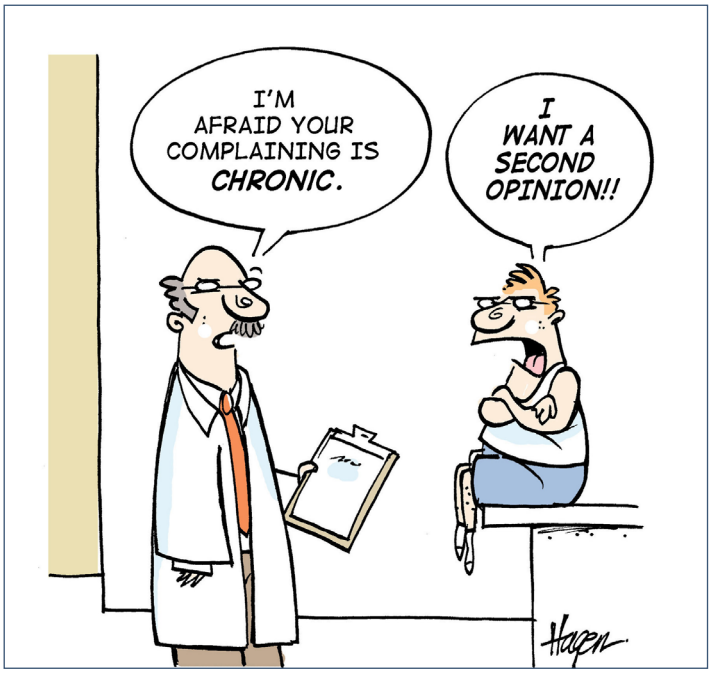
BEARDWINTER LLP
Defender
Vol.12 | Issue 3
October, 2018

Does Chronic Pain Fall Within the Minor Injury Guidelines?

By Cary N. Schneider, Partner, Beard Winter LLP

Introduction

It is evident that the Licensing Appeal Tribunal ("LAT") decisions place a high onus on a claimant to prove that the injuries take him/her outside of the Minor Injury Guidelines ("MIG"). Adjudicators are not accepting at face value assertions that a claimant has "chronic pain" unless this is supported by credible evidence. The dispute over whether a claimant (1) suffers a diagnosis of chronic pain and (2) whether chronic pain in itself is a condition that takes a claim outside of the MIG is subject to much litigation and inconsistent decisions. The inconsistency in the decision making is not necessarily surprising as the nature of chronic pain is highly subjective and difficult to evaluate the authenticity of the complaints. Whereas nearly all of the decisions for the first 1.5 years of the LAT's inauguration were detrimental to claimants, we can see that the trend is now changing. The diagnosis of chronic pain appears to be gaining greater traction within the LAT and claimants have been able to prove that such injuries are outside of the MIG. An astute adjuster and advocate will evaluate the existing jurisprudence to determine what the case law has told us so far, and how we can use that to achieve the desired result for the future.



www.CartoonStock.com

Chronic pain not proven or does not take claimant outside of MIG

In ***AP v. Aviva*** (2016) the claimant was complaining of soft tissue injuries and her family doctor diagnosed her with suffering from "evidence of cervical facet joint involvement which has been established as a common contributor to chronic pain symptoms…". The claimant underwent cervical facet joint injections and obtained a supportive report from the family doctor. However, the family doctor never defined the term "cervical facet joint involvement" and the report was not entirely clear as to whether the claimant's injuries should be taken outside of the MIG based on medical reasons. The claimant also argued that she suffered from chronic pain and therefore she should be taken outside of the MIG on account of prior case law.

CONTENTS:

The Adjudicator noted that the family doctor remarked that cervical facet joint involvement is a contributor to chronic pain but that there is no specific diagnosis in this case of chronic pain or chronic pain syndrome. The fact that the claimant was receiving injection therapy was not a persuasive factor to the Adjudicator.

The Adjudicator was referred to three prior FSCO / ADR decisions that supported the contention that a diagnosis of chronic pain syndrome takes the claimant outside of the MIG. The Adjudicator stated that these prior decisions were not binding on the LAT. Accordingly, even if these prior decisions were directly on point there was no requirement to follow the precedential decisions.

The decision in ***J.S. v. RBC Insurance Company*** (2017) illustrates the importance of challenging the credibility of the claimant by way of thoroughly reviewing the clinical notes and records of the treating doctors. In this case, the claimant relied on a section 25 report from a psychologist and a chronic pain specialist who both opined that the claimant has suffered from major depression, chronic pain, and possible post-concussive symptoms. The problem with their analysis is that they did not review the clinical notes and records of the treating doctors. The claimant assessors relied almost entirely on the self-reporting of the claimant which was inconsistent with the records of his treating doctors. The insurer examination reports were given more credence as they based their analysis both on a review of the records and on their meeting with the claimant. It was found that the claimant had suffered an injury that fell within the Minor Injury Guidelines and the total of eight treatment plans in dispute for a cost of about $11,500 was found to be not payable.

In ***B.U. v. Aviva*** (2016) the Adjudicator found that the claimant was outside of the MIG due to a psychological impairment. The Adjudicator categorized the injuries into two groups that being (1) physical injuries and (2) psychological ones. There was very little analysis regarding the interplay between physical and psychological injuries; which is often the heart of a chronic pain case. From a physical basis, the claimant obtained a report from a physiatrist that diagnosed her with suffering from chronic pain syndrome which thereby took her outside of the MIG. The Adjudicator, however, found that the claimant "had not sufficiently shown how the diagnosis of chronic pain syndrome is not a sequela of soft tissue injuries". The Adjudicator found that from a physical basis that the claimant has not proven that her injuries were outside of the Minor Injury Guidelines.

This is an important finding for two reasons. First, it seems to contrast with a prior ADR decision of ***Arruda v. Western*** (2015) which found that a diagnosis of chronic pain syndrome is not captured by the Minor Injury Guidelines. Second, the analysis of chronic pain syndrome seems to focus on it being a manifestation of physical pain without a substantial interrelating psychological component. From a purely psychological basis, the Adjudicator found that there was overwhelming evidence to support the position that the claimant suffers from an impairment that takes her out of the MIG. The Adjudicator found that the physical treatment plans were not payable but that the psychological treatment was.

Chronic pain takes claimant outside of MIG

YXY v. The Personal (2017) provides a well-reasoned analysis regarding the interaction between chronic pain and the MIG. This decision seems to input a new consideration as to the factors to be considered relating to chronic pain as there is a focus on the level of impairment suffered by the claimant and not just the nature of the injuries. Unlike some prior decisions, the Adjudicator agreed with prior FSCO / ADR decisions that when chronic pain causes a functional impairment or disability that it is significant enough to take the claimant outside of the MIG. The Adjudicator agreed with the reasoning in ***Arruda*** that ongoing pain alone is not sufficient to take a claimant outside of the MIG but that a legitimate diagnosis of chronic pain syndrome would take a claimant outside of the MIG.

For chronic pain to be considered more than simply sequelae from the soft tissues injuries enumerated in s. 3 of the *Schedule*, it must be: (1) chronic pain syndrome or continuous (in that the initial minor injury never fully healed) and (2) it must be of a severity that it causes suffering and distress accompanied by functional impairment or disability. Some essential factors to consider is whether chronic pain affects a claimant's functional abilities to engage in employment, housekeeping or caregiver activities. A diagnosis of chronic

pain without any discussion of the level of pain, its effect on the person's function, or whether the pain is bearable without treatment will not meet the claimant's burden to show that chronic pain is more than mere sequelae. Unless a claimant provides evidence that the pain she experiences contains these elements, the pain is mere sequelae of a MIG injury.

Some key takeaways from this decision are that if chronic pain prevents a claimant from performing functional activities such as working or housekeeping that this a consideration that would potentially take a claimant outside of the MIG. Unless a claimant provides evidence that the pain she experiences contains these elements, the pain is mere sequelae of the minor injury and the MIG applies.

In ***PJ v. Continental*** (2017) the Adjudicator took into consideration the change in type and frequency in medication as an important factor to consider whether the claimant suffered injuries that took him outside of the MIG. Prior to the accident, the claimant suffered from osteoarthritis, obesity, diabetes, abdominal pain, high blood pressure, and back pain. He obtained an orthopaedic surgeon report that diagnosed chronic pain and aggravation of pre-accident knee pain. The claimant was treating his injuries with cortisone injections (before and after loss – increased post MVA), massage, physiotherapy, prescription medication, and was seeking psychological treatment to fight depression/anxiety. The Adjudicator found that the increase in pain and injections/prescription medication post-loss supports that the claimant is not able to recover under the MIG treatment limits.

The Adjudicator accepted the evidence of claimant assessors that he suffered from chronic pain and that the IE assessors did not adequately explain why the injuries have not resolved. As such, the Adjudicator placed a positive obligation on the IE assessor to provide an alternative explanation for the claimant's condition. The Adjudicator found that "the applicant has chronic pain and her injuries cannot be treated under the MIG". This was an important decision that seems to accept that a diagnosis of chronic pain takes a claimant outside of the MIG and provides examples of considerations used by the Adjudicator to come to that decision.

The decision ***MHE v. Aviva*** (2018) further supports the position that a diagnosis of chronic pain takes a claimant outside of MIG. The claimant asserted that she was still having pain 18 months post-loss and had supportive reports that diagnosed her with suffering from chronic pain. The Adjudicator found that the claimant presented as a credible witness during the oral hearing and accepted the law emanating from FSCO/LAT that accepts that chronic pain is a condition that may take the claimant outside of the MIG. The Adjudicator found that "based on the duration of the time the applicant has experienced limitations in her ADL from ongoing pain, the medically uncontroverted diagnosis of Dr. P.N. and the expert report of Dr. C, I am satisfied that her chronic pain is of a nature to take her out of the guideline".

This is an important decision as the claimant did not have any psychological diagnosis or objective injuries to support the diagnosis of chronic pain. The case was advanced solely on the basis of subjective musculoskeletal injuries and it was found that such compaints were enough to take the claimant outside of the MIG. It is suspected that the claimant's credible oral presentation was a factor that weighed heavily in the Adjudicator's decision-making process.

Takeaways

There continues to be a live question in the decision-making process at the LAT as to whether chronic pain is simply sequelae from the soft tissues injuries enumerated in s. 3 of the *Schedule* that falls within the MIG or something more substantial. There is no consistency in the decisions that can be used as a definitive guide to answer this question. This is perhaps understandable as chronic pain is difficult to evaluate and is historically subjective in nature. The inconsistent reasoning of the Adjudicators seems to reflect the challenges in evaluating chronic pain from a medical-legal basis.

Some Adjudicators have recognized the legal support for chronic pain in past FSCO decisions and some have exercised their prerogative to not be so influenced. The use of injection therapy was considered an important consideration in ***P.J. v. Continental*** and a non-factor in ***AP v. Aviva***. In ***YXY v. The Personal*** the adjudicator created a test for the severity of chronic pain that impacted the determination as to whether the claimant's injuries fall within the MIG. It is not clear if this rationale will be followed by Adjudicators into the future or will be an outlier.

The credibility of the claimant still appears to be a significant consideration. In ***J.S. v. RBC Insurance Company,*** the claimant's credibility was rattled by the fact that his clinical notes and records were inconsistent with his self-reported problems to his assessors. In ***MHE v. Aviva*** the Adjudicator was influenced by the fact that the claimant presented as a credible witness at the hearing despite the lack of any evidence to support that there was a diagnosable psychological component to his chronic pain.

There is no definitive chart to follow that will guide us to determine when chronic pain is legitimate and when it is significant enough to take a claimant outside of the MIG. However, a good analysis of the existing case law will provide an informed party with the tools to evaluate a case and advocate on one's behalf.

Cary Schneider is a partner at Beard Winter LLP specializing in insurance and civil litigation matters including the growing area of cyber law. He has a diploma from Harvard University in Cyber Security and is a certified Information Privacy Professional/Canada (CIPP/C). He focuses on being effective and efficient in his law practice with the goal of achieving excellent results for his clients in a timely manner.

Your comments are appreciated and if there are any accident benefits or tort topics that you would be interested in reading about, please feel free to email us and we will certainly explore the possibility of writing an article.

Contact: defender@beardwinter.com

BEARDWINTER LLP

Beard Winter LLP is pleased to welcome seven talented lawyers to our firm

H. J.(Jim) Blake, Q.C.
416.306.1785 | jblake@beardwinter.com
Jim's focus is securities, corporate finance, and M&A in resource exploration and development and mining.

William G. Scott
416.306.1808 | wscott@beardwinter.com
Bill's practice focuses exclusively on repairing and defending matters on behalf of lawyers.

Jillian Van Allen
416.306.1809 | jvanallen@beardwinter.com
Jillian's practice focuses on professional errors and omissions, including repairing and defending matters on behalf of lawyers.

Wayne O. Lewis
416.306.1753 | wlewis@beardwinter.com
Wayne practises corporate/commercial law for clients in healthcare, technology, fintech, media, transportation and cannabis industries.

Mikhail Shloznikov
416.306.1817 | mshloznikov@beardwinter.com
Mikhail focuses on errors and omissions, and acting for insurers in the defence of tort and AB claims.

Francesca D'Aquila-Kelly
416-306-1718 | fdaquila-kelly@beardwinter.com
Francesca's practice includes commercial and tort disputes, environmental and regulatory matters, and privacy.

Pearce Jarvis
416.306.1716 | pjarvis@beardwinter.com
Pearce's practice involves a wide range of commercial and tort matters, including contract disputes, debt collection and occupiers' liability.

Recreational Cannabis Legalization Part 1: Homeowners Insurance

By Aaron Murray, Partner, and
David Edwards, Lawyer, Beard Winter LLP

While recreational users of marijuana have counted down the days to October 17, 2018, the insurance industry has been preparing for the resulting changes, risks and opportunities that will occur as a result of the legalization of marijuana in Canada. With the passing of Bill C-45- ***The Cannabis Act***, there is a new legal landscape that will impact premiums, coverages and claims. The legalization of recreational marijuana will have far-reaching impacts across many different lines of insurance, and will likely take years to fully measure and understand. Insurers must consider the consequences that legalization will have on their current standard policies including amendments to the wording to reflect the new law, and potential variations in the requirements across the country. Although this article deals with legalization related to homeowners insurance, there will be impacts on commercial general liability and automobile insurance as well.

Background

According to Statistics Canada, in 2017, almost 5 million Canadians between the ages of 15 to 64 purchased both medical and recreational cannabis, spending approximately $5.7 billion in the process. Nearly all of the cannabis consumed in Canada was produced in Canada. These figures are expected to increase after cannabis is legalized.[1]

The Cannabis Act allows adults (18 or 19 years of age, depending on the jurisdiction) to legally purchase, possess, share, cultivate and alter limited amounts of cannabis for recreational means.

The ***Act*** permits the cultivation of four plants per "dwelling house". This limit applies regardless of the number of adults living in one house. The ***Act*** does not restrict the growing of cannabis plants indoors and appears to contemplate that people will be able to grow the plants in their gardens, yards, or greenhouses.

According to the legislative provisions, provinces will have the ability to impose additional requirements on personal cultivation and possession limits. As a result, there could be varied restrictions and/or requirements from province to province. All insurers who underwrite business in multiple provinces will need to be aware of potential variations in recreational cannabis requirements across the country.

The ***Act*** also permits individuals to make cannabis-containing products (such as edibles), provided that dangerous organic solvents are not used in making them.

Impact on homeowners insurance

Although large-scale, personal growing operations ("grow-ops") will remain illegal and void most homeowner insurance policies that are faced with related claims, the ***Act*** permits the cultivation of cannabis plants at home, as noted above. Personal cultivation of cannabis will introduce another peril that is currently excluded under homeowners insurance. Specifically, an indirect or direct loss or damage to a dwelling used in the processing or manufacturing of marijuana. This exclusion will need to be amended to reflect the new law.

The typical homeowner's policy includes some form of relatively standard criminal and intentional act exclusion. Under the new legislation, marijuana cultivation within the allowed restrictions would not fall within the typical criminal act exclusion. This will be a big change from both an underwriting and claims perspective.

1 https://www.reuters.com/article/us-canada-marijuana-statistics/canadians-spent-c5-7-billion-on-cannabis-in-2017-statistics-canada-idUSKBN1FE282 (accessed July 4, 2018)

Marijuana cultivation and disclosure

Home cultivation of marijuana has many inherent dangers, with a multitude of potential claims that could result. Growing marijuana plants indoors can require additional heat, water, and electricity. Electrical modifications and overloaded circuits can increase the risk of fire, while improper ventilation and irrigation can increase the risk of water damage and mould. Marijuana also grows faster when the amount of carbon dioxide increases, which is why many grow-ops have been found to use natural gas, propane, and other fuels to power carbon dioxide generators, which would dramatically increase the risk of fire.

Insurers will need to consider a requirement for insureds, or potential insureds, to disclose whether or not they are cultivating their own marijuana. Insurers currently do not typically ask applicants for insurance whether they are actively growing marijuana within their home. Whether or not someone is cultivating marijuana at home is likely to impact the premium that is charged. As a result, a failure to disclose cultivation could represent a material change in risk, as was argued by the insurer in ***Bahniwal v. The Mutual Fire Insurance Company.***[2]

The insurer in the ***Bahniwal*** case was unsuccessful in proving that the insureds had knowledge of the grow-op on their property. The Court confirmed that *if* the insureds had been aware of the presence of the grow-op on their premises, their failure to disclose its existence would have constituted a failure to disclose a material fact. As a result, insurers should consider their policy wording carefully, and determine whether or not such a disclosure should be included in their standard application process.

An additional risk related to marijuana cultivation is presented when it comes to rental properties. Insureds as landlords may have no idea if their rental property is being used to cultivate marijuana plants. Insurers should consider whether or not questions posed on an insurance application for a rental property will require landlords to demonstrate that they have taken measures to inform themselves of the legal marijuana cultivation activities of their tenants. This could require landlords to show the insurer that they have included disclosure of marijuana cultivation as a question, or series of questions, on their lease/tenancy agreement to be completed by all prospective tenants.

All of these additional risks could be heightened when looked at in the context of multi-unit housing complexes, such as large apartment and condominium complexes. The additional risk to adjoining or neighbouring properties could be significant, with the potential for a rise in claims framed as nuisance/escape to land. There is the obvious risk of flooding, fire, and mould that could impact adjoining properties. In addition, there is the potential for nuisance claims as a result of escaping odours.

Insurers are expected to recognize the increased risk of claims, where homeowners cultivate marijuana within their residential premises, by reflecting this with increased premiums. Insurers must adjust their policy application process and develop a methodology for evaluating these increased risks. This might take some time as claims arise and new policies are issued/renewed after legalization.

Insurers must also consider that although possession and home cultivation are now legal in Canada, there are limits to both. As noted earlier, almost all standard homeowner insurance policies currently include criminal activity exclusions. As a result, if a homeowner is cultivating marijuana and selling it themselves illegally (including edibles), or exceeding the limits imposed by the ***Act***, insurers might be able to exclude, fight, or void coverage on the basis of the criminal activity exclusion. That said, losses and/or claims arising from marijuana activity that fall within the legalization limits will not be excluded.

Theft and damage of marijuana plants

If an insured homeowner is legally growing marijuana, it is not unreasonable to believe that the home is likely subject to an increased risk of theft as a result.

An increase in claims related to theft or damage to marijuana plants also presents an additional risk for insurers as private homeowners could become a lucrative target for thieves. Will policies allow homeowners to recover the cost of damaged marijuana plants? How will the value of the plants be determined? And, will marijuana plants be considered to be personal property for theft or damage claims, or will they fall

2 *Bahniwal v. The Mutual Fire Insurance Company of British Columbia*, 2016 BCSC 422

under the "tree, shrub, and plant" portion of the policy (which typically has maximum recoverable amounts)? To ensure the smooth and efficient processing of claims, insurers are best advised to clarify the policy wording and set up a framework for adjusters faced with such claims.

Although there is a limited judicial commentary on the treatment of recreational marijuana in the context of homeowners insurance policies, the Ontario Divisional Court addressed the issue of medical marijuana in ***Stewart v TD General Insurance Co.***[3] The plaintiff had Health Canada's permission to possess and cultivate his own marijuana for medicinal purposes. Eleven of his marijuana plants were subsequently stolen, and the plaintiff took the position that the plants were personal property.

The insurer in ***Stewart*** took the position that the plants were not personal property, but conceded that they were covered under the "extended coverage" clause for "landscaping", and that it had already paid to the plaintiff the limited coverage of $1,000 per plant. The plaintiff claimed that the value of the plants was just under $50,000. The Divisional Court held that a loss due to the theft of the marijuana plants from the plaintiff's home was excluded under the policy. The Court also noted that the standard grow-op exclusion did *not* apply because the plaintiff had Health Canada's authorization to possess and cultivate the marijuana.

In reaching their conclusion, the Court in ***Stewart*** held that marijuana plants in a backyard could be considered personal property. The Court also noted that covered personal property under the subject policy must be "usual to the ownership of the maintenance of a dwelling". As a result, the policy wording operated to exclude the marijuana plants from coverage as they could not be considered usual to the ownership and maintenance of a dwelling.

In coming to its conclusion, the Divisional Court in ***Stewart*** stated that fewer than one-third of one per cent of the population of Canada was authorized to grow marijuana for their own medicinal purposes at the material times relevant to the action (the losses occurred in 2009 and 2011). It used this information to reach its conclusion that marijuana plants in a backyard are not "usual to" the ownership or maintenance of a dwelling itself. Given the expected growth in the home cultivation of marijuana, now that the ***Act*** has come into effect, one can expect that such a judicial interpretation could be quite different in the context of legalized marijuana.

Social host liability claims

Insurers should also be prepared for a possible increase in social-host liability type claims as they relate to marijuana. As Canadians are now able to share up to 30 grams of dried marijuana with other adults, insurers should be prepared for personal injury claims resulting from situations where a homeowner supplies guests with marijuana, whether cultivated at home or not.

What if a homeowner supplies tainted or "defective" marijuana to a guest who then drives high and causes an accident? What if a child visiting a home consumes and reacts to the homeowner's home-grown marijuana? Not only is there the potential for social-host liability claims, but there is also likely to be product liability type claims where a homeowner's guest ingests marijuana cultivated by the homeowner.

Conclusion

The legalization of marijuana will result in additional risks and opportunities for the insurance industry. Insurers and their counsel must adapt to the changes that will be brought about by the ***Act***, including undertaking an analysis of the current insurance policy exclusions and prohibitions. There will also likely be a need for changes to the policy application process, to reflect the increased risk posed by at-home marijuana cultivation.

Key takeaways

- From a claims perspective, the expected growth in the number of homeowners cultivating their own marijuana will require insurers to develop an appropriate framework to ensure that claims are being adjusted effectively.
- Given that premiums are impacted by claims experience, compiling data on marijuana-related claims will be critical from an underwriting perspective so that premiums can appropriately reflect the risk posed by the legalization of marijuana.

3 *Stewart v. TD General Insurance Company*, 2014 ONSC 854 (hereinafter "Stewart").

- Under the new legislation, marijuana cultivation within the allowed restrictions would not fall within the typical criminal act exclusion. Policies will need to be amended accordingly.
- Personal cultivation of marijuana represents an increased risk of direct or indirect damage to property. Consideration should be given to amending standard policy applications to require disclosure of marijuana cultivation at the time of application and at renewal.
- It may take some time for insurers to develop a standard method for the evaluation of the additional risk presented by the home cultivation of marijuana that can be applied somewhat consistently. Insurers should develop a framework to adjust marijuana claims and implement a system to track and evaluate such claims so that they turn the challenges faced by the legalization of marijuana into a profitable opportunity.

Aaron Murray is a partner at Beard Winter LLP, practising primarily in the areas of insurance defence and personal injury litigation. He deals with many different types of insurance law disputes including personal injury, product liability, professional liability, property/environmental damage, residential and commercial construction damage, CGL, winter maintenance, life and health disability, defamation, fire loss, theft and coverage issues.

David Edwards practises civil litigation, primarily in the area of insurance defence. He maintains a diverse practise defending various insurance law disputes, including personal injury, product liability, recreational liability claims, property/environmental damage, CGL, fire loss, winter maintenance, defamation, and coverage issues. He also has experience representing clients in administrative law disputes in the context of environmental and regulatory matters.

Recent Wins

Follow us on LinkedIn for all Beard Winter LLP News

***Bucknol v. 2280882 Ontario Inc.*, 2018 ONSC 5455 - Standard of Care | Robert Betts for Classic Lounge**

Beard Winter LLP was successful in defending our client, Classic Lounge when the plaintiff, a patron at the establishment, was struck by a bottle thrown by another patron. Litigation partner Robert Betts brought a motion for summary judgment seeking to dismiss the claim on the basis that the standard of care was met and, in any event, that the incident was not reasonably foreseeable. ***Read more...***

***Unica Insurance Inc v. Certas* (2018) - Fault Determination Rule | Cary N. Schneider for Certas**

In this important precedent-setting decision, Unica alleged that an ice cream truck insured with Certas reversed into its insured and was responsible for the accident. Unica advanced the proposition that Fault Determiantion Rule 19(a) applied as the ice cream truck was backing up and, therefore, 100% at fault. Certas, on the other hand, argued that Rule 16 (4) applied, which deals with incidents that occur in parking lots and that there is no specific provision within Rule 16 that deals with reversing in a parking lot. The Arbitrator agreed with Certas on all fronts. Certas also took the position that there was objective evidence supporting that the ice cream truck was actually stopped at the time of the accident. ***Read more...***

***Farmer v. 145 King Street West et al.*, 2018 ONCA 525 - Appeal upholding an order dismissing the plaintiff's claim for delay**

The case was a joint action relating to two separate events – an alleged slip and fall and a motor vehicle accident, both occurring in 2009. The original action had been commenced in 2011. ***Read more...***

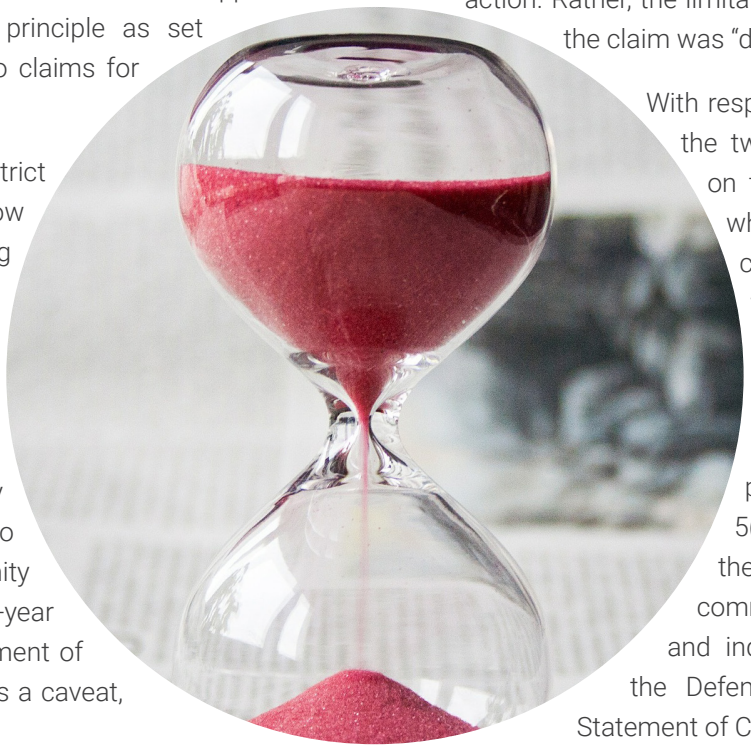
Discoverability, Contribution and Indemnity's New Best Friend

By Paul Omeziri, Lawyer, Beard Winter LLP

Paul Omeziri is a litigator and member of the Insurance Group at Beard Winter LLP. His practice focuses on motor vehicle tort claims, personal injury claims, general liability claims, property casualty claims, product liability claims and coverage matters. Paul acted as counsel for the Hart Defendants in *Murphy v. Hart*.

There has been a recent shift in the court's approach to applying the discoverability principle as set out in the ***Limitations Act***[1] to claims for contribution and indemnity.

While earlier cases applied a strict two-year limitation window to Defendants advancing crossclaims or third party claims seeking contribution and indemnity, recent case law has adopted a different approach. This new approach applies the discoverability principle such that the right to claim contribution and indemnity no longer expires on the two-year anniversary of when a Statement of Claim was issued, but there is a caveat, discoverability.



In this regard, recent case law has adopted the same approach as that which applies to an originating process, namely, the limitation period for claims seeking contribution and indemnity can be extended beyond two years if a Defendant could not have reasonably known of the identity or involvement of the proposed third party. Notwithstanding, there remains a presumption that the two-year limitation period for such claims starts when a Defendant is served with a Statement of Claim and this presumption will continue to apply unless a Defendant can establish to the court's satisfaction that due diligence was exercised in attempting to identify any other alleged wrongdoers.

1 *Limitations Act*, S.O. 2002, c. 24, Sched. B, Sections 4, 5, 18

Limitations Act

In understanding this issue, it is helpful to review the wording of the *Limitations Act*.

Section 4 provides a two-year limitation period that ends on the second anniversary of when a claim was "discovered". Therefore, the two-year limitation period does not necessarily begin on the date of loss or date that triggered the cause of action. Rather, the limitation period begins on the day the claim was "discovered".

With respect, section 5 (1) states that the two-year window commences on the earlier of the two dates: when the person making the claim knew of its basis or when a "reasonable person" ought to have known of its basis.

Despite the "discoverability" principle set out in Section 5(1), Section 18 states that the two-year limitation period to commence claims for contribution and indemnity begins on the date the Defendant was served with the Statement of Claim.

Case law synopsis

One of the leading authorities in applying a strict interpretation of Section 18 of the *Limitations Act* was Justice Perell's decision in ***Miaskowski v. Persaud***[2]. In ***Miaskowski***, Perell J. held, in obiter, that the deeming provision in Section 18 constituted an absolute two-year limitation period that

2 *Miaskowski (Litigation guardian of) v. Persaud*, [2015] O.J. No. 1208 (S.C.J.)

was not subject to discoverability. Justice Perell found that this approach brought certainty and efficiency to the law of limitations and was consistent with the policy purposes of the *Act*.[3] Justice Perell also noted that it would be a rare case where a Defendant would not know who to sue for contribution and indemnity; in any event, the further limitation of two years would provide "ample time" to exercise due diligence to determine against whom to claim.[4]

By contrast, in ***Demide v. Canada*** (Attorney General)[5], Leach J. held, in obiter, that by its wording, Section 18 of the *Limitations Act* was not intended to operate as a stand-alone limitation period, but rather was subject to discoverability under Section 5.

Recent decisions and shift in approach

Until very recently, most cases seemed to adopt the approach set out by Justice Perell in ***Miaskowski***.[6] However, two recent cases have broken from this trend. The first was Justice Monahan's decision in ***Hart v. Murphy***[7]. ***Hart*** involved a claim arising from a leak in an underground oil tank that although was discovered in 2009, claims for contribution and indemnity were not initiated until 2015.

In coming to his decision, Justice Monahan disagreed with ***Miaskowski*** and held that the principle of discoverability applied to claims for contribution and indemnity. With respect, Monahan J. noted that "an alleged wrongdoer, who seeks to commence a third party claim more than two years after they have been served with a Statement of Claim, is entitled to rely on the fact that they only discovered their claim less than two years previously."[8] Despite the application of the discoverability principle, Justice Monahan noted that the Defendants had not exercised reasonable diligence and therefore could not rely on discoverability.[9]

The second case that applied the discoverability principle was the Court of Appeal's decision in ***Mega International Commercial Bank (Canada) v. Yung***[10] which found that Section 18 of the *Limitations Act* did not displace the discoverability principles found in Section. 5. While the Court of Appeal affirmed the presumption that the two-year limitation period for claims seeking contribution and indemnity begins with the service of a Statement of Claim, the Court held that this presumption can be rebutted if the contribution claim could not have been reasonably discovered with due diligence until some later date after the Statement of Claim was served. [11]

Implications of the recent case law

While the court has provided Defendants with some relief regarding the limitation period that applies to claims seeking contribution and indemnity, Defendants must be cognizant that an extension of the two-year limitation limit period requires a Defendant to act reasonably in investigating potential claims. This was the essence of the ***Hart*** decision as Monahan J., recognized that while not all claims are discoverable within the two-year limitation period, unless a Defendant can establish that due diligence was exercised, the court will apply the default limitation period as set out in Section 18 for claims seeking contribution and indemnity and will not be extended. Accordingly and in consideration of Justice Perell's comments that it would be a rare case where a Defendant would not know of a potential claim for contribution and indemnity, Defendants who seek to extend the two-year limitation period will face a high onus.

Takeaways

- The practical implications of the recent case law are that Defendants must continue to be vigilant in identifying and investigating claims for contribution and identity even after being served with a Statement of Claim.

3 *Miaskowski (Litigation guardian of) v. Persaud*, [2015] O.J. No. 1208 (S.C.J.) at paragraph 95

4 *Miaskowski (Litigation guardian of) v. Persaud*, [2015] O.J. No. 1208 (S.C.J.) at paragraph 96

5 *Demide v. Canada (Attorney General)*, [2015] O.J. No. 2611 (S.C.J.) at paragraphs 77 to 95

6 *Hughes v. Dyck* [2016], 129 O.R. (3d) 495 (S.C.J.) at paraghraphs 36-39; *Mega International Commercial Bank (Canada) v. Yung*, [2017] O.J. No. 2511 (S.C.J) at paragraph 41; *Lilydale Cooperative Ltd. v. Meyn Canada Inc.* [2010] O.J. No. 3142 (S.C.J.) at paragraph 17; *Sandrabalan v. Toronto Transit Commission* [2009] O.J. No. 1610 (S.C.J) at paragraph 16; *Scotia Mortgage Corp. v. Chmielewski*, [2013] O.J. No. 524 (S.C.J) at paragraphs 7-8

7 *Murphy v. S.P. Hart Home Inspections*, [2018] O.J. No. 1365 (S.C.J.)

8 *Murphy v. S.P. Hart Home Inspections*, [2018] O.J. No. 1365 (S.C.J.) at paragraph 3

9 *Murphy v. S.P. Hart Home Inspections*, [2018] O.J. No. 1365 (S.C.J.) at paragraph 58-60

10 *Mega International Commercial Bank (Canada) v. Yung*, [2018] O.J. No. 2389 (O.N.C.A)

11 *Mega International Commercial Bank (Canada) v. Yung*, [2018] O.J. No. 2389 (O.N.C.A) at paragraph 74

- The recent case law has opened up a small window for Defendants to rely upon the principle of discoverability to extend the limitation period for such claims.
- Defendants must now consider the potential consequences of commencing a Third Party Claim beyond two years from the date they were served with the Statement of Claim.
- The Court of Appeal has now given the green light to such claims under appropriate circumstances.
- But for the clearest of cases, Defendants who issue Third Party Claims beyond two years should anticipate being faced with summary judgement motions and related costs expenses.

Listen to
Beard Winter LLP lawyers discuss the legalization of marijuana on the recently recorded WP Radio podcast.

https://www.youtube.com/watch?v=nmiUC3wHuDU

YouTube

Beard Winter LLP lawyers are available to consult with you on cannabis legalization and your business. To arrange a meeting or in-house presentation, please contact:

Ruth Morayniss, Manager, Client Relations & Business Development
rmorayniss@beardwinter.com or 416-306-1730.

Contact us at: defender@beardwinter.com

Subscribe To The Beard Winter Defender
CLICK HERE
(to receive The Defender by email)

The Beard Winter Defender Past Issues

Mandatory breach reporting in Canada: What it means for cyber insurers

There is nothing like a deadline that motivates people to take action. In Canada, the due date for organizations to have their privacy compliance protocols in place, or risk severe consequences, has just been announced to be November 1, 2018. As of that date, it will be mandatory for organizations to disclose to both their customers and the privacy commissioner when they have suffered a data breach that results in the possibility of a "real risk of significant harm".

Cyber Hacking and Security: Consequences For Canadian Companies And Insurers

The prevalence of cyber-predators unleashing new and comprehensive hacks that infiltrate a company's network grows seemingly unabated. The question is not "if" a company will be subject to a cyber-attack but rather "when".

Liability In Motor Vehicle Accident Cases: Left-Hand Turns, Pedestrian Knock-Downs, and Rear-End Collisions.

The analysis and investigation of liability in a motor vehicle accident case are crucial to the evaluation of every claim. Any percentage of liability that can be attributed to the plaintiff or co-defendant results in a direct financial saving to your particular claim.

The Examination Under Oath: Underutilized and Under-Appreciated (Updated and Revised)

The evaluation of any personal injury claim primarily revolves around a question of credibility. The impact of the injuries suffered by one claimant is often significantly different compared to the same injuries suffered by another claimant. There is no scientific-medical diagnostic tool that can predict to what extent one person's injuries will result in a long term disability while as someone else will suffer a temporary health setback.