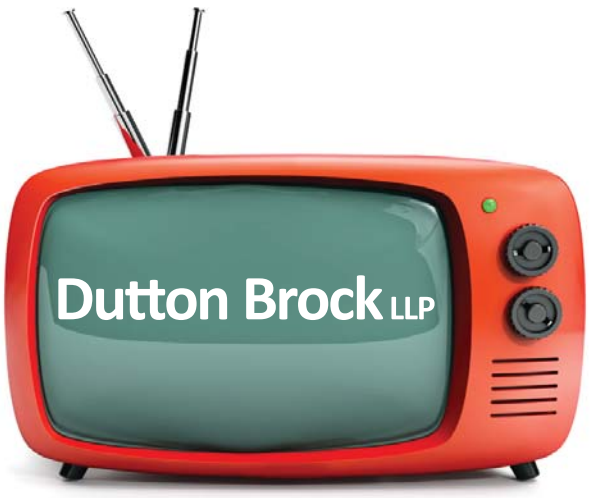


# The Walking Dead: Limitation Period for Motor Vehicle Accidents That Never Die

*It is common knowledge that a claimant generally has two years from the date of loss to issue a lawsuit before the limitation period expires, but there are caveats. One such caveat is what is known as the discoverability rule; a claimant can only sue once he "discovers" that he has something to sue for. The date of that discovery does not always coincide with the date of loss. The recent decision of Justice Perell in Farhat v. Monteanu deals with the discoverability of a claim in the context of motor vehicle litigation and the governing statutes of the Insurance Act.*

Mr. Farhat was injured when his vehicle was rear-ended on May 18, 2006. Within a few weeks of the accident, Mr. Farhat's lawyer put the Defendant on notice of a potential claim. Nearly a year later, Mr. Farhat was diagnosed with a sensory deficit in his left upper and lower extremities. On June 19, 2008, two years and 32 days after the accident, Mr. Farhat issued his claim, for non-pecuniary damages only.

The Plaintiff brought a partial summary judgment motion to defeat the Defendant's limitation period defence. In turn the Defendant brought a cross-motion for a summary judgment dismissing Mr. Farhat's action as statute-barred. The basis of Mr. Farhat's argument was that he discovered that his injuries met the statutory threshold of "serious and permanent", as found in section 267 of the *Insurance Act,* only when he was diagnosed with the sensory deficit, and that his two year clock to commence a claim began only with that diagnosis.

In ruling for the Plaintiff, Perell J. held that all a Plaintiff needs to do is show that he or she could not have discovered his or her threshold injury during the time by which the 2 year anniversary is missed. In this case the claim was issued 2 years and 32 days after the accident, so all the Plaintiff had to show was that the threshold injury didn't crystallize in the first 32 days following the accident.

Perell J. goes on to write about the interplay between section 267 of the *Insurance Act* and the limitation period. He notes that "perhaps ironically, because s. 267.5 (5) of the *Insurance Act* was introduced to eliminate minor personal injury claims, its effect has also been to protect such claims from the running of a limitation period for a period of time commensurate with how long it would take a reasonable person with the abilities and in the circumstances of the Plaintiff to have discovered that the threshold for a claim has been surpassed".

This is in contrast with the operation of the limitation period in, for example, a slip and fall claim and according to Perell J. it "rankles the insurance defence bar" because a Plaintiff, or his or her negligent lawyer, "can take comfort from this slack because the limitation period only begins to run when a sufficient body of information is available to determine whether the Plaintiff has a claim that may meet the threshold".

It will be interesting to see how future decisions interpret *Farhat.* Arguably, this decision leads to separate limitation periods within the same motor vehicle lawsuit – one for pecuniary losses, that begins from the date of loss, and


- The Risk of Playing the Waiting Game (of Thrones)
- The Big Branco Theory returns for another Season
- Inherent Jurisdiction vs. Inherent Vice: The Ziebenhaus Rules


*cont'd on Page 2*


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*"Television is the source of Aldous Huxley's "Brave New World".*
*~ Robert MacNeil*

*from Page 1*

one for non-pecuniary losses, that begins only when a sufficient body of evidence shows that the Plaintiff sustained a threshold injury. Furthermore, the limitation for non-pecuniary losses where the Plaintiff's injuries are minor in nature may never commence, as the claimant will not be able to procure a sufficient body of evidence required to give knowledge of a potential claim.

*Elie Goldberg is an associate at Dutton Brock. His favourite television programs are of the reality variety – sports, and Survivor.*

## The Risk of Playing the Waiting Game (of Thrones)

The recent decision of *Mallory v. Werkmann Estate* released by the Ontario Court of Appeal shows why a "wait and see" approach on coverage can prove costly to insurers.

The action arose out of an accident caused by the defendants driving their motorcycles at excessive speeds. One of the motorcyclists, Gabor Werkmann, lost control of his motorcycle and struck a vehicle driven by the plaintiff, Robert Mallory. Werkmann was killed and Mallory suffered serious injuries. Mallory sued the Estate of Werkmann and the other two motorcyclists, Kritzian Nemes and Istivan Mihali. Also named was the plaintiff's own insurer, Security National, in the event that the defendants were uninsured or underinsured.

RSA was the liability insurer for Mihali, and defended him under a reservation of rights but continued to investigate and dispute coverage. RSA appointed coverage counsel but, for reasons that are unknown, did not take steps to add itself to the action as a Statutory Third Party.

The trial proceeded on the issue of liability only as between Mihali and the Plaintiff. The Trial Judge found Mihali liable due to his involvement in a "joint venture" whereby the three motorcyclists incited each other to drive dangerously. Liability was apportioned against Mihali at 25%. The claim against Security National was dismissed, with the trial judge noting that Mihali was insured at the time of the loss.

RSA's coverage counsel wrote to the trial judge expressing concern over her comments about Mihali's insurance coverage. In response, the judge suggested counsel contact the trial coordinator, but coverage counsel for RSA did not do so. Instead, RSA had defence counsel appeal the decision, including the finding that Mihali was insured at the time of the accident. It also sought to add itself to the appeal as an intervenor. In response, Security National brought a motion to have RSA's defence counsel removed from the case.

Chief Justice Strathy granted Security National's motion to remove defence counsel, and refused RSA's motion to intervene. He found that appealing the finding of coverage was contrary to defence counsel's duty of loyalty to the insured. Such grounds were clearly for the benefit of the insurer and against the insured's best interests. Mihali was therefore entitled to retain and instruct independent counsel of his own choice, with all reasonable fees and disbursements paid for by RSA.

The Chief Justice was also critical of RSA's wait and see approach to coverage, and for not clearly communicating its position on coverage to the trial judge to ensure that the scope of trial was properly defined.

Insurers and their counsel would be well served to listen to the Chief Justice's criticism in this case. It is generally best to make coverage determinations early, and to make sure the line between coverage and defence counsel does not become blurred.

*Josiah MacQuarrie's favourite TV show is Masterchef, except for the parts involving food.*

## The Big Branco Theory Returns for Another Season

This past June, the Saskatchewan Court of Appeal issued its unanimous ruling in *Zurich Life Insurance v. Branco*, 2015 SKCA 71, significantly reducing the trial judge's punitive damages award against Zurich and American Home Assurance ("AIG") from $4,500,000 to $675,000.

Luciano Branco was working as a welder for Kumtor in Kyrgyzstan, when, on March 13, 2000, he injured his foot. Mr. Branco had access to two group policies of insurance. The Zurich policy provided benefits for 24 months if Branco was unable to perform his own occupation and benefits past 24 months if he was unable to perform any occupation. There was an AIG policy which mirrored the benefits and language of the Workers' Compensation scheme in Saskatchewan.

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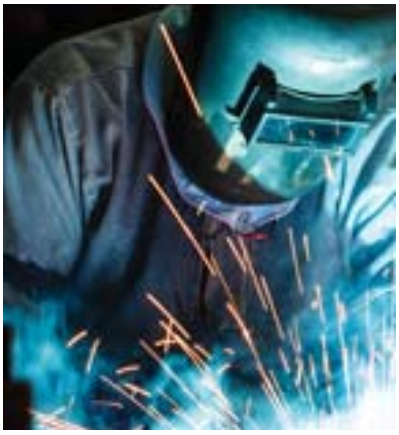

In March 2001, AIG started paying income replacement benefits. AIG suspended payment in May 2001 due to a lack of ongoing medical information. In August 2001, AIG received a medical opinion that Mr. Branco was "permanently unable to perform his occupation". AIG did not pay any further benefits until October of 2002, eventually paying benefits to December 2004. Benefits were not paid post-December 2004 as Mr. Branco did not attend vocational retraining.

Immediately before trial, AIG paid Mr. Branco's permanent functional impairment, independence allowance, owed payments on the wage loss benefits, and approved payment of an annuity from age 65.

Zurich accepted Mr. Branco's claim benefits under the "own occupation" period in either 2002 or 2003 (there was uncertainty as to the year). Those benefits were valued at $71,688. Zurich, without telling Mr. Branco he had been approved for benefits, offered to settle the claim for $62,688 ($71,688 less $9,000 for Zurich's legal fees).

In April of 2009, Zurich determined the benefits should be continued under the "any occupation" period and provided a payment to Mr. Branco in the amount of $362,198 representing benefits from June 26, 2000 to April 30, 2009. Benefits were later extended to December 31, 2013. At a judge alone trial, punitive damages were awarded of $1,500,000 against AIG and $3,000,000 against Zurich.

There were several grounds of appeal before the Court, including questions on jurisdiction, costs, the awarding of damages for mental distress, and the awarding of punitive damages. At the outset, the Court outlined the foundations of punitive damages, namely, an insurer's breach of the contractual duty of good faith independent of and in addition to the breach of contractual duty to pay a loss. The Court stated that the general objectives of punitive damages are punishment, deterrence of the wrongdoer, and denunciation. Punitive damages should only be awarded in exceptional cases (as per *Whiten v. Pilot Insurance Co., 2002 SCC 18).*

In examining the conduct of AIG, the Court held the periods of benefit denials must be examined individually (contrary to the approach taken by the Trial Judge). The Court found the denial of benefits from May 2001 to October 2002 was a breach of good faith as the lack of medical documentation was caused by a doctor retained by AIG and further, as of August of 2001, AIG had an opinion that Mr. Branco could not work in his previous position. In addition, AIG breached its duty when, in February of 2003, it received a report in support of Mr. Branco's claim for benefits but did not issue payment until April of 2003. AIG's refusal to pay benefits post-December 2004 was not a breach as, despite multiple requests, Mr. Branco failed to provide any information regarding re-training, as required per the policy.

As to the punitive damages claim against Zurich, the Court found that while Swiss law applied, an award of punitive damages would be allowed on public policy grounds.

The Court held Zurich's administration of Mr. Branco's claim during the "own occupation" period was a "dramatic transgression of the bounds of good faith" (para.196). Mr. Branco was approved for benefits in March 2002 but was not informed of the approval until 2007, on questioning during a discovery examination. The benefits were not paid out until 2009. Zurich's Statement of Defence (which was filed after Mr. Branco was approved for benefits), pleaded Mr. Branco was not disabled and disputed his entitlement to benefits.

The Court held that the punitive damage amounts awarded by the Trial Judge were unwarrantedly high. The $1,000,000 awarded in *Whiten* was considered to be at the upper end of punitive damages. In determining an appropriate quantum, the Court was to consider the blameworthiness of the defendant's conduct; the degree of vulnerability of the Plaintiff; the harm directed at the Plaintiff; the need for deterrence; other penalties available; and the advantage wrongfully gained by the defendant.

Punitive damages against AIG and Zurich were reduced to $175,000 and $500,000 respectively. Zurich's conduct attracted a higher award as it refused to pay a claim it had approved and failed to pay for a longer period of time.

While Branco did significantly reduce the punitive damages awarded by the Trial Judge, it is important to remember the original awards were significantly higher than anything seen in Canadian law before. The new awards are now in line with previously decided cases, albeit still on the high side of punitive damage awards. The Court also reduced the Trial Judge's awards for mental distress from $150,000 to $15,000 against AIG and from $300,000 to $30,000 against Zurich, again placing these awards in line with previous jurisprudence.

The take-away from *Branco* has not changed since the original decision was rendered. An insurer owes a duty of good faith to its insureds, and the Court will punish an insurer who breaches this duty. Insurers must act in a timely and reasonable manner. Perhaps most

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*from Page 3*

importantly (as evidenced by the $500,000 in punitive damages against Zurich), insurers must not withhold approved benefits for no reason.

*In addition to the return of her favourite crime dramas, Katherine Marshall is looking forward to watching meaningful fall baseball (and hoping that she didn't just jinx it).*

## Inherent Jurisdiction vs. Inherent Vice: The Ziebenhaus Rules

In 2012, Justice M. L. Edwards of the Ontario Superior Court of Justice ruled that a court may use its inherent jurisdiction to order a party to attend a "non-medical" assessment. The decision was premised on the apparent "gap" created by the legislature's silence on "non-medical" assessments (section 105 of the *Courts of Justice Act* and Rule 33 of the *Rules of Civil Procedure).* The Superior Court's decision in *Ziebenhaus v. Bahlieda* was appealed to the Divisional Court, which affirmed the earlier judgment. In 2015, the Plaintiff appealed the decision of the Divisional Court to the Ontario Court of Appeal.

The appellants argued that the Divisional Court erred when it affirmed the motion judge's decision, since the legislature had precisely defined the category of persons who may conduct an examination (i.e. "health practitioner"). The Court of Appeal disagreed with this submission and found no basis to interfere with the earlier Court's decision to permit a vocational assessment of the Plaintiff.

The Superior Court advanced the common law doctrine of inherent jurisdiction. The Superior Court decided that the vocational examination was necessary to ensure justice and fairness and that without specific language ousting this jurisdiction, a court is free to use its discretion in applying this common law power. The wording in both section 105 and Rule 33 was neither clear nor precise enough to suggest that an assessment could not be made by someone who is not a "health practitioner".

The Divisional Court further concluded that section 105 does not "occupy the field" since general medicine, dentistry and psychology are not the only professions to conduct physical and mental examinations. The Court of Appeal speculated that if this were the case, it would surely be contrary to good public policy since health sciences and patient care have evolved to include a wide array of assessments by various experts.

This Court of Appeal decision appears to close the book on this issue. It is now clear that a party can request a plaintiff to attend a non-medical examination. This decision is particularly important as it resolved a conflicting line of authority on the matter. Nevertheless a non-medical examination will not be granted in every instance. It must be shown that the requesting party cannot properly evaluate the plaintiff's claim without the requested assessment. If the defendant is only requesting attendance in order to "level the playing field"a court may find in favour of the plaintiff's non-attendance. It appears that a defendant will likely be required to demonstrate that the "non-medical" assessment is being requested in the interest of trial fairness and justice.

*Jordan Elmore is a student-at-law with Dutton Brock. Prior to starting his articles, Jordan worked as a claims handler for large commercial insurers. When not burning the midnight oil at the office, he indulges in Game of Thrones, but never Keeping up with the Kardashians (or so he says).*

## WEB CONTEST

Our last contest had 6 winners, namely Katherine Daley, Jennifer Bethune, Ken Jones, Tom Hammers, Jessica Larrea and John Lammey. Congratulations to all who played!

This edition's trivia quiz is multi-answer and taken from our television source code. This Sherlockian villain also had a major role in the 2003 feature film The League of Extraordinary Gentlemen. He is a Professor of what subject? Who played this character in the feature film "Sherlock Holmes: A Game of Shadows"? Who played the character in the BBC series "Sherlock"?

The bonus question is what US actor with this character's surname, played the recurring role of a District Attorney in "Law and Order" in the 1990s?

Email your answers to dlauder@duttonbrock.com. Do NOT email answers by hitting reply to this email address, as it will get lost in spam-limbo.

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