# LIMITATIONS FOR INSURANCE LITIGATIONS

This article is intended to review the application of the *Limitations Act*, *2002* as it pertains to the personal injury litigation practice. In order to implement an effective system of practice management, we need to understand how this *Act* applies to our specific area of practice.

## The New Act

Section 2 of the *Limitations Act, 2002* provides that all actions shall be governed by the new law unless specifically excluded.

Section 4 of the *Limitations Act, 2002* provides basic limitation periods of two years from the "day on which the claim was discovered".

Section 5 of the *Limitations Act, 2002* sets out the discoverability principle in statutory language and provides:

"S. 5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,
  (i) that the injury, loss or damage had occurred,
  (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
  (iii) that the act or omission was that of the person against whom the claim is made, and
  (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a)."

Onus is on the Plaintiff [S. 5 (2)] to prove the application of s. 5 (1).

Recent jurisprudence defining the discoverability rule will still be relevant under the new *Limitations Act*. Thus *Peixeiro v. Haberman* will remain important. However, I would commend to you reading recent cases which have refined the discoverability rule including: *Ioannidis et al v. Hawkings*, Aguonie v. Galion Solid Waste Material Inc. et al, Burke-Smith v. Sun and Chenderovitch v. John Doe.

Section 15 of the *Limitations Act, 2002* provides for an ultimate limitation period of 15 years. In other words, the injured person's right to action will

be extinguished 15 years from the date of the incident, giving rise to the injury, regardless of the discoverability rule. This section may not apply to cases involving sexual assault, (please see rule at the end of the article).

It is also important to note that Section 6 and 7 of the *Act* extend the limitation period for minors and incapable persons. Under Section 6 of the Act, a limitation period will not begin to run for a minor until such time as he/she obtains the age of 18. This protection is only provided if the minor is not represented by a litigation guardian in relation to their personal injury claim.

Section 7 provides that the limitation stops running for person incapable of commencing a proceeding in respect of their personal injury claim because of their physical, mental or psychological condition.

What personal injury actions will be governed by the *Limitations Act*, *2002*?

The following personal injury claims shall be governed by the new *Limitations Act*, 2002:

1. Motor Vehicle Accident (including uninsured and family protection endorsement cases);
2. Occupiers liability (including commercial and social host negligence);
3. Injuries caused by public authorities;
4. Injuries resulting from negligence of the Crown;
5. Maintenance and design of highways and sidewalks;
6. Railway accidents;
7. Hospital negligence;
8. Doctors negligence;
9. FLA claims (except in the case of death see s. 38 (3) Trustee Act);
10. Assault (except sexual assault – see note at the end of paper);
11. Long-term disability claims;
12. Product liability claims;
13. Claims for contribution and indemnity pursuant to the Negligence Act;
14. Boating cases (except for those actions exclusively within the jurisdiction of the Canada Shipping Act).

Exceptions to the *Limitations Act*, *2002*

Generally, all actions are covered by the *Limitations Act, 2002*. However, there are some exceptions including the following:

1. Insurance Act; Section 148, Statutory Condition (Fire Policies).
2. Insurance Act, Section 259.1 (auto property claims).
3. Insurance Act Section 281 (Accident Benefit Cases)
4. Trustees Act, Section 38(3) (death cases brought by FLA claimants).
5. Cases where federal jurisdiction is exclusive and not concurrent.

Even though the above-noted statutory limitation periods will not be covered by Section 4 of the *Limitations Act*, *2002,* Section 5, 6 and 7 of the *Limitations Act, 2002* will be applicable to all Acts of the legislature.

Accident Benefits

Section 281 (5) of the Insurance Act provides:

> "A step authorized by subsection (1) [commencing a court action or arbitration proceeding] must be taken within two years after the insurer's refusal to pay the benefit claimed or within such longer period as may be provided in the *Statutory Accident Benefits Schedule*."

Therefore, Plaintiff's Counsel must diarize each denial received from the accident benefit carrier. In the alternative, Plaintiff's Counsel could obtain written instructions to abandon a particular issue.

Much of the recent case law has focussed on the adequacy of the insurer's notice. The limitation period will not start to run until there has been adequate notice of the denial provided by the insurer.

In Smith v. Co-operators [2002] S.C.J. 34 the insurance company had sent out a denial in the form prescribed by the Financial Services Commission of Ontario. The Plaintiff had a lawyer. The Plaintiff mediated the claim within two years following the denial, but did not sue within that period. The Motion's Judge and the Court of Appeal found that the Plaintiff was out of time. The Supreme Court of Canada reversed the two decisions below and noted as follows:

> "As I have mentioned above, insurance law is, in many respects, geared towards protection of the consumer. This approach obliges the courts to impose bright-line boundaries between the permissible and the impermissible without undue solicitude for particular circumstances that might operate against claimants in certain cases."

This decision has been extremely influential for both Arbitrators and Trial Judges. *Smith v. Co-operators* is a Bill 164 decision but the Trial courts and arbitrators have applied it in Bill 59 cases (*Nahsari and Belair Insurance Company*, FSCO P02-0002). *Smith v. Co-operators* has also been used in order to assist in reviving OMPP claims which were thought to have expired long ago (*Turner v. State Farm* [2004] 272/03 (Div. Crt.)).

It is likely that we will continue to see the repercussions from *Smith v. Co-operators* for some time into the future.

Notice Provisions

Present notices provisions are as follows:

- Municipality Act – repair of bridge on Highway – 7 days' notice from the date of the accident
- Public Highway and Transportation Act – 7 days' notice from the date of the accident
- Proceeding against Crown Act re occupier liability – 10 days' notice from date of accident and notice 60 days before claim is issued

The new *Limitations Act, 2002* also amends both the *Municipal Act*, 2001 and the *Public Transportation and Highway Improvement Act* to provide that the failure to give notice or insufficiency of the notice is not a bar to the action. The trial judge has the flexibility to find that there is a reasonable excuse for the lack or the insufficiency of notice so long as the municipality (and/or Ministry) is not prejudice in its defence (*Limitations Act*, 2002, Section 42 and 25).

Thus, the most significant change brought about with these amendments is the change to the notice required to municipalities for slip and falls on snow and ice. In the past, Judges did not have any discretion to extend or abridge the notice period unless the injured party was a minor or disabled. This is an important change which will save many claims.

Transitional Provisions

The transition rules apply to claims based on acts or omissions that took place before January 1, 2004 (sexual assault cases are treated differently, please see note at end of paper).

Section 24 of the *Limitations Act*, *2002* provides that where an act or omission occurred before January 1, 2004 and the elements of the cause of action had been discovered before January 1, 2004, then the law that existed prior to January 1, 2004 shall govern the limitation period for that claim.

However, in cases where the act or omission occurred before January 1, 2004, but the elements of the cause of action were not discovered by the injured party until after January 1, 2004, then the *Limitations Act, 2002* will apply to that action.

If a claim has expired before January 1, 2004 then it will not be revived by the new *Act* (see exception for sexual assault, read note at end of paper).

Section 22 of the *Limitations Act, 2002* provides that parties cannot agree to contract out of the new *Act*. However, contracts in place prior to January 1, 2004 shall be grand-fathered. In other words, if a contract of insurance is renewed anytime prior to December 31, 2003 and specifies limitations periods, then the limitation periods will be as per the contract for the duration of the policy. Any contractual terms entered into after January 1, 2004 which alter the limitation period outlined in the *Limitations Act, 2002* will be a nullity.

During the transition period, we will have to be careful when handling matters involving Family Protection Endorsements under the auto insurance policy or long-term disability claims.

Most LTD policies stipulate a one year limitation period within the contract. I would recommend that you continue to assume the one year limitation is effective until you can review the “policy”.

Conclusion

Note: This paper is not intended to outline the application of the Limitations Act, 2002 as it applies to sexual assault claims.

I would recommend the paper of Susan Bella entitled “The Future Law of Limitations in Ontario as applied to Sexual Misconduct Claims”. This paper was delivered at the Law Society Conference on the *Limitations Act*, 2002, held June 11, 2003 in Toronto.