SUPREME COURT OF NOVA SCOTIA
Citation: *Morrisey v. Bulmer*, 2020 NSSC 294

Date: 20201020
Docket: Tru. 478657
Registry: Truro

Between:

Matthew Steven Morrisey

Plaintiff/Moving Party

v.

Joshua Bulmer

Defendant

v.

Jaden Kenneth Dean

Third Party

v.

Royal and Sun Alliance

Motion Respondent/
Proposed Defendant

LIBRARY HEADING

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	July 20, 2020, in Truro, Nova Scotia
Written Release:	October 20, 2020
Subject:	Adding Section D insurer to proceeding – operation of s.12 of *Limitations of Actions Act*.
Summary:	Moving Party sought to add his Section D Insurer to proceeding against uninsured defendant. Insurer objected on grounds that two-year limitation period had expired.

Issues:

1. Discoverability of claim against Section D Insurer.

2. Operation of s.12 of *Limitations of Actions Act*.

Result:

Although the limitation period had expired, in the particular circumstances of this matter s.12 of the *Limitations of Actions Act* allowed the expiry to be relieved against. Motion to add insurer granted.

SUPREME COURT OF NOVA SCOTIA
Citation: *Morrisey v. Bulmer*, 2020 NSSC 294

Date: 20201020
Docket: Tru. No. 478657
Registry: Truro

Between:

Matthew Steven Morrisey

Plaintiff/Moving Party

v.

Joshua Bulmer

Defendant

v.

Jaden Kenneth Dean

Third Party

v.

Royal and Sun Alliance

Motion Respondent/
Proposed Defendant

DECISION
(Motion to add Royal and Sun Alliance)

Judge:	The Honourable Justice Jeffrey R. Hunt
Heard:	July 20, 2020, in Truro, Nova Scotia
Written Decision:	October 20, 2020
Counsel:	Gus Richardson Q.C., Counsel for Solicitor Brad Yuill Wayne Francis, Solicitor for RSA, Motion Respondent Defendant and Third Party not participating in Motion

By the Court:

Introduction

[1] This matter arises from a series of collisions between three all-terrain vehicles which occurred on October 15, 2016. It is alleged that Matthew Morrisey was a passenger on his own ATV driven by his friend Tyler Murray. The other two ATVs were operated by Joshua Bulmer and Jaden Dean.

[2] On July 18, 2018, Morrisey commenced action in damages against Bulmer. Bulmer defended the action and advanced a third-party claim against Dean.

[3] In this motion, Morrisey is seeking to add his Section D insurer, Royal and Sun Alliance, to his proceeding against Bulmer. This is on the basis that Bulmer was uninsured at the time of the collision.

[4] RSA argues the applicable limitation period between itself and its insured, Morrisey, has expired. Accordingly, it seeks the dismissal of the motion.

[5] In response, Morrisey says the limitation period has not expired and, in the alternative, seeks to have the Court relieve against any expiry pursuant to s.12 of the *Limitation of Actions Act*, SNS 2014, c. 35.

[6] As a consequence of the suggestion that the limitation period had expired, the Solicitor for the Plaintiff was separately represented on this motion by outside counsel. Accordingly, Gus Richardson, Q.C. had the conduct of the matter with Mr. Francis responding for RSA, the proposed defendant.

Issues

1. Is there more than one potential cause of action between Morrisey and RSA?
2. Has any applicable limitation period expired?
3. If a limitation period has expired, does Section 12 of the *Limitations of Actions Act* operate to relieve against the limitation defence?

Evidence

[7] Many of the facts in this matter are not contested. There is real disagreement, however, about what conclusions ought to be drawn from the facts. Specifically, the parties disagree on issues of discoverability as these relate to the commencement of the limitation period.

[8] The evidence on this motion is found in the Affidavits of Brad Yuill, Solicitor for Morrisey, and Lisa Euloth, a claims examiner with RSA. Mr. Yuill was cross-examined on his Affidavit. Ms. Euloth answered a series of written

questions advanced by the Moving Party. Her responses formed part of the evidence in the record.

Brad Yuill

[9] Mr. Yuill was the solicitor retained by Morrisey following the accident. He initially acted for both Morrisey and Murray beginning in January 2017.

[10] He provided evidence that he followed his "standard operating procedure" in this claim. He testified that he would not commence a Section D claim on behalf of a client until he was sure the other party was uninsured. His evidence was that, in this case, this was not clear to him until quite far into the proceeding. He acknowledged that it was during a break in the multi-party discoveries in July 2019 when he first formally requested that RSA agree to be added to the Morrisey/Bulmer action.

[11] In cross-examination he was confronted with various statements and points of evidence which stated or suggested that it was known much earlier in the process that Bulmer was uninsured. Mr. Yuill maintained that he felt this was an unknown and, accordingly, he did not feel compelled to proceed against RSA in the circumstances.

[12] He felt he did not have full knowledge of the insurance status of Bulmer until approximately April 2019 when he received the affidavits disclosing documents, the RCMP investigation file and the transcript of a Provincial Court proceeding against Bulmer. It was also his experience, he testified, that Section D insurers would consent to be added to a proceeding once all parties were satisfied on the insurance status.

Lisa Euloth

[13] Lisa Euloth has extensive experience in the insurance industry, having worked 30 years as a claims examiner at various companies. She confirmed the existence of a standard insurance policy covering the ATV owned by Morrissey on the date of the alleged loss. RSA learned of the collision three days after it occurred. Four days after the collision, she had her initial phone interview with Morrisey. He was still hospitalized at that time.

[14] In the notes of the October 19 interview, Morrisey was reported as saying the collision occurred on October 15th at around 6:30 p.m. in good weather on Belmont Mountain. In this account, Morrisey stated he had Tyler Murray on the back of his ATV (whether he was driver or passenger is also addressed later). They went over a blind hill and were struck on the left side by a second

ATV. He and Murray were both thrown clear. His injuries were listed in the note as a broken left femur, fractured left kneecap, broken ribs, collapsed lung and cracked sternum.

[15] He was recorded as saying that the bike which hit them had no one riding it. He did not know if the person jumped off or what had occurred. He had heard a rumour it was uninsured. The second ATV had apparently been involved in a collision with the third ATV just out of the sight line of those on the Morrisey ATV.

[16] Following the interview, RSA very swiftly retained an outside adjusting firm. Mike Maddigan of Charles Taylor Adjusting arranged for an in-person interview with Morrisey which took place on October 26, eleven days after the collision.

[17] In the October 26 statement a much more detailed account of the collision emerges. Morrisey is now reported as indicating he was the passenger on his ATV operated by Tyler Murray. Morrisey provided an account of the sequence of collisions and his multiple orthopedic injuries. He went on to relate to the adjuster that Bulmer had admitted to him that he did not have insurance on his ATV.

[18] Also on October 26, the outside adjuster received a standard form accident report from the RCMP listing the vehicle and insurance details for the other two vehicles involved in the accident. While insurance details are provided for the Dean ATV, the insurance line for the Bulmer vehicle is blank.

[19] In early November 2016, RSA directed a reservation of rights letter to its insured, Morrisey. This allowed them to continue investigating without facing an allegation that they had waived their right to deny indemnification or defence under the policy. The receipt of this letter prompted a call from Morrisey to Euloth on November 8, 2016. Euloth's note of this conversation was as follows:

> Rec'd a call from Matthew as he received the reservation of rights letter. We discussed same. He sounds like an honest young man and is adamant that Tyler was driving his ATV and was not impaired. He said Josh is definitely at fault of this accident and has no insurance. Matthew understand that we need to complete our investigation. Essentially, we are looking at a Sect D claim for him and Tyler. I think I will go ahead and set that up with reserves at protocol until I have [statements] with employment info, etc. We are looking at significant claims and will be sure to take out of protocol within 60 days.

[20] On January 19, 2017, RSA received a letter from Brad Yuill in which he advised that he had been retained by Morrisey. A month later, Yuill advised he had also been retained by the driver of the Morrisey ATV, Tyler Murray. The file reveals further correspondence between RSA and Yuill over the following

months. Yuill appeared to be seeking updates on the status of the bodily injury claims. Euloth advised that the investigation was still actively underway.

[21] On January 27, 2017, Euloth wrote to Yuill indicating she was still accumulating medical records. With respect to the insurance issue, she wrote:

> No one has confirmed to date that the ATV that struck him is uninsured or at fault. If you have information that states otherwise, kindly advise.

On April 19, 2017 she wrote again to Yuill, in part:

> …We are proceeding under a Sect D claim with regards to the bodily injury claims. My understanding is the driver of Matthew's ATV has not been charged with anything (I believe the police did a blood alcohol test) …
>
> Matthew will face a large contributory negligence deduction as he made a conscious decision to ride as a passenger on his ATV which is not made to carry passengers.

[22] Bulmer was eventually charged under the *Motor Vehicle Act*. In 2017 RSA continued to receive status updates on the Morrisey and Murray claims. She continued to work the file herself as well. Material added to the Euloth file in 2017 included copies of Morrisey's interview with the adjuster acting for the insurer of Jaden Dean, together with a transcript of Morrisey's evidence from the November 2017 summary offence trial of Joshua Bulmer.

[23] In January 2018, Yuill presented demands to the insurer for Jaden Dean. These were advanced on behalf of Tyler Murray and Matthew Morrisey. These demand letters were copied to Lisa Euloth at RSA.

[24] In May 2018, Murray changed representation to a different solicitor. That solicitor moved quite quickly thereafter to file an action on behalf of Tyler Murphy against Bulmer and RSA (Hfx. No. 476352). It plead, in part, that Bulmer was operating his ATV without insurance. RSA was claimed against under the Section D portion of the Morrisey policy. This claim was defended with a denial from RSA.

[25] Jaden Dean had also commenced a proceeding for personal injury. With all parties represented by counsel, the parties communicated and agreed to organize three days of discovery examinations. The matters were not formally joined or consolidated. It appeared to be accepted by the parties that, as the matters clearly were connected through the liability issue, it was efficient for discoveries to be organized jointly.

[26] In July 2019 Bulmer, Dean, Murray and Morrisey were all examined. The discovery of Morrisey took place on July 24. Counsel for RSA was present and asked questions with respect to liability, as did counsel for Bulmer and Dean.

[27] Subsequently, the damages portion of the discovery was reached. Counsel for Bulmer and Dean again questioned Morrisey and then counsel for RSA began his questioning, saying as follows:

> "Mr. Francis: Okay, I just have a few quick questions –
>
> Morrisey: Yeah.
>
> Q: …and we'll be done shortly. Now, just to clarify the record, my client RSA is not currently a party in this case but based on my conversations with counsel, I'm a party…I may become a party down the road. So, I'm asking my questions on that basis, but I do note that I don't believe I have received full document production. I don't think I've received the supplemental document delivery that came last week, and we did just receive some additional documents this morning. So, I reserve my right to ask any questions down the road on the documents that I've received, should that come up. I don't think it's gonna be a big issue but just in case, I reserve the right."

[28] Part way through day two of discovery, Yuill spoke with counsel for RSA regarding adding RSA to the claim between Morrisey and Bulmer. Counsel suggested that the request be formalized in writing.

[29] On July 25, 2019 Yuill wrote requesting that RSA consent to be added as a party to the Morrisey/Bulmer Action. On August 22 counsel for RSA responded and advised they would not consent to be joined.

[30] Later in July, between making the request that RSA consent to be joined and before receiving RSA's refusal, Yuill forwarded to RSA over 300 additional pages of medical and financial disclosure respecting Morrisey.

[31] In her affidavit, Euloth set out what she indicates are the steps RSA typically takes when advised of a potential uninsured motorist claim. She states that standard practice is to conduct its own investigation to determine whether the vehicle was in fact uninsured and whether RSA insured would be legally entitled to receive damages from the owner or driver of the uninsured vehicle. Such an entitlement would be under section D, clause 2 of the standard auto policy.

Adding party after close of pleadings

[32] Civil Procedure Rule 35.05 and 83.04 are both relevant to the hearing of this motion:

> 35.05 A party who starts a proceeding may join a further party by amending the originating document, or a notice of claim against a third party, as provided in Rule 83 – Amendment.
>
> …
>
> 83.04 (1) A notice that starts a proceeding, or a third-party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).
>
> (2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:
>
> (a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;
>
> (b) the expiry precludes the claim;
>
> (c) the person protected by the limitation period is entitled to enforce it.

[33] A simple reading of these provisions makes clear that, when a limitation defence is advanced at this stage, the court must address the issue before permitting the requested amendment. If the applicable limitation period is found to have expired, and it is not relieved against, then the motion to add will be dismissed: see *Sweeney-Cunningham v. IBG Canada Ltd*., 2013 NSSC 415.

Issue 1 – Is there more than one potential cause of action in play?

[34] The discussion of limitation periods in the context of Section D claims has often been complicated by confusion stemming from a failure to appreciate there can be more than one potential cause of action between an insured and his or her Section D insurer. See, for instance, discussion of this issue in *Cook v. Gold Circle Insurance Co,* [1987] O.J. No. 665 (Ont.HCJ).

[35] In the present case there are two potential causes of action which are material on these facts. These would be:

1. The Plaintiff's claim for a declaration that it is entitled to have its Section D insurer added to its Action against the uninsured motorist ("declaratory relief"), and
2. A separate claim which arises when the insured, <u>following a contested proceeding,</u> presents a judgment which has not been satisfied (the "claim on unsatisfied judgment").

[36] The first of these options, declaratory relief, is what the Moving Party seeks in this motion. Morrisey seeks to have RSA added to the proceeding such that it becomes a party and is bound by the outcome. This is the process we are most familiar with and has largely become the norm.

[37] The reason it has become the usual practice is easy to identify. It generally has attraction for both insured and Section D insurer. For the insured, it means there is one proceeding and, while the Section D insurer is entitled to fully contest the claim, the payoff is that the insurer is bound by the outcome. Any judgment within coverage limits will be paid.

[38] As for the Section D insurer, participating in the original proceeding could be viewed as preferable to allowing issues of liability and damages to be resolved without their participation. There is a risk in such a case that the insurer will be presented with an unsatisfied judgment which they had no role in challenging.

[39] A Section D insurer is afforded some protection, however, in that it is only bound to cover an unsatisfied judgment presented for payment if the judgment was the product of a contested proceeding. What this means has sometimes been the source of dispute. This uncertainty does create complications for an

insured pursuing action against an uninsured motorist. If the motorist fails to defend the proceeding, for instance, any subsequent judgment may be open to contest by the insurer.

[40] For purposes of the present analysis, it is enough to identify that there is more than one potential cause of action in play between Morrisey and RSA.

[41] The second possible cause of action, this being the claim on an unsatisfied judgment, has not yet been triggered. This would be a claim based in contract and crystallized by an alleged failure to pay a future judgment obtained by Morrisey against an uninsured Bulmer.

[42] The balance of these reasons will deal with the first of the potential causes of action - the claim for declaratory relief requiring RSA to participate in the original proceeding. It must be determined whether Morrisey has lost his opportunity to bring RSA into the original proceeding because he failed to act within the applicable limitation period.

Issue 2- Has any applicable limitation period expired?

[43] The answer to this question requires an examination of the relevant insurance policy together with the *Limitation of Actions Act*. The law surrounding discoverability of a claim will be assessed as well.

[44] The following provisions of the policy and *Limitation Act* are relevant at this stage of the analysis:

> **Section D of the Policy in place between Morrisey and RSA**
>
> 9(1) No person shall commence an action to recover the amount of a claim provided for under the contract and under subsection 139(2) of the Act unless these regulations have been complied with.
>
> 9(2) Every action or other legal proceeding against an insurer for the recovery of an amount of damages shall be commenced within two years after the date on which the cause of action against the insurer arose and not afterward.
>
> **Nova Scotia Limitation of Actions Act**
>
> 8(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
>
> That the injury, loss or damage had occurred;
>
> That the injury, loss or damage was caused by or contributed to by an act or omission;
>
> That the act or omission was that of the defendant; and
>
> That the injury, loss or damage is sufficiently serious to warrant a proceeding.
>
> ….
>
> 9 (2) Every action or other legal proceeding against an insurer for the recovery of an amount of damages shall be commenced within two years after the date on which the cause of action against the insurer arose and not afterward.

Position of the Moving Party

[45] The Moving Party here argues that its claim against RSA was not discoverable until any one of the following dates:

(i) January 5, 2018 when the Morrisey demand was delivered to RSA, or

(ii) August 16, 2018 when RSA filed a defence in the companion Murray action denying all liability under Section D, or

(iii) February 8, 2019 when Yuill asserts he first had confirmation that Bulmer did not have insurance, or

(iv) August 22, 2019 when RSA refused the request to allow it to be joined as a party Defendant.

[46] The Moving Party says that, if any of these dates are selected, then the limitation period had not expired when Morrisey first sought to add RSA.

Position of the Respondent

[47] The insurer agrees there are two possible claims between its insured and itself. It accepts that these claims have separate limitation periods. The first potential claim is for a declaration of coverage, which would see RSA added to the original action. The second is contractual and would only arise after its insured obtained an unsatisfied judgment against Bulmer. As no judgment has been obtained or presented, this limitation period has not yet begun to run.

[48] The only limitation period that could be running is that applicable to the possible declaratory relief.

[49] RSA argues that the limitation period on declaratory relief arose on October 20, 2016, some five days after the accident. On that day, Morrisey told Lisa Euloth that he believed the Bulmer vehicle may have been uninsured.

[50] If this is the case, then the motion to add RSA to the Morrisey/Bulmer action needed to be advanced by October 20, 2018.

Discoverability

[51] In *Central Trust Co. v. Rafuse,* [1986] 2 S.C.R. 146, the Court described the discoverability rule as follows (pp. 151):

> ... A cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.

[52] Bourgeois, J. (as she then was) referenced the discussion in *Rafuse* and then went on to address discoverability in these terms in *Sweeney-Cunningham*, supra.:

> 49 The issue before me is, when based upon the evidence presented, did the Plaintiffs know, or could have known by virtue of the exercise of reasonable diligence the material facts giving rise to a claim against AVG? In my view, this question must be considered objectively, as opposed to considering the subjective views of the Plaintiffs.

[53] Accordingly, the question to be answered is ‘When, with the exercise of reasonable diligence, was the cause of action against the insurer discoverable?’

[54] The answer to this question is entirely tied up with the discoverability of the insurance status of Bulmer.

[55] Discoverability was also a central issue in *Barry v. HRM*, 2017 NSSC 180; appeal allowed 2018 NSCA 79. In this case, the plaintiff was a passenger on a bus operated by the defendant. On March 3, 2013 she allegedly fell and suffered injury when the bus stopped suddenly as the result of the actions of an unidentified motorist. She commenced action against the municipality alone for negligence in October 2015. In the late summer of 2016, the plaintiff learned the Municipality had a fleet policy which arguably gave her access to a Section D policy. On September 29, 2016, she advised the insurer (RSA) that she intended to add them to the proceeding. This was the first notice whatsoever that RSA had of the accident.

[56] In the trial level proceeding, the Court determined that the plaintiff knew, or with the exercise of reasonable diligence could have discovered, as of the date of the accident that she had a potential claim against the HRM fleet policy. It was notable that this was a claim against an unidentified motorist as opposed to

one who was alleged to be uninsured. Given the Hearing Judge's view on discoverability, the limitation period was found to have commenced on the date of the accident and was lapsed by the time the plaintiff sought to add the insurer as a party.

[57] In the second part of the analysis, the Hearing Judge relieved against the operation of the limitation period. This component of the judgment was successfully appealed against by the insurer.

[58] The Moving Party in the present matter notes a number of factual differences between the situation in the Barry matter and the present case. He argues that the potential declaratory claim against RSA in the present case did not crystallize until perhaps:

> a. The point the insured delivered a demand for indemnity in respect of damages caused;
> b. The point the insured presents a judgment against the motorist which has not been satisfied
> c. When the insurer expressly repudiates its obligations under the policy;
> d. The point it becomes apparent for another reason (such as a declaration of bankruptcy) that the motorist cannot be collected against.

[59] I have concluded with respect to the declaratory action, there were multiple points in time on the facts of the present case when it was clear to Morrisey, or

ought to have been clear with the exercise of reasonable diligence, that Bulmer had no insurance.

[60] Some of these include:

- In his October 26, 2016 statement to Adjuster Maddigan, Morrisey shared that Bulmer told him he had no insurance coverage.
- Morrisey and Euloth spoke in November 2016 and Morrisey was asserting that Bulmer was at fault for the accident and uninsured.
- The RCMP file information available to all parties within six weeks of the accident reveal no named insurer for the Bulmer vehicle.
- In November 2016, Morrisey gave a statement in the Dean matter in which he stated that he understood Bulmer was being charged with a failure to carry insurance on the ATV.
- Bulmer was charged with a Motor Vehicle Act offence arising from these circumstances. He testified in open court on November 7, 2017 as to his lack of insurance. Morrisey was a witness in that proceeding.

[61] A review of the record in this matter reveals multiple points at which the insurance status of Bulmer appears to have been obvious. The first indications that this was an issue come from Morrisey himself. The RCMP file appeared to confirm Morrisey's information as to lack of coverage.

[62] Caselaw indicates that the Court must assess what was known or ought to have been known through the exercise of reasonable diligence. It is the conclusion of the Court that Morrisey knew or ought to have known of the insurance status of Bulmer within 45 days of the collision.

[63] Accordingly, the limitation period commenced to run on November 15, 2016.

Issue 3 - Does Section 12 of the LAA operate to relieve against the limitation defence?

[64] Having concluded that the limitation period on the declaratory action expired in November 2018, it is necessary to consider the application of section 12 of the *Limitations of Actions Act*:

> 12 (3) Where a claim is brought without regard to the limitation period applicable to the claim, and an order has not been made under subsection (4), the court in which the claim is brought, upon application, may disallow a defence based on the limitation period and allow the claim to proceed if it appears to the court to be just having regard to the degree to which:
>
> (a) the limitation period creates a hardship to the claimant or any person whom the claimant represents; and
>
> (b) any decision of the court under this Section would create a hardship to the defendant or any person whom the defendant represents, or any other person.
>
> ….
>
> (5) In making a determination under subsection (3), 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 claimant;
>
> (b) any information or notice given by the defendant to the claimant respecting the limitation period;
>
> (c) the effect of the passage of time on
>
> (i) the ability of the defendant to defend the claim, and (ii) the cogency of any evidence adduced or likely to be adduced by the claimant or defendant;
>
> (d) the conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts that were or might be relevant to the claim;
>
> (e) the duration of any incapacity of the claimant arising after the date on which the claim was discovered;
>
> (f) the extent to which the claimant acted promptly and reasonably once the claimant 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 a claim;
>
> (g) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice the claimant may have received;
>
> (h) the strength of the claimant's case; and
>
> (i) any alternative remedy or compensation available to the claimant

[65] In summary, the section 12 analysis permits the limitation defence to be set aside, if this appears in all the circumstances to be just, having regard to the degree of hardship caused to either party.

[66] In *Barry v. HRM*, *supra*, Bourgeois, J.A. provided direction on how the analysis is to be conducted:

> 73 Firstly, s. 12(5) requires all the enumerated factors to be considered. Although a judge has the discretion to weigh the significance of particular factors against

> the others, she does not have the discretion to exclude any factor from consideration….
>
> ….
>
> 77 Before undertaking a consideration of the various factors, a preliminary observation is in order. Although s. 12(3) requires a court to consider the degree of hardship to both claimant and defendant, it should not be forgotten that this exercise is triggered due to the claimant having missed a limitation period created by virtue of the Act or other enactment. As such, the burden rests on the claimant to establish that any defence arising from the lapsing of that period ought to be disallowed.
>
> 78 It is incumbent on a claimant to adduce evidence which addresses the factors contained in s.12(5), in order to inform the s. 12(3) assessment. Although s. 12(5) mandates a judge to "have regard to all the circumstances of the case", those who fail to provide an evidentiary foundation do so at their peril. Similarly, in response, a defendant (or proposed defendant) is well-advised to provide a sufficient foundation to permit a comprehensive consideration of the factors in s. 12(5) in order to better inform the hardship assessment.

Section 12(5) Statutory Factors

(a) Length of and reasons for delay.

Morrisey filed the motion to add RSA approximately 12 months after the expiration of the limitation period. It was suggested that counsel was waiting until they had confirmation of the insurance status of Bulmer. Counsel knew that RSA was aware of the accident and in communication with Morrisey from nearly the date of the loss. It is possible there was confusion and a misplaced belief that joinder of RSA was a mere formality or technicality as the insurer had been following the proceeding from the beginning.

(b) Any information or notice given by the defendant to the claimant respecting the limitation period.

RSA acknowledged in their submission that they gave no notice to Morrisey about the limitation period. They say this was not necessary as he was represented throughout by counsel.

Morrisey argues that RSA's agreement to participate in joint discovery examinations in the Morrisey and Murray actions means it would be inequitable to now allow RSA to say the limitation period had already expired while they remained silent at the time.

Morrisey points to the contents of the Euloth letter to Morrisey of November 2, 2016 where she wrote in part that reasonable notice would be given to the insured if the insurer elected to do certain things including discontinuing its investigations or negotiations. Morrisey says that failure to give notice in these circumstances weighs substantially against the insurer. RSA argues this letter has no bearing on the limitation issue.

(c) **Effect of the passage of time on defence and cogency of evidence.**

A review of the record certainly reveals that RSA has been aware of this matter and has actively investigated and participated throughout. Morrisey argues there has been no effect on RSAs ability to defend the claim. It had a role in the matter from the beginning. It was able to investigate the accident, undertake multiple interviews of the relevant parties including Morrisey and even set reserves. RSA was waiting to be sued, although admittedly the suit never came, until mentioned during the joint discoveries in 2018.

RSA submits that its defence has been harmed. As they were not a party to the Morrisey/Bulmer action, they did not ask all the questions at discovery that they might have. They also disagree with the Plaintiff's assertion that they received all the Plaintiff's medical disclosure. It was received, but only following the discovery.

RSA does acknowledge that, at the discovery of Morrisey, they had an opportunity to question him. They commented they might be joining

the proceeding and did reserve their right to resume his discovery, should RSA ever be made a party.

As a result of RSA's knowledge and investigation of the accident from the outset, the passage of time here would have had much less negative effect than would be the case in a situation where the insurer was unaware of the loss until months or years after the expiry of the limitation period.

(d) **Conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by the claimant.**

The Court of Appeal in *Barry v. HRM*, *supra*. (para 81) indicates it is appropriate to consider whether anything in the record suggests the claimant was detrimentally influenced by the actions of the insurer. Morrisey suggests that the contents of the reservation of rights letter is relevant under this factor. He says RSA indicated the insurer would give notice before discontinuing investigation or negotiations. The insurer argues this letter has no bearing on the limitation issue.

RSA argues that it had no more information on the insurance issue than Morrisey. In fact, Morrisey had been their original source of information respecting Bulmer's insurance status.

The degree of initial cooperation and contact between the parties makes this an unusual case. RSA was aware of the claim from nearly the first day. Thereafter it had a cooperating insured. The parties agreed to participate in a joint discovery. RSA was waiting for a suit which never came.

(e) Duration of any incapacity of the claimant.

It is agreed this element is not relevant to the analysis.

(f) **Extent to which claimant acted promptly and reasonably once the claimant knew whether or not the act or omission might be capable of giving rise to a claim.**

Morrisey knew or ought to have known the insurance status of Bulmer within a few weeks of the collision. The decision not to proceed against RSA appears to have been less a conscious decision and more the result of complacency stemming, at least in part, from the fact RSA seemed to be fully engaged in the file.

In an April 17, 2017 communication to Yuill, Lisa Euloth for RSA had stated that the file was proceeding as a Section D claim. She went on to discuss particulars of Morrisey's possible contributory negligence. It appears Morrisey failed to appreciate there was a limitation period running on the declaratory action required to bring RSA into the proceeding involuntarily.

An unusual feature of this case is the degree of awareness and involvement of RSA in the matter. Communication was taking place between Morrisey and RSA. A copy of a demand letter was forwarded. Documents were shared. They agreed to attend a joint discovery. RSA rejects any suggestion that an estoppel argument can be advanced in this case. They accept that RSA received a copy of the Morrisey demand letter of January 5, 2018 but it was merely a copy of the letter which had been directed to the insurer for Dean.

(g) **Steps taken by claimant to obtain medical, legal or other expert advice.**

Morrisey cooperated with RSA as the insurer conducted its initial investigation. Subsequently there was medical and other documentation shared with RSA, although the largest group of medical and financial records were not disclosed until after the discovery.

Morrisey did hire a solicitor in a timely way.

(h) **Strength of the claimant's case.**

> While ultimately an issue for the trial judge, Morrisey argues that, absent the limitation issue, he has a clear claim against his insurer. RSA submits that liability is not clear. While Bulmer is uninsured, there still exist complex liability issues, including the possible application of the "1% rule" exclusion [Policy section 3(1)(d)] which arguably could eliminate any Section D entitlement if Dean or Murray were to be found even 1% liable for the accident.
>
> While Morrisey clearly did suffer an injury in the accident, there was limited evidence advanced on the issues highlighted by the Court of Appeal in paragraph 90 of *Barry v. HRM, supra*. The Court there suggests a preference for evidence on liability together with details of the nature, extent, duration and causation of the injuries.
>
> (i) **Any alternative remedy or compensation available to claimant.**
>
> Morrisey argues he has no alternative remedy. RSA suggests he did have the option to advance tort claims against Dean or Murray.
>
> Case law indicates that it is speculative to weigh potential claims against professional advisors: see *Lord v. Smith*, 2013 NSCA 34, para 52.
>
> It is relevant that Morrisey does have a possible second pathway to indemnity under the policy. This is the claim on an unsatisfied judgment. There are complications with being required to proceed in this way. It is not as convenient or timely for the insured. There are policy and coverage requirements which must be complied with. The insurer has defences available to it.

[67] The Court is required to assess and balance these considerations. The objective is to achieve a just outcome in all the circumstances, having regard to the respective hardships.

[68] The Respondent has argued that the outcome of the *Barry v. HRM, supra* case ought to be determinative here. While there is no question as to the applicability of the principles set out in that case, it is equally inescapable that the fact situation was materially different.

[69] In *Barry v. HRM, supra*, the insurer knew nothing about the potential claim for a period of years prior to the attempt to have the insurer added to the proceeding. The company had no awareness of the claim and no opportunity to investigate.

[70] The scenario now before the Court could hardly be more different. In the present matter, RSA was involved from, almost literally, the first day. It investigated, set coverage reserves, interviewed and re-interviewed the parties involved. It retained an outside adjuster to assist in the investigation. It participated in joint discovery along with the other parties.

[71] It is true there is no reasonable explanation for the failure of Morrisey to act. RSA anticipated that a suit was coming. It appears that Counsel for Morrisey failed to appreciate the consequence of the passage of time and was perhaps lulled into inaction because RSA remained partly in the litigation picture. He

may have been comforted by the fact RSA was participating in joint discoveries.

[72] I have weighed the respective harms to each party if the motion is granted or refused. The Court could have benefitted from a more complete record on this point. The matter seemed to proceed on the basis that certain harms were self-evident. Direction from the Court of Appeal *in Barry v. HRM, supra*, suggests that parties should more deliberately turn their minds to this element. Nonetheless, I am satisfied that the record, as it stands, does allow me to adequately weigh the respective positions of the parties.

[73] Bulmer is uninsured and has declared bankruptcy. Morrisey will recover nothing material in the way of damages from him. RSA has been aware of this potential claim from nearly the day of the accident. It investigated the matter thoroughly and clearly anticipated being brought into the proceeding. This appears clear from the comments of its counsel even as late as the July 2019 discoveries.

[74] I find that, in these particular circumstances, it is just to relieve against the strict operation of the limitations period. This amounts to relieving against the

eight-month period between the expiry of the limitation period in November 2018 and the request that RSA be added in July 2019.

[75] In summary, the issues in this matter are resolved as follows:

Is there more than one potential cause of action between Morrisey and RSA?

Answer: Yes, there are two potential causes of action, each with their own limitation period which are triggered and run independently. One is a declaratory action respecting potential entitlement under the policy and the other a claim based in an unsatisfied judgment.

Has any applicable limitation period expired?

Answer: Yes, the two-year limitation period attached to the declaratory action expired in November 2018.

If a limitation period has expired, does Section 12 of the Limitations of Actions Act operate to relieve against the limitation defence?

Answer: Yes, in the particular circumstances of this case, section 12 operates to relieve against the limitation period.

[76] I direct the Moving Party to draft the Order. In the event the parties are unable to resolve the question of costs, I ask that written positions be forwarded to the Court within 45 days.

[77] To assist the parties in their discussion of this issue, I note that while the Moving Party has been successful, there is a line of authority suggesting a more nuanced approach to the costs question may be required where the motion was the result of a missed limitation period.

J.