**SUPREME COURT OF NOVA SCOTIA**
**Citation:** Thornton v. Economical Insurance Group, 2010 NSSC 355

**Date:** 20100924
**Docket:** Hfx No. 290561
**Registry:** Halifax

**Between:**

John Thornton

Plaintiff

v.

The Economical Insurance Group

Defendant

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|---|---|
| **Judge:** | The Honourable Justice Allan P. Boudreau |
| **Heard:** | At Halifax, Nova Scotia on January 14, 2010 |
| **Counsel:** | Barry J. Mason, for the Plaintiff<br>Debbie L. Brown, for the Defendant |

**Introduction**:

[1] The Plaintiff, John Thornton, has sued a Section B insurer, The Economical Insurance Group (Economical) approximately ten years after he had been denied further lost wages benefits resulting from a motor vehicle accident. The Defendant, Economical, has brought this application pursuant to Civil Procedure Rule 12 asking the Court to declare Mr. Thornton's action barred by the applicable limitation periods and as being well outside the discretionary provisions of the *Limitation of Actions Act.* Mr. Thornton contends that his cause of action only arose when he received medical evidence to support and settle his Section A claim, some eight years after the accident and some seven years after the denial of further Section B benefits. Mr. Thornton also contends that there is no limitation period to claims for Section B loss of wages benefits because they are subject to what has been called a " Rolling Cause of Action".

**Background:**

[2] Mr. Thornton was a passenger in a motor vehicle owned and operated by Chris Cooper and which was rear-ended on April 15, 1997. Mr. Thornton suffered personal injuries and damages as a result of the accident. He presented a claim for benefits under Section B of the automobile policy insuring the Cooper vehicle. He initially dealt personally with a claims adjuster acting on behalf of Economical; but shortly after the accident he was represented by legal counsel, Mr. David Richey. Mr. Thornton *avers* in his affidavit (see para. 3) that thereafter Mr. Richey dealt with the adjuster acting on behalf of Economical.

[3] Economical paid Section B weekly lost wages benefits until November of 1998. Economical terminated weekly indemnity benefits at that time following the receipt of an Independent Medical Examination (IME) report; however, it continued to honour claims under Section B for medical and rehabilitation benefits after that date, until some time in July of 1999, when the balance of the policy limits for those expenses was paid.

[4] Mr. Thornton states in his affidavit (para. 4) that he did not commence an action against Economical in 1998 because, at that time, he was already involved in a claim against the third party responsible for the accident and that he understood he could claim loss of income as part of that claim. He said he did not pursue Economical because he had hoped to be able to return to work and because he did not have the financial means to "pursue a lawsuit against large insurance companies". Mr.

Thornton also *avers* that he did not have any medical evidence at that time to dispute the IME obtained by Economical. There can be little question that Mr. Thornton was fully aware of his legal rights as early as 1998. Mr. Thornton also *avers* in his affidavit (para. 5) that he did not have a medical opinion until June 15, 2005, when he received the report of a neurologist, Dr. David King, which indicated that he was significantly disabled and that his prospects of returning to employment were poor. However, he *avers* in the same paragraph that he "had believed that I was disabled" all along but that he simply did not have any medial evidence until Dr. King's report of 2005.

[5] Mr. Thornton also *avers* (see para. 7) that he settled his Section A third party claim in 2005; but that he "did not recover all of my lost income, past or future". He also *avers* (see para. 5) that it was not until September and October of 2006 that his present legal counsel, Mr. Mason, attempted to contact Economical regarding a possible Section B benefits claim. Those efforts did not succeed since they were attempted through the private adjusting firm which had represented Economical and those adjusters no longer had an active file on the matter. Approximately one and a half years later, January of 2008, Mr. Thornton started the present action.

[6] Mr. Thornton is only claiming damages or Section B benefits from June 15, 2005, (Dr. King's report) and forward. He acknowledges that he does not have any medical evidence to support a claim before that date. Agents of Economical, Ann LeBlanc and Brian McLean, have filed a total of three affidavits which state that Economical and the private adjusters handling this matter in 1998 and forward have both destroyed their files after seven or more years had elapsed without notice of any claim or action being filed with them. I understand this is the customary practice. In addition, Economical alleges it has lost the opportunity to have IMEs of Mr. Thornton conducted at the relevant times. In answer to this alleged prejudice, Mr. Thornton has attached the materials found at Tabs A, B, C and D of his affidavit. These are partial file materials obtained from the sources indicated in Mr. Thornton's affidavit (see para. 6).

**The issues:**

1. Is this a proper Motion to hear under Civil Procedure Rule 12?
2. If this Motion is properly dealt with under Rule 12;
    (a) Does the "discoverability rule" operate to permit Mr. Thornton's action. ie: when did the cause of action arise?

(b) Is Mr. Thornton's claim for loss of income under Section B benefits Statute barred by the *Limitation of Actions Act* and/or the *Insurance Act*?

3. Is there a continuous or "rolling" cause of action in Nova Scotia as it relates to Section B benefits; and if so, does it apply to Mr. Thornton's claim?

**The Authorities:**

[7] This application is brought by Economical as an application for determination of a preliminary question of law under Rule 12, which provides:

> 12.01 Scope of Rule 12
>
> (1) A party may, in limited circumstances, seek the determination of a question of law before the rest of the issues in a proceeding are determined, even though the parties disagree about facts relevant to the question.
>
> (2) A party may seek to have a question of law determined before the trial of an action or the hearing of an application, in accordance with this Rule.
>
> 12.02 Separation
>
> A judge may separate a question of law from other issues in a proceeding and provide for its determination before the trial or hearing of the proceeding, if all of the following apply:
>
> (a) the facts necessary to determine the question can be found without the trial or hearing;
>
> (b) The determination will reduce the length of the proceeding, duration of the trial or hearing, or expense of the proceeding;
>
> (c) no facts to be found in order to answer the question will remain in issue after the determination
>
> • • •
>
> [Emphasis added]

[8] It appears that Mr. Thornton is relying primarily on his claim that a "Rolling Cause of Action" exists, or should exist, in Nova Scotia, in order for his claim to

succeed. I say this because it also appears that a determination of issues 2(a) and (b) may still leave his claim outside the applicable limitation periods and outside the discretionary jurisdiction of the Court. I shall therefore first review the Canadian Authorities which involved a "Rolling Cause of Action".

[9] There is persuasive authority for the argument that, where an insurance contract contemplates ongoing periodic loss of income payments, the plaintiff's cause of action is a "rolling" or "continuous" one. That is, as long as the plaintiff is entitled to the benefit, a new right of action accrues each time the insurer fails to make a payment. As such, the plaintiff will be entitled to advance a claim for all or part of the missed payments after the denial of further Section B benefits by the insurer. This proposition has been accepted by courts in other provinces, and by several authors of authoritative texts. At least one Nova Scotia case - the decision of Carver J. in *Dempsey, infra* - appears to take a contrary view, holding that there is but a single cause of action that arises when the insurer denies the benefit. However, that case was distinguished in *Welsh, infra*, where LeBlanc J. held that *Dempsey* was not determinative of the issue.

[10] As I stated, there is support in the textbooks for a "rolling" or "continuous" cause of action applicable to insurance contracts that involve ongoing or periodic payments. The authors of *Insurance Law in Canada*, 2d edition (Carswell, 1991), write:

> Causes of action for the recovery of ongoing payments, such as income-replacement benefits under no-fault auto insurance or accident and sickness insurance, continually renew themselves each time an instalment becomes payable because the insurer is under a continuing liability for each succeeding benefit. Therefore so long as entitlement to the benefits continues (by continued disability), the limitation period only bars claims "originating more than [the prescribed period] before the commencement of an action." Each cause of action "originates" with each benefit as it becomes payable, allowing for any time period between entitlement and the insurer's deadline to pay.

[11] Similarly Mew's *The Law of Limitations*, 2d edition (Lexis Nexis, 2004), provides the following discussion on the law of limitations as it applies to the payment of periodical benefits:

> Where benefits are payable periodically, a new cause of action may arise at the end of each period. In *Zigouras v. Royal Insurance Co. Of Canada*[(1987), 46 D.L.R.

> (4th) 365 (Ont. Div. Ct.)], weekly benefits were payable within 30 days after receipt by the insurer of proof of claim. A one-year limitation period applied to the bringing of an action against the insurer for non-payment of benefits. It was held that at the end of each 30-day period a right of action accrued. Accordingly, even though time had passed for recovering some weekly payments, all those accruing less than a year and 30 days prior to commencement of proceedings could be recovered. [emphasis added]

[12] This issue has not been addressed in any detail in Nova Scotia caselaw. There are, however, authorities from other provinces that support the proposition that alleged non-payment of such periodic insurance benefits as Section B loss of income payments are subject to a "rolling" or "continuous" cause of action. The result is that a plaintiff will be permitted to advance a claim for payments not received within the limitation period, but not before. The claim will, of course, be subject to the necessity to prove that the plaintiff was disabled within the meaning of the policy and therefore entitled to Section B payments at the relevant time. I shall comment more on this later.

[13] In *Leblanc v. Zurich Insurance Co.* (2000), 231 N.B.R. (2d) 112, 2000 CarswellNB 444 (N.B.Q.B.), the plaintiff received Section B loss of income benefits after an accident that occurred in September 1991, until the benefits were terminated in August 1992. By letter in August 1994 the insurer "made a clear and unequivocal denial of any intention to pay weekly indemnity benefits under its policy of insurance with the Plaintiff." The plaintiff commenced an action against the insurer, which was discontinued in September 1994 "on the understanding that the Discontinuance was not a bar to further claims and that no release to further claims was given." The plaintiff carried on with an action against the Section A insurer of the other driver, settling that action in November 1998. There was no evidence as to the extent of compensation the plaintiff received in that settlement on account of lost income. The plaintiff commenced a new action against the Section B insurer in July 1998, claiming benefits back to the termination of his benefits in August 1992. The insurer sought summary judgment on the ground that the insurance policy limitation period had expired. The limitation period provided that "[e]very action or proceeding against the insurer for the recovery of a claim under this section shall be commenced within one year from the date on which the cause of action arose and not afterwards." Creaghan J. held that there could be no basis "to claim that the plaintiff should be relieved from the limitation period set out in the policy with respect to any Section B weekly indemnity payments claimed due and owing prior to one year before this action was commenced..." (See *LeBlanc* at para. 14) Creaghan J. went on to say;

> ...[D]oes the limitation period for a claim against a Section B insurer run from the time the insurer clearly and unequivocally states it will entertain no further claims or does it run from the time each periodic payment would be due if the insurer had an obligation to pay under the policy?
>
> The limitation period commences on the date when the cause of action arose.
>
> The law as stated in *Insurance Law in Canada,* C. Brown and J. Menezes, (Toronto: Carswell, 1999), at page 17-66 is and I quote:
>
> > Where the limitation period commences on the date the cause of action arises, the insurer does not have to do anything to start the limitation period running. With respect to claims for on-going weekly benefits, the limitation period commences on the date on which the payment for the particular time period would be due from the insurer. Each particular time period has its own separate limitation period.
>
> This principle is supported by a line of Ontario decisions....These cases do stand for the statement of law set out by Brown and Menezes to the effect that the rights of a plaintiff to no-fault payments accrue to him from week to week according to the terms of the policy. An insurer does not have a single cause of action, but rather contractual rights which mature if the conditions prescribed in the contract exist. *Morgan v. Dominion Insurance Corp.* (1980), 118 D.L.R. (3d) 675 (Ont. H.C.).
>
> Accordingly, as a matter of law, I accept the position of the Plaintiff that he retains a right of action to claim recovery of Section B weekly indemnity benefits from the Defendant subsequent to July 6th, 1997, according to the terms of the policy in effect.

[14] In *Christian v. Zurich Indemnity Co. Of Canada* (2002), 59 O.R. (3d) 141, 2002 CarswellOnt 1020 (Ont. Sup. Ct. J.), the accident occurred in December 1989, and the defendant insurer paid weekly loss of income benefits until 1997. The plaintiff protested the termination of benefits, and there was sporadic communication and review of the status of the file until June 1998, when, after inviting further information from the plaintiff, the defendant closed the file on the basis that the plaintiff was no longer disabled. There were more discussions until December 1999, when, after the plaintiff had undergone a medical evaluation at the defendant's request, the defendant repeated that the plaintiff was no longer disabled and gave notice that it would not reopen the file. The plaintiff commenced an action in November 2000. The relevant limitation period in the *Ontario Insurance Act* provided that "[e]very action or proceeding against the Insurer for the recovery of a claim under this section shall be

commenced within one year from the date on which the cause of action arose and not afterwards." The defendant sought summary judgment. The defendant took the position that the cause of action arose upon "a clear denial of any further benefits to the plaintiff." H. Speigel J. reviewed a line of Ontario and New Brunswick caselaw, including *LeBlanc v. Zurich Insurance, supra,* and *Zigouras v. Royal Insurance Co. Of Canada* (1987), 63 O.R. (2d) 78, 1987 CarswellOnt 737 (Ont. Div. Ct.). The law, Spiegel J. concluded, was as set out in *Zigouras*, as drawn from *Morgan v. Dominion Insurance Corp.* (1980), 31 O.R. (2d) 285, 1980 CarswellOnt 1399 (Ont. H.C.). He stated:

> The right to periodic payments under the policy accrues at the end of each week and a right of action arises at the end of each 30-day period when the payments have become payable, and that accordingly Cowan [the plaintiff] is entitled to sue for all payments which had accrued during the period of one year plus 30 days before the writ was issued. [emphasis added]

[15] A couple of court decisions in Nova Scotia have dealt with this question indirectly. In *Dempsey v. Dominion of Canada General Insurance Co.* (1996), 154 N.S.R. (2d) 256, 1996 CarswellNS 410 (S.C.), the plaintiff claimed against his Section B insurer. The issue was whether the limitation period should be set aside. The defendant took the position that the plaintiff was not entitled to Section B loss of income benefits. Section 7(a) of Section B of the Standard Automobile Policy provided that "[e]very action or proceeding against the insurer for the recovery of a claim under this section shall be commenced within one year from the date on which the cause of action arose and not afterwards". The action was commenced in October 1995. Carver J. held that the cause of action arose in December 1989, when the defendant's adjuster informed the plaintiff that the insurer would not pay Section B loss of income benefits. Addressing the plaintiff's submission that the limitation defence should be disallowed under s. 3(6) of the *Limitation of Actions Act*, Carver J. said:

> The plaintiff ... argued the payments under Section "B" are regular and periodic. As a consequence, he suggests the insurer is under a continuing liability for each succeeding benefit. He therefore argues that should I find the limitation period began to run on December 13, 1989 with the current action not being in time, the claim is only barred with respect to loss of income benefits payable prior to October 16, 1990. He claims the denial of benefits beyond that date constitute grounds for a new cause of action against the defendant.

> I find not. There is one cause of action in this case which arose on December 13, 1989 based on the denial of payment.
>
> Where this action was commenced four years after the time limitation period expired, I have no jurisdiction to exercise discretion to allow this action to proceed. I find his claim for loss of income under Section "B" absolutely barred.

[16] The point was raised in *Welsh v. Wawanesa Mutual Insurance Co. of Canada*, 2002 NSSC 90, 203 N.S.R. (2d) 305, 2002 CarswellNS 139 (S.C.), a decision of LeBlanc J. of this Court. There it was argued that a termination of ongoing Section B benefits "does not constitute one cause of action, but a continuous or 'rolling' cause of action each time a denial of benefits occurs." After reviewing authorities that supported the existence of a rolling cause of action in other jurisdictions, LeBlanc J. distinguished *Dempsey, supra*, on the basis that that case involved a denial of benefits at the outset, rather than a termination of benefits that were being paid. He concluded that it was "not clear whether a rolling cause of action would be recognized in Nova Scotia in the proper circumstances." He ultimately concluded that the application required findings of fact and law that could not be made in chambers, as not all of the necessary evidence was before the court. In coming to his conclusions, LeBlanc J. reviewed the authorities on the appropriateness of deciding such issues at a summary application hearing rather than at trial. He said the following at paras. 21 to 27 of *Welsh, supra*:

> [21] The case law recognizing a **rolling cause** of **action** is not found within this jurisdiction. It is not clear whether a **rolling cause** of **action** would be recognized in Nova Scotia in the proper circumstances. Clearly, courts in other jurisdictions have recognized such a concept. I conclude that *Dempsey v. Dominion of Canada General Insurance*, supra, is not binding, as it must be distinguished based on the discussion above. I can find no other case law in Nova Scotia where the issue has been squarely before the court and therefore conclude that it is open for judicial consideration.
>
> [22] Unfortunately, I have concluded that this application requires both factual and legal findings that I am unable to make. The Nova Scotia Court of Appeal discussed the confines of a chambers judge in an application to strike a limitation defence in *Merner v. Flinn*, [2001] N.S.J. No. 382 (N.S. C.A.). Justice Freeman stated that the test for striking a statement of claim under *Civil Procedure Rule* 14.25 is 'on the basis that it does not disclose a reasonable cause of action' or whether the claim is obviously unsustainable. Furthermore, Freeman J.A. concludes that when complex

legal and factual issues arise, a decision about statute of limitations should be left for the trial judge. He states at para. 18:

> In my view however the introduction of the contractual limitation provision by amendment raises issues of a legal and factual nature which should be determined at trial.

and later at para 22:

> For greater certainty I would restore the claim with the intention that all issues raised by the pleadings, **including all issues related to the limitation defence**, be determined in a full hearing on the merits. Justice Goodfellow's findings of fact must be confined to the narrow context of the matter before him, the s.3(2) application on a limited record, and neither those findings nor any comments in this decision as to the issues should be allowed to prejudice the outcome. (**emphasis added**)

[23] These comments are consistent with the statements made by the Court of Appeal in previous cases. In *Wall v. Horn Abbot Ltd.*, [1999] N.S.J. No. 124 (N.S. C.A.) Justice Cromwell discussed the principle that disputed issues of fact are to be determined at trial. At para. 47 he states:

> This reluctance to assess the merits of a claim or defence before trial is based both on procedural values and practical concerns. The prime procedural value is that "plenary trial on the merits" is a key element of fair procedure: see *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) per Borins, J.A. at para 6. Practical concerns relate to the difficulty of making correct factual determinations on the limited material available on the interlocutory applications and the important advantages of a trial court in evaluating evidence in the light of the factual context of the entire case rather than on a selective and partial record at the interlocutory stage: see Rexcraft, supra, at para. 27.

[24] The matter before me would require complex factual findings as well as findings of credibility. As well, not all the evidence required is before me. A review of the case of *Wilson's Truck Lines Ltd. V. Pilot Ins.*, supra, shows the in-depth analysis necessary to come to a conclusion on this issue. The Ontario Court of Appeal stated in Pilot at paragraph 39:

> We now turn to the evidence relevant to the limitation period issue. It consists of the testimony of Bourne and his lawyer (no one testified

> on behalf of Pilot), the correspondence relating to bourne's accident benefit claim and Pilot's internal file.

[25] They then proceeded to go through a general background, a review of the evidence of the insured and his lawyer, a detailed review of the correspondence between the parties and a detailed review of the insurance company's internal file. This information was used to determine the intention and understanding of the parties which is relevant to when a limitation period issue arose. The Court said at paragraph 52:

> Pilot's internal file, the correspondence and the viva voce testimony establish that by April 14, 1982, Pilot had told Bourne that he did not qualify for accident benefits. Both Bourne's and Thompson's testimony confirm that Pilot never changed that position. Communications within Pilot and between Pilot and Thompson suggest a willingness on the part of Pilot to receive material with respect to Bourne's income loss and medical condition. From these communication[s] an inference might be drawn that Pilot was willing to reconsider.

[26] I accept that this type of analysis must be done in many cases where there is a question as to when the limitation period and cause of action [arise]. I am also sensitive to the direction from the Court of Appeal in ***Merner***, supra, and have concluded that this type of detailed analysis of the evidence is best left to a trial judge. In any event, I do not have evidence from the original insurance adjuster, Ms. Pam Mills, the original lawyer for the plaintiff, Mr. Gilbert Gaudet, or Ms. Welsh. Obviously their evidence as to the understanding and communication between them would be relevant. There is some evidence regarding their written communication but often phone conversations are referred to. It may be that Ms. Mills and Mr. Gaudet understood the termination to be permanent from the beginning and therefore the cause of action arose in November 1993, 30 days after payment was refused. Equally it may be that Ms. Mills and Mr. Gaudet understood that payment had been discontinued until proof of continued disability was submitted, at which time payments would resume. A determination of when the cause of action arose will require findings of fact, a determination based on evidence of what occurred between October 1993, and August 1994, and very likely findings of credibility, all of which are best left to a trial judge.

[27] A determination of whether Nova Scotia recognizes a '**rolling cause** of **action**', and whether the applicant is entitled to medical benefits are matters of law and within my jurisdiction. To make such a determination however, would be to tie the hands of the trial judge who will have more evidence and be in a better position to judge of the issues as a whole. I have concluded that it is not appropriate to make a determination on some of the issues and leave some for the trial judge when, such

> as the case at bar, the issues are inextricably linked. The trial judge should not be pre-empted from deciding all of the issues based on the merits of the case. His or her findings on the principal issue may be determinative of all of the issues.

**Analysis:**

[17] The Plaintiff submits that the matter cannot be determined under Rule 12 because it "involves complex determinations of fact and law that are more appropriately left for the trial judge." The plaintiff relies on *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2009 CarswellNS 479 (S.C.), where Robertson J. considered the analysis required by Rule 12.02. According to the plaintiff, that case supports the proposition that whether an issue is statute-barred is not the type of issue that should be dealt with under Rule 12, since it requires a determination of other legal issues, specifically, whether a "rolling" cause of action exists, as well as the "issue of the discoverability rule." The plaintiff says "[t]hese issues involve more detailed factual findings such as when the Plaintiff became aware that he had a valid cause of action against the Section B insurer."

[18] Needless to say, Mr. Thornton will have to prove that he was disabled at the relevant times. In this case, counsel for Mr. Thornton, in oral argument, indicated that Mr. Thornton was not claiming Section B benefits prior to the receipt of Dr. David King's report of June 2005. In any event, according to the authorities cited previously, the facts will dictate the appropriate period of the claim, if it is accepted at all.

**Conclusion:**

[19] It appears to me that the facts and the law are inextricably linked in order to make an appropriate determination of the issues raised by Mr. Thornton's claim.
I therefore chose to follow the analysis and reasoning applied by LeBlanc J. in ***Welsh***, ***supra*** and decline to use my discretion pursuant to Civil Procedure Rule 12. I find this is not an appropriate case to be decided summarily. The matters should be left to be decided by a trial judge without being prejudiced by my comments on a preliminary motion.

[20] The application of Economical is therefore dismissed. Costs shall be in the cause. I will grant an order accordingly, prepared by counsel for Mr. Thornton and consented as to form by counsel for both parties.