

Limitations Act 2002

by *Michael E. Girard*

The new Limitations Act 2002 takes effect on January 1, 2004. The law will sweep away most of the existing limitation periods in favour of a basic limitation period of two years¹. The limitation period will run from the day the claim is “discovered”.

Claim is defined in the Act as:

“A claim to remedy an injury, loss or damage that occurred as a result of an act or omission.”

The provisions of the Act cannot be ousted by agreement.

Discoverability

The Act incorporates the discoverability criteria. A claim is “discovered” when a person knows or reasonably should know he has a cause of action against a specific person or a specific act or omission. Section 5(1) provides:

“A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of a 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 a remedy to it; and

(b) the day on which a rea-

(Continued on page 2)

1. Some special limitation periods will remain. These are specifically identified in a schedule to the Act. Of particular note, section 148 of the Insurance Act, (fire insurance statutory conditions section 14) barring a claim unless commenced within one year after the loss or damage occurs is preserved. Section 259.1 of the Insurance Act, requiring an action for loss or damage to an automobile or its contents to be commenced within one year after the happening of the loss or damage is preserved. Also exempted is Section 281.1 of the Insurance Act dealing with the limitation period in a statutory accident benefits claim. As well, the current limitation periods for property claims in the Limitations Act are preserved.

Limitations
Act 2002

Michael Girard

Who Is An
Occupant ?

Richard Horak

Firm News

Noteworthy

(Continued from page 1)

sonable 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).”

There is a presumption of discoverability. The person is presumed to have known of the matters referred to in clause 1(a) on the day when the act or omission on which the claim is based took place, *unless* the contrary is proved. In other words, the onus will be on the plaintiff to establish that the claim was “discovered” on a date other than the date of the accident or occurrence.

For purposes of the commencement of the limitation period, where a loss is caused by a continuous act or omission, the limitation period runs from the day on which the act or omission ceases. Where there are a series of acts or omissions in respect of the same obligation, the limitation period runs from the day of the last act or omission.

The limitation period does not run against a minor who is not represented by a litigation guardian, nor does it run during any time in which the person with the claim is incapable of commencing a proceeding because of their physical, mental or psychological condition and they are not represented by a litigation guardian. The Act recognizes that a defendant may move before a judge to have a litigation guardian appointed for a minor or an incompetent person so that

the limitation period will run.

The discoverability period may be triggered by formal “notice of possible claim” delivered by the potential wrongdoer to the injured party. The court may consider such notice in determining when the claim was discovered.

There are special limitation periods with respect to assaults and sexual assaults. There is a presumption against discoverability in favour of a claimant where one of the parties to the assault had an intimate relationship with the person or with someone on whom the person was dependent, whether financially or otherwise.

The limitation period is also suspended during any time in which there is an agreement to mediate a claim.

Ultimate Limitation Period

The Act also imposes an ultimate limitation period of fifteen years regardless of discoverability. This again is subject to the exceptions for time running while a person is a minor or incompetent. The ultimate limitation period also does not run where the allegedly responsible party willfully conceals their act or omission.

No Limitation Period for Certain Causes of Action

The Act sets out certain causes of action for which there is no limitation period. Of note, there is no limitation period for pure declaratory actions, pro-

ceedings to enforce a court order, proceedings for support under the Family Law Act, a proceeding arising from a sexual assault where one of the parties had charge of the person assaulted, was in a position of trust or authority in relation to the person or with someone on whom he or she was dependent, whether financially or otherwise. There is also no limitation period with respect to an undiscovered environmental claim.

Contribution and Indemnity

Claims against third parties or co-defendants for contribution and indemnity are now also subject to a new limitation period. The limitation period runs from the day on which the first alleged wrongdoer was served with the claim. This will mean that parties to lawsuits will have to make claims for contribution or indemnity within two years of the date of service.

1. The Act prevents the adding of parties to a lawsuit once the existing limitation period has expired. This does not prevent the correction of a misnaming or misdescription of a party in an existing lawsuit.
2. **Transition** Where the acts or omissions take place before January 1, 2004, they could be subject to different limitation period regimes. The Act deals with the transition period as follows:
3. If the former limitation period has already expired by

(Continued on page 3)

(Continued from page 2)

January 1, 2004, the new Act does not revive the action.

1. If the former limitation period is unexpired and it falls into the category of claims for which there is no limitation period under the new Act, there is no limitation period ap-

plicable.

1. Generally, for all other claims, the date of discovery will determine the applicable limitation regime. If discovery occurred prior to January 1, 2004, the existing limitation framework would apply. For claims discovered after January 1,

2004, the new regime will apply.

The general rule for most causes of action will be a two year limitation period from the date of discoverability, subject to an ultimate limitation period of fifteen years.

Who Is An Occupant ?

by **Richard F. Horak**

In the recent decision of *McIntyre v. Scott*, the Ontario Court of Appeal has once again delved into the murky area of determining whether an individual is an “occupant” of a vehicle within the meaning of the *Insurance Act*.

In *McIntyre* the Plaintiff was a passenger on a motorcycle driven by her husband. When a rainstorm occurred they stopped and dismounted under an overpass. Both McIntyre and her husband waited on an embankment in close proximity to the motorcycle, pending the cessation of the rain. As the Plaintiff approached the motorcycle to retrieve some dry clothing she was struck by an uninsured motor vehicle.

While it was clear that the Plaintiff was neither mounted on, or operating the motorcycle, it was unclear whether she was touching the vehicle at the time of the collision.

Pursuant to Section 224 of the *Insurance Act*, an occupant is defined to mean the driver, a passenger, whether being carried in or on the automobile and a person getting into or on or getting out of or off the automobile.

It is interesting to note that on the facts of this case, a decision as to whether or not the Plaintiff was an occupant meant that either one insurer would have to pay damages, or the damages would be apportioned equally between two insurers. While the court noted that in the circumstances of this case the Plaintiff would be entitled to coverage under a policy of insurance even if she was found not to be an occupant, others injured in similar circumstances might not be so fortunate and this factor must be borne in mind when deciding the appeal.

Although the motions court judge found that according to the plain meaning of the section, the Plaintiff could not be considered an occupant, this

finding was overturned by the Court of Appeal.

In coming to this conclusion the Court of Appeal followed the “objective observer” approach followed in the earlier Court of Appeal decision of *Axa Insurance v. Markel Insurance Co. of Canada* (2001) 140 O.A.C. 109. Interestingly, the motions court judge had purported to follow this case in coming to the opposite conclusion.

Writing for a unanimous court, Justice Sharpe noted that there are four reasons for following the “objective observer” approach. These are as follows:

1. The section should be interpreted in a coherent and consistent manner - the words used identified a status rather than a physical activity.
2. The “plain language” of the statute did not dictate a different approach. Had a narrower meaning

(Continued on page 4)

(Continued from page 3)

been intended Justice Sharpe suggested that the legislature would have provided that a person is a "passenger *while* being carried in or on the automobile".

3. There was nothing in the *Axa* decision which required the court to give

"passenger" a more limited reading.

4. Finding the Plaintiff to be an occupant is consistent with the general principle that insurance legislation defining coverage should ordinarily be liberally construed in favour of the insured.

The court accordingly concluded that an objective observer of the accident would describe the Plaintiff as a passenger, the appeal was allowed and an Order made to the effect that the Plaintiff was an occupant of the motorcycle at the time of the accident.

Firm News

Michael Teitelbaum has been appointed as the General Editor of the Canadian Journal of Insurance Law

Pamela Stevens will be speaking on "Tips for Examination-in-Chief" on November 19, 2003 at an Ontario Bar Association program on Personal Injury Litigation.

Richard Horak will take part in a panel discussion on Bill 198 at a conference on Auto Insurance Claims Litigation in Ontario presented by Insight on December 11-12, 2003.

Michael Girard was a teacher at the Civil litigation Skills Certificate Program: Convincing Cross Examination put on by the Advocates Society Nov 4, 2003

Michael Girard will be speaking on "Essential Litigation Strategy and Preparation Tools" on Nov. 28, 2003 at the OBA conference on Technology for Lawyers 2003.