure, for additional oral discovery, for a medical examination, or any other reasons which will enable the opposing party to properly address the new state of affairs. And there is equally wide latitude to impose costs arising out of the amendment. But there is no discretion in the Rule or in cases following it, to impose a condition restricting the rights of the litigants, in this case, restricting the right to bring a motion to strike the jury notice.

Thirdly, the Master does not have enhanced jurisdiction to impose such a condition simply by his appointment as a case management master. Section 86.1(6) of the Courts of Justice Act is as follows:

86.1(6) A case management master has,

- (a) the jurisdiction of a master conferred by the rules of court; and
- (b) the case management jurisdiction conferred by the rules of court.

Rule 77.04(1) also addresses the powers of the case management master as follows:

- (a) the power to hear motions that are within the jurisdiction of a master under subrule 37.02(2); and
- (b) case management powers and duties provided by this Rule.

Rule 77.11(1) defines the powers generally of a case management judge or case management master to include extending or abridging time, transfer between tracks, adjourn case conferences, and to

- (e) make orders, impose terms and give directions as necessary to carry out the purpose of this Rule.

Rule 77.02 provides that the purpose of the Rule is:

. . . to establish a case management system throughout Ontario that reduces unnecessary cost and delay in civil litigation, facilitates early and fair settlements and brings proceedings expeditiously to a just determination while allowing sufficient time for the conduct of the proceeding.

None of the foregoing justify the Master in exceeding the jurisdiction, which according to Rule 26, permits conditions that are "just" to be imposed as they relate only to costs and to an adjournment. While the imposition of such a condition might appear to be efficient and expedient, it would not be a "just determination" of a motion to amend a pleading to impose a condition which prevents a litigant from pursuing its legal right to challenge a jury notice. Accordingly, I allow the plaintiff's appeal and set aside the condition.

Analysis: Did the Master Err with Respect to Rule 48.04?

As a further ground of appeal unrelated to the substantive issues, the defendant asserts that since the plaintiff had set the action down for trial, she needed leave pursuant to rule 48.04, to initiate a motion to amend, but the Master did not grant leave. His reasons are silent on this issue. The plaintiff did not include a request for leave in the notice of motion before the Master although counsel advised me that the Master heard submissions on that point. The affidavit filed in support of the amendment does not include any evidence relevant to the granting of leave under rule 48.04. Mr. Winny argues that the test for leave under rule 48.04 is that substantial or unexpected circumstances have occurred and that, in the absence of such evidence, the plaintiff ought not to be given leave to bring the motion. I agree with Borins J. in *Gloucester Organization Inc. v. Canadian Newsletter Managers Inc.* (1995), 21 O.R. (3d) 753 at p. 760, 37 C.P.C. (3d) 111 at p. 118 (Gen. Div.), where he concluded that the grounds for leave under rule 48.04 were different if the motion sought leave to amend a pleading or if the motion sought leave to proceed with a motion for other relief. In the former case, he held that the grounds for leave under rule 48.04 should include an analysis as to whether the opposing party would suffer prejudice which could not be compensated in costs or in an adjournment, namely, a test consistent with the test for leave to amend.

The Master ought to have expressly considered the issue of leave to bring the motion under rule 48.04. However, given my finding that he did not err in granting leave to amend and given that the analysis would have been the same under rule 48.04, I conclude that his failure to make an express finding is not a reversible error.

Costs

If counsel are unable to agree on costs, they will make written submissions, as agreed at the conclusion of the motion. I will expect counsel to agree on a timetable for exchange of brief written materials, all of which should be in my hands by November 28.

Defendant's appeal dismissed; plaintiff's appeal allowed.



---- End of Request ----

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