Date: 20020118
Docket: S. N. No. 113170

IN THE SUPREME COURT OF NOVA SCOTIA

[CITE: Day v. Guarantee Company of North America, 2002 NSSC 012]

BETWEEN:

TERRI LEAH ANNE DAY

PLAINTIFF

- and -

THE GUARANTEE COMPANY OF NORTH AMERICA, a body corporate

DEFENDANT

D E C I S I O N

HEARD: **At Halifax, Nova Scotia, in Chambers, before the Honourable Justice C. Richard Coughlan, on November 2nd, 2001**

DATE OF DECISION: **January 18th, 2002**

COUNSEL: **M. Joseph Rizzetto, for the Plaintiff**
David P. S. Farrar and Christa M. Hellstrom, for the Defendant
Robert L. Barnes, Q.C. and Jennifer Ross, for the Intended Intervenor, Raymond F. Wagner

COUGHLAN, J.:

[1] Terri Leah Anne Day, an Ontario resident, was involved in a motor vehicle accident in Richmond County, Nova Scotia on September 4th, 1994. Her automobile was registered in Ontario and insured by the Guarantee Company of North America (Guarantee) by a policy issued in Ontario. The accident involved a truck and a second automobile whose drivers have never been identified.

[2] Ms. Day retained Mr. Raymond F. Wagner, a Nova Scotia lawyer, to represent her in connection with the accident. Mr. Wagner wrote to Guarantee on September 29th, 1994, advising of the accident. By letter dated October 21st, 1994, Mr. J. Stephen Hague, Claims Examiner of Guarantee, responded stating Ms. Day could claim under her policy the difference between the limit of the Nova Scotia Uninsured Motorist Fund and her policy limit. Mr. Hague also advised of a two year limitation period.

[3] By letter dated April 15th, 1995, Guarantee notified Ms. Day her weekly benefits would stop effective April 30th, 1995 unless she provided a written notice requesting an assessment as provided in the Ontario Regulations.

[4] Mr. Wagner filed a notice of intended action and on May 23rd, 1995 issued an originating notice (action) and statement of claim against the Registrar of

Motor Vehicles pursuant to the provisions of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293. By letter dated September 19th, 1995, Mr. Hague informed Mr. Wagner the only recourse Ms. Day had was against the uninsured motorist funds in Nova Scotia as, in order for the S.E.F. 44 endorsement to be available, the owner of the vehicle has to be identified.

[5] In June, 1997, Ms. Day retained Mr. James Pitcher, an Ontario lawyer, to represent her with respect to her claims. Ms. Day notified Mr. Wagner of a potential negligence claim for a missed limitation period on February 23rd, 1999 and Mr. Pitcher, by letter dated May 12th, 1999, also brought to Mr. Wagner's attention the potential negligence claim. In August, 1999, Ms. Day retained a Nova Scotia lawyer, Joseph Rizzetto, to represent her.

[6] On June 22nd, 2000, Ms. Day commenced action against Guarantee in Nova Scotia pursuant to her policy of insurance.

[7] Guarantee defended the action, pleading the proper law of the contract was Ontario law and Ms. Day's action was out of time and pleaded the provisions of the **Insurance Act**, R.S.O. c.1.8 and the regulations thereto, and in the alternative, the **Limitations of Actions Act**, R.S.N.S. 1989, c. 258. Mr. Wagner has made application to be added as an intervenor, and if added, application to strike out the limitation defence.

[8] The parties agree Guarantee is a licensed insurer in Nova Scotia; the applicable policy of insurance is entered into evidence; Nova Scotia is a "convenient forum" for this proceeding; and this Court has jurisdiction to hear the applications.

[9] The issues for the Court to decide are: Should Mr. Wagner be added to this action as an intervenor? In dealing with the application to strike the limitation defence, what is the proper law to be applied - that of Ontario or Nova Scotia? And applying the proper law, should the limitation defence be struck?

APPLICATION TO ADD INTERVENOR

[10] Guarantee does not oppose the application of Mr. Wagner to be added as an intervenor. Mr. Wagner was retained by Ms. Day to represent her and there is a question of whether he missed a limitation period. Mr. Wagner is, therefore, a person interested in the proceeding. His addition as an intervenor will not unduly delay or prejudice the adjudication of the rights between the plaintiff and defendant. The issue of intervenors is dealt with in Civil Procedure Rule 8.01, which provides in part:

> (1) Any person may, with leave of the court, intervene in a proceeding and become a party thereto where,

> (a) he claims an interest in the subject matter of the proceeding, including any property seized or attached in the proceeding, whether as an incident to the relief claimed, enforcement of the judgment therein, or otherwise;
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> ....
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> (3) On the application, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the parties to the proceeding and it may grant such order as it thinks just.

[11] I grant Mr. Wagner's application to be added as an intervenor herein.

CHOICE OF LAW

[12] Guarantee contends the claim of Ms. Day against it arises out of an Ontario insurance policy and the proper law of the contract is that of Ontario.

[13] Mr. Wagner's position is, a separate conflict regime for claims arising out of automobile insurance policies has been established.

[14] In dealing with a claim based in tort arising out of a motor vehicle accident, the Supreme Court of Canada in **Tolofson v. Jensen**, [1994] 3 S.C.R. 1022 held the law to be applied, at least as a general rule, is the law of the place where the activity occurred. The Court also held that a limitation defence is not a procedural matter, but a matter of substantive law, to be governed by the law of the place the activity occurred.

[15] Section 127(1) of the **Insurance Act**, R.S.N.S., 1989, c. 231 provides:

> In any action in the Province against an insurer transacting the business of automobile insurance in the Province or its insured arising out of an automobile accident in the Province, the insurer shall appear and shall not set up any defence to a claim under a contract made outside the Province, including any defence as to the limit or limits of liability under the contract, that might not be set up if the contract were evidenced by a motor vehicle liability policy issued in the Province, and the contract made outside the Province shall be deemed to include the benefits prescribed pursuant to Section 140.

[16] Guarantee executed a power of attorney and undertaking dated February 18th, 1983 which provides, in part:

> THE GUARANTEE COMPANY OF NORTH AMERICA the head office of which is in the City of Montreal in the Province of Quebec in the Canada, hereby, with respect to an action or proceeding against it or its insured, or its insured and another or others, arising out of a motor-vehicle accident in any of the respective Provinces or Territories, appoints severally the Superintendents of Insurance of ... Nova Scotia ... or such official as may from time to time be designated by the Provinces or Territories concerned, to do and execute all or any of the following acts, deeds, and things, that is to say: To accept service of notice or process on its behalf.
>
> THE GUARANTEE COMPANY OF NORTH AMERICA aforesaid hereby undertakes:
>
> A. To appear in any action or proceeding against it or its insured in any Province or Territory in which such action has been instituted and of which it has knowledge:
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> ...

> C. Not to set up any defence to any claim, action, or proceeding, under a motor-vehicle liability insurance contract entered into by it, which might not be set up if the contract had been entered into in, and in accordance with the law relating to motor-vehicle liability insurance contracts of the Province or Territory of Canada in which such action or proceeding may be instituted, and to satisfy any final judgment rendered against it or its insured by a Court in such Province or Territory, in the claim, action, or proceeding, up to
>
> (1) the limit or limits of liability provided in the contract; but
>
> (2) in any event an amount not less than the limit or limits fixed as the minimum for which a contract of motor-vehicle liability insurance may be entered into in such Province or Territory of Canada, exclusive of interest and costs and subject to any priorities as to bodily injury or property damage with respect to such minimum limit or limits as may be fixed by the Province or Territory.

[17] Is s. 127(1) of the **Insurance Act** limited to claims based in tort and not claims based in contract? The section is not so limited. Neither the words of s. 127(1) nor of the power of attorney and undertaking are limited to tort claims. The section speaks of not setting up "any" defence to "any" claim under a contract of insurance made outside the Province which might not be set up if the motor vehicle liability insurance policy was issued in the Province. The power of attorney and undertaking is even broader in wording. Ms. Day's claim arises out of an automobile accident in the Province, against an insurer transacting the business of automobile insurance in the Province. To limit the application of the section as suggested by Guarantee would defeat the meaning and purpose of the section. The section

modifies the common law conflict rules of choice of law arising out of automobile accidents.

[18] The accident took place in Nova Scotia, the law of Nova Scotia applies and Guarantee cannot set up any defence that could not be set up if the policy were issued in Nova Scotia. Ms. Day is entitled to any defence available to her pursuant to Nova Scotia law.

APPLICATION TO STRIKE LIMITATION DEFENCE

[19] Applying Nova Scotia law, should the limitation defence be struck? The two year limitation period had expired prior to the commencement of action in June, 2000; however, s. 3 of the **Limitation of Actions Act**, R.S.N.S., 1989, c. 258 gives the Court discretion to disallow a limitation defence in certain circumstances. The section provides, in part:

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

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

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

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

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

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

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

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

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

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

[20] The test for the Court is whether it is equitable to disallow the limitation defence, having regard to the degree to which the time limitation prejudices the plaintiff and the defendant. (See **MacCulloch v. McInnes, Cooper & Robertson** (1995), 140 N.S.R. (2d) 220 (C.A.)) This statute also provides that, in determining whether it is equitable to disallow the limitation defence, the Court shall have regard to all the circumstances of the case and, in particular, to the factors set out in s. 3(4)(a) to (g). It is the degree of prejudice which is the governing factor. In dealing with the issue of prejudice, Hallett, J. (as he then was) in **Anderson and Anderson v. Co-operative Fire & Casualty Company** (1983), 58 N.S.R. (2d) 163 stated at p. 167:

> ... The issue before the Court on this application is whether it is equitable to disallow the time limitation defence, having regard to the degree to which (1) the time limitation prejudices the plaintiff or any person whom he represents and (2) any decision to disallow the time limitation pursuant to this amendment would prejudice the defendant or any other person. In determining the issue, the Court must have regard to all the circumstances of the case and, in particular, the seven matters referred to in s. 2A(4)(a) to (g).
>
> In any case, there is great prejudice to a plaintiff if a time limitation defence succeeds as the plaintiff loses his cause of action. On the other hand, there is great prejudice to the defendant who loses a perfect defence if the order is granted. The Legislature in enacting this amendment must have recognized that there was prejudice to each party when the word "degree" was used in s. 2A(2). The Court has been directed to consider not simply whether there is prejudice but to weigh the degree of prejudice to the parties. The intention of the Legislature as expressed is to give the Court the authority to disallow a defence based on time limitation considering the criteria set forth in ss. 2A(2) and (4).

[21] Section 3(6) places an absolute bar of four years after the limitation period expires during which the Court has the discretion, if the appropriate circumstances exist, to disallow the limitation defence.

[22] I now review the factors set out in s. 3(4):

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

[23] The motor vehicle accident took place on September 4th, 1994. Ms. Day retained a lawyer within a month. Guarantee was contacted. Action was commenced against the Registrar of Motor Vehicles on May 23rd, 1995. Stephen Hague, by letter dated September 19th, 1995, informed Mr. Wagner Ms. Day's only recourse was through the uninsured motorists' fund in Nova Scotia. Ms. Day retained Mr. Pitcher in June, 1997. Mr. Pitcher dealt with Guarantee and applied for mediation pursuant to Ontario law. On February 23rd, 1999, Ms. Day informed Mr. Wagner about her potential negligence claim against him for the missed limitation period. The mediator's report dated February 24th, 1999 was issued. By letter dated May 12th, 1999, Mr. Pitcher stated that Mr. Wagner had been negligent and had missed a limitation period. In August, 1999, Ms. Day retained Joseph Rizzetto to represent her regarding her motor vehicle accidents, including the accident which occurred on September 4th, 1994. Action was commenced against Guarantee on June 22nd, 2000.

[24] In his letter of September 19th, 1995, Stephen Hague advised Mr. Wagner, because the identity of the driver alleged to have caused the accident was unknown, Ms. Day's only recourse was to the Nova Scotia claims fund; he went on to refer Mr. Wagner to the policy. Ms. Day was represented by experienced counsel. In 1997, she retained Mr. Pitcher. In August, 1999, she retained Mr. Rizzetto. Still action was not commenced until June, 2000. The delay was inordinate.

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

[25] This is not a factor in this case as Guarantee advised Mr. Wagner of the limitation period of two years.

(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;

[26] The drivers of the other vehicles have never been identified and there is no issue of witnesses' memories becoming stale or relevant witnesses no longer being available to give evidence. Although Guarantee has been involved with the action and has been involved with mediation attempts, there are

other steps Guarantee may have taken if action had been commenced in a timely fashion, including independent medical assessments.

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

[27] There is nothing in Guarantee's conduct which had an effect in assessing whether the limitation defence should be struck.

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

[28] Ms. Day was not under any disability regarding her ability to pursue an action against Guarantee.

(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;

[29] Ms. Day retained Mr. Pitcher in June, 1997. By letter dated April 2nd, 1998, Mr. Pitcher wrote to Lindsey Morden Claims Services Limited concerning Ms. Day's claim stating she had until September 4th, 1998 to apply for

mediation and/or arbitration and/or to commence formal civil proceedings. Mediation was undertaken and a mediator's report filed February 24th, 1999. Still no action was commenced until June 22nd, 2000, three years after Mr. Pitcher was retained, more than a year after the mediator's report. Ms. Day notified Mr. Wagner on February 23rd, 1999 of a potential negligence claim based on a missed limitation period, followed by a letter dated May 12th, 1999 from Mr. Pitcher concerning the missed limitation period. Still no action until June 22nd, 2000. Ms. Day's mind was certainly directed to the issue of the limitation period. Ms. Day retained Joseph Rizzetto in August of 1999 to represent her in connection with the motor vehicle accidents and terminated Mr. Wagner's retainer. Still no action was commenced until June 22nd, 2000.

(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.

[30] In this case the plaintiff took all necessary steps to obtain medical, legal or other expert advice. There is an issue as to whether the legal advise received may have contributed to the missed limitation period. However, based on

what was set out with regard to factor (f) above, even after receiving notice of the missed limitation period, Ms. Day delayed bringing the action.

[31] Considering all the circumstances of the case, in particular the factors set out in s. 3(4)(a) to (g) of the **Limitation of Actions Act**, and having regarding to the degree to which the time limitation prejudices Ms. Day and Guarantee, I am satisfied it is inequitable to disallow the limitation defence. The application to disallow the limitation defence is therefore dismissed.

[32] Counsel may submit written briefs on the issue of costs.

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C. Richard Coughlan, J.