COURT OF APPEAL FOR ONTARIO

CITATION: Tomec v. Economical Mutual Insurance Company, 2019 ONCA 882
DATE: 20191108
DOCKET: C66763

Hourigan, Benotto and Fairburn JJ.A.

BETWEEN

Sotira Tomec

Applicant (Appellant)

and

Economical Mutual Insurance Company

Respondent (Respondent)

John Adair, William Keele, Michele Valentini, and Joseph Cescon, for the appellant

Philippa Samworth, Lisa Armstrong and Shalini Thomas, for the respondent

Trevor Guy and Kathryn Chung, for the Licence Appeal Tribunal

Steven Rastin, Alexander Voudouris and Stanley Pasternak, for the intervener Ontario Trial Lawyers Association

Heard: October 16, 2019

On appeal from the order of Divisional Court (Regional Senior Judge Morawetz, Justices Whitten and Gray), dated October 2, 2018, with reasons reported at 2018 ONSC 5664, affirming a decision of the Licence Appeal Tribunal, dated September 7, 2017.

Hourigan J.A.:

I. Overview

[1] The primary issue for determination on this appeal is whether the two-year limitation period in both s. 281.1(1) of the *Insurance Act*, R.S.O. 1990, c. I.8 and s. 51(1) of the *Statutory Accident Benefits Schedule - Accidents On or After November 1, 1996*, O. Reg. 403/96 ("*SABS*"), is subject to discoverability.

[2] The Licence Appeal Tribunal ("LAT") and the Divisional Court concluded that discoverability did not apply to these sections. Instead, they found that the limitation period was a hard limitation period that proscribed the appellant from asserting her claim for certain statutory accident benefits before she was legally entitled to make that claim.

[3] After the Divisional Court's decision in this case, the Supreme Court released *Pioneer Corporation v. Godfrey*, 2019 SCC 42, 26 B.C.L.R. (6th) 1, which provided guidance regarding when a limitation period should be construed as a hard limitation. Applying *Pioneer* and well established rules of statutory construction to this case make clear that the LAT's and Divisional Court's orders cannot stand. I would therefore allow the appeal.

II. Background

[4] The appellant was a pedestrian and was struck by a motor vehicle on September 12, 2008. She was hospitalized and required surgery. The appellant

applied to her insurer, the respondent, Economical Insurance Corporation, and received statutory accident benefits for: (i) attendant care benefits, pursuant to s. 18 of the *SABS*; and (ii) housekeeping benefits pursuant to s. 22 of the *SABS*.

[5] These benefits are payable for 104 weeks following an accident, unless the beneficiary sustains a "Catastrophic Impairment" ("CAT") and is designated as such. In CAT cases, the 104-week time limit "does not apply": *SABS*, ss. 18(3) and 22(4).

[6] On August 26, 2010, Economical provided a letter to the appellant wherein it purported to advise her that she would no longer qualify for housekeeping or attendant care benefits past September 12, 2010. It is common ground that as of August 2010, the appellant's injuries did not rise to the level of CAT. Her physician did not, at that time, apply for such a designation, and the appellant did not appeal the termination of benefits to the LAT.

[7] Over the next five years, the appellant underwent various medical tests under the *SABS* scheme and submitted her test results to Economical. The appellant's condition worsened over time. On May 13, 2015, her doctor opined that she now met the definition of CAT, and that her condition was result of the September 12, 2008 car accident.

[8] On November 4, 2015, Economical accepted that the appellant was CAT and provided various elevated statutory accident benefits on that basis. It refused,

however, to provide further attendant care and housekeeping benefits, either for the intervening period between September 2010 and November 2015, or at any point going forward. Economical took the position that it had denied the benefits in its August 26, 2010 letter, and the appellant was out of time.

[9] The appellant appealed Economical's decision to the LAT. Economical relied on s. 281.1(1) of the *Insurance Act* and s. 51(1) of the *SABS*. Both sections provided that any dispute over benefits must be brought within two years of the insurer's refusal to pay the benefits.

III. Decisions Below

[10] In dismissing the appeal, the LAT Vice-Chair determined that the August 26, 2010 letter to the appellant was a clear and unequivocal denial of her *SABS* benefits. In addition, the Vice-Chair found that Economical's denial of benefits triggered the commencement of the limitation period and that the doctrine of discoverability did not apply.

[11] On further appeal to the Divisional Court, the court framed the issues as follows: (i) whether there was a refusal to pay the benefit claimed, thus triggering the applicable limitations period; and (ii) whether a proceeding must be commenced within two years after the refusal, regardless of whether the claimant qualifies for payment of the benefit at the time of the refusal.

[12] With respect to the first issue, whether Economical' s letter was a clear and unequivocal denial, the court determined that the standard of review was reasonableness. The court further found that the Vice-Chair considered and applied the governing test from *Smith v. Co-Operators General Insurance Co.*, 2002 SCC 30, [2002] 2 S.C.R. 129, analyzed the evidence, and came to a reasonable conclusion.

[13] With respect to the issue of discoverability, the court stated that the standard of review was less clear. The court ultimately found that it was not necessary to decide the issue, as the LAT decision would stand on either a correctness or reasonableness standard of review.

[14] The Divisional Court recognized that, as a general proposition, a limitation period did not arise until the claimant discovers that he or she has a claim: *Kamloops v. Nielson*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, at p. 40 and *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, 151 D.L.R. (4th) 429, at para. 39. However, the court noted that there is nevertheless a category of hard limitation periods, which are triggered by a fixed and known event, and where it is possible for a claim to be barred even before the claimant is aware that she has a claim.

[15] The court cited this court's recent decision in *Levesque v. Crampton Estate*, 2017 ONCA 455, 136 O.R. (3d) 161 as an example of a hard limitation period. That case involved a limitation period in the *Trustee Act*, R.S.O. 1990, c. T.23, for claims

against an estate. The limitation period under that statute expires on the two-year anniversary of the deceased's death.

[16] The Divisional Court found that the legislature, in enacting the limitation period in issue in this case, had similarly tied the commencement of the limitation period to a fixed event — the insurer's refusal to pay the benefit claimed. According to the court, it is irrelevant that the insured did not qualify for the benefit at the time of the refusal, or indeed at any time prior to the limitation period's expiration.

[17] The court recognized that this is a harsh result for the appellant. However, it reasoned that, as with any hard limitation period, there are policy considerations on both sides. It noted that the insurer has no control over when an insured applies for a CAT designation. The court inferred that the legislature thought it important to provide for a reasonable period, after which the insurer's obligation would be discharged, regardless of whether meritorious claims may be discovered later.

IV. Issues

[18] The appellant focused on two issues in her submissions before this court. First, she argued that Economical's letter was not a clear and unequivocal denial of benefits that would trigger the running of the limitation period. Second, she submitted that the LAT and Divisional Court erred in determining that discoverability did not apply to the limitation period in the *Insurance Act* and *SABS*.

[19] I am of the view that the LAT and Divisional Court's decisions on the second issue cannot stand. Consequently, it is unnecessary to consider the first issue. Nothing in these reasons should be construed as an endorsement of the sufficiency of the notice in Economical's letter.

V. Analysis

(a) Standard of Review

[20] Before turning to an analysis of the limitation period, consideration must be given to the standard of review on this issue. The appellant submits that the standard of review is correctness, while Economical and the LAT argue that the standard of review is reasonableness[1].

[21] This case concerns an administrative decision-maker interpreting a statute closely related to its function. The presumption of reasonableness review applies to such cases: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 22. Here, the LAT is determining whether discoverability applies to a limitation period contained in the *Insurance Act* and *SABS*, which the LAT must apply frequently to resolve compensation disputes.

[22] In my view, the presumption of reasonableness review is not rebutted. This case does not clearly concern a question of law of central importance to the legal

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[1] In *Pioneer* at para. 30, the court stated the standard of review regarding whether discoverability applies to a limitation period is correctness. However, that case considered an appeal from a court ruling, not a ruling from an administrative tribunal.

system and outside the adjudicator's specialized area of expertise, which would attract correctness review: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 55. The Supreme Court has found this correctness category to apply in only two cases: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 55; and *Mouvement laique Quebecois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3.

[23] The discoverability issue in this case is confined to the accident benefits context in Ontario. It is difficult to analogize to the scope of the state's duty of religious neutrality as in *Saguenay*, or the question of what statutory language is sufficient to set aside solicitor-client privilege, as in *Alberta*. Limitation periods are "*generally* of central importance to the fair administration of justice", but it does not follow that "*this* limitation period must be reviewed for correctness" (emphasis in original): *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 28.

[24] Reasonableness is a more deferential standard of review than correctness. Having said that, reasonableness also "takes its colour from the context" and "must be assessed in the context of the particular type of decision making involved and all relevant factors": *Catalyst Paper Corp. v, North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at. para. 18. Here, we are concerned with a question of law — whether a common law doctrine applies to a statutory provision. This differs, for

instance, from a highly discretionary ministerial decision, which would likely result in a much wider range of reasonable outcomes.

[25] In fact, *McLean* acknowledged the possibility that where "the ordinary tools of statutory interpretation lead to a single reasonable interpretation and the administrative decision maker adopts a different interpretation, its interpretation will necessarily be unreasonable — no degree of deference can justify its acceptance": at para. 38.

[26] In my view, as will be discussed below, the LAT's decision was unreasonable.

(b) Limitation Periods

[27] Our courts have recognized that the rule of discoverability may apply to limitation periods. Discoverability generally provides that a limitation period will not begin to run until the material facts on which the cause of action is based are known to the plaintiff or ought to have been known through the exercise of reasonable diligence. It is not a universal rule applicable to all limitation periods but a rule of construction to aid in interpreting limitation periods: *Pioneer*, at paras. 31 – 32.

[28] Both the LAT and the Divisional Court concluded that the applicable limitation period is a hard limitation period, i.e. a limitation to which the rule of discoverability does not apply.

[29] Section 281.1(1) of the *Insurance Act*, which has since been repealed, reads as follows: “A mediation proceeding or evaluation under section 280 or 280.1 or a court proceeding or arbitration under section 281 shall be commenced within two years after the insurer’s refusal to pay the benefit claimed.”

[30] At the material time, s. 51(1) of the *SABS* provided: “A mediation proceeding or evaluation under section 280 or 280.1 of the *Insurance Act* or a court proceeding or arbitration under clause 281 (1) (a) or (b) of the Act in respect of a benefit under this Regulation shall be commenced within two years after the insurer’s refusal to pay the amount claimed.”[2]

(c) Application of *Pioneer*

[31] In *Pioneer*, which the Divisional Court did not have the benefit of, the Supreme Court provided guidance for determining when a limitation period is subject to the rule of discoverability and when it is a hard limitation period. *Pioneer* analyzed the cause of action found in s. 36 of the *Competition Act*, R.S.C. 1985, c. C-34. In that analysis, Brown J. made the following comments, at paras. 34-35:

> First, where the running of a limitation period is contingent upon the accrual of a cause of action or some other event that can occur only when the plaintiff has knowledge of his or her injury, the discoverability principle applies in order to ensure that the plaintiff had

[2] Section 51(1) of the *SABS* was revoked and replaced with slightly different wording in April 2016. This analysis is confined to the legislation as it read when Economical purported to deny the appellant benefits (i.e. in August 2010).

> knowledge of the existence of his or her legal rights before such rights expire.
>
> Secondly (and conversely), where a statutory limitation period runs from an event unrelated to the accrual of the cause of action or which does not require the plaintiff's knowledge of his or her injury, the rule of discoverability will not apply. [Citations omitted.]

[32] Thus, the analysis is not focused on whether a limitation period is tied to a fixed event, as the Divisional Court opined. Rather, the question is whether the limitation period is related to the cause of action or the plaintiff's knowledge.

[33] In *Pioneer*, Brown J. made this point by distinguishing *Ryan v. Moore*, 2005 SCC 38, [2005] 2 S.C.R. 53, where the court considered the limitation period in the *Survival of Actions Act*, R.S.N.L., 1990, c. S-32, for a claim against an estate. That limitation period expires two years after the death of a potential defendant. Justice Brown stated that discoverability did not apply in *Ryan,* "because the action was 'complete in all its elements' before the operation of the event triggering the limitation period": *Pioneer*, at para. 39. The limitation period was not dependent upon the accrual of the cause of action.[3] However, the court noted that had "the event triggering the limitation period been an *element* of the cause of action, or had it been required to occur before the cause of action could accrue, discoverability *could* apply" (emphasis in original): *Pioneer*, at para. 40.

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[3] For a similar result see *Levesque*, which considered a comparable provision in the *Trustee Act*.

[34] Economical submits that the refusal to pay a benefit referenced in s. 281.1(1) of the *Insurance Act* and s. 51(1) of the *SABS* is a specific event that is not tied to a cause of action. In support of this argument, counsel notes that in previous iterations of the *Insurance Act*, the limitation period ran from "the date on which the cause of action arose".

[35] I would not give effect to this argument. It is contrary to the admonition from the Supreme Court in *Pioneer* at para. 36 that:

> In determining whether a limitation period runs from the accrual of a cause of action or knowledge of the injury, such that discoverability applies, substance, not form, is to prevail: even where the statute does not explicitly state that the limitation period runs from 'the accrual of the cause of action', discoverability will apply if it is evident that the operation of a limitation period is, in substance, conditioned upon accrual of a cause of action or knowledge of an injury.

[36] The refusal to pay a benefit is clearly tied to the appellant's cause of action. Absent a refusal to pay the benefit sought, there cannot be a claim made for mediation or an evaluation. Thus, the refusal to pay a benefit and the ability to make a claim are inextricably intertwined in the cause of action. The refusal cannot be stripped out of the cause of action and treated as if it is independent from it.

[37] This distinguishes the case at bar from the situations in *Ryan* and *Levesque*. In both those cases, the courts were considering limitation periods that were wholly independent from the cause of action. The commencement of the limitation period

was tied to the date of the deceased's death. In contrast, the applicable limitation period in this case is tied to the accrual of the cause of action.

[38] Economical submits that this case is distinguishable from *Pioneer* because of s. 19 of the *Limitations Act*, 2002, S.O. c. 24, Sched. B. That section specifically exempts s. 281.1(1) of the *Insurance Act*, among other limitation periods, from the operation of the *Limitations Act*, which codifies discoverability. Economical argues that s. 19 of the *Limitations Act* demonstrates that the legislature intended to exclude discoverability from applying to s. 281.1 of the *Insurance Act*.

[39] I am not persuaded by this submission. It is open to a legislature to exempt a limitation period from the discoverability rule. However, it must do so with clear legislative language: see *Pioneer*, at paras. 32 and 36. There is no such clear statutory text in the *Limitations Act*. Economical's argument is premised entirely on an inference that counsel invites this court to draw. That does not meet the test of clear legislative intent.

[40] I note as well, that this court has stated that discoverability applies to the limitation period in the *Libel and Slander Act,* R.S.O. 1990, c. L12, s. 6: *Shtaif v. Toronto Life Publishing Co. Ltd.*, 2013 ONCA 405, 306 O.A.C. 155, at para. 42. This limitation period is also exempted by s. 19 of the *Limitations Act*. Therefore, inclusion under s. 19 of the *Limitations Act* does not automatically mean the rule of discoverability does not apply.

(d) Purposes of the *SABS*

[41] In *Pioneer*, after analyzing the law regarding discoverability and hard limitation periods, the court undertook a detailed analysis of the *Competition Act*. This included considering the statute's purpose. A similar analysis of the *SABS* is instructive in understanding whether the limitation period in issue is intended to operate as a hard limitation period.

[42] Unlike the situation in *Ryan* and *Levesque,* the *SABS* contains both the limitation period and the statutory mechanisms designed to provide no-fault benefits. In *Arts (Litigation Guardian of) v. State Farm Insurance Co.*, (2008) 91 O.R. (3d) 394 (S.C.), MacKinnon J. provided a compelling analysis of the *SABS*' purposes and offered guidance regarding the interpretation of the *SABS*, at paras. 14 and 16:

> The legislature's definition of "catastrophic impairment" is intended to foster fairness for victims of motor vehicle collisions by ensuring that accident victims with most health needs have access to expanded medical and rehabilitation benefits. That definition is intended to be remedial and inclusive, not restrictive.
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> …
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> The SABS are remedial and constitute consumer protection legislation. As such, it is to be read in its entire context and in their ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature. The goal of the legislation is to reduce the economic dislocation and hardship of motor vehicle accident victims and as such, assumes an importance which is both pressing and substantial.

[43] The decisions below and Economical's narrow interpretation of the limitation are incongruous with the *SABS'* consumer protection purposes. The appellant falls within a small category of victims who suffer from lasting and very serious health impacts as result of a motor vehicle accident. The *SABS* is supposed to maximize benefits for that class of victims. A hard limitation period prevents the appellant from making a claim for the benefits the *SABS* are intended to provide. I do not see how such a result could be consistent with consumer protection legislation designed to provide fair compensation and minimize economic disruption in the lives of accident victims.

[44] The *SABS* is unlike the statutory regimes in *Ryan* and *Levesque*, which are aimed at creating finality in the context of claims against an estate. A hard limitation period is consistent with such regimes.

[45] Given the choice of a statutory interpretation that furthers the public policy objectives underlying the *SABS* and one that undermines it, the only reasonable decision is to side with the former.

(e) Absurd Result

[46] Statutes are to be interpreted in a manner that does not lead to absurd results. An interpretation is absurd if it "leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the

legislative enactment": *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, 36 O.R. (3d) 418, at para. 27.

[47] Here, the decisions below thrust the appellant into a Kafkaesque regulatory regime. A hard limitation period would bar the appellant from claiming enhanced benefits, before she was even eligible for those benefits. However, if the appellant had not claimed any benefits until she obtained CAT status in 2015, she would not be caught by the limitation period: *Machaj v. RBC General Insurance Company*, 2016 ONCA 257, at para. 6. Alternatively, if the appellant had coincidentally obtained CAT status before 2012, the hard limitation period would not bar her claim for enhanced benefits.

[48] This outcome is absurd. There is no principled reason for barring the appellant's claim for enhanced benefits in the first scenario but allowing the claim in the second and third scenario. To do so would effectively penalize the appellant for accessing benefits she is statutorily entitled to, or for developing CAT status too late.

[49] The impossible position a hard limitation places the appellant is best illustrated by having regard to Economical's counsel's oral submissions. Counsel denied that the appellant was put in a lose-lose situation. She argued that the appellant could have applied to the LAT before the expiry of the limitation period for a declaration that, in the future, she would be entitled to extended benefits if she were subsequently found to be CAT.

[50] I start by noting that courts must be cognizant of the significant disparity in resources between large insurance companies and their insureds, who do not have unlimited resources to bring multiple proceedings, including prophylactic claims based on a future contingency: see *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, at para. 88, leave to appeal refused, [2016] S.C.C.A. No. 39.

[51] In any event, if such a proceeding were commenced for a declaration, it is difficult to imagine how it could succeed. At best, the appellant could only lead speculative evidence that she might be CAT at some unknown point in the future. Faced with that evidentiary record, the LAT would likely decline to make the requested declaration.

[52] In my view, the hard limitation period puts the appellant in an impossible situation, where the time for claiming a benefit commences when she is ineligible to make such a claim. This is an absurd result. To choose it, as the LAT did, is unreasonable.

(f) Policy Rationales for Limitation Periods

[53] Finally, it is worth considering the three policy rationales that underlie limitation periods to determine whether they support the finding of a hard limitation period. Those rationales are that limitation periods: (i) foster certainty; (ii) are

intended to help prevent evidence from going stale; and (iii) encourage plaintiffs to be diligent in pursuing their claims: *Pioneer* at para. 47.

[54] None of those rationales support a finding of a hard limitation period in this case. There is little certainty achieved, since there is no limitation period for initially bringing benefits claims resulting from CAT status: *Machaj,* at para. 6*.* There is no risk of evidence going stale. To the contrary, a hard limitation period bars potentially meritorious claims based on current evidence. A hard limitation period will also not ensure the insured's diligence in pursuing a claim, because the insured has no claim to pursue until a CAT designation is made.

(g) Unreasonable Decision

[55] In summary, it is unreasonable to construe the relevant limitation period as a hard limitation. There is a single reasonable interpretation of s. 281.1(1) of the *Insurance Act* and s. 51(1) of the *SABS*. The limitation period contained in those sections is subject to the rule of discoverability because it is directly tied to the cause of action that an insured can assert when denied benefits. A hard limitation period is contrary to the purposes of the *SABS* and the Supreme Court's guidance in *Pioneer*. In addition, a hard limitation period in these circumstances would lead to absurd results and is not consistent with the policy rationales that underlie limitation periods.

VI. Disposition

[56] For the foregoing reasons, I would allow the appeal and set aside the orders of the Divisional Court and the LAT.

[57] I would make an order declaring that the limitation period regarding the appellant's entitlement to attendant care benefits, and housekeeping and home maintenance benefits has not expired, and that accordingly, the appellant is entitled to proceed with her application for those benefits.

[58] I would further order that Economical pay the appellant her costs of the appeal fixed in the agreed upon, all-inclusive, sum of $10,000.

Released: "C.W.H." November 8, 2019

"C.W. Hourigan J.A."
"I agree. M.L. Benotto J.A."
"I agree. Fairburn J.A."