Date: 20001124
Docket: S.H. 110146

IN THE SUPREME COURT OF NOVA SCOTIA
Cite as: Merner v. Flinn, 2000 NSSC 89

BETWEEN:

VIRGINIA MERNER

PLAINTIFF

- and -

PATRICK FLINN, CAROLE DOWNEY, GREG BLANCHARD, IVANO ANDRIANI, JACK INGRAM, and DAVID CROXEN, THE TRUSTEES OF THE NOVA SCOTIA ASSOCIATION OF HEALTH ORGANIZATIONS LONG TERM DISABILITY PLAN TRUST FUND

DEFENDANTS

D E C I S I O N

HEARD BEFORE: **The Honourable Justice Walter R. E. Goodfellow in the Supreme Court of Nova Scotia (Chambers) on November 7th, 2000**

DECISION: **November 24th, 2000**

COUNSEL: **Harvey M. McPhee, Solicitor for the Plaintiff**
Brian Casey, Solicitor for the Defendants

GOODFELLOW, J.:

BACKGROUND

[1] Virginia Merner, born June the 2nd, 1954 was employed with the Cape Breton Regional Health Care Complex, formerly the Sydney City Hospital as a registered nurse. She entered this employment in 1975 and on August the 7th, 1991 injured her back. She had surgery January the 8th, 1992 which it is said to have been unsuccessful.

[2] While employed, Ms. Merner was covered under a Long Term Disability Plan and in February, 1993 she applied for LTD benefits pursuant to the Plan and her application was approved. She received benefits commencing March the 2nd, 1993 which continued until September the 7th, 1994.

[3] On August the 31st, 1994 it was determined by the Defendant that as of the expiry date of the initial thirty month disability period, September the 7th, 1994, that Ms. Merner, in their view, was no longer total disabled within the meaning of the Plan. Ms. Merner appealed this determination September the 26th, 1994 and was advised February the 1st, 1995 that her review was

denied. She was further advised in the same letter of her right to appeal within thirty days and she chose not comply. On March the 13th, 1995 Ms. Merner received written notice from the Defendants that her benefits would continue to be denied and that her file was closed.

[4] Ms. Merner issued her Originating Notice and Statement of Claim November the 3rd, 1998.

ISSUES

1. **Does the Court have jurisdiction on an application pursuant to Rule 14.25 or Rule 25.01 to strike the claim because of the limitation period?**
2. **Does the *Limitation of Actions Act*, Section 3(1)(2) apply to contractual limitation periods?**
3. **Is this a proper case for this Honourable Court to strike out the Plaintiff's claim because it was commenced outside the limitation period?**

4. If the Defendants are successful in invoking a limitation defence, does a new cause of action arise at the end of each payment period under the contract?

LIMITATION OF ACTIONS ACT

Chapter R.S., c.258

Interpretation of Section

3 (1) In this Section,

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

(iii) the provisions of an agreement or contract.

Application to proceed despite limitation period

(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.

Factors considered

(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 plaintiffs 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.

Jurisdiction of court restricted

(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.

CONTRACT

[5] The Long Term Disability Plan contains a contractual limitation on the commencement of a legal action.

27.00 LEGAL ACTIONS

27.01 No legal action relating to this Plan may be brought against the Trustees or their staff and agents more than one year after benefits have been denied. If a claimant appeals the denial of his/her claim for benefits, pursuant to article 28.00, the time limitation begins to run from the date of the appeal decision.

ISSUE NUMBER ONE

1. Does the Court have jurisdiction on an application pursuant to Rule 14.25 or Rule 25.01 to strike the claim because of the limitation period?

[6] This issue must be answered in the affirmative. On an application to strike, it is assumed that the facts alleged in the Statement of Claim can be proved. The facts are assumed to be true and if there is no dispute with respect to the time facts, then an Application to Strike, based on a limitation period disclosed in the Statement of Claim, can be taken pursuant to CPR 14.25. In *Hendsbee v. Khuber* (1995), 148 N.S.R. (2d) 270, this court determined that it was appropriate to strike a Statement of Claim pursuant to Rule 14.25 on the basis that the claim was brought outside the applicable limitation period.

ISSUE NUMBER TWO

2. Does the *Limitation of Actions Act*, Section 3(1)(2) apply to contractual limitation periods?

[7] Yes. Section 3(c)(iii) of the *Limitation of Actions Act*.

ISSUE NUMBER THREE

3. Is this a proper case for this Honourable Court to strike out the Plaintiff's claim because it was commenced outside the limitation period?

[8] The determination of this issue requires application of *Smith v. Clayton, et al* (1995) 133 N.S.R. (2d) 157 at p. 161:

> **[19]** The starting point in approaching an application under s. 3(2) is to note the court may disallow a defence based on the time limitation, if "it appears to the court to be equitable". ...
> In making its determination the court is obligated to s. 3(4) "shall have regard to all the circumstances of the case". The legislation goes on to list seven factors that are to be particularly taken into account, and on each application these individual factors must be reviewed and then weighed in the context of all the circumstances of the case to determine the relative degrees of prejudice as well as to conclude whether or not it is equitable to disallow the defence.

[9] Continuing at p. 165 and 166:

> **[44]** In determining whether it is equitable, the court must have regard to the relative degrees of prejudice. However, this cannot mean the determination is based upon relative degrees of prejudice. If that were so, the application would never be denied because the degree of prejudice to the plaintiffs is ultimate, complete, final and absolute. If the application is not granted, the plaintiffs lose their right to claim a remedy or recovery. The best the defendant or other party could hope to establish is a comparable degree of prejudice, namely the inability to advance a defence that would defeat, on the merits, the plaintiffs' claim, due to the plaintiffs' delay.

> **[46]** If the determination were based upon the relative degree of prejudice, then the application would, in reality, be automatic as the best another party could establish would be a stalemate.
>
> **[47]** What the defendant must establish is a real or serious prejudice to the defendant on the merits which prejudice cannot be compensated for by directions or conditions such as allowing the defence to be struck on the admission of evidence the delay unequivocally would have otherwise caused to be inadmissible.

[10] The Defendants in their reply brief do a *Smith v. Clayton, et al* review of factors. The length of delay set out in the Statement of Claim appears to be from when Ms. Merner was advised her review was denied in February, 1995, to November the 3rd, 1998 and there does not appear to be any specific explanation for this delay. Ms. Merner, in addition to being a party to the contract, was clearly informed with respect to the time limitation for her to appeal the final denial.

[11] Turning now to a *Smith v. Clayton, et al* (above) analysis:

REVIEW OF FACTORS

(a) <u>the length of and the reasons for the delay on the part of the Plaintiff</u>;

[12] Ms. Merner in her Affidavit outlines that she suffered an injury at employment on August the 7th, 1991. She proceeded to pursue her contractual entitlement to Long Term Disability Benefits and received them from March the 7th, 1992 until September the 7th, 1994.

[13] Ms. Merner in her Affidavit acknowledged receipt of correspondence dated March the 13th, 1995 advising that since she did not launch a further appeal within the 30 day appeal period, the decision to terminate her benefits would stand and her Long Term Disability Benefits file had been closed.

[14] In her Affidavit, Ms. Merner provides no reason(s) for the delay on her part except she was at the time of the denial of her benefits in February, 1994, attending Compu College taking business and computer courses and that it was not until late 1997 or 1998 she says that it became apparent that "because of the added stress in attending school full-time, my condition was

worsening and I would not be able to continue my re-training plans". Ms. Merner says in early 1998, she left the program at Compu College and only then realized that she would not be able to re-train for any type of employment.

[15] These statements in her Affidavit hardly constitute any reason(s) or justification for failing to pursue her final right of contractual appeal which was clearly set out in the contract and which was drawn specifically to her attention and acknowledged by her in her Affidavit.

(b) <u>any information or notice given by the Defendants to the Plaintiff respecting the time limitation</u>;

[16] There could not be a case where the limitation period was more clearly set out from the outset in the contract and reiterated specifically in correspondence from the Defendants to Ms. Merner and in particular, the letters of February the 1st, 1995 and March the 13th, 1995.

nova scotia AHO association of health organizations

2 Dartmouth Road, Bedford, Nova Scotia B4A 2K7 Telephone (902) 832-8500

Fax No. (902) 832-8505

February 1, 1995

PRIVATE AND CONFIDENTIAL

Ms. Virginia Merner
50 Andrews Lane
Port Morien, N.S.
B0A 1J0

Dear Ms. Merner:

RE: LTD CLAIM NO. L3-5058481

Please be advised that your appeal for Long Term Disability benefits has been fully reviewed. Please refer to the enclosed letter of January 31, 1995, from LonLife Financial Services regarding the decline of this appeal.

The enclosed copy of the appeal Procedure (from within the Plan Text) outlines the particular procedures – refer to sections 9A.16 onward. You have 30 days from the date this letter is received (deemed to be no later than five business days from the date of this letter) to submit a letter of intention to appeal. This letter is to be addressed to:

LTD Trustees
Chairman, LTD Appeal Board
c/o Benefits Department
NSAHO
2 Dartmouth Road
Bedford, N. S. B4A 2K7

You may appeal on the grounds of an irregularity to the process (i.e. time limitations, etc. were not met Section 9A.20) or on Non-Medical Grounds (Section 9A.26 onward). No medical evidence is submitted during either form of appeal. The Appeal Board will have copies of medical reports which were initially considered in assessing your claim. The Board's function is strictly to determine whether the correct process was applied in dealing with your case.

You may wish to discuss this matter with your lawyer. Should you have any questions, please feel free to contact us. Please keep in mind that if you wish to appeal further, we must receive your intention to appeal within 30 days.

Sincerely,

Carole Arsenault
Admin. Clerk/Benefits

cc: Louise Vassallo, CBRH

Encl.

ca

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Fax No. (902) 832-8505

March 13, 1995

PRIVATE AND CONFIDENTIAL

Ms. Virginia Merner
50 Andrews Lane
Port Morien, N. S.
B0A 1J0

Dear Ms. Merner:

RE: LTD CLAIM # L3-5058481

Further to my letter of February 1, 1995, copy enclosed, this letter will confirm that no letter of intention to appeal was received within the 30-day period under the Appeal Procedure. As no appeal letter was received, the decision to decline benefits will stand and your file has been closed.

Should you have any questions on this matter, please feel free to contact the undersigned.

Sincerely,

Susan G. Gray
Admin. Clerks-Benefits

sgg

Enclosure

C: Ms. Louise Vassallo, CBRH
Ms. Kathy Janssen, Lonlife

[17] One might ask what more could be expected of the Defendants than to clearly draw to the Plaintiff's attention the time limitation set out in the contract between the parties and suggest that she might wish to discuss the matter with her own lawyer. Ms. Merner chose to respond by silence until 1998.

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

[18] There are many arguments advanced when a Defendant is faced with an Application to Strike a limitation defence, including "if" arguments. That is, if the Defendant had known the Plaintiff intended to proceed, the Plaintiff would have done steps a 'a' to 'z'. When there was no indication that any of those steps had in fact been taken, either in a preliminary manner or indicated, the court has had some difficulty attaching much weight to such arguments.

[19] The situation in this case is somewhat different. The Defendants maintain that if the Plaintiff had proceeded to respond to their letter of February the

1st, 1995 clearly outlining the time limitation and a further letter of confirmation of March the 13th, 1995, then the Defendants indicate they would have probably **continued** the video surveillance that they had underway prior to and leading up to the denial of continuation of Long Term Disability Benefits. There is also the feature that a disability claim has an important time component in that it would have been an obligation on the part of Ms. Merner in February/March, 1995 to establish that she remained totally disabled in September, 1994 and that she had an entitlement to continuing Long Term Disability based upon the medical and other evidence available at that time. If the action were to proceed, the Defendants will be confronted with evidence that presumably will endeavour to retroactively overcome the Defendants denial Ms. Merner was totally disabled within the meaning of their contract at the time of denial. I conclude it is quite probable that had Ms. Merner proceeded within the time limitations or within a reasonable period thereafter, that the Defendants quite probably would have responded to any further more timely medical opinion advanced by Ms. Merner with a timely independent medical examination of their own.

[20] It is clear from Ms. Merner's own Affidavit that she is now alleging a deterioration of her condition, in part due to the stresses of pursuing her further education. If such is advanced, the Defence have lost the opportunity for timely examination in response. Ms. Merner had a right of a further appeal in February, 1995 which she chose not to pursue. That right of appeal would focus on her medical condition in September, 1994 and that focus would, from a practical point of view, be diminished by a reduced capacity of the Defendants to respond in a timely manner. Ms. Merner's introduction of her subsequent deterioration, due to stress, if supported with medical evidence in 1995, will be difficult, if not impossible, for the Defendants to fairly address.

[21] The extensive delay by Ms. Merner has deprived the Defendants of these opportunities to properly defend and has resulted in serious prejudice to the Defendants, should the claim be proceeded with.

(d) the conduct of the Defendants after the cause of action arose, including the extent, if any, to which they 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 Defendants;

[22] I repeat what I said earlier that one might ask what more could be expected of the Defendants than to clearly draw to the Plaintiff's attention the time limitation set out in the contract between the parties and suggest that she might wish to discuss the matter with her own lawyer. Ms. Merner chose to respond by silence until 1998.

(e) <u>the duration of any disability of the Plaintiff arising after the date of the accrual of the cause of action</u>;

[23] In *Smith v. Clayton, et al*, it was stated:

> **[38]** The disability referred to in this subsection is not a question of legal disability or competence. Such is addressed elsewhere in the ***Limitation of Actions Act*** covering minors and incompetent persons. The disability here is the practical disability that flows from the accident or consequences of the accident. In a clear-cut case you could have a person in a coma for an extended period of time or hospitalized with such a condition that it would be difficult if not impossible to address the legal aspects. There are obviously many shades of factual disability, and here the plaintiffs had to contend with the loss of their son, and it is quite understandable that it took some period of time for them to come to grips with the question of whether or not to pursue a legal course. This is not a major factor of all the circumstances of this case, nevertheless, it is a factor.

[24] There is nothing to suggest any comparable or factual basis that the alleged total disability impacted on the delay of Ms. Merner in exercising her contractual rights or justified in any way her silence.

(f) <u>the extent to which the Plaintiff acted promptly and reasonably once she knew whether or not the act or omission of the Defendants, to which the injury was attributable, might be capable at that time of giving rise to an action for damages</u>;

[25] It is clear that Ms. Merner did not act promptly when it was unequivocally confirmed to her by letter of February the 1st, 1995 and the follow-up letter of March the 13th, 1995 that she had a contractual time limitation. She did absolutely nothing until her cousin recommended to her in February of 1998, three years later, that she consult with a solicitor and this action was not commenced until November the 3rd, 1998. From February the 1st, 1995 to November the 3rd, 1998, reduced by the month she had to file her further appeal, is a period of over three and a half years before she commenced this lawsuit and at no time, after she consulted a lawyer in March of 1998, was there ever any negotiations or change in the denial of entitlement by the Defendants. Contrast the situation here with *Brett v. Anthony & Bolton, et al* (1999), 171 N.S.R. (2d) 356. From February the 1st, 1995 onward, the claim in this case not only was dormant but the Merner file, as advised, was closed by the Defendants. Nothing was advanced by Ms. Merner until her request for the file prior to her commencement of this suit.

(g) <u>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</u>;

[26] This heading is more appropriate to a claim for damages in a tort situation. Certainly, the Affidavit of Ms. Merner shows that she attended at some time upon a substantial number of physicians, surgeons, pain management, physiatrist and a psychiatrist. The focus here is on the medical evidence that was available **and presented** by Ms. Merner in pursuit of her claim for disability in 1994 and up to her appeal period ending in March of 1995. There are substantial variances when the claim is a Long Term Disability claim compared to, for example, an ordinary tort claim where frequently the injured party is still coming to grips with the degree and extent of injury its assessment, treatment, etcetera, before finalizing a determination to pursue legal action. There is no indication of any new discovery of a pre-existing condition not previously advanced in 1994/1995 that would alter the determination based on the medical evidence **at that time**. Even if there was, I would have serious reservations and many questions would have to be answered.

[27] There are fundamental differences between a claim for disability benefits and most tort actions specifically **time, fault, extent of loss and causation**.

1. Time

[28] In a conventional personal injury action, there may be a positive benefit in waiting to obtain medical information until the symptoms have resolved or a definite prognosis is available. The court is being asked to measure the entire loss caused to the Plaintiff as a result of an incident and many need to consider evidence over a long time frame to reach that determination.

[29] By contrast, the LTD Plan is a contractual entitlement to a benefit payment (upon meeting certain conditions) for each month that the claimant is disabled. The claimant will necessarily know at the end of each 30 day period her employability. There is no issue of damage still to be discovered in the future; at the end of the 30 days, the claimant knows all that she needs to know in order to assert a claim to LTD benefits. The entitlement to make an application for benefits has crystallized, because of circumstances which were known to the claimant at the time. The Plaintiff cannot wait until she knows the entire extent of her disability (for example, when or whether she will return to work) before she acts. There is no need for the Plaintiff to wait to determine the extent of her injuries (because the amount of the monthly benefit is fixed).

2. Fault

[30] In some tort actions, it is reasonable to wait the commencement of an action until the Plaintiff knows who is at fault. This may require the gathering of expert evidence, or waiting until other proceedings have been completed. Litigation is expensive and it is not usually unreasonable to wait and see for example what plea an alleged tortfeasor might enter on a criminal charge arising out of the alleged tortuous act.

[31] In a disability claim on the LTD Plan, there is no question of waiting until the Plaintiff knows "who was at fault" for the injury: the entitlement to a payment does not depend on fault.

[32] The fact that payments are made irrespective of fault is balanced by the fact benefits are available only if certain conditions are met (including the 1 year limitation period). If someone else was responsible for Ms. Merner's injury, she may be able to sue or claim compensation. If she is seeking benefits from the LTD Plan irrespective of fault, then it is only fair if the benefits require establishing entitlement in a reasonably timely manner.

3. Extent of Loss

[33] A tort action measures the total loss to a plaintiff as a result of an accident. It may take some time before that is known. An injury which is caused by the accident but not apparent until a later date may, nonetheless, give rise to a valid claim.

[34] The LTD claim is only concerned with whether in each particular month the Plaintiff is disabled. The fact that a Plaintiff is disabled, for example, in November of 1998, is no evidence that she was disabled in March of 1995 at the time that benefits were refused. Unlike a conventional tort action, if Ms. Merner first became disabled in 1998 when she commenced the action (three years after she ceased to be covered by the Plan), she has no claim.

4. Causation

[35] In a tort action, the ultimate issue for the court (after issues of liability are resolved) is causation: was the injury complained of a result of the incident.

[36] In a disability action, causation is not the issue. The ultimate issue is whether the Plaintiff was disabled on each particular month for which she now claims benefits. Expert evidence can assist the court to determine if the present complaint is a result of a particular incident, but it is much more difficult to determine whether the Plaintiff was disabled at any particular time in the past, hence the need for timely presentation of an LTD claim. If Ms. Merner was not disabled in September 1994, then she is not entitled to any Plan benefits, even if she is subsequently found to be disabled in November 1998.

ISSUE NUMBER FOUR

4. If the Defendants are successful in invoking a limitation defence, does a new cause of action arise at the end of each payment period under the contract?

[37] There is a time focus whereby Ms. Merner has had an opportunity in March, 1995 to appeal the denial of total disability in accordance with her contract and if she was not totally disabled at the time of denial, the present claim would be at an end.

SUMMARY

[38] In reaching my determination I have followed carefully the statutory direction of determining whether it is equitable to have the action proceed, having regard to the degree to which the time limitation prejudiced the Plaintiff or the Defendants. In that regard, I have reviewed the statutory factors that are mandatory for consideration. The ultimate conclusion is whether or not, having reviewed and applied the statutory requirements, it appears to the court to be equitable to disallow a defence based on the time limitation and allow the action to proceed.

[39] Ms. Merner was a party to the contract and the contract states in clear language a time limitation one year **"more than one year after benefits have been denied"**. The time limit in clear language is said to run **"begins to run from the date of the appealed decision"**. Fundamentally, parties should be held to the terms of their contract. Following the mandatory statutory directions, it is clear that there has been a lengthy delay on the part of Ms. Merner and Ms. Merner has given no reasons or justification for her

delay. This is an LTD claim which has different aspects of time, fault, extent of loss and causation from most tort actions and therefore, a much more timely focus. The delay by Ms. Merner has placed the Defendants in the position of being unable to effect a continuation of the surveillance that they had in place and to address in a timely fashion what, if any, variations retroactively Ms. Merner might advance with respect to her medical situation. A host of medical personnel have, unknown by the Defendants, been consulted by Ms. Merner. The conduct of the Defendants was beyond reproach and indeed, they went far beyond any legal duty and made it clear the finality of the matter from their perspective by indicating failure to file the further appeal in 1995 resulted in their file being closed. The other factors are addressed within the decision and I conclude the ultimate determination must be that it is not in all the totality of these circumstances equitable to allow the action to proceed. Indeed, I conclude that it would be most inequitable and the Plaintiff's Application to Strike the Time Limitation is dismissed.

COSTS

[40] Counsel are entitled to be heard on the issue of costs and disbursements, if they are unable to reach agreement. The dismissal of the Application brings an end to the action and I would suggest that the file indicates costs might more appropriately be in the range envisioned by Tariff 'C' based upon settlement or discontinuance.

[41] There is another feature of this Application that I did not feel it necessary to take into account in reaching my conclusion and that is the position advanced by the Defendants that this is a contractual arrangement between employer and employee and that the fund is set up and does not provide funded resources for the resurrection of claims that are not advanced within the contractual limit limitations agreed upon. Undoubtedly, this is a matter of concern to the Defendants and probably where an employee party to the contract is not held to the contract, it would result in prejudice to all other parties to the contract and the fund.

J.