SUPREME COURT OF NOVA SCOTIA

Citation: *Vantassel v. Dominion of Canada General Insurance Company*, 2015 NSSC 159

Date: 2015-06-09
Docket: SD No. 327781
Registry: Digby

Between:

Judy E. Vantassel

Plaintiff

v.

The Dominion of Canada General Insurance Company

Defendant

Judge: The Honourable Justice Pierre L. Muise

Heard: April 8, 2015, in Digby, Nova Scotia

Counsel: Derrick J. Kimball and Sharon L. Cochrane, for the Plaintiff
Karen Bennett-Clayton, for the Defendant

INTRODUCTION

[1] The Plaintiff, Judy Vantassel, was involved in a motor vehicle accident on February 16, 2006. Her Section B insurer was the Defendant, the Dominion of Canada General Insurance Company. Dominion paid Ms. Vantassel weekly indemnity benefits for the initial 104 week, “own occupation” period. However, based on a functional capacity evaluation, Dominion concluded that Ms. Vantassel was capable and suited, by her education, training or experience, to engage in sedentary employment. As such, in Dominion’s view, she would not qualify for the “any occupation” weekly indemnity benefits.

[2] Therefore, by letter dated April 11, 2008, Dominion informed Ms. Vantassel that the weekly indemnity payments would cease on May 11, 2008.

[3] Ms. Vantassel inquired of Dominion as to the reasons for the termination of benefits. In support of her claim that the benefits should continue, she forwarded to Dominion a copy of her approval for CPP benefits.

[4] By letter dated May 6, 2008, Dominion advised her that, if she wished to use her CPP approval to dispute the termination of her weekly indemnity benefits she would have to provide them with a full copy of her CPP file. Between then and

March 6, 2009 there were substantial communications between Ms. Vantassel and Dominion's adjuster, Sara Tulk. There were also communication between Ms. Vantassel's family doctor, Doctor John Black, and Ms. Tulk. Some of those communications included documentation supporting Ms. Vantassel's claim. However, there is no evidence that any of them attached the entire CPP file.

[5] On January 29, 2009, Ms. Vantassel spoke with Ms. Tulk. Upon Ms. Tulk advising her that she still required the CPP file, Ms. Vantassel indicated she would call CPP and see if she could provide her approval for Ms. Tulk to deal directly with CPP and would let her know. During a March 6, 2009 conversation with Ms. Tulk, Ms. Tulk advised Ms. Vantassel that she had not yet received her CPP file. Ms. Vantassel advised that she would follow up with CPP as she had requested it from them. Ms. Vantassel received her CPP file with a letter dated March 10, 2009. However, she does not recall whether she forwarded it to Dominion.

[6] On May 12, 2009, Ms. Vantassel attended at the law firm of Kimball Brogan for an initial appointment and subsequently retained Derrick Kimball on May 31, 2009.

[7] A Notice of Action, with Statement of Claim, was filed on behalf of Ms. Vantassel on April 22, 2010.

[8] Dominion filed its Notice of Defence on July 30, 2010. That Notice of Defence pleaded, among other things, the limitation period in the Standard Automobile Policy for Nova Scotia, Section B, Subsection 3 – Special Provisions, Definitions and Exclusions (7)(c), which provides that the action is to be commenced within one year of when the cause of action arose.

[9] Ms. Vantassel brought the within Motion for an order disallowing the limitation period defence pursuant to Section 3(2) of the ***Limitation of Actions Act***, R.S.N.S. 1989, c. 258.

[10] In the pre-motion brief filed on behalf of Ms. Vantassel, it was argued that Dominion extended the limitation period by waiver or estoppel. However, at the hearing, the lawyer for Ms. Vantassel agreed that the evidence did not support promissory estoppel and that there was clearly no waiver.

ISSUES

[11] The issues which remain to be determined on this Motion are as follows:

1. Does the determination of whether relief should be granted pursuant to Section 3(2) of the ***Limitation of Actions Act*** require findings of fact that are best left to the Trial Judge?

2. If not, should the Court exercise its discretion to disallow a limitation period defence pursuant to Section 3(2) of the ***Limitation of Actions Act***?

LAW AND ANALYSIS

Issue 1 Does the determination of whether relief should be granted pursuant to Section 3(2) of the *Limitation of Actions Act* require findings of fact that are best left to the Trial Judge?

[12] As indicated, the Standard Automobile Policy for Nova Scotia, provides a one year limitation period for actions claiming entitlement to Section B benefits.

[13] Section 145 of the ***Insurance Act***, R.S.N.S. 1989, c. 231, also provides for a minimum limitation period of one year after the accident for actions against a Section B insurer. It states:

> "Every action or proceeding against an insurer under a contract with respect to insurance provided under Section 139 or 140 shall be commenced within the limitation period specified in the contract but, in no event, shall this be less than one year after the happening of the accident."

[14] Section 140 of the ***Insurance Act*** provides that every motor vehicle liability policy shall provide, among other things, "Section B – Accident Benefits".

[15] Section 3(2) of the ***Limitation of Actions Act*** gives a Court discretion to disallow a defence based on a time limitation. Subsection (4) of Section 3 lists relevant factors to consider in exercising that discretion.

[16] Subsection 6 of Section 3 states:

> "A court shall not exercise the jurisdiction conferred by this Section where the action is commenced or notice given more than four years after the time limitation therefor expired."

[17] In ***Welsh v. Wawanesa Mutual Insurance Company of Canada***, 2002 NSSC 90, the Court dealt with an application pursuant to Section 3(2) of the ***Limitation of Actions Act*** to set aside a limitation defence to a claim for Section B benefits. The Court determined that it was unable to make the factual determinations required to decide whether the limitations defence applied.

[18] The Court in ***Thornton v. Economical Insurance Group***, 2010 NSSC 355, dealt with an application pursuant to ***Civil Procedure Rule*** 12 seeking a declaration that the Plaintiff's action was barred by the limitation period. The Court, following the approach in ***Welsh***, declined to exercise its discretion pursuant

to ***Civil Procedure Rule*** 12. It found that an appropriate determination of the issues required findings of fact that should be left to be decided by the Trial Judge.

[19] Dominion argues, based upon those cases, that, in the case at hand, it is not appropriate for this Court, on a preliminary motion, to determine whether its limitation period defence ought to be disallowed. It argues that, before considering whether to grant Ms. Vantassel the relief requested under Section 3(2) of the ***Limitation of Actions Act***, the Court must determine when the limitation period arose which, itself, requires a determination of whether there is one limitation period or a rolling limitation period for Section B weekly indemnity benefit claims. Dominion further argues that the evidence presented on this motion is too limited to make the required factual determinations. It points out that we have no direct evidence from Ms. Vantassel and Ms. Tulk. There is only evidence of their communications, and no evidence of their understanding of those communications.

[20] In my respectful view, there is a significant distinguishing feature which existed in those cases which does not obtain in the case at hand. In both of those cases the actions were commenced more than four years after the termination of Section B benefits. In ***Welsh***, the action was commenced about five and a half

years after the last Section B benefits were paid. In ***Thornton***, the action was started approximately ten years after the Section B benefits ceased.

[21] Therefore, in both of those cases, the actions were started more than four years after the expiration of the limitation period, assuming the limitation period commenced when the benefits ceased. Consequently, Section 3(6) of the ***Limitation of Actions Act*** removed the Court's discretion to disallow the limitation period defence, unless it was determined that the principle of a rolling cause of action applied to Section B weekly indemnity benefit claims. It was argued, in both of those cases, that a termination of Section B benefits did not constitute a single cause of action, but rather a rolling cause of action each time there was a denial of benefits. The Plaintiffs in those cases referred to decisions from other jurisdictions where it was found that a continuing or rolling cause of action arose each time a periodic payment would have been due, such that the one year limitation period runs from each of such payment due dates.

[22] In ***Welsh***, at paragraphs 25 and 26, the Court noted that "where there is a question as to when the limitation period and cause of action" arose, a detailed analysis of the evidence relating to the intention and understanding of the parties is required.

[23] In the case at hand, there is no disagreement that the cause of action arose, and the limitation period started running, on May 11, 2008, the date of termination of Ms. Vantassel's Section B weekly indemnity benefits. For the action to have been started in time, it would have to have been commenced by May 10, 2009. It was only filed April 22, 2010. That is less than one year after the expiration of the limitation period. Therefore, this Court is not barred from exercising its jurisdiction to disallow a limitation period defence under Section 3(2) of the ***Limitation of Actions Act***. Consequently, there is no need to determine when the cause of action and limitation period arose, nor whether a continuing or rolling cause of action arises each time a periodic Section B weekly indemnity payment becomes due.

[24] All this Court has been asked to determine, and all that it needs to determine, is whether it is appropriate for it to exercise its discretion under Section 3(2) of the ***Limitation of Actions Act*** to disallow Dominion's limitation defence.

[25] Dominion argues that this Court must also conduct a detailed analysis of evidence as to the intention and understanding of the parties to weigh the respective prejudice to them arising from the missed limitation period. It further argues that there is insufficient evidence before the Court on this motion to do so.

It points out that the evidence presented is essentially comprised of communications and incomplete notes of communications amongst Ms. Vantassel, her family doctor and the adjuster, highlighting that there is no direct evidence from Ms. Vantassel nor the adjuster, Ms. Tulk.

[26] However, there is no dispute in relation to the content of the adjuster's file, nor whether the communications and notes of communications in that file accurately reflect the communications which actually took place. Additional detail, explanation or clarification might provide further assistance. However, the communications clearly reveal that Dominion was standing by its decision to terminate Section B weekly indemnity benefit payments subject to receipt and review of Ms. Vantassel's complete CPP file. That was communicated throughout the period from May 2008 to March 6, 2009. Neither party disputed that Dominion remained open to reassessing its decision and that it did not receive Ms. Vantassel's complete CPP file until after the within action was commenced.

[27] Further, if the Court were to defer determination of whether or not a limitation period defence should be disallowed to the trial on the basis that a defendant failed to provide sufficient evidence relating to its prejudice, that would allow defendants to force deferral of that determination simply by withholding

evidence. In my view, that would run contrary to the object of the ***Civil Procedure Rules***, expressed in Rule 1.01 as being “for the just, speedy, and inexpensive determination of every proceeding”. It would be unnecessarily cumbersome and expensive for plaintiffs to be forced to go through the expense of a complete trial only to find out whether or not limitation period defences advanced by defendants would be successful.

[28] Considering these points, in my view, it is appropriate that I determine whether or not the relief requested by Ms. Vantassel pursuant to Section 3(2) of the ***Limitation of Actions Act*** should be granted. In my view, that determination does not require findings of fact that are best left to the Trial Judge.

Issue 2 Should the Court exercise its discretion to disallow a limitation period defence pursuant to Section 3(2) of the *Limitation of Actions Act*?

[29] Section 3 of the ***Limitation of Actions Act*** states:

“Disallowance or invocation of time limitation

3 (1) In this Section,

(a) "action" means an action of a type mentioned in subsection (1) of Section 2;

(b) "notice" means a notice which is required before the commencement of an action;

(c) "time limitation" means a limitation for either commencing an action or giving a notice pursuant to

(i) the provisions of Section 2,

(ii) the provisions of any enactment other than this Act,

(iii) the provisions of an agreement or contract.

(2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which

(a) the time limitation prejudices the plaintiff or any person whom he represents; and

(b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

(3) Where a time limitation has expired, a party who wishes to invoke the time limitation, on giving at least thirty days notice to any person who may have a cause of action, may apply to the court for an order terminating the right of the person to whom such notice was given from commencing the action and the court may issue such order or may authorize the commencement of an action only if it is commenced on or before a day determined by the court.

(4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to

(a) the length of and the reasons for the delay on the part of the plaintiff;

(b) any information or notice given by the defendant to the plaintiff respecting the time limitation;

(c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;

(d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

(g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

(5) The provisions of this Section shall have effect in relation to causes of action arising

(a) before the twenty-sixth day of June, 1982, if the time limitation has not expired before that date;

(b) on or after the twenty-sixth day of June, 1982.

(6) A court shall not exercise the jurisdiction conferred by this Section where the action is commenced or notice given more than four years after the time limitation therefor expired.

(7) This Section does not apply to an action where

(a) the time limitation is ten years or more; or

(b) the time limitation is contained in the Mechanics' Lien Act. R.S., c. 258, s. 3."

[30] As stated by the Court in ***Oliver v. Elite Insurance Company***, 2014 NSSC 413, at paragraph 190:

"The law regarding a court's exercise of its discretion under this section was described by Cromwell, J.A., (as he then was) in *Butler v Southam Inc*. 2001 NSCA 121, (2001) 197 N.S.R. (2d) 97, at paras. 137-143:

(ii) The purposes of s. 3 of the *Limitation of Actions Act*:

137 Limitation and notice provisions are blunt instruments. They defeat a plaintiff's claim no matter how meritorious the case, no matter how diligent the plaintiff and no matter how little the defendant in fact has been prejudiced. Section 3 of the Limitation of Actions Act provides for a measure of judicial discretion to be used on equitable grounds to prevent unduly harsh results from the strict application of limitation and notice provisions. Underlying this grant of discretion is recognition by the Legislature that limitation and notice provisions may lead to harsh and unjust results by barring actions where, in the particular case, there is little reason to do so. In other words, the Legislature's decision to

permit the court to disallow limitation defences recognizes that such defences may result in prejudice to the plaintiff which is disproportionate to the importance, in a particular case, of the achievement of the purposes for which the limitation period exists.

138 **The crucial assessment under s. 3 is the one required by ss. 3(2):** the determination of what is equitable having regard to the degree which the decision will prejudice the plaintiff and the defendant. **It may be convenient to speak of this as a comparison of the relative degrees of prejudice** (see, for example, MacCulloch v. McInnes Cooper and Robertson, supra at para. 48 - 55). **However**, as Goodfellow, J. pointed out in Smith v. Clayton, (1994), 133 N.S.R. (2d) 157; [1994] N.S.J. No. 328 (Quicklaw) (S.C.) at para. 42 - 44, **the decision about what is equitable cannot be based solely on the relative degrees of prejudice. This is because, in one sense, the prejudice to either party is total whichever decision the Court makes**. If the limitation period is disallowed, the defendant is totally prejudiced in the sense that he or she is deprived of a complete defence to the action: see, Hallett, J. (now J.A.) in Anderson v. Co-operative Fire and Casualty Co. (1983), 58 N.S.R. (2d) 163 at para. 18; aff'd (1983), 62 N.S.R. (2d) 378 (S.C.A.D.). Conversely, if the limitation defence is not disallowed, the prejudice to the plaintiff is absolute in the sense that the cause of action is lost: see Anderson per Hallett, J. at para. 16; Smith at para. 42 - 44.

139 In considering what is equitable, a fundamental consideration is whether the harsh result to the plaintiff of the loss of a cause of action is disproportionate to the purposes served by giving effect to the limitation provision in issue in the particular case. For example, if the primary purpose served by the relevant limitation period is finality, furtherance of this objective at the cost of the loss of the plaintiff's cause of action may often be regarded as disproportionate, particularly where the delay in relation to the limitation period is short. This is implied by the fact that the Legislature has addressed the issue of finality by restricting the length of time by which a limitation period may be extended: see ss. 3(6) and 3(7) and by providing a mechanism for a potential defendant to apply to terminate a right of action: see ss. 3(3). The situation may well be different when other purposes of the limitation period are in issue in the particular case. For example, there may be concerns that the plaintiff's delay has prejudiced the defendants in their defence. The limitation period's objective of preserving the cogency of evidence must be carefully considered both generally, and in relation to the specific prejudice to the defendants in the particular case.

140 Where, as here, the limitation provision in issue has purposes in addition to those of finality and preservation of the cogency of evidence, the extent to which these other purposes are defeated by the disallowance of the limitation period should be considered as an aspect of assessing the relative degrees of prejudice to the plaintiff and the defendant.

141 The prejudice to the plaintiff flowing from the loss of the cause of action cannot generally be controlling on its own; if it were, disallowance of the limitation defence would be virtually automatic because such prejudice is absolute: see Smith at para. 44. The specific matters to be considered which are set out by the Legislature in ss. 3(4)(a) - (g) make it clear that **the diligence of the plaintiff, broadly defined, in pursuing his or her rights is an important factor in exercising the discretion to disallow a limitation defence**. For example, s. 3(4)(a) refers to the length and the reasons for the plaintiff's delay, s. 3(4)(e) to any disability of the plaintiff after the date of the accrual of the cause of action; s. 3(4)(f) to the extent to which the plaintiff acted promptly and reasonably once he or she knew the defendants' acts might be capable of giving rise to an action and s. 3(4)(g) to the steps taken by the plaintiff to obtain expert advice and the nature of that advice. All of these factors, in my view, relate to aspects of the plaintiff's diligence in pursuing the claim. Such diligence is, therefore, an important aspect of the assessment of the prejudice to the plaintiff resulting from the limitation defence.

142 This concern with the plaintiff's diligence reflects both an underlying purpose of limitation periods and a widely accepted principle of fairness. The idea that plaintiffs should act with diligence underlies statutory limitation periods generally: see, for example, J.S. Williams, Limitation of Actions in Canada (2d, 1980) at 5. Moreover, concern with the plaintiff's diligence is consistent with s. 3(2)'s focus on what is equitable. **It will generally be less equitable for a limitation defence to defeat the claim of a diligent plaintiff than of one who has sat on his or her rights**. This reflects the old equitable maxim that delay resulting from lack of diligence defeats equity: vigilantibus, non dormientibus, jura subveniunt: see Sir Robert Megarry and P.V. Baker, Snell's Principles of Equity (27th, 1973) at 33.

143 In assessing the prejudice to the defendant it is important to focus on prejudice attributable to delay after the expiry of the limitation period. This is made clear, for example, in s. 3(4)(c) which requires consideration of the impact of delay on the cogency of evidence compared to what it would have been had the action been started within the time limit. The cases have consistently recognized this: see, for example, Bollivar v. Hirtle's Estate(1990), 97 N.S.R. (2d) 247 (S.C.A.D.) at para. 11; Fern v. Christie's Estate (1986), 76 N.S.R. (2d) 271 (T.D.) at p. 275; Vickery v. Murphy and Yarmouth Regional Hospital (1986), 73 N.S.R. (2d) 429 (S.C.) at para. 23."

[my emphasis added]

[31] The Court in ***MacCulloch v. McInnes, Cooper & Robertson***, 1995 CanLii 4292 (C.A.) stated:

> " The main issue on this appeal is whether the chambers judge erred in denying the appellant an extension of time under s. 3 of the Act in which she could bring an action against the respondents.
>
> In this case, as in most, an extension of the time limit prejudices both parties. The legislators recognized that fact. That is why the words "...and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which..." there is prejudice to each party, are in s. 3(2). [Emphasis added) In so doing a court must "have regard all of the circumstances of the case and in particular" to the seven factors set out in s. 3(4). The weighing of the degrees of prejudice is an important and required prerequisite to any conclusion which may be reached by a court.
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> In **Anderson v. Co-op Fire & Casualty** (1983), 58 N.S.R. (2d) 163, Hallett, J., as he then was, was confronted with the same issue. After setting out the provisions of the **Statute of Limitations**, previously quoted, at p. 167 he commented:
>
>> ...The issue before the Court on this application is whether it is equitable to disallow the time limitation defence, having regard to the degree to which (1) the time limitation prejudices the plaintiff or any person whom he represents and (2) any decision to disallow the time limitation pursuant to this amendment would prejudice the defendant or any other person. In determining the issue, the Court must have regard to all the circumstances of the case and, in particular, the seven matters referred to in s. 2A(4) (a) to (g).
>>
>> In any case, there is great prejudice to a plaintiff if a time limitation defence succeeds as the plaintiff loses his cause of action. On the other hand, there is great prejudice to the defendant who loses a perfect defence if the order is granted. The Legislature in enacting this amendment must have recognized that there was prejudice to each party when the word 'degree' was used in s. 2A (2). The Court has been directed to consider not simply whether there is prejudice but to weigh the degree of prejudice to the parties. The intention of the Legislature as expressed is to give the Court the authority to disallow a defence based on time limitation considering the criteria set forth in ss. 2A (2) and (4). [Now s. 3(2) and (4)].
>>
>> The degree of prejudice to a plaintiff caused by a valid time limitation defence could not be greater as the cause of action is lost....

> What the Legislature must have meant when it authorized the Court to disallow the defence if it appeared equitable to do so, having regard to the degree to which any such decision would prejudice the defendant, was whether the defendant was prejudiced in the defence of the action on its merits because of the failure of the plaintiff to have proceeded in time. The Legislature could not have intended that the Court consider the fact that the defendant loses a perfectly good defence in assessing the degree of prejudice to the defendant if the order were granted, as, otherwise, it would be somewhat pointless for the Legislature to have enacted the amendment. There would be virtually no basis upon which to weigh the degree of prejudice to the parties as if the relief is refused, the plaintiff is totally prejudiced in the case and to allow the relief, the defendant is totally prejudiced. In summary on this point, in determining the degree of prejudice that would be suffered by the defendant if a decision were made to disallow the time limitation defence, the Court should not give much weight to the fact that the defendant loses its defence.
>
> I agree with those comments. They are of utmost significance to this appeal. It is a given: each party will suffer prejudice depending upon whether the decision is to allow or disallow the time limitation defence. Thus, the necessity to weigh the degree of prejudice suffered by each.

[32] In contrast, in ***Butler v. Southam Inc.*** 2001 NSCA 121, at paragraph 146, the Court stated that it is an error for a Judge, in exercising his or her discretion under Section 3(2) of the ***Limitation of Actions Act***, to fail to "give significant weight to the prejudice flowing to the Plaintiffs from the fact that the notice and limitation provisions would foreclose their action".

[33] In my view, it makes sense to give more weight to the foreclosure of a plaintiff's cause of action than to a defendant's loss of a limitation period defence because, if the limitation period defence is struck, the defendant is still left with the

ability to challenge the action on its merits. If not, the plaintiff loses the opportunity to have the matter heard on its merits.

[34] The Court in ***Butler***, at paragraph 165, also stated, in relation to the question of the cogency of evidence, that: "the primary consideration should be the significance of any loss of cogency for the proper disposition of a case on its merits having regard to the issues to be determined at trial."

[35] The Court in ***Butler***, at paragraph 157, was also of the view that seeking legal advice was "some evidence of diligence" on the part of the Plaintiffs.

[36] The Court in ***Oliver***, at paragraph 193, stated:

> "Some of the purposes of limitation periods are: to promote certainty in the law where the limitation period arises in a contractual context; to promote finality of litigation; to ensure the preservation of the cogency of evidence; to encourage diligence in having matters proceed expeditiously".

[37] Similarly, the Court in ***Butler***, at paragraphs 127 and 128 stated:

> "[127] The main purposes of limitation periods are to provide certainty and finality and to help assure the cogency of evidence on which matters will be judged: see generally Graeme Mew, The Law of Limitations (1991) at 7- 8. These purposes were well expressed by the Ontario Law Reform Commission in its **Report on Limitation of Actions** (1969) at page 9:
>
> > (ii Lawsuits should be brought within a reasonable time. This is the policy behind limitation statutes. ... Underlying the policy is a recognition that it is not fair that an individual should be subject indefinitely to the threat of being sued over a particular matter ...

> Furthermore, evidentiary problems are likely to arise as time passes. Witnesses become forgetful or die: documents may be lost or destroyed. Certainly, it is desirable that, at some point, there should be an end to the possibility of litigation in any dispute. A statute of limitation is sometimes referred to as an "Act of peace."

> [128] The degree to which these purposes are relevant may vary depending on the particular limitation period in issue and on the circumstances of a particular case. For example, in the case of a fairly long time limit such as the six year period for contract actions, the cogency of evidence objective is obviously very much a secondary consideration. While the existence of even this lengthy period will facilitate the preservation of relevant records, the time limit permits an action to be commenced long after the events giving rise to it occurred. The passage of time permitted by such a lengthy limitation period will likely adversely affect witnesses' availability and memory of the relevant events. However, where the time limit is shorter, assuring that cogent evidence is available is likely to be a more important legislative objective. In addition to this general legislative purpose, assuring the cogency of evidence may be a significant consideration on the facts of particular cases. For example, it may be clear in some cases that important evidence has been lost since the expiry of the limitation period thus making the cogency of evidence objective highly relevant in the particular situation".

[38] This Court must determine whether it appears equitable to it to disallow a limitation defence having regard to the degree of prejudice to the Plaintiff caused by the time limitation, and the degree of prejudice that will be caused to the Defendant if the limitation defence is disallowed, having regard to the relevant circumstances, and particularly those listed in Section 3(4)(a) of the ***Limitation of Actions Act***. I will first discuss the relevant circumstances, before proceeding to an assessment of the respective prejudices to the parties and of what result appears equitable.

Relevant Circumstances

[39] The delay in the case at hand is slightly less than one year. The limitation period expired May 10, 2009. Ms. Vantassel first met with counsel on May 12, 2009 and first retained counsel on May 31, 2009. Prior to that, she was pursuing her claim directly with Dominion. That explains the delay up until May 31, 2009. There was no explanation offered for the delay between May 31, 2009 and April 22, 2010.

[40] As noted in ***Butler***, Ms. Vantassel seeking that legal advice is "some evidence of diligence" on her part. Unfortunately, the counsel she engaged was not diligent in commencing an action for Section B benefits on her behalf, even though the limitation period had expired.

[41] There is no indication that Dominion provided Ms. Vantassel, or her lawyer, with any information or notice respecting the time limitation at any time.

[42] Ms. Vantassel argues that the delay has had little or no adverse impact on the cogency of the evidence likely to be adduced by Dominion. She points to Dominion's Affidavit Disclosing Documents, filed in October of 2010, which indicates that it is complete with the exception of an "original hard copy of the

[Defendant]'s file", indicating that there is no missing information. She adds that the Affidavit Disclosing Documents lists extensive notes, medical reports, and other documents dating back as far as February 19, 2006, as being still in Dominion's possession. Thus, there has been little or no loss of relevant evidence or information. In addition, both Ms. Vantassel and Dominion were aware, from the beginning, of the issues bearing on eligibility for weekly indemnity benefits. Further, both sides are in the same position in relation to providing evidence of the Plaintiff's condition and capacity from: medical information gathered and/or created between May of 2008 and now; and, medical opinions based on reviews of that information, combined with current assessments of Ms. Vantassel.

[43] Dominion argues that its position on weekly indemnity benefits was based upon a Functional Capacity Assessment prepared in February of 2008. It has no other assessment between then and when the action was filed in April of 2010; and, it has lost the ability to obtain another assessment during that period of time, such as an independent medical examination of Ms. Vantassel. Any medical report that would be prepared now would be looking back in time based on documentary evidence gathered at certain points in time. In addition, Dominion has lost the ability to have arranged for surveillance of Ms. Vantassel. Dominion submits that

these points prejudice Dominion's ability to present cogent evidence as to the merits of the case.

[44] It is important to remember that the prejudice to assess is that which is attributable to and arises as a result of any delay following the expiration of the limitation period. If the action had been filed on May 10, 2009, no limitation defence would have arisen. Therefore, this Court must focus on the prejudice that arises as a result of the delay in commencing the action between May 10, 2009 and April 22, 2010.

[45] Dominion was clearly informed by Ms. Vantassel by May of 2008 that she had been approved for CPP disability benefits and provided Dominion with a copy of her approval. On May 15, 2008, Dominion received, from Ms. Vantassel's family doctor, Doctor John Black, copies of orthopaedic consultations and a letter to CPP Disability.

[46] Therefore, Dominion was clearly aware, in May of 2008, that Ms. Vantassel had a realistic foundation for her expressed claim that she was entitled to continued weekly indemnity benefits. They were not dealing with a situation where their insured was asking them to reverse their decision to terminate weekly indemnity benefits at the end of the own occupation period with no supporting information or

grounds. They were put on notice, very early on, that if they wanted something more than the existing Functional Capacity Assessment to counter Ms. Vantassel's claim, they would have to arrange to obtain it.

[47] There is no indication that Dominion made any efforts to obtain an independent medical examination or to conduct surveillance on Ms. Vantassel between May of 2008 and May 10 of 2009. The weekly indemnity benefits claimed in Ms. Vantassel's Statement of Claim include benefits for that period. The most cogent evidence to counter that portion of her claim would have been evidence gathered between May of 2008 and May of 2009. Yet, despite being aware that Ms. Vantassel was claiming entitlement to benefits during that period, there is no indication that Dominion did anything to gather such cogent evidence.

[48] There is also no evidence that Dominion did anything to gather such evidence between when it was served with the Notice of Action and now.

[49] Further, there is no evidence that Dominion's normal course of action following receipt of such a Notice of Claim would be to obtain an independent medical examination and/or to conduct surveillance on the Plaintiff.

[50] I note that in ***Thornton*** the insurer had obtained an independent medical examination regarding a Section B benefits issue prior to the Plaintiff commencing

an action against them. Therefore, it is something which does happen. There was no evidence as to why it did not happen in the case at hand. There was also no evidence in relation to whether or not surveillance sometimes occurs following a contesting of a termination of Section B weekly indemnity benefits, prior to an action being commenced, nor why none would have been conducted in the case at hand.

[51] Therefore, in my view, the evidence does not show that Dominion has lost evidence that it otherwise would have acquired. All that has been presented to this Court is a representation that it has lost the chance of deciding whether or not it would seek to obtain an independent medical examination and/or conduct surveillance between May 10, 2009 and April 22, 2010.

[52] There is no indication of any conduct by Dominion which negatively impacted Ms. Vantassel's ability to ascertain facts relevant to her cause of action.

[53] The Court in ***Butler***, at paragraph 153, noted that the test for determining whether there existed the type of "disability" envisioned by Section 3(4)(e) of the ***Limitation of Actions Act*** is "whether a plaintiff had reduced physical or mental abilities as a result of matters arising after the accrual of the cause of action which could excuse, in whole or in part, the plaintiff's failure to comply with the

limitation provisions". There is no indication that Ms. Vantassel suffered any such disability after the cause of action arose which interfered with her ability to commence an action against Dominion.

[54] Ms. Vantassel was advised by letter dated April 11, 2008, that her weekly indemnity benefits would cease May 11, 2008. She quickly contacted Dominion to inquire as to the reasons for that termination. Before May 6, 2008, she had provided them a copy of her approval for CPP disability benefits. She then, also in May of 2008, arranged for her doctor to forward, to Dominion, copies of his orthopaedic consultations and a letter to CPP Disability. On July 3, 2008, again through her doctor, Dominion was advised she would be appealing their decision to terminate her weekly indemnity benefits. There was subsequent and regular contact between Ms. Vantassel and Dominion between May 2008 and March of 2009. Dominion repeatedly advised Ms. Vantassel they required her complete CPP file. She made efforts to obtain that file. On December 8, 2008 she informed Dominion that her doctor told her that there was no need to provide the entire CPP file. Dominion confirmed that they needed it. On January 29, 2009, Dominion's adjuster, Ms. Tulk, contacted Ms. Vantassel and asked again for her CPP file. At that point, Ms. Vantassel advised Ms. Tulk that she was asked whether CPP could deal directly with Dominion. There is a letter dated March 10, 2009 from Human

Resources Development Canada to Ms. Vantassel indicating that they had received, on February 13, 2009, a request for information dated February 6, 2009. It is unclear whether that request came from Ms. Vantassel or from Dominion. That letter of March 10 attached photocopies of 80 pages of materials. Ms. Vantassel did not recall whether she forwarded those materials to Dominion. It is shortly thereafter that she attended at the offices of Kimball Brogan. A letter dated November 12, 2010, from the Atlantic Regional Access to Information and Privacy Coordinator indicates that it encloses a copy of her file in response to her request for a complete copy of her CPP file being sent to her solicitor.

[55] Therefore, in my view, Ms. Vantassel acted promptly and reasonably, between when she was advised that her weekly indemnity benefits would cease, and March of 2009. However, in my view, once she received her CPP file enclosed with the letter of March 10, 2009, she did not act promptly and reasonably when she failed to ensure a copy of the file was received by Dominion. Had they received it, they could have considered it and reassessed their decision to terminate her benefits.

[56] However, Ms. Vantassel did take steps to obtain advice from her family doctor very early on. Shortly after the end of the limitation period, she retained

legal counsel. As indicated in ***Butler***, that is an indication of diligence on her part, particularly given that there is no indication she was provided information or notice in relation to the time limitation. Prior to that, she had been dealing with the matter on her own. While communication was ongoing between Ms. Vantassel and Dominion, in my view, it was not unreasonable for her to continue attempting to resolve the matter without involving counsel.

[57] A relevant circumstance which provides important contextual background is that Dominion is sophisticated in the area of insurance litigation, while Ms. Vantassel is not.

Comparing Prejudice to Plaintiff and Defendant in Allowing or Disallowing Limitation Period Defence

[58] If the limitation period defence is not disallowed, Ms. Vantassel will not have the opportunity to have her claim determined on its merits. If the limitation period is disallowed, Dominion will simply have that line of defence eliminated. It will still be able to challenge the claim on its merits, having, in my view, for reasons already noted, lost little, if any, cogency of evidence.

[59] To the extent that there has been any loss of cogency of evidence, it is a loss that has been suffered by both parties.

[60] It may be argued that Ms. Vantassel had the added benefit of the ability to see her own physician continuing through the delay between the expiry of the limitation period and the commencement of the action, while Dominion lost the ability to have an IME during that time. However, any such medical evidence is available for review by a medical expert who can provide his or her own opinion to the Court. In addition: the visits were continuing while Ms. Vantassel was trying to convince Dominion to reinstate weekly indemnity benefits; new information from those visits and diagnostic procedures related to them was being conveyed to Dominion; and, it did not prompt Dominion to obtain an IME then. Further, there is no evidence of such continuing visits with the family physician during the period between when the limitation period expired and the action was started, or whether they reveal any information of significance which Dominion was not already aware of prior to the expiry of the limitation period.

[61] Any expert medical opinion evidence to be provided is likely to be based more on notes made by medical professionals than on their actual recollection of their observations. Therefore, in relation to that evidence, the passage of extra time

is not likely to have any meaningful impact on the cogency of their evidence as it relates to the ability to recollect and recount their observations.

[62] The memory of lay witnesses as to their observations of Ms. Vantassel's physical abilities may be somewhat more detrimentally affected than if the action had been started within the limitation period. However, that is a factor which will prejudice Ms. Vantassel at least as much as Dominion.

Equities and Proportionality Between Losing Cause of Action and Purposes of Limitation Period

[63] Dominion, whose representative, Ms. Tulk, was very experienced in these matters, did not raise any issue of delay or limitation period with Ms Vantassel who was self-represented. It merely continued communications with her, in which she was repeatedly told that there would be no reconsideration of the termination of her weekly indemnity benefits until they received the complete CPP file. Only two days after the limitation period expired Ms. Vantassel attended an appointment with a lawyer.

[64] If I were to disregard Ms. Vantassel's failure to ensure her CPP file was received by Dominion as soon as practicable after she received it, it would clearly appear to me to be: equitable to disallow the limitation period defence; and, disproportionate to the purposes of the limitation period to foreclose the cause of action. It would not be necessary to allow the limitation period defence to encourage diligence in having the matters proceed expeditiously, nor to ensure preservation of the cogency of evidence, for reasons already noted. It would also not be necessary to promote finality of litigation, as the delay was less than one year past the limitation period and there is no evidence that Dominion was relying upon the matter being at an end.

[65] However, given that the diligence of the Plaintiff is an important aspect, a more in depth assessment of the equities and proportionality is warranted.

[66] The relatively short duration of the limitation period in relation to Section B benefit claims suggests preservation of cogency of evidence is one of its purposes that is of substantial importance. Aside from there being little or no loss of cogency, it is also noteworthy that, though no action for benefits was commenced until almost a year after the expiry of the limitation period, the fact that Ms.

Vantassel was contesting Dominion's decision to terminate weekly indemnity benefits was made know to Dominion even before the termination took effect.

[67] That which alerts a Section B insurer to the need to preserve evidence is the notice that a denial or termination of benefits is being contested.

[68] The applicable limitation period provision in the Standard Automobile Policy for Nova Scotia states that an action for section B benefits must be "commenced within one year from the date on which the cause of action arose". Pursuant to **Civil Procedure Rule** 4.02, an action is started by filing a notice of action. Pursuant to **Civil Procedure Rule** 4.04, the plaintiff, after filing the notice of action, can go up to one year without notifying the defendant before the notice of action expires. Therefore, conceivably, Ms.Vantassel could have: said nothing to Dominion in response to its termination of weekly indemnity benefits; filed a notice of action on May 10, 2009; and, served it on Dominion by May 9, 2010. Unless Dominion checked for actions filed against it, the first it would have become aware that Ms. Vantassel was contesting the termination of weekly indemnity benefits would have been on May 9, 2010. Yet, it would not have been able to raise a limitation period defence.

[69] In the case at hand, Ms. Vantassel made it known to Dominion in April of 2008, more than 2 years before May 9, 2010, that she was contesting the termination or denial of weekly indemnity benefits. Therefore, Dominion had significantly more opportunity to preserve cogency of evidence than it would have had if Ms. Vantassel had kept quiet and waited until the deadlines for filing and serving her notice of action.

[70] The delay in filing the Notice of Action did not cause Dominion to forego an IME and surveillance. They chose to forego those sources of evidence knowing the termination or denial was contested. They are in the insurance business. They are not unsophisticated litigants. They know of the importance of preserving evidence in the face of such a contest. Consequently, it is unnecessary to allow the limitation period defence to give effect to the purpose of preserving the cogency of evidence.

[71] Knowing of Ms. Vantassel's contest and her efforts to provide information that would cause Dominion to reverse its decision, Dominion provided Ms. Vantassel with repeated requests and reminders in relation to the complete CPP file until March 6, 2009, about two months before the expiry of the limitation period. There is no evidence it did anything to alert Ms. Vantassel to the existence of the limitation period and whether it was of importance to Dominion. After March 6,

2009, it appears that Dominion was content to let the matter remain dormant, perhaps hoping that Ms. Vantassel, a person far less sophisticated in litigation matters than itself, would simply eventually let the matter drop. There is no evidence that it expressed any concern over obtaining a timely IME if an action was going to be started or over the passage of time.

[72] The limitation period in the case at hand arises in the context of a contract for insurance. However, the ***Limitation of Actions Act***, which excludes discretion to disallow a limitation period defence where the limitation exceeds ten years or more or is contained in the ***Mechanics Liens Act***, does not exclude that discretion in relation to claims for Section B benefits. The standard automobile policy provides for a one year limitation period. The ***Insurance Act*** ensures that the contractual limitation period is not less than one year from the accident. The ***Limitation of Actions Act*** allows discretionary extension. Consequently, it is not necessary to refrain from disallowing the limitation period defence in order to promote certainty in the law. There is no requirement for a strict and inflexible enforcement of the limitation period to effect that purpose.

[73] Further, in my view, it would be inequitable for an insurer to take advantage of a mandatory limitation period clause in an insurance contract to defeat an

unsophisticated insured's claim without bringing that limitation period to the insured's attention where, as in the case at hand, the insured has indicated he or she is contesting the denial of benefits.

[74] In my view, in the circumstances of this case, the harshness of Ms. Vantassel being prevented from having her case decided on its merits would be disproportionate to the purposes of the limitation period in question.

[75] As indicated, I do have concerns in relation to Ms. Vantassel's lack of diligence in ensuring Dominion received a copy of her CPP file as soon as practicable after she received it. Had she done so, it would have rendered reasonable further delay, at least until Dominion had an opportunity to respond with whether or not the contents of that file impacted its prior decision to terminate benefits. Instead, Ms. Vantassel simply went straight to a lawyer. The fact that she had to request the CPP file from Service Canada on October 15, 2010, to be provided to her solicitor, indicates that she did not provide that file to him either. No explanation was provided for that. I cannot speculate as to what the explanation might be.

[76] Nevertheless, it caused little or no prejudice to Dominion. Dominion already knew of CPP's decision and the general basis for it. Its non-receipt did not cause it

to forego an IME or surveillance. It now has a copy of the file. It can have it assessed by its own expert.

[77] Lack of diligence by Ms. Vantassel's counsel, in failing to file the notice of action in a timely way, can be reflected or punished by disallowing a portion of pre-judgment interest pursuant to Section 41(k) of the Judicature Act R.S.N.S. 1989, c. 240, as indicated at paragraph 193 of ***Oliver***.

[78] As noted at paragraph 139 of ***Butler***, the finality purpose is adequately addressed by limiting the discretion to extend a limitation period to a delay of four years or less and by permitting a defendant to apply to terminate a right of action. If Dominion was concerned about the delay, it could have applied to terminate.

[79] In ***Oliver***, the lack of diligence resulted in a delay of a year and a half in the context of a 12 month limitation period. The motion to disallow the limitation defence was granted in any event. In the case at hand, the delay due to lack of diligence was less than one year in the context of a one year limitation period.

[80] Having regard to the circumstances of this case, in my respectful view, despite incomplete diligence on the part of Ms. Vantassel and her counsel, it still appears to me to be equitable to disallow Dominion's defence based on the time limitation.

CONCLUSION

[81] Based on the foregoing, I grant Ms. Vantassel's motion, pursuant to Section 3 of the ***Limitation of Actions Act***, and disallow Dominion's defence based on the limitation period contained in the Standard Automobile Policy For Nova Scotia, Section B, subsection (3) – Special Provisions, Definitions and Exclusions (7)(c).

ORDER

[82] I ask counsel for Ms. Vantassel to prepare the order.

COSTS

[83] Following the hearing of this motion both parties made oral submissions in relation to costs. They both agreed that there was nothing unusual about the motion and that costs should be within the usual range set out in Tariff C for a matter lasting more than one hour but less than one-half day. That range of costs is $750.00 to $1,000.00. I award costs, approximately in the middle of that range, of $850.00, to be paid by Dominion to Ms. Vantassel.

[84] Tariff C provides that: "Unless otherwise ordered, the costs assessed following an application shall be in the cause and either added to or subtracted

from the costs calculated under Tariff A." In my view, there is no reason to depart from the presumptive approach. The direction that they be added to or subtracted from Tariff A costs indicates that it is actually intended that they be "in any event of the cause". Therefore, I order that these costs be paid by Dominion to Ms. Vantassel in any event of the cause at the end of the proceeding, at which time Ms. Vantassel will receive them regardless of success, to be added to or subtracted from Tariff A costs as applicable.

Muise, J.