

A Quarterly Newsletter published by Dutton Brock LLP  
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- celebrating Toronto's new aquarium  
"The essential is to excite the spectators. If that means playing Hamlet on a flying trapeze or in an aquarium, you do it."  
- Orson Welles"

## The Devil and the Deep Blue Sea: Indemnity Limitation Period is the Same in Contract and Tort

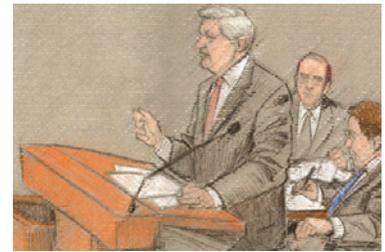
On June 7, 2013, the Ontario Court of Appeal released its landmark decision in *Canaccord Capital v. Roscoe* (2013 ONCA 378), which for the first time clarified that section 18 of the *Limitations Act, 2002* applies equally to claims in both contract and tort.

The defendant, Gregory Roscoe, was previously employed as an investment advisor with Canaccord Capital. Roscoe's employment contract contained a provision whereby he agreed to indemnify Canaccord for any claim made against it arising from Roscoe's acts or omissions. In August 2008 Roscoe and Canaccord were both named as defendants in a claim for damages filed by two former clients, the Cavanaghs. Immediately Canaccord funded a joint defence and delivered a joint statement of defence. At no time did Canaccord cross claim against Roscoe for indemnity. Without any additional involvement from Roscoe, Canaccord settled the matter with the Cavanaghs in July 2009.

In June 2011, almost three years after service of the Cavanagh's Statement of Claim, Canaccord filed a claim for damages and breach of contract against Roscoe for indemnification. Soon after, Roscoe brought a motion for summary judgment dismissing the action as being statute barred by section 18 of the *Limitations Act, 2002*. Canaccord argued that section 18 did not apply to indemnity claims arising out of contract and that the appropriate limitation period would be two years from the date Canaccord settled the action with the Cavanaghs, and not two years from the date the original claim was served. The motion judge agreed with Canaccord and Roscoe's motion was dismissed. Roscoe appealed this decision.

On June 7, 2013, the Court of Appeal for Ontario released its decision which reversed the motion judgment and concluded

that section 18 was equally applicable to claims in both contract and tort. The Court's review of the historical background of the *Limitations Act, 2002*, showed that the language of section 18 expressly applies to indemnification by one "wrongdoer" (as opposed to "tortfeasor") against another for contribution and indemnity "in respect of a tort or otherwise".



Writing for the Court, Mr. Justice Sharpe, further noted that the intent of the Act was to create uniformity which would be undermined if contractual claims for indemnification were treated differently from those made in a tort context. The Court also noted that if wrongdoers wanted to present a united defence and preserve their right to commence indemnification litigation at a later date, both parties were entitled to do so by entering into a tolling agreement pursuant to section 22 of the *Act*.

The Court of Appeal's decision in *Canaccord v. Roscoe* has finally provided some clarification

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surrounding indemnity limitation periods under section 18 of the *Limitations Act, 2002*. It is now clear that any party to an indemnification agreement who intends to seek contribution and indemnity from another party named as a wrongdoer in the originating action must file a claim against the other party within two years of being served with the initial claim. Failure to do so, without entering into a tolling agreement with the other party, will result in the claim for indemnification being time-barred. Such claims failing to meet the limitation period will have to be thrown back in the water.



*Kathleen Mertes was called to the bar in 2010. Kate joined Dutton Brock in 2013 practicing in the area of insurance defence with an emphasis on first party accident benefit disputes.*

## **A Watering Down of the Minor Injury Guidelines**

*FSCO has recently released a decision on the issue of a minor injury which now provides some clarification on the applicability of the Minor Injury Guideline for statutory accident benefits claims made post September 1, 2010 under the revised Schedule, Ont. Reg. 34/10.*

In *Scarlett and Belair Insurance* (A12-001079) decided February 22, 2013, a claim was made for attendant care and medical rehabilitation benefits as a result of injuries sustained in a motor vehicle accident which occurred after September 1, 2010. In considering the claim for attendant care and medical rehabilitation benefits, Arbitrator Wilson reviewed whether the alleged injuries sustained by the insured fell under the definition of a minor injury as defined in the Minor Injury Guideline (MIG). Under section 14 of the *Schedule*, no attendant care benefits are payable in respect of an impairment to which the MIG applies. Further, the MIG limits the medical rehabilitation benefits payable to an insured who sustained predominantly a minor injury up to a maximum of \$3,500 per accident.

In *Scarlett*, the medical evidence presented demonstrated that the claimant initially sustained soft tissue injuries and later developed other injuries related to the accident including depression, post-traumatic stress disorder, temporal mandibular joint syndrome (TMJ) and chronic pain. The insurer also conducted insurer's examinations and provided medical evidence to support that the insured sustained a minor injury and there were insufficient symptoms to meet a TMJ disorder or a psychological diagnosis.



In considering the applicability of the MIG, Arbitrator Wilson considered the legislative context under the *Insurance Act* under which it was enacted and noted that guidelines are a non-binding interpretative aid and that the requirement for "compelling evidence" as an exception to a minor injury did not create a new evidentiary burden for the insured. In *Scarlett*, Arbitrator Wilson held that it remains the insurer's burden to prove any exception to the limitation of coverage on the civil standard of balance of probabilities.

In the end, Arbitrator Wilson accepted the medical evidence of the claimant as credible and the diagnoses of psychological impairments and chronic pain from the reports as distinct from soft tissue injuries and found that the claimant did not sustain a minor injury. As the MIG did not apply, the insured was entitled to attendant care benefits and the increased medical and rehabilitation benefits beyond the \$3,500 limit in the guideline.

**EXPENSE LIMIT!**

In *Scarlett*, the closing comments of Arbitrator Wilson are revealing about how future adjudicators may view the applicability of the MIG and the approach towards future arbitrations at FSCO on this issue. Arbitrator Wilson states: "The insurer is in effect mandated to make an early determination of an insured's entitlement to treatment beyond the MIG. In essence, because of the necessarily early stage of the claim when the MIG is applied, the determination must be an interim one, one that is open to review as more information becomes available. What it is not, is the 'cookie-cutter' application of an expense limit in every case where there is a soft tissue injury present. Such does not respond either to the spirit of the accident benefits system or the policy enunciated in the Guideline of getting treatment to those in need early in the claims process...Each case merits an open-minded assessment, and an acceptance that some injuries can be complex even when there are soft tissue injuries present amongst the constellation of injuries arising from an accident."

The insurer is appealing this decision.



*Shirline Apiou is a senior associate in Dutton Brock's accident benefits group. She has represented insurers at FSCO and all levels of Ontario courts.*

## **Minding the Gaps or Traversing the Mariana's Trench?**

*The Stonewall Principle is controversial. It is problematic for insurers, and has just been rejected by the Ontario Court of Appeal.*

The Stonewall Principle developed in the United States due to the asbestos-related litigation that came out of the 1970s and 1980s. The principle was put forward in the eponymous *Stonewall Insurance Company v. Asbestos Claims Management Corporation*, 73 F.3rd 1178 (2d Cir. 1995), where the Second Circuit Court held that where coverage gaps emerge due to the commercial unavailability of

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insurance (a particular problem in the asbestos industry), an insured should not be deemed to be self-insured for that time frame. *Stonewall* is a controversial decision, and even in the United States it has been inconsistently followed.

Goodyear Canada Inc. recently tried to have the *Stonewall* Principle adopted in Ontario. Goodyear manufactured products that contained asbestos. It sold these products in the United States and found itself the target of claims by plaintiffs suffering from various asbestos-related diseases.

In 2004, Goodyear brought an application in Ontario to have its Canadian insurers respond to these claims. The issue was what coverage, if any, was to be afforded for the period after 1985 when Goodyear elected not to obtain asbestos coverage due to commercial unavailability. Canadian insurers had begun inserting asbestos exclusions into their policies after 1985 and to obtain such coverage would have been prohibitively expensive. Despite electing to self-insure its asbestos business after 1985 Goodyear attempted to use the *Stonewall* Principle to have its Canadian insurers respond to these types of claims.



Justice Stinson of the Ontario Superior Court rejected Goodyear's argument in a 2011 decision. He noted that Goodyear chose to continue manufacturing asbestos products after insurance was no longer available, and held that the pre-1985 occurrence based policies should not have to respond to losses that occurred after the policy period. Goodyear appealed.

In a decision released June 13, 2013, the Ontario Court of Appeal affirmed Justice Stinson's decision that *Stonewall* not be adopted in Canada. The Court looked to the language of the policies and found nothing to suggest that they were intended to respond to the claims being made after 1985. The Court held that by attempting to rely on *Stonewall* Goodyear was attempting to shift the risk of its asbestos business onto its insurers when clearly such risk was being born by Goodyear.

The Court appeared particularly critical of Goodyear's attempt to rewrite the commercial arrangement it agreed to under the guise of "fairness". In response to Goodyear's argument that the "per occurrence" deductible should be pro-rated, Justice Cronk said Goodyear was attempting to "cloak its proration of deductibles submission in notions of fundamental fairness". Goodyear agreed to a per occurrence deductible, and there was no suggestion that such a bargain would allow deductibles to be prorated where multiple policies were responding.

For now, it appears that there is little appetite for *Stonewall* in Canada. Furthermore, Justice Cronk's refusal to rewrite the insurance agreement on the basis of "fairness" should be welcome news for insurers who should worry less about what lies beneath the waves.



Josiah T. MacQuirre is a graduate of Dalhousie Law School and is an associate in Dutton Brock's tort group. He was admitted to the Ontario Bar in 2010.

A recent decision of the Ontario Court of Appeal has provided the first appellate level confirmation of what most insurers already knew – the cost of section 42 (now section 44) Insurer Examinations are not recoverable in loss transfer proceedings. The 2:1 decision of Justice Weiler in the case of *The Wawanesa Mutual Insurance Company v. Axa Insurance (Canada)* (2012), ONCA 592 was released on September 11, 2012.



This case marks the first time since 1995 that the issue of reimbursement for insurer generated medical assessments was brought as an issue before the Courts. Essentially, the Court of Appeal has affirmed the law as it already existed following the decision of Justice Mandel in *Jevco Insurance Company v. Prudential Insurance Company*, (1995) 22 O.R. (3d) 779 (Ont. Gen. Div.). In the *Jevco* case, Mandel J. held that insurer generated medical assessments are part of loss control efforts as opposed to actual benefits administered and that such loss control efforts (or overhead/administrative costs as sometimes referred to) were never intended by the Legislature to be indemnified. This determination went unchallenged until this recent case before the Court of Appeal.

In the case of *Wawanesa v. Axa*, Wawanesa's insured drivers in two separate losses were paid accident benefits by Wawanesa. In both incidents, the insured drivers were involved in accidents with a heavy commercial vehicle that was insured by Axa. In both incidents, Axa accepted 100% liability for the accidents and accepted that the loss transfer provisions of section 275(1) of the Insurance Act applied. A dispute arose with



respect to reimbursement of section 42 assessments or insurer's medical assessments which are undertaken to determine an insured claimant's initial or ongoing entitlement to certain accident benefits. Axa refused to reimburse Wawanesa the cost of the insurer assessments based on the fact that they were not "in relation to a benefit" paid to the insured. The dispute proceeded to private arbitration as permitted under the *Arbitrations Act* and was heard before of Dutton Brock Arbitrator Philippa Samworth. Although Arbitrator Samworth found that Wawanesa had a compelling argument that was consistent with the 1994 Insurance Commission Interpretation Bulletin, she felt bound by the decision of Justice Mandel, which was never appealed, and determined that the insurer assessments were not recoverable in loss transfer proceedings. Arbitrator Samworth's decision was appealed by Wawanesa to the Ontario Superior Court and heard by Justice Susan Greer. Justice Greer determined the issue on appeal was an issue of law and therefore subject to a standard of review of correctness. She dismissed Wawanesa's appeal, upheld Arbitrator's Samworth's decision and found that the *Jevco* decision was still good law and will continue to be until the legislation is changed.

In hearing Wawanesa's appeal, the Court of Appeal reviewed the history and legislative intent of section 275(1) of the *Insurance Act*, including the 1992 and 1994 Interpretation Bulletins, amendments to the *Statutory Accident Benefits Schedule* under the *Insurance Act* as well as reviewing the rules of statutory interpretation. The Court of Appeal ultimately concluded that insurer generated medical assessments were not meant to be recoverable in loss transfer proceedings. Essentially, the Court of Appeal upheld what was already decided by the *Jevco* decision many years earlier and never challenged.

Interestingly, this case affirms the law as it already was, but Justice Weiler, at the end of the decision, adds a proviso in stating that it is in the insurer's best interests to work out an arrangement between themselves in agreeing to fund a portion of insurer assessment costs as one insurer is saving the other costs by having assessments done. It is highly doubtful this will occur since the Court of Appeal has clearly stated the cost of insurer assessments are not recoverable under the statute.



Dana R. Spadafina is an associate in Dutton Brock's accident benefits group. She was called to the Bar in 2004.

## WEB-CONTEST

A Canadian pop star re-recorded a song from a Disney movie's release on BluRay coming out soon. The movie is loosely based on a story by a famous Danish author, who bares more than just a passing resemblance to Canada's first Prime Minister. As was the case with Canada's first Prime Minister, the writer's mother, Anne Marie Andersdatter, was a lawyer. In the year that the original story that is now being re-released by Disney was published, who was voted in as the President of the United States?

Email your answer to [dlauder@duttonrock.com](mailto:dlauder@duttonrock.com). A draw will be held to award a prize.



### Editors' note

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LITIGATION COUNSEL

[www.duttonbrock.com](http://www.duttonbrock.com)

Dutton Brock LLP

438 University Avenue, Suite 1700

Toronto, Canada M5G 2L9