

AVOIDING THE STATUTORY AND THE CONTRACTUAL LIMITATION DEFENCE IN DISABILITY INSURANCE DISPUTES

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I. INTRODUCTION

The limitation defence to an action is usually considered in the context of whether a statutory limitation period is available to a defendant for the purposes of extinguishing a plaintiff's claim. Each province in Canada has a statute of limitations and many provincial and federal statutes contain limitation periods applicable to a variety of causes of actions, including contract disputes. A limitation period may also be included as a provision in a contract. Thus, in a contractual dispute, an applicable limitation period can be found in the contract terms, a statute or both. Traditionally, limitation periods have been strictly enforced. More recently, however, the subject of when time begins to run for a limitation defence has received greater attention from our courts and legislatures.

Canadian commentators, courts and legislatures have been grappling with establishing a balance between a plaintiff's right to maintain an action and a defendant's right to rely upon a limitation defence. In the last ten years, particularly in the area of tort claims, much has been written by legal commentators on techniques that a plaintiff can employ in order to avoid a limitation defence raised by a defendant. In Canadian legal literature there is now a body of articles and treatises that discuss techniques to avoid the expiry of limitation periods. While these works provide a check-list of what a plaintiff can use to circumvent or avoid the expiry of a limitation period, they provide little insight and

guidance on contract law and how courts treat the limitation defence in contractual disputes. This is particularly true of disability insurance contracts.¹

In the last twenty years, disability insurance contracts have increasingly been sold by insurers to individuals and to employers or organizations on behalf of a group. These policies insure against the inability to pursue a livelihood arising either from accident or illness. Disability insurance is insurance which provides benefits to replace lost income.² As a further result of the growth of the market share of disability policies, disability insurance litigation, which was far less common twenty years ago, is now common place. Disability insurance litigation is a hybrid between contract law, employment law and insurance litigation. The disability case is litigation based on contract. The outcome of that litigation depends on how the contract and its terms are interpreted.

Relying on both contractual and statutory provisions, insurers have developed creative and effective tactics to reduce their exposure to claims. The limitation defence in contractual disability disputes is one such tactic. Provisions in disability insurance contracts are designed to limit the commencement of an action beyond a period of time. Statutory limitation periods in the various provincial Insurance Acts also may bar the

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¹ See J.P. Galligan, M.S. Binks, C. Laframboise, "Avoiding The Expiry Of Limitation Periods" (1989) 10 *Advocates' Quarterly* 465; J.C. Morton, *Limitation of Civil Actions* (Toronto: Carswell, 1988) at 93-107 suggests: 1) Amendment of claims following expiration; 2) Disability, minor, incompetents and absentees; 3) Fraud; 4) Acknowledgement 5) Part Payment and agreement not to plead the statute; G. Mew, *The Law of Limitations* (Toronto: Butterworth, 1991) at 61-90; L. Banack and N. Shapiro, "Limitations: A Story In Avoidance" (2000) 8:3 *The Litigator* 33.

² See John Hewitt & Associates Inc. "2000 U.S. Group Disability Market Survey Summary Report" on group disability sales growth.

commencement of a disability action.³ The whole area of Canadian law on limitation periods in contractual disability disputes is a quagmire for the unwary. Sometimes, as we shall see, a court finds that although the limitation period prescribed by the statute or contract appears to have expired by the time the action was commenced, the limitation period did not really begin to run until some time later than that used by the insurer in the initial calculation of its commencement. A court may also find that the limitation period provided by the statute or contract did not actually expire because there may be a discretion to extend, suspend or interrupt the running of time. As such, plaintiffs in disability insurance disputes may have ways to keep their claims alive.

This paper examines avoiding the statutory and contractual limitation defences in disability insurance disputes. In part II, this paper will discuss the three types of disability contracts: individual contracts, group contracts and ASO (Administrative Services Only) contracts. This part also outlines how to classify the types of disability contracts for the purposes of applying the appropriate statutory limitation period or contractual limitation provision. In part III, the equitable doctrines and legal principles for commencing, extending, suspending and interrupting the running of time of a limitation period in a disability dispute will be examined. The discussion in this part will begin by addressing how, in general, limitation provisions are to be interpreted in insurance contracts and who, practically speaking, has the burden of proof to raise the equitable doctrines and legal principles for commencing, extending, suspending and interrupting

³ This paper adopts the terminology of the Ontario insurance statute. Unless otherwise indicated, statutory citations will utilize the section numbering of the Insurance Act, R.S.O. 1990, c. I.8. See the Interprovincial Table of Concordance in J. P. Weir and D. Norwood, *The Annotated Insurance Act of Ontario* (Toronto: Carswell, 1996) for comparable section numbers in the legislation for other common law provinces. In Quebec, the civil court applies to the conditions of formation of insurance contracts and to the interpretation and enforcement of those contracts pursuant to the Quebec Civil Code (Articles 1378ff). The law relating to Life Insurance and Accident and Sickness Insurance is contained, with other insurance law, in the Quebec Civil Code (Articles 2389ff). This paper only purports to address the law as it relates to the common law provinces.

the running of time in a disability dispute. Next, part III examines the various equitable doctrines and legal principles and how they can be applied to avoid the statutory and contractual limitation defence in a disability insurance dispute. The paper then revisits the purposes for limitation periods and attempts to make the case, in part IV, for legislative reform.⁴

II. DISABILITY CONTRACTS AND THEIR LIMITATION PERIODS

Identifying the correct limitation period for a disability contract requires both an understanding of the type of disability contract and an understanding of the applicable parts of the *Insurance Act*. In order to identify the correct limitation period a careful reading of the disability contract is first required. Next, the contract must be properly classified so that the appropriate statutory or contractual limitation provision is identified.

A. The Various Types Of Disability Contracts

An insurance policy defines the duties and responsibilities of both insurer and insured. The policy should contain all the legal elements of a private contract. The parties to the contract must be competent to contract. There must be an agreement between the parties on the important terms, including the amount and duration of the contract. There must be a subject matter of the contract and at least one risk covered with a specification of the amount of the coverage provided by the policy. The consideration payable by way of premium must be set out. The insurer underwrites the risk in

⁴ This paper will not be reviewing incapacity as a technique to avoid the limitation defence. See B. Legate, "The Meaning of Incapacity Under The Limitations Act: Balancing The Rights Of Plaintiffs and Defendants" (2000) 8:3 *The Litigator* 21; See also *Swiderski v. Broy Engineering Ltd.* (1992), 11 O.R. (3d) 594 (Ont. Div. Ct.) and *Mazzuca v. Silvercreek Pharmacy Ltd.* 2001 CarswellOnt 4133 (Ont. C.A.) November 27, 2001 on special circumstances of adding additional parties after the expiry of a limitation period.

exchange for payment of the premium. As a result there is a mutuality of obligation between the parties.⁵

Disability insurance policies indemnify against losses resulting solely from disability, accident or sickness. These policies are meant to compensate an insured or third party beneficiary during periods of “total disability” or “partial disability” with the compensation in some way being measured relative to the disabled party’s pre-disability income.

Disability insurance policies insure against the loss of capacity to work. These policies are one of *uberrimae fidei* (utmost good faith). An insurer owes its insured or a third party beneficiary a duty of good faith in the handling of the claim. Likewise, there is a corresponding duty of good faith on the insured or the third party beneficiary to tell the insurer the complete truth.⁶

Insurance policies that insure both the disability and the death of the insured or of the third party beneficiary within the same contract are defined as “disability insurance” and are governed by the various common law provincial Insurance Acts.⁷ In Ontario, policies of “disability insurance” come within Part V of the *Insurance Act*, R.S.O. 1990, c. I.8.⁸ A policy which does not contain any death benefit and covers only in the event of disability is governed solely by accident and sickness insurance law and not life insurance law.

These policies are also governed by the various common law provincial Insurance Acts.

⁵ A. Milrad, *Artful Ownership* (Washington: American Society of Appraisers, 2000) at 200-201.

⁶ R.V. Buller, “The Rainmaker Revisited: Punitive and Aggravated Damages In the Real World of Disability Insurance” (2000) 79:1 *The Canadian Bar Review* 201 at 204.

⁷ The so-called *Uniform Life and Accident and Sickness Insurance Acts* are model legislations developed by the Superintendents of Insurance of the Provinces of Canada. These model legislations are not in fact enacted in exactly the same form in each province. Most of the variations are minor and technical and do not have an impact on the substance of these model legislations. See the *Uniform Life and Accident & Sickness Insurance Acts*, Blair C.F. Fraser, Ed. (Toronto: Stone & Cox Limited, 1992). See also R. Hayles, *Disability Insurance* (Toronto: Carswell, 1998) at 86-88.

⁸ *Insurance Act*, R.S.O. 1990, c. I.8. See *supra*, note 3.

In Ontario policies of “accident insurance” and “sickness insurance” come within Part VII of the *Insurance Act*. These policies are deemed by statute not to be life insurance contracts within the meaning of Part V, Life Insurance, of the *Insurance Act*.⁹

Individual Contracts

Individual policies are contracts sold to individuals without an intermediary such as an employer. The insured submits an application to obtain an individual contract. The contract is underwritten and the policy is provided in exchange for premiums. Unlike group contracts and ASO contracts discussed below, contractual terms for an individual contract are provided to an insured when they purchase the policy or shortly thereafter. Individual policies are either classified as policies of “disability insurance” or “accident insurance” or “sickness insurance”. Subject to their terms, these policies can fall under Part V, Life Insurance, of the *Insurance Act* or Part VII, Accident and Sickness Insurance, of the *Insurance Act*.¹⁰

Group Contracts

Group policies are contracts between an insurer and a policyholder for the benefit of a third party beneficiary, typically employees. These policies are the most commonly sold policies and are often sold to employers for the benefit of a group of employees to insure them in case of the onset of disability. The employer is the policyholder and the employee is the plan member. As the discussion below will show, third party

⁹ D. Norwood and J.P. Weir, *Norwood On Life Insurance Law In Canada*, 2nd ed. (Toronto: Carswell, 1992) at 377; See also B. O'Brien, “Accident And Sickness Insurance” in *Special Lectures*, Law Society of Upper Canada (Toronto: Richard De Boo Limited, 1962) at 157 for a history of Accident And Sickness Insurance.

¹⁰ Part VII, Accident and Sickness Insurance, of the existing Ontario *Insurance Act* sets out statutory conditions which are deemed to be part of every individual contract of insurance. These statutory conditions do not apply to group insurance contracts. In contrast, Part V, Life Insurance, of the Ontario *Insurance Act* has no such statutory conditions.

beneficiaries of group policies may be subject to abuses by insurers due to the effect of the doctrine of privity of contract. Like individual policies, group policies can fall under Part V for Life Insurance or Part VII for Accident and Sickness Insurance of the *Insurance Act*.¹¹ Policies that are group contracts, irrespective of whether they contain a death benefit or not, are similar in their operation and administration. While the terms of these contracts may differ, the way information is communicated to the third party beneficiary, employee, is the same.

The doctrine of privity applies to prevent everyone other than the contracting parties from enforcing a contract. The rationale offered for the doctrine is, first, that the third party should not be allowed to sue on the contract inasmuch as he or she cannot be sued on it and, secondly, that the third party provides no consideration. Strict reliance upon the traditional concept of privity of contract has been criticized by authors and circumvented by many courts.¹² In order to enforce contracts, courts have avoided or circumvented the need for privity by relying upon such principles as “assignment”, “attornment”, the construction of a “collateral contract”, “agency”, the use of “tortious liability”, a finding of “equitable trust”, or “reversal of the rule by statute”.

¹¹ Where a collective agreement specifically provides for certain long term disability benefits or the long term disability plans are incorporated by reference into the collective agreement, any dispute with respect to the long term disability coverage under such circumstances would be handled through the grievance and arbitration process outlined in the collective agreement. The time limits outlined in the collective agreement would then govern for that process. However, where the plan or policy is not mentioned in the collective agreement or the collective agreement provides only for payment of premiums, the rights of the employee are governed solely by the group insurance plan and any dispute as to coverage and the amount of benefits is resolved through litigation. Thus, the courts would retain jurisdiction and the statutory and contractual limitation periods for group contracts outlined in this paper would govern.

¹² See J.D. McCamus, “Loosening the Privity Fetters: Should Common Law Canada Recognize Contracts for the Benefit of Third Parties?” (Paper presented to Canadian Bar Association-Ontario, At the Heart of Contract Law, 2001).

The right to sue an insurer directly under a group disability policy is found in sections 201 and 318 of the *Insurance Act*. According to Part V, Life Insurance, section 201: "A group life insured may in his or her own name enforce a right given to him or her under a contract, subject to any defence available to the insurer against him or her or against the insured." According to Part VII, Accident and Sickness Insurance, section 318: "A group person insured may, in his or her own name, enforce a right given by a contract to him or her, or to a person insured thereunder as a person dependant upon or related to him or her, subject to any defence available to the insurer against his or her or such person insured or against the insured." As such, even though the group member is not a party to a contract, they are entitled to claim under the contract.

Sections 201 and 318 of the *Insurance Act*, in essence, reverse the rule of privity by statute. These sections allow for a person who is a plan member of a group policy to commence an action for benefits. The group member is treated as a contracting party for the purposes of commencing an action and, therefore, must be concerned about limitation provisions.

Often the insurer will, in the course of a dispute, take the position that the contract lies between them and their insured, the policyholder, or that the group member is not entitled to a copy of the contract as the contract is the property of the policyholder. Often a claimant or their lawyer will request a copy of the policy wording from the insurer. The insurer will reply by referring the claimant or their lawyer to the employer. Meanwhile, time is running to the detriment of the claimant and their lawyer. The third party beneficiary, employee, may have been provided with a booklet summarizing the policy from their employer, policyholder, when they became a plan member. For the purposes

of understanding the applicable limitation provision, the underlying group policy and not the booklets summarizing the policy must be relied upon.¹³

ASO Contracts

ASO contracts are Administrative Services Only Contracts. Under these contracts, the employer and the insurer enter into a business arrangement whereby the insurance company provides the administration of the contract. While entitlement to disability benefits is part of the expressed or implied terms of an employment contract, the employer is liable for benefits to a group of employees who may have the responsibility to pay a portion of premiums. The expressed terms of the disability insurance policy are outlined in a group contract to the employees or, alternatively, can be construed through the disability benefit booklet provided to the group of employees.¹⁴ The employer, in fact, remains the payor at the end of the day for the insurance funds paid out. Like individual policies and group policies, these disability policies can fall under Part V, Life Insurance, or Part VII, Accident and Sickness Insurance, of the *Insurance Act*.

ASO contracts have not received much attention by legal scholars of contractual disability insurance disputes. In the area of ASO contracts, abuses arise due to

¹³ The booklet provided to a plan member usually contains a disclaimer as to its accuracy and usually contains a disclaimer stating that the underlying group policy outlines the terms and conditions are to be relied upon and not the booklet.

¹⁴ Where a collective agreement specifically provides for certain long term disability benefits or the long term disability plans are incorporated by reference into the collective agreement, any dispute with respect to the long term disability coverage under such circumstances would be handled through the grievance and arbitration process outlined in the collective agreement. The time limits outlined in the collective agreement would then govern for that process. However, where the plan or policy is not mentioned in the collective agreement or the collective agreement provides only for payment of premiums, the rights of the employee are governed solely by the expressed terms of the disability insurance contract and any dispute as to coverage and the amount of benefits is resolved through litigation. Thus, the courts would retain jurisdiction and the statutory and contractual limitation periods for group contracts outlined in this paper would govern. See *Clara Hamilton v. ICI Canada Inc., operating as ICI Autocolor* (02 October 2001), Court File No. C39454/97, (Ont. Sup.Ct.).

misinformation and misrepresentation on the part of the insurance company and employer to the employee.

B. Provisions Limiting The Running Of Time

The right of an insured to sue their insurer is a cause of action in contract. Except for claims for a declaration to interpret a contract, a cause of action based on contract does not arise until the contract has been breached or repudiated. A breach of contract by an insurer arises when the insurer refuses to perform its obligation to indemnify the insured or refuses to pay upon an occurrence of a specified event.¹⁵ Where a contract is contingent upon the occurrence of a certain event, no obligation arises until the occurrence of that event.¹⁶ If an insurer fails to make a payment or denies liability for reasons that the claimant rejects, the claimant can bring legal proceedings to enforce their rights under the policy.

An exculpatory provision in a contract results in the right of action being expressly released or extinguished if not begun within a specified period of time or it may eliminate or diminish the damages recoverable for any breach of contract. In insurance contracts, a statutory condition is a condition created by legislation that can be found as a term in a contract. Once it becomes a term of the insurance contract, it has no different quality from any other term of the contract. As such a statutory condition dealing with the running of time for the commencement of an action in an insurance contract dispute has the same result as an exculpatory provision in contracts generally.¹⁷ However, if the statutory period for bringing an action expires before an action is brought, the plaintiff's right is not extinguished. The plaintiff is simply deprived of their remedy of action by

¹⁵ *Peltier v. Guitard* (1984), 44 O.R. (2d) (Ont. H.C.) 665 at 676 [hereinafter *Peltier*].

¹⁶ Morton, *supra* note 1 at 26.

procedural law. Since the plaintiff's right is not extinguished, the plaintiff is justified in obtaining satisfaction otherwise than a legal proceeding if he or she is able to.¹⁸

In order to identify the right limitation section it is necessary to classify the kind of insurance involved and then find the part of the *Insurance Act* applicable to that class.¹⁹

Where an individual contract or group contract contains a death benefit, Part V would apply. In Ontario, under Part V, Life Insurance, section 206 of the *Insurance Act*, states:

(1) Limitation of action-Subject to subsection (2) an action or proceeding against an insurer for the recovery of insurance money shall not be commenced more than one year after the furnishing of the evidence required by section 203 or more than six years after the happening of the event upon which the insurance money becomes payable, whichever period first expires.

Section 203 states:

Proof of Claim – Where an insurer receives sufficient evidence of, (a) the happening of the event upon which insurance money becomes payable; (b) the age of the person whose life is insured; (c) the right of the claimant to receive payment; and (d) the name and age of the beneficiary, if there is a beneficiary, it shall, within thirty days after receiving the evidence, pay the insurance money the person entitled thereto.

The statutory limitation period in Part V applies only to a policy that insures both the disability of the insured or third party beneficiary and, in addition, the death of the insured or third party beneficiary within the same contract. The language in Part V favours the claimant. It expressly ties the limitation period to the furnishing of proof.

¹⁷ Mew, *supra* note 1 at 138.

¹⁸ *Gillevet v. Crawford & Co. Insurance Adjusters Ltd.* (1988), 66 O.R. (2d) 665 (Ont. Dist. Ct.) at 668.

¹⁹ *Holme Estate v. Unum Life Insurance Co. of America* (2000), 194 D.L.R. (4th) 139 (B.C.C.A.) at 147 [hereinafter *Holme*] and *Kerry v. Blue Cross Life Insurance Company*, [1996] I.L.R. 1-3365 (P.E.I.T.D.).

By contrast, where an individual and group disability contract does not contain any death benefits, Part VII would apply.²⁰ An individual Accident and Sickness policy is subject to the statutory conditions found in Part VII section 300. Under Part VII, Accident and Sickness Insurance, section 300, statutory condition 12 reads:

An action or proceeding against the insurer for the recovery of a claim under this contract shall not be commenced more than one year after the date the insurance money became payable or would have become payable if it had been a valid claim.

Under section 300, statutory condition 11, the initial benefit for loss of time must be paid by the insurer within thirty days after it has received proof of claim and thereafter in accordance with the terms of the contract but not less than once in each succeeding sixty days while the insurer remains liable for payments. Under statutory condition 7, the insured or a person insured, or a beneficiary entitled to make a claim or the agent of any of them has ninety days from the date a claim arises under the contract on account of accident, sickness or disability to furnish a proof of claim form. Under Part VII, Accident and Sickness Insurance, section 300, statutory condition 10 reads: "All money payable under this contract, other than benefits for loss of time, shall be paid by the insurer within sixty days after it has received proof of claim."²¹ The statutory limitation period in Part

²⁰ This Part of the *Insurance Act* applies to contracts made in Ontario after September 30, 1970. For contracts made before that date, some sections of the Act then in force continue to apply, as specified in subsection 244(2) of the present Act.

²¹ Part VII, Accident and Sickness Insurance, section 300, statutory condition 10 applies to an individual Health Insurance contract and to an individual Critical Care Insurance contract. Critical Care Insurance falls under Part VII, Accident and Sickness Insurance, section 300, statutory condition 10 of the Ontario *Insurance Act*. Under section 301 (6) of Part VII, statutory condition 10 can be varied by shortening the period of time prescribed. A typical limitation of action provision found in a Critical Care Insurance contract reads: "An action or proceeding against the insurer for the recovery of a claim under this contract may not be commenced more than one year after the date the insurance money became payable or should have become payable if it had been a valid claim." Money becomes payable "within sixty days after the insurer has received proof of claim." As a new product being sold in Canada, there are no cases dealing with the limitation provision for Critical Care Insurance contracts to date. A court in Ontario could entertain a discoverability type argument where a limitation defence is raised in a Critical Care Insurance dispute. As these contracts do not provide a periodic payment, the case law on continuing cause of action would not apply. Waiver may not apply because of Part VII Accident and Sickness Insurance section

VII applies only to an individual contract that does not contain a death benefit. The language in Part VII favours the insurer. The language in Part VII is not as favourable to a claimant as compared to the language in Part V because it is open to the interpretation that time begins to run at the point when the entitlement to benefits arises.²²

An individual disability contract of insurance that does not contain any death benefit can contain a longer limitations of actions provision than that which the statute provides. Pursuant to section 301 (6) of Part VII, section 300 statutory conditions 10 and 11 can be varied by shortening the period of time prescribed, and section 300 statutory condition 12 may be varied by lengthening the period of time prescribed.

A group Accident and Sickness policy is subject to the terms of the contract because section 300 states that the statutory conditions are deemed to be part of every contract other than a contract of group insurance. Most group Accident and Sickness policies impose a limitation of one or two years from the date the insurance money ought to have been paid. Some of these policies contain a provision which requires that a claim for benefits be filed within one year after the date the insurance money became payable or would have become payable had a valid claim been filed. Other policies require that any action be commenced within one year after the cause of action arose.²³ Where there is no period provided in the insurance legislation, and where none has been included in terms of the policy, the applicable period is that provided in the *Limitations Act* for

300 statutory conditions 1.(1)(2) that precludes waiver. Promissory estoppel could apply to Critical Care Insurance contracts to extend the running of time.

²² *Holme, supra* note 19 at 148.

²³ Some provinces have included in their *Insurance Acts* a provision setting a limitation for insurance not otherwise specifically dealt with in their *Insurance Act*. Reference must be made to the individual provincial *Insurance Acts* to ensure that such a provision does or does not exist.

enforcement of a debt. In Ontario, the applicable limitation for the enforcement of a debt is that the action shall be commenced within six years after the cause of action arose.²⁴

III. COMMENCING, EXTENDING, SUSPENDING AND INTERRUPTING THE RUNNING OF TIME

As noted above, where a defendant raises the limitation defence in a disability dispute, the acceptance by a court of the limitation defence can deprive the plaintiff of their action. However, various equitable doctrines and legal principles can sometimes be applied to avoid or minimize the effect of the statutory and contractual limitation defence in a disability insurance dispute. The discoverability rule, waiver and estoppel, and relief from forfeiture are doctrines that can avoid the limitation defence or limit its effect.

Likewise, principles such as interpreting the elimination period and the elements for the cause of action have been adopted by courts to avoid the limitation defence or limit its effect. These doctrines and principles are the subject of this part of the paper.

Individual contracts and group contracts that fall under Part VII, Accident and Sickness, of the *Insurance Act* contain either a statutory condition which forms part of the contract terms or an exculpatory provision in the contract of insurance. This Part will first discuss rules of interpreting the insurance contract and their limitation provisions in general.

Next, it will address who has the evidentiary burden when the equitable doctrines and legal principles for commencing, extending, suspending and interrupting the running of time are in issue. The majority of this Part will be devoted to examining the equitable doctrines and legal principles to show how these doctrines and principles may be applied whenever a limitation defence is raised in a disability insurance dispute.

²⁴ *Limitations Act*, R.S.O. 1990 c. L.15 s.45(1)(g).

A. Rules Of Interpretation Of Insurance Contracts And Their Limitation Provisions

Insurance contracts are interpreted with the same rules of construction as employed for contracts generally. There are no special rules for interpreting insurance contracts. As with all agreements, regard must be had to the words used in the contract in their particular circumstances.²⁵

Generally speaking, promissory provisions of a contract are construed generously but the exclusions are narrowly construed.²⁶ Exclusions are not to be interpreted so that they are repugnant with the main purpose of the insurance coverage or so as to nullify coverage.²⁷ Limitation periods are to be construed strictly so as not to take away the rights of the insured.²⁸

With respect to insurance contracts and the interpretive difficulties that arise from them, Justice Estey in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*,²⁹ which is one of the more important cases about contract interpretation generally, stated:

... the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the

²⁵ See *LeBlanc & Royle Enterprises Inc. v. United States Fidelity & Guaranty Co.* (1994), 24 C.C.L.I. (2d) 71 (Ont. C.A.) at 78 and *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888 at 899 [hereinafter *Consolidated*].

²⁶ See *Madill v. Chu* (1976), 71 D.L.R. (3d) 295 (S.C.C.).

²⁷ See *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Company* (1993), 13 C.C.L.I. (2d) 161 (S.C.C.) and *Consolidated*, *supra* note 25 at 888.

²⁸ See *Peltier*, *supra* note 15 and *Marra v. Constitution Insurance Co.* (1987), 27 C.C.L.I. 206 (Ont. Pro. Ct. Small Claims Court) at 209.

²⁹ *Consolidated*, *supra* note 25.

parties. Similarly, an interpretation which defeats the intention of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision, which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.³⁰

In recent years, the Supreme Court of Canada has attempted to clarify how an exculpatory provision is to be interpreted as a term of a contract. In *Guarantee Co. of North America v. Gordon Capital Corp.*,³¹ the Court clarified that where there is a breach of contract or repudiation of a contract, a time-limited clause is to be treated by the court as any other clause in the contract so long as the contract entered into is not found to be unconscionable.³²

Where an ambiguity is found, the court may apply the *contra proferentum* doctrine, the rule expressed in the maxim, *verba fortius accipiuntur contra proferentum* (the contra proferentum rule). Under this maxim, where there is any doubt as to the meaning of the scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted the excluding or limiting term and who is now relying upon it.

B. Evidentiary Burden

Where the plaintiff commences an action beyond the apparent limitation period and relies upon the equitable doctrines or legal principles for commencing, extending, suspending or interrupting the running of time, there will be an evidentiary burden on a

³⁰ Ibid. at 899.

³¹ *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 [hereinafter *Guarantee*].

³² Ibid. at 453.

plaintiff to assert when time began to accrue. If a limitation period seems to apply, then the plaintiff must show why the limitation period does not bar the claim. For example, in *The Mutual Life Insurance Company v. Gloria Bezaire*,³³ (a motion under rule 20.01 of the Ontario Rules of Civil Procedure) an application was made by an insurer to dismiss the respondent's action based upon the limitation period contained in a group insurance policy under which the respondent claimed in an action for disability benefits. The policy provided, among other things, that actions or proceedings against the insurer for recovery of any claim for disability benefits must be commenced no later than one year after the date on which proof of claim is received by the insurer. The respondent was entitled to benefits on September 7, 1991. She received benefits from March 10, 1992, to March 10, 1994, at which time she was advised that she was no longer disabled under the policy. Further medicals were provided and the insurer advised on June 30, 1994, that the information submitted did not support the claim for benefits. The respondent's benefits were terminated as of March 10, 1994, and she was told that she could appeal and file further material. The respondent did not submit further written materials, but she did request a copy of the policy on September 23, 1994, and she submitted a medical consent to release the existing medical information on October 6, 1996. The insurer advised on December 16, 1996, that medical information could not be released without the authority of the doctors. In April of 1998, a representative of the respondent advised the insurer that the respondent wished to appeal the decision by having the insurer call the respondent's doctors to obtain medical information. The representative also inquired as to whether a new claim could be initiated. The insurer advised that a new claim could not be initiated as the respondent had not returned to work. The statement of claim was issued on April 27, 2000.

³³ *The Mutual Life Insurance Company v. Gloria Bezaire* (25 January 2001), Court File No. 00-GD-48778, (Ont. Sup. Ct.) [hereinafter *The Mutual*].

The court concluded that the proof of claim was received at the latest on June 30, 1994, when the insurer had all material and wrote the respondent that benefits were terminated. The court then dismissed the action. In the decision, the court noted that the respondent's counsel did not rely upon waiver, estoppel or discoverability principles. The respondent's counsel did not specify a date on which the plaintiff alleged the limitation period started or ended, and proof of claim was not defined in the policy.³⁴

A reading of this case, however, provides very few answers and raises many questions. Why were waiver, estoppel and discoverability principles not argued or relied upon? If the respondent was found to be disabled as of the date of issuing the statement of claim, could not a continuing cause of action argument be relied upon at a minimum?

To avoid the limitation defence in contractual disability disputes and outcomes like that of *The Mutual Life Insurance Company* case, the court must have evidence to support a decision on the equitable doctrines or legal principles that may cause the running of time to be commenced, extended, suspended or interrupted. Where a defendant raises the limitation defence, it is the trial judge who will be in the best position to assess the equitable doctrines and legal principles for commencing, extending, suspending or interrupting the running of time. The Ontario Court of Appeal in *Boutin v. Co-operators Life Insurance Company*³⁵ can be interpreted to hold that whether the insurer is entitled to rely on the limitation period in a policy has a significant factual component and is a matter which should be addressed at trial.

³⁴ Ibid. at 3.

In the *Boutin* case, on appeal, the appellant, Boutin, took the position that the respondent, Co-operators Life Insurance Co., could not rely upon the policy limitation period since the respondent did not provide her with a copy of the policy or refer to the limitation period in material concerning the policy that was given to her and other employees. The appellant also relied upon the fact that after benefits were terminated, during the period in which her claim was being considered by the respondent, nothing was said to alert her about the one-year limitation period. The appellant pleaded and relied upon the doctrines of waiver and estoppel to avoid the limitation defence.³⁶

The limitation provision in the policy read as follows:

Limitation of action

No action or proceeding at law or in equity shall be brought against the Insurance Company to recover benefits payable under this Policy prior to the expiration of sixty (60) days after Proof of Loss has been filed in accordance with the requirements of this Policy, nor shall such action be brought at all unless brought: ... (ii) where benefits have been paid under the provision under which benefits are being claimed-

within one year of the date on which the Insurance Company terminates the payment of benefits under the said provision.

If any time limitation of this Policy with respect to the bringing of an action at law or in equity is less than that permitted by the law of the province in which the insured Employee resides at the time this Policy is issued, then the limitation is hereby extended to agree with the minimum period permitted by law.³⁷

The Court of Appeal allowed the appeal and held that whether the policy limitation period was a bar to the appellant's action was not a question of law which should have been resolved on a rule 21.01 (1)(a) motion. Even if leave was granted to permit the parties to file evidence on the motion, inferences to be drawn from the evidence were not so clear as to permit the question of law at issue to be resolved on a rule 21.01 (1)(a) motion. As

³⁵ *Boutin v. The Co-operators Life Insurance Company* (1999), 42 O.R. (3d) 612 (Ont. C.A.) [hereinafter *Boutin*].

³⁶ *Ibid.* at 613.

³⁷ *Ibid.* at 615.

there was a significant factual component to whether the insurer could rely upon the limitation defence, the court felt that the matter should be addressed at trial.³⁸

In the *Boutin* case, it was within the power of the Court of Appeal to permit the rule 21.01 motion to be converted to a rule 20 summary judgment motion; nevertheless, the Court rightfully recognized that these decisions are factually driven. In other words, a court needs to assess all of the underlying factual evidence to make a determination that even though the limitation period prescribed by statute or contract appears to have expired, the limitation period based upon the underlying facts did not begin to run or did not really come to a final end. Moreover, to assess the merits of any equitable doctrines or legal principles, the court will need to look at the underlying factual evidence to determine if the plaintiff exercised due diligence in advancing the cause of action.

i. The Discoverability Rule

Where a limitation defence is raised, a plaintiff in a disability dispute may have a discoverability argument to avoid the limitation defence. Generally, scholars have addressed the discoverability rule in the context of tort law.³⁹ Nevertheless, the discoverability rule does apply to contract law actions. Moreover, in the area of disability insurance disputes, the discoverability rule can be equated to the clear and unequivocal denial argument discussed below. These arguments are the subject matter of the next section of this paper.

³⁸ Ibid. at 618.

³⁹ See S. Muller, "Defining The Parameters Of Peixeiro v. Haberman In Personal Injury Actions" (2000) 18:2 Canadian Journal of Insurance Law 1.

To begin the discussion, the discoverability rule has evolved fairly recently.⁴⁰ It gives relief to claimants in certain factual situations by effectively calculating the commencement of the limitation period from a time later than would produce a limitation defence by the statute or contract. According to the discoverability rule, a limitation period begins to run when the material facts upon which an action is based have been discovered or ought to have been discovered by the plaintiff through the exercise of due diligence. It postpones the running of time until a reasonable person, in the exercise of reasonable diligence, would discover the facts necessary to maintain the action.⁴¹ The discoverability rule is a general rule applied to avoid injustice.

It was not clear from the Supreme Court decision in *Central Trust Co. v. Rafuse*⁴² whether the Supreme Court of Canada intended the discoverability rule to apply to breach of contract actions as well as to tort actions. Nevertheless, following *Central Trust*, courts have applied the discoverability rule to a broad range of causes of action and situations some of which have included breach of contract disputes.⁴³ Moreover, since *Peixeiro v. Haberman*,⁴⁴ the discoverability rule has enjoyed broad application. There is now a body of jurisprudence on the scope and application of the discoverability rule. *Peixeiro* leaves it to counsel, faced with an expired limitation period in a contract case, to raise the question of whether the limitation commenced running at the date of the contract breach or the date of discovery.

⁴⁰ *Kamloops (City) v. Nielsen* (1984), 10 D.L.R. (4th) 641 (S.C.C.) [hereinafter *Kamloops*]; *Consumers Glass Co. Ltd. v. Foundation Co. of Canada Ltd.* (1985), 51 O.R. (2d) 385 (Ont. C.A.) [hereinafter *Consumers*]; *Central Trust Co. v. Rafuse* (1986), 31 D.L.R. (4th) 481 (S.C.C.) [hereinafter *Central Trust*]; *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6 [hereinafter *M.(K.)*]; *Murphy v. Welsh* (1993), 106 D.L.R. (4th) 404 (S.C.C.).

⁴¹ *Novak v. Bond*, [1999] 1 S.C.R. at 816 [hereinafter *Novak*].

⁴² *Central Trust*, *supra* note 40.

⁴³ Galligan, *supra* note 1 at 468. See also *Air Canada v. Meridien Credit Corp. Canada* (1987) 15 C.P.C. (2d) 135 (Ont. Dist. Ct.) Fanjoy J. held that the discoverability rule applies to all actions in contract and tort.

⁴⁴ *Peixeiro v. Haberman* (1997), 12 C.P.C. (4th) 255 (S.C.C.).

Justice Borins speaking for the Ontario Court of Appeal in *Aguonie v. Galion Solid Waste Material Inc.*,⁴⁵ stated that the discoverability rule applies to all cases in which the issue is the time when a cause of action arises for the purpose of determining the commencement of a limitation period. He stated:

... this principle provides that a cause of action arises for the purpose of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered by the plaintiff by the exercise of reasonable diligence. This principle conforms with the generally accepted definition of the term “cause of action”—the fact or facts which give a person a right to judicial redress or relief against another.⁴⁶

The application of the discoverability rule depends, in part, on the wording of the limitation provision. The discoverability rule does not apply when, based on that wording, the limiting time runs from a fixed event unrelated to the party's knowledge of the basis of the cause of action.⁴⁷

Where a plaintiff commences a claim beyond the limitation period that would bar the claim and relies upon the discoverability rule, there is an evidentiary burden on the plaintiff to provide that the material facts giving rise to the action were not within their knowledge before the apparent limitation period expired. It is a question of fact, depending on the circumstances of the case as a whole, as to when the knowledge of the material facts or facts were acquired by the plaintiff.⁴⁸ The plaintiff must exercise due diligence and is not entitled to wait until they have an overwhelming case.⁴⁹ A court can

⁴⁵ *Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222 (Ont. C.A.) [hereinafter *Aguonie*].

⁴⁶ *Ibid.* at 230 to 232.

⁴⁷ *Waschkowski v. Hopkinson Estate* (2000), 47 O.R. (3d) 370 (Ont. C.A.) at 372-373.

⁴⁸ *Findlay v. Holmes* (1998), 111 O.A.C. 319 (Ont. C.A.) at 329.

⁴⁹ *Ioannidis v. Hawkings* (1998), 39 O.R. (3d) 427 (Ont. Gen. Div.) at 434 [hereinafter *Ioannidis*].

decline to apply the discoverability rule to extend a limitation period where everything was available to enable the plaintiff and its advisors exercising due diligence to advance a cause of action in a timely way. More recently, the Supreme Court of Canada has reiterated that there is a burden on the plaintiff to act reasonably.⁵⁰

Various Canadian courts have outlined the parameters of the discoverability rule for breach of contract actions including insurance contracts. The courts have applied the discoverability rule to breach of contract actions where the question arises as to when damages arose or occurred.⁵¹ In *July v. Neal*,⁵² the question arose as to whether the plaintiffs' action against their insurer for recovery under the unidentified motorist coverage of their standard automobile insurance policy was within time. Section 8(2) of Ontario's *Uninsured Automobile Coverage Regulation*, R.R.O. 1980, Reg. 535, provided as follows: "(2) Every action or proceeding against the insurer for the recovery of a claim shall be commenced within two years from the date on which the cause of action against the insurer arose and not afterwards." The Ontario Court of Appeal held that the discoverability principle was applicable to this situation.

In *Marin v. Crum & Forester of Can. Ltd.*,⁵³ the claim pursuant to a homeowner's policy concerned damage to the drive shaft of a boat. The defendant relied upon the statutory condition in the policy which required any action to be brought within one year of the occurrence of the damage. The court interpreted the condition in light of the discoverability principle and concluded that, in effect, the damage had not occurred until the material facts had been discovered or reasonably could have been discovered.

⁵⁰ *Novak*, *supra* note 41 at 816.

⁵¹ *Mew*, *supra* note 1 at 134.

⁵² *July v. Neal* (1986), 32 D.L.R. (4th) 463 (Ont. C.A.) [hereinafter *July*].

⁵³ *Marin v. Crum & Forester of Can. Ltd.* (1987), 29 C.C.L.I. 245 (Ont. Prov. Ct.).

Unlike the Ontario courts, the Alberta courts have restricted the application of the discoverability rule to contracts of indemnity. The Alberta Court of Appeal held in *Fidelity Trust Co. v. 98956 Investments Ltd. (Receiver of)*⁵⁴ that the discoverability rule laid down by the Supreme Court of Canada in *Kamloops (City) v. Nielsen*⁵⁵ and *Central Trust Co. v. Rafuse*⁵⁶ did not apply to actions in contract. The Court ruled that the limitation period in contract begins to run when the contract is breached, not when the material facts on which it is based have been discovered or ought to have been discovered by the exercise of reasonable diligence. Justice Harradence went on to state, however, that the question of limitation periods must be addressed differently when dealing with contracts of indemnity. The nature of a contract of indemnity is that it is a reimbursement obligation for an amount of damages that has actually been suffered. No cause of action can ever arise until the extent of the loss has been quantified.⁵⁷

The Alberta Court of Appeal was asked to reconsider its earlier decision in *Fidelity Trust* but refused to do so in *Luscar Ltd. v. Pembina Resources Ltd.*⁵⁸ Justice Kerans stated at para. 2 & 5 :

The view taken to date by this Court is that the subject is governed by statute and the issue, therefore, remains at the level of interpretation of the Alberta statute. Moreover, no decision of the Supreme Court of Canada or a provincial Court of Appeal applies the discoverability rule in a case where the dispute is over the breach of an express term of the contract, as opposed to liability in tort arising from a contractual relationship... We do not think that there is any reasonable prospect of success with an argument that the two Supreme Court of Canada cases are about anything other than the interpretation of provincial

⁵⁴ *Fidelity Trust Co. v. 98956 Investments Ltd. (Receiver of)*, [1988] 6 W.W.R. 427 (Alta.C.A.).

⁵⁵ *Kamloops*, *supra* note 40.

⁵⁶ *Central Trust*, *supra* note 40.

⁵⁷ The court was interpreting s. 4(1)(C)(i) of the *Limitation of Actions Act*, R.S.A. 1980, c. L-15, which read: 4(1) The following actions shall be commenced within and not after the time respectively hereinafter mentioned: c) actions (i) for the recovery of money,...whether recoverable as a debt or damages or otherwise, and whether on a ...simple contract, express or implied... within 6 years after the cause of action arose.

⁵⁸ *Luscar Ltd. v. Pembina Resources Ltd.* (1992), 131 A.R. 79 (Alta. C.A.).

statutes. We do not think that there is any reasonable prospect of success for an argument that an earlier decision incorrectly interpreted an Alberta statute when that decision has been left by the Alberta Legislature to stand for three years, despite two studies and reform proposal by the Alberta Law Reform Institute.

As well, in *Edmonton (City) v. Lovat Tunnel Equipment Inc.*,⁵⁹ the court, referring to *Fidelity Trust and Luscar Ltd.*, concluded that, although the remarks of Justice Major in *Peixeiro* can be broadly interpreted, they were not intended to apply to a situation where breach of contract is alleged.⁶⁰ The court did not, however, comment on indemnity contracts.

The fundamental policy underlying the discoverability rule is the recognized unfairness in requiring a plaintiff to bring a cause of action before they could have reasonably discovered that there was a cause of action. The purpose of the rule is to avoid the injustice of a limitation period that expires before a person is reasonably able to sue.⁶¹ There seems to be no reason in principle why a distinction should be drawn between contract and tort. The general principle of the injustice of an unknown cause of action expiring without the plaintiff being aware of this is identical for both actions in contract and in tort. The judicial line of reasoning concerning breach of contract actions suggests that the discoverability rule is alive and available as a rule of construction to avoid the limitation defence.

Individual Contracts

The case law in the area of individual disability insurance contracts has examined the insurer's denial as a basis for sometimes avoiding the limitation defence. The argument

⁵⁹ *Edmonton (City) v. Lovat Tunnel Equipment Inc.* (2000), 3 C.C.L.T. (3d) 78 (Alta. Q.B.) [hereinafter *Edmonton (City)*].

⁶⁰ *Ibid.* at 140.

is that, in order for the limitation period to commence, the insurer's denial of benefits must be clear and unequivocal. Where the denial of benefits is based upon a pre-existing condition exclusion, non eligibility, or is based upon non payment of premiums, the denial is often formulated as a clear and unequivocal denial. However, where payment of benefits are denied or terminated due to insufficient evidence of "total disability" or "partial disability" pursuant to the policy wording, an insurer often will invite the claimant to submit further evidence and to appeal the decision. In these circumstances, the position of the insurer may be unclear. The argument concludes that the limitation period barring a contract claim is not commenced unless the insurer provides a clear and unequivocal denial. The language and reasoning adopted by the courts in advancing the clear and unequivocal denial argument is similar to the language adopted in espousing the discoverability rule.

In *Naboulsi v. Unum Life Insurance Co. of America*,⁶² the Alberta Court of Queen's Bench applied the doctrine of the discoverability rule to avoid the expiry of the cause of action for the plaintiff in a disability insurance dispute. In *Naboulsi*, the disability policy stated that initial payment was to be paid within 30 days after receiving satisfactory proof of claim, and the policy provided for a limitation period to expire "one year from the date the insurance money became payable or would have become payable if it had a valid contract". The court stated that the "principal of discoverability was reengaged" when the insurance company indicated it would re-evaluate the claim. The plaintiff could not have known the defendant had received satisfactory proof of loss until the defendant informed the plaintiff of that fact. Subsequently, the plaintiff supplied some additional information

⁶¹ See *Fisher v. Novakovic* (2001), 52 O.R. (3d) 473(Ont. Sup. Ct.) at 478. and *Ioannidis*, *supra* note 49 at 430.

⁶² *Naboulsi v. Unum Life Insurance Co. of America* (1999), 15 C.C.L.I. (3d) 58 (Alta. Q.B.) [hereinafter *Naboulsi*].

and the defendant provided a form letter indicating that they would initiate a re-evaluation of the plaintiff's claim and expect to complete their assessment within 60 days from the date of that letter. It was the court's view that such a letter would lead the plaintiff to believe that the decision that had been taken originally was being set aside by the defendant to allow the defendant to consider new information and to determine whether the new information would be satisfactory proof of loss and then make a decision. The court concluded that until a negative response from the re-evaluation, "the limitation period did not start because the plaintiff could not discover that the defendant had received a satisfactory proof of loss."⁶³

Group Contracts

The discoverability rule and the clear and unequivocal denial argument has been applied to group contracts. Courts have examined the refusal and or denial relied upon by the insurer to determine whether it has been clear and unequivocal in its communication to the plaintiff. Where the insurer does not maintain a steadfast denial of the benefits, the limitation period does not begin to run. The language and reasoning adopted by the court in espousing the clear and unequivocal denial argument is similar to the analysis of *Naboulsi* which applied the discoverability rule.

In Ontario, *Richardson v. Great-West Life Assurance Co.*⁶⁴, is the leading case on unequivocal denial in disability group policies. In *Richardson*, a motion was brought before Justice Festeryga to determine a point of law about whether the plaintiff's claim

⁶³ Ibid. at 59.

⁶⁴ *Richardson v. Great-West Life Assurance Co.*, [1997] I.L.R. 1-3452 (Ont. Gen. Div.) [hereinafter *Richardson*].

was barred by a limitation period. The disability group policy in question provided as follows: “No legal action to recover benefits under this policy can be introduced:

1. for 60 days after notice of claim is submitted; or
2. more than 2 years after benefits have been denied.”

The plaintiff was paid benefits until January 26, 1992. The defendant wrote the plaintiff on December 30, 1991 denying benefits after January 26, 1992. The statement of claim was issued on August 11, 1994 beyond the two years from the denial of January 26, 1992. The defendant argued the plaintiff’s action was barred. The plaintiff argued that her rights accrued to her from month to month and as such there is no single cause of action but rather contractual rights which mature if conditions exist. The plaintiff also argued that there was no clear denial to start the limitation period from running.⁶⁵

Justice Festeryga dismissed the motion of the defendant. He held that it was clear from the policy wording that an action must be commenced, even though the word “introduced” is used, within two years of the date of denial of further benefits. He went on to state that the denial must be clear and unequivocal. As such he rejected the argument that rights accrue from month to month and that there is no single cause of action. Justice Festeryga found that the letter dated December 30, 1991, from the defendant included an invitation to the plaintiff to appeal the decision. According to Justice Festeryga, the language used by the defendant was somewhat “mystifying language” which is evidence of equivocation as it was an invitation to the plaintiff to appeal the decision of the defendant and giving an address and what material is needed.

⁶⁵ Ibid. at 4541.

The court could have applied the *contra proferentem rule*. Instead, the court based its reasoning on equivocation. Justice Festeryga reasoned that it is the insurer who has the power by its act to begin the running of time. The plaintiff could not have treated the January 26, 1992, date as final and that the claim was clearly rejected. The plaintiff took up the defendant's invitation to appeal and submitted information twice. The second submission of information was done after counsel was retained in September, 1993. Justice Festeryga also found that the plaintiff was confused by the conduct of the defendant about what her rights were and about when the limitation period was to begin. Justice Festeryga concluded that the first clear denial of the plaintiff's disability claim was contained in the statement of defence and as such the action had been commenced within the limitation period.⁶⁶

In *Richardson*, Justice Festeryga relied upon a decision of the British Columbia Court of Appeal called *Dachner Investments Ltd. v. Laurentian Pacific Insurance Company*.⁶⁷

This was a case involving damage to a yacht owned by the plaintiff which was covered by a policy of marine insurance issued by the defendant. In *Dachner Investments Ltd.*, the policy provided under the heading Notice Of Payment Of Loss read "...that in a case of loss covered by the policy, such loss to be paid within 30 days after proof of loss and proof of interest in the said vessel..."⁶⁸

Justice Taggart, in *Dachner Investments Ltd.*, concluded that where an insurer concludes that the loss claimed is not covered by the policy, then the insurer may deny coverage. If it does so in clear and unequivocal fashion, the effect will be to fix the time

⁶⁶ *Richardson*, *supra* note 64. The court described the policy as a disability group policy, the policy presumably would be a Life Insurance policy pursuant to Part V of the *Insurance Act*.

⁶⁷ *Dachner Investments Ltd. v. Laurentian Pacific Insurance Co.*, [1989] I.L.R. 1-2472 (B.C. C.A.) [hereinafter *Dachner*].

from which any limitation period provided by the policy will commence to run. Denial of coverage by an insurer is no more than a notification to the insured that the insurer construes the policy in a way which precludes coverage for the loss claimed by the insured. The court, in *Dachner Investments Ltd.*, explained that the denial of coverage by the insurer was not a repudiation of the contract of insurance unless a policy contains an express provision having that effect.⁶⁹

Justice Taggart concluded that when an insurer seeks to rely on a limitation period whose commencement is fixed by the conduct of the insurer in denying coverage under a policy of insurance, the denial of coverage must be clear and unequivocal. The evidence of equivocation need not be extensive or strong.⁷⁰ Since it is the insurer who chooses the language of the notice of denial and who has the power to act in beginning the running of time, the effect of an unclear notice of denial may have to be determined by the insured's reaction to it. If the notice of the denial objectively considered is not entirely clear, the subjective reaction to it of the party receiving the notice must be considered. Had the plaintiff responded by placing the matter in the hands of his lawyer to begin an action, that would show he understood that time had begun to run.⁷¹ If insurers want to avoid the possibility of misunderstanding, in its notice letter, it can expressly draw attention to the limitation period and state its position to be that the time limit begins to run on receipt by the claimant of that letter.⁷²

⁶⁸ Ibid. at 9568.

⁶⁹ Ibid. at 9570.

⁷⁰ Ibid. at 9571.

⁷¹ Ibid.

⁷² Ibid. See *Blazer v. Sun Life Assurance Co. of Canada*, 2001 CarswellBC 2178 (B.C.S.C.) September 6, 2001 [hereinafter *Balzer*].

On very different facts, the British Columbia decision in *Shewchuk v. London Life Insurance Co.*⁷³ came to the opposite conclusion to that of the *Richardson* court with respect to unequivocal denial. In *Shewchuk*, by letter dated April 30, 1982, the defendant terminated payment of benefits on May 5, 1982. The defendant in May and June of 1982 indicated that their decision was unchanged but if the plaintiff wanted the claim reviewed further, she could submit medical evidence at her expense. Almost ten years passed, and the plaintiff was diagnosed with fibromyalgia in March, 1992. She commenced an action on June 8, 1993. The applicable policy provision, under the group accident and sickness policy, in respect of the limitation of actions read as follows:

No action or proceeding against the Company for recovery under this policy shall be commenced within sixty days, or after two years from the expiration of the time in which proof of total disability is required under this policy. In no event shall any such action or proceeding against the Company be commenced after one year from the date of rejection by the Company of proof of total disability.

The plaintiff argued at trial that the defendant's correspondence in 1982 was not a rejection of proof which triggered the commencement of the contractual limitation.

Justice Meiklem, reviewing the context of the correspondence in May and June of 1982, was of the view that "the correspondence is an unequivocal rejection of the proof of total disability which the defendant had received to date, which can be all that is meant by the contractual limitation provision."⁷⁴ As there was evidence that the plaintiff believed the April 30, 1992 letter to be a rejection of her claim, the court held that there was no evidence of equivocation. In any event, the court concluded that the limitation provision was primarily a two year limitation that commences at the expiry of the time within which proof is required, with a proviso shortening it to one year from rejection of any proof provided. The defendant had destroyed their claim files after seven years from closing

⁷³ *Shewchuk v. London Life Insurance Co.* (1996), 38 C.C.L.I. (2d) 282 (B.C. S.C.) [hereinafter *Shewchuk*].

and files with respect to employers holding group policies were destroyed five years after the policy lapsed. The terms of the applicable group policy had to be partially reconstructed by materials from the plaintiff and defendant. The court reasoned that even where there was no rejection, the limitation remained two years. The court concluded that the claim on the contract was barred by the contractual limitation provision.⁷⁵

Richardson, Dachner Investments Ltd. and Shewchuk are not based on the reasoning that underlying the argument of clear and unequivocal denial is the doctrine of discoverability, but the doctrines are related. It is the denial that ultimately triggers the cause of action to arise. In other words, the courts are looking at the underlying limitation provision and whether the material facts upon which an action is based is discovered or ought to have been discovered by the exercise of due diligence – the discoverability rule. It is a question of fact whether the denial letter provides all the material facts giving rise to the breach of contract. Further, where plaintiff's counsel is retained subsequent to a letter of denial and receives an invitation for added information, the actions of plaintiff's counsel may confirm that the denial is clear and unequivocal.

If an insurer wishes to rely upon a denial or termination where the commencement date is fixed by their action, the insurer should make the limitation period clear regardless of subsequent negotiations or concessions. The onus should be on the insurer to demonstrate that it has provided a clear and unequivocal denial. If an insurer wishes to rely upon a commencement date fixed by when the insurer receives a satisfactory proof of loss or would have received a satisfactory proof of loss for a valid claim, the

⁷⁴ Ibid. at 289.

⁷⁵ Ibid.

calculation of when time begins to run should be made simple without mystifying or obscure language.

At the moment, there is no specific obligation for an insurer to advise a claimant of the limitation period. Where the insurer has used mystifying or obscure language in a disability contract, the courts have not generally applied the *contra proferentum rule*; rather, the courts have analyzed each factual situation and have applied doctrines like the discoverability rule and the clear and unequivocal denial argument to avoid the limitation defence.

The purpose of a clear and unequivocal denial is to tell an unsophisticated person, in a simple and easy to understand way, that the insurer will not pay certain benefits.

Legislation regarding insurance has been characterized as consumer protection. A standard form using language which is easily understood would provide such protection. Clearly, certainty is created when there is a clear and unequivocal denial and when the claimant is advised in simple language the time frame for him or her to seek remedies.⁷⁶

ASO Contracts

Where an ASO (Administrative Services Only) contract is in place between the insurer and the employer, the employer will usually provide a disability benefits booklet to their employees describing their entitlement to disability benefits. However, who is liable for

⁷⁶ On the issue of what constitutes a clear and unequivocal denial with respect to claims arising under Ontario no fault automobile insurance, *Statutory Accident Benefits Schedule - Accidents before January 1, 1994*, R.R.O. 1990, Reg. 672. and the legislative intention of the Ontario *Insurance Act* with respect to statutory accident benefits claims against a no fault motor vehicle accident insurer see *Hall v. Canadian Surety Co.* 1998 CarswellOnt 5254 (Ont. Gen. Div.) allowing leave to appeal 1998 CarswellOnt 3678 (Ont. Gen. Div.) See *Ranisi v. Allstate Insurance Co. of Canada* 2000 CarswellOnt 4177 (Ont. S.C.J.) leave to appeal refused 2000 CarswellOnt

payments should the employee became disabled is not information that generally forms part of an employment contract, aside from a collective agreement.⁷⁷ The employee understands that they are part of a group disability insurance policy. The issue as to who is liable may only arise once there is a dispute.

Although *Peixeiro* dealt with the discoverability of damages, it has been equally applied to the concept of identifying tortfeasors and the addition of the newly identified tortfeasor to an existing action. The discovery of a tortfeasor involves more than the identity of one who may be liable. It involves the discovery of their acts or omissions, which constitute liability.⁷⁸ In motor vehicle actions, the courts have held that it would be highly inappropriate for a plaintiff to be deprived of a cause of action under circumstances where the plaintiff and/or the plaintiff's counsel have been deprived of the identity of the tortfeasor.⁷⁹ Where the date of the discovery of the tortfeasor in these cases is within the limitation period prescribed, the discoverability rule was still applied to extend the limitation period.⁸⁰ Since the discoverability rule is a rule of general application, it can equally apply to the concept of identifying a liable party to a contract and the addition of newly identified liable parties to an existing action for breach of contract.

Where an ASO contract is in place, a question of fact arises as to when is it or reasonably should it have become apparent to the plaintiff employee that the possibility existed that the insurance company was not liable at all and; rather, that the employer

3385 (Ont. S.C.J.) and *Smith v. Co-operators General Insurance Co.* (2000) 183 D.L.R. (4th) 385 (Ont. C.A.), leave to appeal to S.C.C. allowed 2000 CarswellOnt 413, 183 D.L.R. (4th) 385.

⁷⁷ See J.A. D'Andrea, D.J. Corry and H.I. Forester, *Illness and Disability in the Workplace: How To Navigate Through The Legal Minefield* (Aurora: Canada Law Books Inc., 2001) at 3-36.23 for a discussion on Collective Agreements and disability policies.

⁷⁸ See *Grenier v. Canadian General Insurance Co.* (1999), 43 O.R. (3d) 715 (Ont. C.A.).

⁷⁹ *Wong v. Sherman* 1998 CarswellOnt 1413 (Ont. Gen. Div.).

⁸⁰ *Pooni v. Aziz* 1999 CarswellOnt 3237 (Ont. Master).

was solely responsible for payment of benefits.⁸¹ Implicitly, diligence in a plaintiff's actions to sue requires awareness of one's right against a party liable.

An Ontario court has applied *Peixiero* and the discoverability principles to allow a claim by an estate to add an administrator of a plan to an action where evidence from an employment file released over 13 years after the termination of an employee and 2 years after his death revealed that the employer, the administrator of the plan, knew that the claimant had a mental disorder that entitled him to compensation while he was still an employee. The employer did not assist the mentally ill employee to make a claim for long-term disability benefits within the prescribed time period.⁸²

Where an employer who has an ASO contract with an insurance company is aware that their employee does not have the applicable documentation as to when to commence a lawsuit, and is unaware that the employer is the liable party, presumably the discoverability rule could apply to extend the running of time found in the contract provisions. As such, time begins to run from date of discoverability of the liable party's identity, rather than some other date. Following a denial of benefits, where the plaintiff or their counsel request a copy of the policy of insurance and are provided with a copy of the policy of insurance and an ASO contract, arguably time begins to run from the date the plaintiff or their counsel obtains a copy of the ASO contract. Following a denial of benefits, where a plaintiff is advised about an ASO contract by letter and provided with the facts as to the employer's liability under the contract, time should begin to run when the plaintiff discovers that the employer is liable to perform the contractual obligations derived from the policy.

⁸¹ *July*, *supra* note 52 at 473.

⁸² *Corkhill Estate v. Ontario (Public Trustee)* 1996 CarswellOnt 2731 (Ont. Ct. (Gen. Div.)).

The Plaintiff's Mental and Physical Condition

In disability insurance disputes, the mental or physical condition underlying the claim may be what causes the plaintiff to delay in seeking counsel and commencing an action. The discoverability rule can be applied in such a situation to avoid the statutory or contractual limitation defence.

In the case of *Green v. Constellation Assurance Co.*,⁸³ the plaintiff was a partner at the law firm, Fasken & Calvin, and claimed disability due to his alcoholism. In the summer and fall of 1982, his attendance at Fasken & Calvin became less frequent and he eventually withdrew from his partnership. The policy provided for written proof of loss to be filed within 90 days after the termination of the 120 day elimination period from date of disability. The time for extending proof of loss was one year. The policy read that: "No action or proceeding against the company for recovery of any claim shall be commenced within 60 days of nor later than one year after the expiration of the time in which proof of loss is required to be filed with the company." A proof of loss was filed on December 28, 1983, and the action was commenced on November 23, 1984. The defendant submitted that it was not liable under the policy because the plaintiff did not file written proof within the time stipulated and did not commence the action within the time stipulated by the policy.⁸⁴

The plaintiff argued that the discoverability rule based upon the Supreme Court of Canada decisions of *Central Trust Co. v. Rafuse*⁸⁵ and *Consumers Glass v. Foundation*

⁸³ *Green v. Constellation Assurance Co.* 1993 CarswellOnt 2247 (Ont. Gen. Div.) June 24, 1993 [hereinafter *Green*].

⁸⁴ *Ibid.* at par. 50.

⁸⁵ *Central Trust*, *supra* note 40.

*Co. of Canada Ltd.*⁸⁶ applied. The plaintiff argued that the limitation period should not begin to run until he discovered or ought reasonably to have discovered his disability. Justice Mandel accepted the discoverability rule as a principle to apply but, after reviewing the facts in the specific case, reasoned that the plaintiff knew or ought reasonably to have discovered the disability if not on November 1, 1981, well within the time that he could have and should have commenced his action.⁸⁷ While in this case the discoverability rule was unsuccessful in avoiding the limitation defence, Justice Mandel devoted much of his reasoning to the question of fact as to when the plaintiff knew or ought to have known that his mental condition, due to alcoholism, amounted to a disability under the contract.

The discoverability rule is a rule of fairness which provides that a limitation period does not begin to run against a plaintiff until they know, or ought reasonably to know by the exercise of due diligence, the facts upon which the claim is based. When the court considers the limitation period, the plaintiff's interests and concerns must be considered together with the defendant's needs to be protected from stale claims. Where a defendant moves for summary judgment to dismiss the claim, alleging a limitation defence, the plaintiff relying upon the discoverability rule should provide sufficient facts to establish a triable issue as to when they knew or ought to have known the relevant facts upon which the claim is based. Where a plaintiff's mental and physical condition, in part, prevents the plaintiff from commencing an action within the prescribed statutory or contractual limitation period, the plaintiff's physical and mental condition may play an

⁸⁶ *Consumers*, *supra* note 40.

⁸⁷ *Green*, *supra* note 83 at par. 56.

important role in determining whether or not the plaintiff has exercised reasonable diligence in discovering a cause of action.⁸⁸

ii. Estoppel and Waiver

The doctrines of promissory estoppel and waiver have been used by courts for the purposes of interrupting or suspending the running of time of limitation periods. Since both equitable doctrines are quite similar, estoppel can be characterized as the more general doctrine and waiver as the more specific doctrine or subcategory of estoppel. In some cases, both promissory estoppel and waiver may exist within the same facts.

As we will see, in recent years the Supreme Court of Canada has addressed when and how estoppel and waiver can be applied to interrupting or suspending the running of time of limitation periods. Given the appropriate facts, the doctrine of estoppel and waiver can avoid the statutory and the contractual limitation defence in disability insurance disputes.

It is necessary to review the doctrines of estoppel and waiver to understand how to apply these doctrines to disability insurance disputes. Promissory estoppel arises where one party by word or conduct excuses a default under the contract. It often applies to a future non-compliance. The party excusing the default is prevented from going back on its

⁸⁸ *Smythe v. William Waterfall and Chedoke McMaster Hospitals* (22 September 2000) Ontario Court of Appeal No. C33402 (Ont. C.A.). The application of the discoverability principle in *Smythe* should not be confused with the effect of s. 47 of the Ontario *Limitations Act, R.S.O. 1990, C.L. 15*. According to s.47 of the Ontario *Limitations Act* a limitation period may not begin to run against a person of unsound mind until the plaintiff overcomes, the mental incapacity or is represented by a guardian of property or litigation guardian. See Legate, *supra* note 4. Also see *Cynthia Lorraine Hutchings v. The Mutual Life Assurance Company of Canada* (16 October 2001), Court File No. 98-GD-43204, (Ont. Sup. Ct.) where a limitation defence motion was abandoned against a not mentally stable plaintiff. Justice Thomson ordered costs to the plaintiff on a solicitor-client basis and payable forthwith. On November 23, 2001 the assessment officer assessed costs at \$30,894.37.

promise not to insist on compliance with a particular obligation. Estoppel cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced. There must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the word or conduct. Promissory estoppel must be pleaded to be relied upon.⁸⁹

Various Canadian courts have outlined the general principles of promissory estoppel where a limitation defence is raised by a defendant in insurance cases. In *Gillis v. Bourgard*,⁹⁰ a plaintiff suffered a loss on January 3, 1978, and made a claim against his insurer. Correspondence and meetings followed. There was no dispute as to liability. The insurer called upon the plaintiff's solicitor to obtain an appraisal of the property which was not forwarded to the insurer until January 29, 1979. The insurer then relied on the contractual one-year limitation period which read: "Every action or proceeding against the Insurer for the recover of any claim under or by virtue of this contract is absolutely barred unless commenced within one year next after the loss or damage occurs."⁹¹

Justice Brooke, speaking for the Ontario Court of Appeal, held that the essential ingredients of promissory estoppel, namely promise and reliance, were not present in the case. He held that what occurred were normal dealings between parties attempting to resolve an insurance claim. He also held that it would be unwarranted, and would

⁸⁹ *John Burrows Ltd. V. Subsurface Surveys Ltd.*, [1968] S.C.R. 607 at 615.

⁹⁰ *Gillis v. Bourgard* (1983), 41 O.R. (2d) 107 (Ont. C.A.), leave to appeal to S.C.C. refused 51 N.R. 320n [hereinafter *Gillis*].

⁹¹ *Ibid.* at 108.

place in jeopardy the benefit of such dealings to litigants, if the court would hold that such dealings could or did give rise to any admission of liability or promise not to rely upon a condition of the contract.⁹²

Subsequent to *Gillis*, the Supreme Court of Canada, in the decisions of *Maracle v. Travellers Indemnity Co. of Canada*⁹³ and *Marchischuk v. Dominion Industrial Supplies Ltd.*,⁹⁴ dealt with the issue as to the circumstances in which an admission of liability made to a prospective plaintiff by a prospective defendant amounts to promissory estoppel with respect to the timeliness of the claim and, thus, precludes reliance on a limitation period. Similar to *Gillis*, the plaintiffs in *Maracle* and *Marchischuk* were unsuccessful in interrupting or suspending the running of time. Nevertheless, the decisions are important because they set out the applicable principles that would allow a court to find in favour of the plaintiff's argument for interrupting or suspending the running of time.

In *Maracle v. Travellers Indemnity Co. of Canada*,⁹⁵ a case involving a dispute between a commercial building owner and its insurer about a fire loss, Justice Sopinka set out the principles relating to promissory estoppel. He held that a party seeking to rely on the doctrine of promissory estoppel was required to establish: (a) that the other party had by words or conduct made a promise which was intended to affect their legal relationship and to be acted on; and (b) that they acted upon the promise or in some way changed their position. An admission of liability, such as was frequently made in the context of

⁹² *Ibid.* at 109.

⁹³ *Maracle v. Travellers Indemnity Co. of Canada*, [1991] I.L.R. 1-2728 (S.C.C.) [hereinafter *Maracle*].

⁹⁴ *Marchischuk v. Dominion Industrial Supplies Ltd.*, [1991] I.L.R. 1-2729 (S.C.C.) [hereinafter *Marchischuk*].

⁹⁵ *Maracle*, *supra* note 93.

settlement negotiations, was not in and of itself the basis for promissory estoppel. An admission of liability is one of the factors from which a court may infer as a finding of fact, that a promise was made not to rely on the limitation period. It was not an alternate basis of promissory estoppel.⁹⁶ For such an admission to be taken as a promise not to rely on a limitation period, there has to be evidence to enable the trier of fact to infer that was so intended. It was necessary that there be words or conduct supporting an inference that the admission of liability would apply, whether or not the case was settled, and that thereafter the only issue between the parties, should litigation ensue, was to quantum of damages.⁹⁷ Whether this inference can be drawn is an issue of fact. Justice Sopinka relied upon the fact of a “without prejudice” settlement offer made by the insurer as evidence that the elements of promissory estoppel had not been established.⁹⁸

Marchischuk v. Dominion Industrial Supplies Ltd.,⁹⁹ which was heard together with *Maracle* at the Supreme Court of Canada, dealt with the factual situation where a plaintiff was injured in a motor vehicle accident on February 8, 1984. Liability was admitted on August 27, 1984. Negotiations were conducted with the insurance adjuster resulting in an offer to settle. A draft in the amount of the offer was sent to the plaintiff’s solicitor on July 22, 1985, but no response was received. On February 4, 1986, four days prior to the expiration of the limitation period, the adjuster followed up with a letter requesting a response. The limitation period expired on February 8, 1986, and the adjuster asked for the return of the draft on March 11, 1986. On April 14, 1986, the plaintiff made a counteroffer and the insurance company held that the plaintiff’s claim was now statute barred. The plaintiff issued a statement of claim and took the position that both waiver

⁹⁶ Ibid. at 1286-1287.

⁹⁷ Ibid. at 1287.

⁹⁸ Ibid. at 1278.

⁹⁹ *Marchischuk*, *supra* note 94.

and estoppel applied. In *Marchischuk*, Justice Sopinka chose not to disturb the trial judge's view that, while there may be circumstances from which it can be inferred that a claim need not be filed, the facts in *Marchischuk* did not support that conclusion.

Marchischuk was concerned with a personal injury action where the plaintiff and the tortfeasor's insurer were at odds with each other. In *Maracle*, the court was reviewing a contractual relationship between an insurer and their insured. In *Maracle*, the Supreme Court recognized that an admission of liability is one of the factors from which a court may infer as a finding of fact, that a promise was made not to rely on the limitation period.¹⁰⁰ In addition, where a review of the evidence reveals that a claim was effectively resolved between an insurer and insured's counsel, subject to certain administrative details being carried out, and by the conduct of the insurer, it was further evidenced that the insurer understood the full amount to be paid and the only question being to whom the proceeds are to be sent, the defendant will be estopped from raising the limitation period.¹⁰¹

The doctrine of waiver has also been applied by our courts to avoid a limitation defence and suspend or interrupt the running of time. Waiver occurs where one party to a contract take steps which amount to foregoing reliance on some known right or defect in the performance of the other party. In a contract dispute, waiver occurs where one party elects to forgo or release a provision in a contract that has been inserted for the benefit

¹⁰⁰ While the Supreme Court of Canada treated the admission of liability in *Marchischuk* and *Maracle* as the same, arguably where there is a contractual relationship between an insurer and insured, an admission of liability should signify a stronger commitment and should have greater weight in the court's assessment. Moreover, where the contract is one of uberrimae fidei (utmost good faith) as in a disability contract and admission of liability should signify an even stronger commitment.

¹⁰¹ *Maidana Estate v. Maplex General Insurance Co.*, [1994] I.L.R. 1-3087 (Ont. Div. Ct.).

of the party waiving it.¹⁰² Thus, waiver is similar to promissory estoppel. The existence or not of waiver depends upon the determination of the intention of the party who is said to have waived the right.¹⁰³ In essence, the effect of a finding of waiver by a court is to suspend or interrupt the running of time because the defendant cannot rely on the limitation provision. Where waiver is not pleaded, it cannot be relied upon.¹⁰⁴

In *Mitchell & Jewell Ltd. v. Canadian Pacific Express Co.*¹⁰⁵ Justice Prowse, giving the judgment of the Alberta Court of Appeal, reviewed at length the authorities defining waiver. He concluded with this definition as follows:

Summarizing the law as set out in the above cases I am of the opinion that waiver as used in the present context arises where one party to a contract, with full knowledge that his obligation under the contract has not become operative by reason of the failure of the other party to comply with a condition of the contract, intentionally relinquishes his right to treat the contract or obligation as at an end but rather treats the contract or obligation as subsisting. It involves knowledge and consent and the acts of conduct of the person alleged to have so elected, and thereby waived that right, must be viewed objectively and must be unequivocal.

In considering the acts or the conduct of the person alleged to have made such an election the crucial time is after such party has knowledge of the failure of the other party to comply with the condition. However, the acts or conduct of that party either before, at the time of, or following the happening of the event or circumstances giving rise to the right to treat the contract or obligation as at an end may be relevant in determining whether the party elected to waive compliance with the condition.¹⁰⁶

Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon

¹⁰² See *Caldwell v. Stadacona Fire & Life Insur. Co.*, [1883] 11 S.C.R. 212; *Logan v. Commercial Union Insur. Co.*, [1886] 13 S.C.R. 270; *Can. Ry. Accident Insur. Co. v. Haines*, [1911] 44 S.C.R. 386; and *Continental Casualty Co. v. Casey*, [1934] S.C.R. 54.

¹⁰³ *Federal Buisness Devleopment Bank v. Steinbock Development Corp.* 1983 CarswellAlta 334 (Alta C.A.) at par. 18.

¹⁰⁴ See *The Supreme Tent Knights of the Maccabees of the World v. Hilliker*, [1899] 29 S.C.R. 97 and C. Brown and J. Menezes, *Insurance Law In Canada*, 2nd ed. (Toronto: Carswell, 1991) at 14:2:7.

¹⁰⁵ *Mitchell & Jewell Ltd. v. Canadian Pacific Express Co.* [1974] 3 W.W.R. 259 (Alta. C.A.) [hereinafter *Mitchell*].

them. The test is a stringent test because no consideration moves from the party whose favour a waiver operates.

Justice Major, in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*,¹⁰⁷ was of the view that an overly broad interpretation of waiver would undermine the requirement of contractual consideration. He then went on to state that: “the nature of waiver is such that hard and fast rules for what can and cannot constitute waiver should not be proposed. The overriding consideration in each case is whether one party communicated a clear intention to waive a right to the other party.”¹⁰⁸ Moreover, waiver can be retracted if reasonable notice is given to the party in whose favour it operates. Reasonable notice has the effect of protecting reliance by the person in whose favour waiver operates. Where reliance is not an issue, the notice requirement will not be imposed.¹⁰⁹

On the issue of waiver of a limitation period, Justice Kennedy, the trial judge in *Marchischuk v. Dominion Industrial Supplies Ltd.*,¹¹⁰ concluded that in order to waive a right, it must be a known right. On the facts of *Marchischuk*, Justice Kennedy rejected the plaintiff’s argument that it was only when the insurance company was informed of the amount of her claim, which was apparently in excess of its reserve, that it relied upon the plaintiff’s failure to file a claim. He went on to conclude that had the evidence shown that the defendant knew of the absence of the statement of claim and continued to negotiate, a waiver may have resulted, as it might have, had the defendant responded with some

¹⁰⁶ *Ibid.* at 270.

¹⁰⁷ *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] 7 W.W.R. 37 (S.C.C.) at 44 [hereinafter *Saskatchewan*].

¹⁰⁸ *Ibid.* at 45.

¹⁰⁹ *Ibid.* at 46.

¹¹⁰ *Marchischuk v. Dominion Industrial Supplies Ltd.* (1989), 39 C.C.L.I. 269 (Man. Q.B.).

counteroffer to the plaintiff's demand of April 14, 1986. However, nothing in the defendant's conduct, subsequent to February 8, 1996, could amount to circumstances that could be construed as a waiver of the plaintiff's obligation to file a claim.

Interestingly, the Manitoba Court of Appeal and the Supreme Court of Canada did not disturb the decision of the trial judge that there was no evidence from which a promise not to rely on the limitation period could be inferred.¹¹¹ In *Marchischuk*, the plaintiff had counsel and the court was examining a personal injury action where the damages that flow from the cause of action are not usually readily ascertainable by the insurer. Justice Kennedy also took notice of the dynamics of a personal injury action in that it is not unusual in resolving a personal injury case for counsel to know early on in the proceedings whether liability will be admitted or not.¹¹²

Individual Contracts

Part V, Life Insurance, of the *Insurance Act* does not contain any statutory term that precludes estoppel and waiver from being applied to suspend or interrupt the running of time given the appropriate facts. However, some policies that can be classified under Part V may contain a provision that waiver by an insurer's representative of a term of the policy other than by the president of the company is not effective to change the contract.

Part VII, section 300, of the *Insurance Act* is limited to individual policies. This section speaks about waiver in the context of an individual Accident and Sickness policy. Part VII, section 300 statutory condition 1.(1) states:

The Contract – The application, this policy, any document attached to this policy when issued, and any amendment to the contract agreed upon in writing after the

¹¹¹ *Marchischuk*, *supra* note 94.

¹¹² *Marchischuk v. Dominion Industrial Supplies Ltd.* (1989), 39 C.C.L.I. 269 (Man. Q.B.) at 272.

policy is issued, constitute the entire contract, and no agent has authority to change the contract or waive any of its provisions.

Since agent is not defined under Part VII, the definition of agent under the various Provincial Insurance Acts would apply. According to Part VII, section 300 statutory condition 1.(2): "Waiver-The insurer shall be deemed not to have waived any condition of this contract, either in whole or in part, unless the waiver is clearly expressed in writing signed by the insurer." In essence, Part VII, section 300 statutory condition 1.(1)(2) precludes the use of waiver by an insured. Nevertheless, the statutory conditions under Part VII, do not preclude estoppel from being applied to suspend or interrupt the running of time given the appropriate facts.

Where a defendant argues that a non-waiver clause precludes its liability, the burden of proof is on the defendant to show that reasonable measures were taken to draw to the plaintiff's attention the exclusionary clause.¹¹³ Where a plaintiff is said to have signed a contract that includes a non-waiver clause, the non-waiver clause will be found to have no effect if there was no attempt to draw the plaintiff to the waiver provision and the plaintiff did not read it nor know of its existence.¹¹⁴ A court may also consider the knowledge and experience of the plaintiff in enforcing the non-waiver clause.¹¹⁵

Group Contracts

There are no statutory conditions in Group Accident and Sickness Insurance contracts under Part VII and Life Insurance contracts under Part V that preclude a court from applying estoppel or waiver to a group contract. Moreover, the rules regarding waiver

¹¹³ *Greeven v. Blackcomb Skiing Enterprises* (1994), 22 C.C.L.T. (2d) 265 (B.C.S.C.).

¹¹⁴ *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186.

¹¹⁵ *Stevens v. Howitt*, [1969] 1 O.R. 761 (Ont. H.C.).

may be used to suspend or interrupt the running of time where there is a factual finding of no clear or unequivocal denial.

In the Alberta court decision of *Desgagne v. Great-West Life Assurance Company*,¹¹⁶ the Alberta court heard a summary judgment application brought by a defendant to dismiss an action on a disability insurance policy based upon the limitation defence. An agreed statement of facts was filed to which the court was asked to give effect to the contract provision that legal action was limited to a period commencing 60 days after written proof of loss is furnished and ending three years after the time written proof of loss is required to be furnished. Justice Wilson dismissed the defendant's application. He was of the view that the limitation provision was not clear, could not be fixed with certainty and was "a case study in obscurity". While the *contra preferentum* rule was applied against the defendant, the court rested its decision on waiver.¹¹⁷ A letter had been provided to the plaintiff waiving the time limits for claim submission and asked for a job description. The court held that this letter did not say the limitation period was waived and it requested further proof of loss to be filed. The court then reviewed other conduct on the part of the defendant. There was further correspondence between the defendant and the plaintiff's counsel. A letter was sent by the defendant outlining an invitation to appeal and the process of how to appeal. Two further letters were sent requesting medical information. A final letter, dated February 9, 1990, from the defendant to the plaintiff's counsel, which the defendant relied upon as to when time began to run, indicated that the defendant was unable to proceed with their assessment of the claim. The statement of claim was issued on February 24, 1994. The court held that the

¹¹⁶ *Desgagne v. Great-West Life Assurance Co.*, [2000] I.L.R. 1-3783 (Alta. Q.B.) [hereinafter *Desgagne*].

February 9, 1990, correspondence did not, at any time, warn of reliance on a limitation period. The statement of defence of the action was the first time the limitation period was raised. The court determined that the actions of the defendant waived the limitation period and the court concluded that the principle enunciated in *Dachner Investments Ltd.*,¹¹⁸ that the limitation period should start to run on a clear and unequivocal denial, was applicable.¹¹⁹

In *Desgagne*, the conduct of the insurer, not just waiving the time provisions for submitting proof of loss, but subsequently in remaining silent on whether their denial letter started the running of time, provided evidence to the court that the insurer had waived reliance upon the exculpatory provision in the group contract. Had the plaintiff in *Desgagne*, or his counsel, in response to the invitation to appeal submitted further medical information, an argument could have been made that the insurer waived the limitation period while a decision was being made. In *Desgagne*, it appears that the court construed a denial letter from an insurer with an invitation to resubmit further information as a communication of a clear intention to waive a right.

Furthermore, where the insurer or their counsel makes a further one time payment on behalf of their client after the expiry of the limitation period, the insurer or their counsel effectively restart an otherwise already expired limitation period.¹²⁰ A court may consider these facts as evidence of a conscious intention on the part of the insurer to relinquish the right to rely upon the limitation provision as an operative contractual term.

¹¹⁷ See also *Movold v. Alberta Motor Association Insurance Company*, [1987] I.L.R. 1-2216 (Alta. C.A.) on application of the contra preferentum rule in a motor vehicle statutory accident benefits case.

¹¹⁸ *Dachner*, *supra* note 67.

¹¹⁹ *Desgagne*, *supra* note 116 at 6158-6159.

ASO Contracts

The doctrines of estoppel and waiver can be applied for the purposes of interrupting or suspending the running of time in a factual situation where an ASO (Administrative Services Only) contract is in place. In *Gallagher v. H&H Optical (Drumheller) Ltd.*,¹²¹ an employer and administrator of a plan told an employee that she had full coverage to health insurance under a group contract but failed to alert the plaintiff to the condition precedent of prior approval. The court held that the employee was induced to incur expenses claimed and the employer and administrator were estopped from denying coverage.¹²² While the underlying coverage being sought was health insurance, the principles of *Gallagher* can be equally applied to a disability insurance dispute where an ASO contract is in place to avoid the statutory and the contractual limitation defence.

iii. Relief From Forfeiture

An insured is said to have forfeited the coverage of insurance where they have not complied with a statutory condition or term of a policy of insurance. A court may deem that a forfeiture of insurance is inequitable and grant relief from forfeiture. The remedy is available where the claimant makes reasonable efforts to comply with the policy requirements and the insurer is unable to show prejudice.¹²³

Traditionally, the failure to give notice of a claim in a timely fashion is treated as imperfect compliance whereas failure to institute an action within a prescribed time

¹²⁰ D. Norwood and J.P. Weir, *Norwood On Life Insurance Law In Canada*, 2nd ed. (Toronto: Carswell, 1992) at 290-291.

¹²¹ *Gallagher v. H&H Optical (Drumheller) Ltd.* 1999 CarswellAlta 1254 (Alta. Prov. Ct.) [hereinafter *Gallagher*].

¹²² *Ibid.* at par. 15.

¹²³ Hayles, *supra* note 8 at 258.

period has been viewed as non-compliance or breach of a condition precedent. The reason for the distinction is that failure to give notice of claim has been viewed as a breach of a lesser contract term rather than a breach of a condition. The failure to bring an action within the time required is a more serious breach than failure to give timely notice. The actual bringing of an action is the legal crystallization of the claim which sets its parameters and magnitude.¹²⁴ Courts examining non-compliance with a limitation period in a disability insurance dispute have not granted relief from forfeiture whereas, relief from forfeiture has been granted where there has been non compliance with the requirement for notice.¹²⁵

The statutory relief from forfeiture provision applicable to Accident and Sickness Insurance is found under Part VII section 328 of the *Insurance Act* which states:

Where there has been imperfect compliance with a statutory condition as to any matter or thing to be done or omitted by the insured, person insured or claimant with respect to the loss insured against and a consequent forfeiture or avoidance of the insurance in whole or in part, and any court before which a question relating thereto is tried deems it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it deems just.

As already discussed, Part VII section 300, statutory condition 12 of the *Insurance Act* outlines the limitation period for an individual Accident and Sickness policy. A plain reading of section 328 indicates that relief from forfeiture was intended by the legislature to apply to individual Accident and Sickness policies. The relief from forfeiture clause is a remedial provision and, as such, courts must give it a liberal interpretation.¹²⁶

¹²⁴ See *Holme*, *supra* note 19 at 145 and *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.* (1989), 62 D.L.R. (4th) 236 (S.C.C.) [hereinafter *Falk Bros.*].

¹²⁵ *Holme*, *supra* note 19.

¹²⁶ *Hayles*, *supra* note 8 at 258.

Nevertheless, relief from forfeiture is not granted where a limitation period is involved. Its effect is limited to notice provisions.¹²⁷

By contrast, Part V, Life Insurance, does not contain a statutory relief from forfeiture provision. Nevertheless, courts have granted relief from forfeiture in appropriate circumstances claiming that such relief is available in equity. However, once again, relief from forfeiture is not granted where a limitation period is involved.¹²⁸

In December 1996, the *Ontario Law Reform Commission Study Paper On The Legal Aspects Of Long-Term Disability Insurance*¹²⁹ was released. The study paper prepared by Marvin Baer consists of sixty-six insightful recommendations in the area of disability. The paper did not examine the area of disability insurance limitation periods. However, under recommendation number forty one, the study paper recommended that the Act be amended to clarify that a court can provide relief from forfeiture against the effect of failure to meet a limitation period. As it states:

More recently (and more obscurely) the distinction between imperfect and non compliance has been equated with the difference between failure to give timely notice and proof of loss and failure to commence an action within a limitation period. The courts have also referred to the distinction between abolishing a right and a remedy. None of these analogies is very helpful in explaining why the court should have the power to relieve against forfeiture in one case and not the other. Both types of time limits serve much the same purpose –that is, to allow the early investigation and verification of a claim and preservation of evidence. The potential for prejudice exists, but is not inevitable, where delay occurs in either situation. The courts should be able to inquire whether the insurer has actually

¹²⁷ See *Falk Bros.*, *supra* note 124 at 241-242. *Falk Bros. Industries Ltd.* considered s. 109 of the *Saskatchewan Insurance Act* R.S.S. 1978, C.S-26 relief from forfeiture provision which differs from Part VII, s. 382 of the *Insurance Act*. Section 109 of the *Saskatchewan Insurance Act* R.S.S. 1987, C.S-26 states: "Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matters..." Part VII, s. 328 of the *Insurance Act* is worded more broadly.

¹²⁸ Norwood, *supra* note 120 at 291. See *Loney v. Northern Life Assurance Co. of Canada*, [1989] I.L.R. 1-2423 (Ont. Div. Ct.).

¹²⁹ M. Baer, *Study Paper On The Legal Aspects Of Long-Term Disability Insurance* (Toronto: Ontario Law Reform Commission, 1996).

suffered prejudice and whether the insured should be granted relief in both situations.¹³⁰

The legislatures have not amended the Ontario *Insurance Act* to give effect to the study paper's recommendation. The Ontario Law Reform Commission's suggested reform would presumably make it easier for a court to provide a remedy where there has been non-compliance with a contractual limitation provision or limitation statute.

To give effect to the Ontario Law Reform Commission's suggested reform, a statutory relief from forfeiture provision would need to be added to Part V of the *Insurance Act*. As well, the statutory relief from forfeiture provision under Part VII would need to include that relief from forfeiture would apply to exculpatory provisions in a group Accident and Sickness Insurance policy. Finally, at present the statutory relief from forfeiture provision for individual Accident and Sickness Insurance policies could be applied by a court where a plaintiff has not complied with the limitation provision in an individual Accident and Sickness Insurance policy. While courts have not provided relief from forfeiture in this situation, the Ontario Law Reform Commission's reasoning is sound and should be adopted.

iv. Interpreting The Elimination Period

Where a limitation defence is raised, a plaintiff in a disability insurance dispute may be able to extend the running of time by examining and applying other time-related provisions in the disability contract. Sometimes a reading of the contract and the statutory provisions reveals that the calculation of when the limitation period begins depends upon other time-related provisions in the disability contract.

¹³⁰ *Ibid.* at 41.

The elimination period, also referred to as the waiting period, is a stated period of time that begins when the claimant becomes disabled and upon its completion benefits become payable to the claimant. Depending on the wording of the limitation provision, the running of time can be interpreted to begin after the end of the elimination period set out in the contract. As such, by broadly interpreting the elimination period, the expiry of the limitation period may be extended for several months.

In *O'Neil v. Canadian International Paper Co.*,¹³¹ the Supreme Court of Canada was asked to determine when time begins to run in a disability action under a contract of insurance. Under section 217 of the *Insurance Act* of the Province of Quebec:

Any stipulation or agreement to the contrary notwithstanding, any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within one year next after the happening of the event insured against...

Justice Pigeon, speaking for the court, held that the period for which the insurer is liable commences after expiry of the elimination period which is 180 days from the beginning of total disability. As he stated: "The event cannot therefore be said to have happened before the end of this period." As the date of total disability being the first working day after the last date worked was February 25, 1966, the 180 days ended on August 22, 1966. Since the action was instituted on July 25, 1967, the court made a finding that the action was instituted within the time prescribed. While the claim form was only signed by the insured on September 30, 1966, the court declined to consider whether the insurer

¹³¹ *O'Neil v. Canadian International Paper Co.*, [1972] S.C.R. 802. See *New York Life Insurance Co. v. Handler*, [1937] S.C.R. 127 [hereinafter *New York Life Insurance Co.*] which addressed the same limitation provision wording as in *O'Neil*. The Supreme Court of Canada in *New York Life Insurance Co.* held that the limitation period in the Quebec Insurance Act would not apply in circumstances where the insured, once found to have been totally disabled within the meaning of the policy, continued in that condition without interruption. Because of the finding that disability had continued without interruption, the court ordered payment of all disability benefits from and after the date of their discontinuance by the insurer.

who denied the existence of the contract and returned premiums on January 1967 was entitled to plead the formalities required therein were not performed.¹³²

The Supreme Court of Canada in *O'Neil* was interpreting section 217 of the *Insurance Act* of the Province of Quebec. Nevertheless, a common law court could also easily adopt Justice Pignon's methodology when calculating when time begins to run.

v. Continuing Cause Of Action

As another means to avoid the application of a limitation period courts have used the idea of a continuing cause of action. A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.¹³³ In the recent Court of Appeal decision of *Gibbons v. Port Hope and District Hospital*,¹³⁴ the court defined "cause of action" as "the fact or facts which give a person a right to judicial redress or relief against another."¹³⁵ As we shall see, the cause of action in a disability dispute is examined by our courts to create a judge-made rolling or floating time period.¹³⁶

Individual Contracts

The law about no-fault motor vehicle insurance benefits under an individual contract of insurance has significantly influenced the continuing cause of action case law for individual and group disability contracts in Ontario. Before the enactment of section

¹³² *Ibid.* at 809-810.

¹³³ See *July*, *supra* note 52 as well *Letang v. Cooper*, [1964] 2 All E.R. 929.

¹³⁴ *Gibbons v. Port Hope and District Hospital*, [1999] O.J. No. 3283 (Ont. C.A.).

¹³⁵ *Ibid.*

¹³⁶ The floating time period is also recognized in the jurisprudence on time limited grievances under a collective agreement. Where there is a continuing violation consisting of a repetitive breach of a collective agreement such as non-payment of money, it has been held that the failure to initiate the grievance within the stipulated time from the date of its first occurrence will not

281(5) of the *Insurance Act* and the promulgation of the Schedule on June 20, 1990, no-fault accident benefit provisions were contained in Schedules to the *Insurance Act*. The applicable limitation period under those Schedules was: "Every action or proceeding against the Insurer for the recovery of a claim under this section shall be commenced within one year from the date on which the cause of action arose and not afterwards."¹³⁷ The cases dealing with this limitation period held that separate causes of action accrued for each period for which the insurer failed or refused to pay weekly benefits. The limitation period did not bar claims for weekly income benefits falling due in the one-year period before the action for recovery was commenced. This is the argument that prevailed under the old *Insurance Act* scheme and created a rolling or floating time limit running for one year from the date that the payment of each benefit period became overdue.

The origins of the continuing cause of action rationale for no-fault accident benefits begin with the Ontario Court of Appeal's decision in *Coombe v. Constitution Insurance Company*,¹³⁸ which was a case involving a claim to insurance benefits under Sched. E of the *Insurance Act*, R.S.O. 1980, c. 218. It is also a good starting point for understanding the court's reasoning with respect to applying the continuing cause of action to disability insurance disputes in Ontario. The issue in the case was whether benefits under Sched. E had an ongoing effect or whether a new action must be brought in respect of claims accruing after judgment. The insured obtained judgment for no-fault disability benefits due to him until date of trial and for such time as he remained permanently and total

prevent the breach from being grieved. See D.J.M. Brown and D. M. Beatty, *Canadian Labour Arbitration*, 3rd ed. (Aurora: Canadian Law Books Inc., 2001) at 2-93 to 2-95.

¹³⁷ *Insurance Act*, R.S.O. 1970, c. 224, Schedule E, s.s.(7)(c) and *Insurance Act*, R.S.O. 1980, c. 218, Schedule C, s.s. (7)(c).

¹³⁸ *Coombe v. Constitution Insurance Company* (1980), 29 O.R. (2d) 729 (Ont. C.A.) [hereinafter *Coombe*].

disabled. The insurer made payments required by the lower court judgment but had not paid anything subsequent. As such, the plaintiff brought a motion for execution of the judgment. The motions judge dismissed the application based on the ground that the relief the plaintiff was seeking could be obtained only by the institution of a fresh action.

Justice Wilson, for the majority of the Court of Appeal, concluded that the onus was on the insurer to establish the right to stop payments rather than the insured to prove entitlement. The majority held that there was only one cause of action and it was fully determined at trial. The majority also held that this case involved conditions subsequent to entitlement. There was no fresh cause of action where the plaintiff's rights are declared by the court to continue for so long as he was permanently and totally disabled.¹³⁹ Justice Zuber, in dissent, held that since the plaintiff's no-fault payments accrued to him from week to week according to the terms of the policy, the plaintiff did not have a single cause of action but rather contractual rights which mature if the conditions prescribed in the contract exist.¹⁴⁰

Coombe, however, did not address the issue of how a statutory or contractual limitation period is treated where there is a continuing cause of action. Further, factually *Coombe* dealt only with the situation where benefits were terminated, not the situation where benefits were denied. Subsequent to *Coombe*, Justice Osler, of the Ontario High Court, in *Morgan v. Dominion Insurance Company*,¹⁴¹ was faced with a situation where a plaintiff had been off work from August, 1974, but did not file a claim with his insurer until October, 1976, for weekly indemnity loss of income benefits. A statement of claim was

¹³⁹ *Ibid.* at 735.

¹⁴⁰ *Ibid.* at 739-740. See also *New York Life Insurance Co.*, *supra* note 131.

¹⁴¹ *Morgan v. Dominion Insurance Company* (1980), 31 O.R. (2d) 285 (Ont. H.C.) [hereinafter *Morgan*].

issued in February of 1977. After finding the plaintiff was otherwise eligible for weekly indemnity benefits, Justice Osler decided that the obligation of the insurer arose anew each week so long as the insured otherwise qualified for the benefits. He stated:

Upon first approaching this matter, I was inclined to the belief that as the contract called for weekly payments the liability of the insurer was a continuing one for each succeeding benefit so that, so long as the disability continued, the "limitation" period established by subpara.(7)(c) of the "Special Provisions" of par. B of the Schedule would only bar claims originating more than one year before the commencement of an action for recovery of a claim. This appears to be the effect of the American decisions, of which there are many in a variety of Courts. My examination of the Ontario cases to which I have referred has not altered that opinion... It is a proposition which, I think requires no authority that the date upon which a cause of action arises is the date upon which every element of the cause first exists. With respect to any given week, therefore, there must be in existence entitlement to the benefit and refusal or failure by the defendant to pay it. If, therefore, disability is established, the cause of action with respect to benefits arises and may be asserted from week to week....¹⁴²

Thus, the disability must be established by the plaintiff and there must be a refusal or failure by the defendant to pay the benefits.

Justice Osler was of the opinion that the judgments of the Court of Appeal in *Coombe v. Constitution Insurance Company* brought the law of Ontario into conformity with the American law. He was of the view that Justice Wilson's statement that there is no fresh cause of action applied only to the situation where the plaintiff's rights are declared by the court to continue for so long as they are permanently and totally disabled and did not detract from the proposition that, in the absence of such a declaration, the plaintiff had a cause of action each time an instalment payment was refused.¹⁴³ In *Morgan*, Justice Osler found that the insured had been continually disabled since the accident. The defendant was obligated to pay the weekly benefits contracted for so long as the disability endured. However, because of the limitation period, the obligation was

¹⁴² Ibid. at 295 & 297.

¹⁴³ Ibid. at 297.

enforceable only with respect to weekly periods commencing not more than one year prior to the date upon which the writ was issued.¹⁴⁴

In 1983, the Ontario High Court revisited the continuing cause of action argument in *Zappone v. Mutual of Omaha Insurance Company*.¹⁴⁵ *Zappone* involved an action for indemnity under an individual sickness and accident insurance contract. *Zappone* was the first application of the continuing cause of action to individual contracts for disability found under Part V or Part VII of the Ontario *Insurance Act*. In this case the insurance policy statutory condition required that “any action or proceeding against the insurer for the recovery of any claim under this Policy shall be commenced within one year after the cause of action arose.” The terms of the policy were that “benefits will be paid... for one day or more... during such loss of time”; and in the case of “confining total loss of time” they are paid “while there is confinement at the rate of the monthly benefit per month so long as the insured lives.”

The court in *Zappone* concluded that *Coombe v. Constitution Insurance Company*¹⁴⁶ had held that a new action need not be brought in respect of claims accruing after judgment. The court in *Zappone* also was of the view that Justice Zuber’s dissent in *Coombe*, that the plaintiff did not have a single cause of action but rather contractual rights which mature if the condition prescribed in the contract existed, was not in conflict with the view of the majority of the court. Relying upon *Coombe*, the court in *Zappone* held that the right to benefits accrued from day to day so long as the claim comes within the terms of the policy. Since the insurer had a continuing obligation to pay benefits if the

¹⁴⁴ *Ibid.* at 299.

¹⁴⁵ *Zappone v. Mutual of Omaha Insurance Co.* (1983), 1 D.L.R. (4th) 455 (Ont. H.C.) [hereinafter *Zappone*].

¹⁴⁶ *Coombe*, *supra* note 138.

claim fell within the terms of the policy, only insurance payments due more than one year prior to the issuance of the statement of claim were statute-barred.¹⁴⁷

In *Zigouras v. Royal Insurance Co. of Canada*,¹⁴⁸ another automobile insurance contract case, Justice Austin, speaking for the Ontario Divisional Court, held that at the end of each 30-day period a right of action accrued. Even though time had passed for recovering some weekly payments, all those payments accruing less than a year and 30 days prior to commencement of proceedings were recoverable.¹⁴⁹ In *Pajic v. Wawanesa Mutual Insurance Company*,¹⁵⁰ Justice Leitch held that the one year limitation period commenced 30 days after the week for which loss of income is claimed pursuant to *Zigouras v. Royal Insurance Co. of Canada*. Nevertheless, since the defendant's denial was an unequivocal denial clearly communicated, the cause of action expired prior to the issuance of the statement of claim on July 17, 1991.¹⁵¹

In 1996, the Ontario Court of Appeal again revisited the continuing cause of action argument in *Wilson's Truck Lines Ltd. v. Pilot Insurance Company*.¹⁵² In this action the insured was injured in a motor vehicle accident on February 9, 1982. He submitted a claim for accident benefits on March 15, 1982. The insurer did not pay the claim and the insured subsequently assigned his no-fault benefit right to the plaintiff who brought an action against the insurer on January 12, 1987. The plaintiff took the position that for the limitation period to begin to run there must be a clear and unequivocal refusal and there

¹⁴⁷ *Zappone*, supra note 145 at 459. The Court of Appeal decision in *Zappone v. Mutual of Omaha Insurance Co.* (1983) 34 D.L.R. (4th) 320 (Ont. C.A.) did not directly address the limitation period issue for the purposes of the appeal.

¹⁴⁸ *Zigouras v. Royal Insurance Co. of Canada*, [1988] I.L.R. 1-2262 (Ont. Div. Ct.) [hereinafter *Zigouras*].

¹⁴⁹ *Ibid.*

¹⁵⁰ *Pajic v. Wawanesa Mutual Insurance Co.*, [1994] I.L.R. 1-3022 (Ont. Gen. Div.).

¹⁵¹ *Ibid.* at 2684.

¹⁵² *Wilson's Truck Lines Ltd. v. Pilot Insurance Co.* (1996), 140 D.L.R. (4th) 530 (Ont. C.A.).

was no such refusal in this case. Under the *Insurance Act*, R.S.O. 1980, c. 218 Schedule "C", (3) par. 7(c) the action was to commence "within one year from the date on which the cause of action arose and not afterwards." The court held that a failure to pay would be just as much a breach as a refusal. While the court dismissed the plaintiff's claim, in so doing the court effectively rejected *Pajic v. Wawanesa Mutual Insurance Company* and accepted *Morgan v. Dominion Insurance Company*.¹⁵³ The court found that the insurer need not specifically refuse to pay before the limitation period will commence. A refusal to pay or denial of liability was not a condition precedent, although the court reasoned that both are relevant to the question when did the cause of action arise. The court concluded that by April 14, 1982, the insurer had advised their insured that he did not qualify for accident benefits. The insurer did not change their position or mislead the insured's counsel by requesting further information. The court concluded that the insured's cause of action against his insurer for disability benefits crystallized on April 15, 1982, thirty-one days after he made his claim. The right to sue for benefits claimed on March 15, 1982, expired on April 15, 1983, and, like *Zigouras v. Royal Insurance Co. of Canada*,¹⁵⁴ his entitlements to sue for benefits for succeeding months expired in the like manner to and including the benefits for the month commencing November 14, 1986.¹⁵⁵

In 1997, the Ontario Court of Appeal provided additional reasons for its previous decision.¹⁵⁶ The court addressed the question whether the entire action should have been dismissed or only part of it. The court held that Wilson's claim for the insured's no-fault benefits from Pilot were statute-barred from February 9, 1982, to a date preceding

¹⁵³ *Ibid.* at 539.

¹⁵⁴ *Zigouras*, *supra* note 148.

¹⁵⁵ *Wilson's Truck Lines Ltd. v. Pilot Insurance Co.* *supra* note 152 at 544.

¹⁵⁶ *Wilson's Truck Lines Ltd. v. Pilot Insurance Co.* (1997) 147 D.L.R. (4th) 242 (Ont. C.A.).

the commencement of the action. The court concluded that its prior reasons, which fixed the date to November 14, 1986, was in error. It held that the statement of claim in the action was issued on January 12, 1987. As such, a claim for months commencing December 12, 1985, would mature on January 12, 1986, and the limitation period for commencing an action to enforce that claim expired January 12, 1987. The court concluded that claims for the period dating from December 12, 1985, remained alive and, for the period after December 12, 1985, a declaration for entitlement could be provided by the court.¹⁵⁷

In a recent decision, *Holme Estate v. Unum Life Insurance Co. of America*,¹⁵⁸ the British Columbia Court of Appeal adopted the continuing cause of action line of reasoning and applied it to an individual Accident and Sickness Insurance policy. In *Holme Estate*, the limitation period against an insured was for one year after the “insurance money became payable or would have become payable if had been a valid claim”. The court, after providing relief from forfeiture for imperfect compliance with the late notice of the claim and proof of loss, barred the action for the period pre-dating the one year before the filing of the statement of claim. The court held that the policy provided that the insurer must make regular payments as the disability continues. Since the insured had a continuing claim through the period of disability, it was not extinguished by the failure to sue within one year of the commencement of that continuum.¹⁵⁹

Group Contracts

The judge-made rolling or floating time period also applies to group contracts. Where a limitation defence is advanced and the underlying policy is a group contract, a continuing

¹⁵⁷ *Ibid.* at 246.

¹⁵⁸ *Holme*, *supra* note 19. See *Balzer*, *supra* note 72.

cause of action argument will limit the effect of the statutory and contractual limitation defence on a plaintiff's claim for benefits. The group contract cases that apply the continuing cause of action argument focus on what is a cause of action for a continuing disability and when does the cause under the contract begin to run.

In *Richardson v. Great-West Life Assurance Co.*¹⁶⁰, the court rejected the argument that rights accrue from month to month and that there is no single cause of action. Other group contract cases have been successful in avoiding a limitation defence argument at a summary judgment motion or at trial by arguing the continuing cause of action reasoning. In *Smith v. Empire Life Insurance Company*,¹⁶¹ a motion for summary judgment dismissing the claim of the insured was brought. The basis for the motion was that the action was barred by reason of the limitation period. The plaintiff advised her employer that she was unable to continue to work because of health problems and resigned her position on October 11, 1991. When the plaintiff resigned, the plaintiff's employer advised the defendant insurer that the plaintiff had left its employ and instructed the defendant to terminate any group insurance benefits to which the plaintiff would be entitled. Approximately two months later, the defendant received a claim from the plaintiff for long term disability but denied the claim on the ground that the total disability occurred after the cancellation of her benefits. In November, 1994, the plaintiff sued the defendant for long-term disability benefits under the policy that the defendant had with her former employer. The defendant raised a limitation period.

Justice Lally noted that at first blush the limitation defence should succeed. This was so according to section 300, statutory condition 12 of the *Insurance Act*, which provided for

¹⁵⁹ *Ibid.* at 151.

¹⁶⁰ *Richardson*, *supra* note 64.

a one year limitation period. However, in his decision dismissing the motion, Justice Lally noted as follows:

I agree with Mr. Tranmer, limitation periods serve a useful purpose, and that was recently recognised by Mr. Justice Adams at p. 559 of *Swiderski et al. v. Broy Engineering Ltd.* However, this is a claim for long term disability benefits and the courts, in decision binding on me, have interpreted the limitation period in those instances, in a manner very favourable to the insured.

Paragraph 11 of Mr. Polisuk's (solicitor for the Plaintiff) factum sets out accurately the ratio of the cases that are applicable, namely, causes of action for the recovery of ongoing payments continually renew themselves each time an instalment becomes payable because the insurer is under a continuing liability for each succeeding benefit. Therefore so long as entitlement to benefits continues (by continued disability) the limitation period only bars claims originating more than the prescribed period before the commencement of the action. Each cause of action originates with each benefit as it becomes payable, allowing for any time period between entitlement and the insurer's deadline to pay.¹⁶²

Counsel for the defendant argued that since payments were never made the case law which held that payments accrued from week to week was not applicable. Counsel for the defendant further argued that the one year limitation period should run from the date of denial of liability. Justice Lally dismissed the motion. He noted that it was a question for the trial judge whether or not the plaintiff was totally disabled before the policy terminated and up to date the claim was issued. He also was not prepared to state that the principles of *Coombe v. Constitution Insurance Company*, *Morgan v. Dominion Insurance Company*, *Zappone v. Mutual of Omaha Insurance Company* and *Zigouras v. Royal Insurance Company of Canada* should be confined only to cases where payments had been made and then terminated.¹⁶³

¹⁶¹ *Smith v. Empire Life Insurance Co.*, [1996] I.L.R. 1-3312 (Ont. Gen. Div.) [hereinafter *Smith*].

¹⁶² *Ibid.* at 3974.

¹⁶³ *Ibid.*

In the case of *Green v. Constellation Assurance Co.*,¹⁶⁴ also discussed earlier, the plaintiff's policy provided for written proof of loss to be filed within 90 days after the termination of the 120 day elimination period from the date of disability. The time for extending proof of loss was one year. The policy provided that: "No action or proceeding against the company for recovery of any claim shall be commenced within 60 days of nor later than one year after the expiration of the time in which proof of loss is required to be filed with the company." A proof of loss was filed on December 28, 1983, and the action was commenced on November 23, 1984. The defendant submitted that the defendant was not liable under the policy because the plaintiff did not file written proof within the time stipulated and did not commence the action within the time stipulated by the policy.¹⁶⁵

The defendant insurer pleaded a limitation defence. Justice Mandel found that the date of disability was November 1, 1981, when the plaintiff knew he had an alcohol problem and not in the summer or fall of 1982 when his attendance at Fasken & Calvin became less frequent or when he withdrew from his partnership. Justice Mandel concluded that under the policy there was a continuing or periodic obligation to pay benefits extending through from the elimination period and extending 60 months beyond. Justice Mandel held that each obligation constituted a new cause of action with a limitation period running on each such obligation. He stated: "The plaintiff does not have a single cause of action but rather contractual rights which mature if the conditions described in the contract exist."¹⁶⁶ The court barred the action for the period prior to April, 1982.

¹⁶⁴ *Green, supra* note 83.

¹⁶⁵ *Ibid.* at par. 50.

¹⁶⁶ *Ibid.* at par. 57.

Where a court bases its decision on doctrines such as the discoverability rule and waiver, the limitation defence is completely avoided and the plaintiff who is totally disabled is entitled to all past benefits. In contrast, where a court bases its decision on a continuing cause of action reasoning, the limitation defence is not completely avoided. As such, where there is a short maximum benefit period such as 20 or 60 months, the continuing cause of action reasoning has limited effect in avoiding or limiting the limitation defence.

vi. Summary

The discussion in Part III reveals two emerging patterns in the law of limitations in disability contracts. The first pattern that emerges is that courts have applied several different doctrines in a disability action to avoid the running of time of limitation periods. Sometimes, courts apply these doctrines and within the same case apply the principles of continuing cause of action. Sometimes courts have equated the discoverability rule and waiver to the clear and unequivocal denial argument and have applied the doctrine of the discoverability rule and waiver loosely. Where a plaintiff is successful, based upon the factual situation, to apply the discoverability rule or waiver, the effect has been that no benefit entitlements are lost.

The second pattern that emerges is that the courts have developed what this paper terms a continuing cause of action approach. The case law creates a rolling or floating time limit. So long as a claim falls within the policy terms, for each period prescribed in the policy a right of action accrues. In disability disputes, this judicial reasoning has limited effect in avoiding the limitation defence. In applying this reasoning in favour of the plaintiff, a court may not dismiss an entire action but a plaintiff may lose their entitlement for some benefit periods.

A case can be made that the area of limitation periods either by way of statute or contract in contractual disability disputes is riddled with uncertainty. Courts have compensated for this uncertainty and the inequality among the parties by, as the *Smith*¹⁶⁷ court said, interpreting the limitation period in a manner very favourable to the plaintiff.

IV. POLICY CONCERNS AND LEGISLATIVE REFORM

The policy rationale for limitation periods in general should apply equally to disability disputes. Limitation periods are premised on traditional and contemporary rationales. The traditional rationale reflects the interests of defendants: certainty, preservation of evidence and diligence.¹⁶⁸ The contemporary rationale reflects the interests of fairness to plaintiffs.

Proponents of the traditional rationale argue that there should be certainty to limitation periods. A potential defendant should have a reasonable expectation that they will not be held accountable after a certain period of time. A potential defendant should be able to part with papers, discharge their lawyer and conduct affairs as though any liability was discharged.¹⁶⁹ Further, under the traditional rationale, courts should not be called upon to adjudicate stale disputes. Society should not be troubled by old conflicts and the judicial system should be able to focus its attention on resolving present disputes.¹⁷⁰ It is in society's interest that disputes not drag on interminably. Uncertainty adversely affects business and creates adverse economic consequences to both consumers and society.

¹⁶⁷ *Smith*, *supra* note 161.

¹⁶⁸ See *M. (K.)*, *supra* note 40 at 301-02, Justice La Forest presents the three rationales underlying limitation periods. See also *Ioannidis*, *supra* note 49 at 431.

¹⁶⁹ *Mew*, *supra* note 1 at 7.

Business people who fear a claim may be brought against them and do not know how much the claim may eventually cost them may be reluctant or unable to commit themselves to other investments, business ventures and other business transactions. Further, as the potential of claims remains outstanding, there is the cost of maintaining records for many years and obtaining adequate liability insurance.¹⁷¹ Finally, by a court failing to give effect to a limitation provision and allowing an action to continue, resources are tied up by litigation when they would otherwise be free of such imposition.¹⁷²

Proponents of the traditional rationale argue that there is an evidentiary interest to enforcing strict time limits. Litigation should be commenced while the evidence is available and fresh. In time, witnesses die, memories fade, and records are lost or destroyed.¹⁷³ Witnesses leave the jurisdiction as time passes. As a result of the passage of time, the quality and availability of evidence diminish. Therefore, limitation periods are meant to encourage litigants to settle their disputes promptly while the evidence is fresh so that evidential difficulties are minimized. By enforcing limitation provisions courts function more effectively and with a greater likelihood of determining the truth.

Finally, proponents of the traditional rationale argue that limitation periods are meant to ensure that plaintiffs act with diligence and do not sleep on their rights. A minority of claims are brought at the very end of the limitation period. Having a set limit focuses the mind and forces potential plaintiffs to make their move if they are going to do so.¹⁷⁴

¹⁷⁰ Morton, *supra* note 1 at 7.

¹⁷¹ Mew, *supra* note 1 at 7-8.

¹⁷² *Patrick v. Dowhos* 1998 CarswellOnt 5012 (Ont. Gen. Div.) at par. 23.

¹⁷³ Mew, *supra* note 1 at 7.

Critics of the traditional rationale argue that modern limitations statutes should seek to balance traditional rationales oriented towards the protection of the defendants with the need to treat plaintiffs fairly, having regard to their specific circumstances.¹⁷⁵ Potential plaintiffs should have a reasonable opportunity to investigate what appears to be a wrongful conduct or breach of a right, obtain expert advice, gather evidence, consult counsel and prepare and file their claim. There should also be ample time allowed for discussion and negotiation which may lead to settlement without the need for a claim to be filed in court. There is a recognition in the contemporary rationale argument that beyond the immediate parties to the litigation, society as a whole has an interest in seeing that parties to a dispute are treated fairly and a just and true result achieved.

According to proponents of the traditional rationales, interests such as certainty and closure are more closely identified with the defendant. According to proponents of the contemporary rationale, interests such as fairness are identified with the plaintiff. These rationales are meant to reflect the various societal interests at odds over how broadly or narrowly the courts should be interpreting the running of time in a civil action. These diverse rationales require delicate balancing by our courts.

Disability disputes are disputes between parties of unequal power. Claimants have an interest that limitation periods are enforced fairly. They also have an interest in certainty and in closure for their disputes. Claimants are motivated to have disputes resolved and to receive benefits. Having a set time limit forces claimants to make a decision whether or not to pursue litigation.

¹⁷⁴ *Novak, supra* note 41 at 816.

¹⁷⁵ *Ibid.* at 840.

Insurers have a strategic advantage after a loss due to their familiarity with a claims process, economies of scale, and the financial plight or physical distress of the claimant. Delay tends to favour insurers who suffer few, if any adverse consequences, unless their conduct is “harsh, vindictive, reprehensible or malicious.”¹⁷⁶ In a disability dispute, there is a strategic advantage for evasiveness in the denial. If insurers truly want to be held unaccountable after a certain period of time, the expiry date of the limitation period could easily be outlined in every denial letter. While one can make the argument that insurers are motivated to have limitation periods be uncertain and unclear for the claimant, they, equally, have an interest to calculate their exposure to risk for a given claim. There are economic interests in knowing when a claim no longer can be litigated.

Over the last few decades, many legislatures have moved to modernize their limitation statutes. To this end, more attention has been given to ensuring that limitation statutes are framed in a manner that addresses plaintiffs' interests and not just those of the defendants'. Arbitrary limitation dates have been discouraged in favour of a more contextual view of the parties' circumstances.¹⁷⁷

Bill 10 2001 is an Act to revise the current Ontario *Limitations Act*.¹⁷⁸ Under section 39 (1) of the Bill, section 206 of the Ontario *Insurance Act* is repealed. Under section 39(4) of the Bill, statutory condition 12 set out in section 300 of the Ontario *Insurance Act* is repealed. Under section 39(5) of the Bill, section 301(6) of the Ontario *Insurance Act* is amended by striking out “and statutory condition 12 may be varied by lengthening the period of time prescribed therein”.

¹⁷⁶ Baer, *supra* note 129 at 64.

¹⁷⁷ Novak, *supra* note 41 at 840-841.

Bill 10 establishes in section 4 a basic limitation period of two years running from the date a claim is discovered. A claim is discovered under section 5(1) (a) the day on which the person with the claim first knew,

i) that the injury, loss or damage occurred, ii) that the injury, loss or damage was caused 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. (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).

Under section 5(2) unless the contrary is proved, a person is presumed to have known of the matters referred to on the day the act or omission on which the claim is based took place. This basic limitation period replaces the sections repealed in the *Insurance Act* concerning Part V, Life Insurance, and Part VII, Accident and Sickness Insurance. The Bill also establishes an ultimate limitation period of 15 years that runs from the day the act or omission on which the claim is based takes place. No proceeding may be commenced when the ultimate limitation period has run, irrespective of when the claim was discovered.

Bill 10 adopts the discoverability principle. It also has the effect of foreclosing the right of parties to a disability contract to vary the statutory limitation period in a disability contract. However, under section 22 (2) of the proposed Act, it would not affect an agreement made before the Act comes into force. Conceivably, hundreds of thousands of disability policies in Ontario will continue to be governed under the pre *Bill 10* regime outlined in this paper. As well, longstanding disability claims or claimants that are currently receiving disability benefits and may be terminated in the future will be governed under the pre *Bill 10* regime. It is still too early to know the effect of *Bill 10* on

¹⁷⁸ Bill 10, An Act to revise the Limitations Act, 2nd session, 37th Leg., Ontario, 2001.

the limitation period in Ontario contractual disability disputes. Nevertheless, should *Bill 10* become law in Ontario, the Ontario courts conceptually will need to determine in a limitation defence dispute if they are governed by the limitation period in *Bill 10* or under the pre *Bill 10* regime which is governed by the limitation provision in the contract and statute.

Clearly there is a longstanding need for legislative reform both in Ontario and throughout the provinces so that the interests of defendants and the interests of plaintiffs are addressed and so that determining the limitation period in this area of law becomes easy for the parties to the dispute, for the court and for counsel instructing in these matters. A legislative framework that requires a determination whether the individual or group policy falls under the pre *Bill 10* or post *Bill 10* regime and whether Part V, Part VII of the Insurance Act or group contractual terms apply is unmanageable for both claimants, their counsel and the courts. There needs to be one set of statutory rules for disability policies that are currently classified either under Part V, Part VII of the Insurance Act or governed by contract. Furthermore, legislative changes to the *Insurance Act* should include a requirement that where an insurer refuses or terminates benefits, communication from the insurer must be made in writing with clear and unequivocal wording. The notice should include the date by which the claimant must commence a lawsuit. The burden of proof should be on the insurer to prove that it has provided to the claimant adequate notice of the termination of benefits and the limitation period.

V. CONCLUSION

In recent years, much has been written on how the courts treat limitation statutes. It has been an evolving area of law. There has been an apparent liberality on the part of the lower courts in the application of principles that commence, extend, suspend or interrupt

the running of time for these statutes. Likewise, the area of interpreting and redefining limitation provisions in contracts has also been an evolving area of law, often overlooked. In the last decade, the Supreme Court of Canada has provided some parameters in the area of interpreting exculpatory provisions in contracts. Likewise, there is now a body of case law on commencing, extending, suspending and interrupting the running of time in contractual disputes.

Disability insurance litigation is a hybrid between contract law, employment law and insurance litigation. The disputes that arise in disability insurance cases are between unequal bargaining powers. All too often, the dispute involves a party who did not negotiate the contract or who does not have knowledge of the party liable under the contract. The law of limitations as it applies to disability insurance is complicated.

Factually, the claimant usually does not have a copy of the policy wording. The policy needs to be classified to determine where it falls under the insurance statute. The limitation provisions can be varied and in group Accident and Sickness Insurance policies, the vast majority of policies, the contractual limitation provision governs. One party to the contract who has the terms of the contract is often motivated to delay and to be evasive. The other party to the contract who does not have the terms of the contract is often motivated for certainty.

Finally, an examination of avoidance of the statutory and contractual limitation defence in disability insurance disputes is useful for plaintiffs and their counsel who are seeking ways to keep their claims alive. An examination of avoidance the limitation defence in disability insurance disputes is also useful for our understanding of avoiding limitations in contractual disputes more generally. It provides us with a framework for applying

doctrines such as the discoverability rule, estoppel and waiver, and relief from forfeiture to limitation provisions in contract cases.