

NOVA SCOTIA COURT OF APPEAL
Citation: *Wagner v. Day*, 2003 NSCA 13

Date: 20030123
Docket: CA 177136
Registry: Halifax

Between:

Raymond F. Wagner

Appellant
Respondent on Cross-Appeal

v.

Terri Leah Anne Day

Respondent
Respondent by Cross-Appeal

- and -

The Guarantee Company of North America, a body corporate

Respondent
Appellant by Cross-Appeal

JUDGE: Saunders, J.A.

APPEAL HEARD: November 18, 2002

JUDGMENT DELIVERED: January 23, 2003

SUBJECT: Motor vehicle accident in Nova Scotia. Automobile insurance policy issued in Ontario. Unidentified motorists. Judgment Recovery. *Insurance Act*, R.S.N.S. 1989, c. 231. Reciprocity Rules modifying the common law. *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, as amended. *Motor Vehicle Act*, R.S.N.S. 1989, c. 293. Disallowing a limitation defence.

SUMMARY: Ontario resident badly hurt in a car crash in Nova Scotia in 1994.

She was unable to identify the other motorists. Judgment Recovery defended the action against the Registrar of Motor Vehicles. Her liability policy was issued in Ontario. There, the discretionary authority that exists in Nova Scotia to set aside a limitation defence for equitable reasons, is not available. Her Nova Scotia lawyer was said to have missed a prescription period in commencing her action. He was added to these proceedings as an Intervenor. The injured motorist sued her Ontario insurer for unpaid benefits and damages. The insurer defended on the basis that Ontario law was the proper law of the contract, that the courts in Nova Scotia did not have jurisdiction to deal with the case and that therefore the motorist ought not to be able to avail herself of the judicial discretion that exists in this province to set aside a limitation defence.

The Intervenor appealed the chambers judge's decision which refused to disallow the limitation defence relied upon by the Ontario insurer in its defence of the action taken against it by its insured. The respondent insurer cross-appealed the chambers judge's decision which failed to find that the proper law in this proceeding was the law of Ontario.

HELD:

Allowed the Intervenor's appeal and found that the chambers judge erred in law by failing to apply the proper principles when considering and weighing the relative degrees of prejudice to both parties. It was open to this court to exercise the discretion conferred by s. 3 of the *Limitation of Actions Act* and after considering all of the factors therein set out in accordance with the evidence, the insurer's limitation defence was disallowed.

Dismissed the respondent's cross-appeal after finding that the chambers judge did not err in deciding that he had a discretion to disallow the limitation defence under s. 3 of the Nova Scotia *Limitation of Actions Act*.

<p>This information sheet does not form part of the court's decision. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 23 pages.</p>
