



The Limitations Act and Auto Claims

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Everding v. Skrijel marks the first word from the Ontario Court of Appeal on how the *Limitations Act, 2002* applies to the statutory criteria for recovery in an auto claim under the *Insurance Act*.

Ms. Everding was involved in a motor vehicle accident on May 24, 2000. She experienced immediate pain from the base of her skull to her left shoulder-blade. She consulted her family doctor and over the years following the accident underwent various therapies, including physiotherapy, massage therapy, chiropractic treatment, painkillers and anti-depressants. She reportedly experienced significant improvement of her symptoms to 80% of normal within the first year and a half after the accident. She also obtained employment where she advanced over the years after the accident. In May 2001, she consulted a lawyer, who advised her that she did not have a case, since her injury would not meet the “threshold”. Despite her progress, Ms. Everding continued to complain of pain. She was diagnosed by her family doctor in May 2004 as suffering from a chronic pain condition. An MRI scan done in March 2006 revealed a disc bulge at two locations in Ms. Everding’s spine.

Ms. Everding did not start on action to recover for the injuries arising from the May 2000 motor vehicle accident until August 1, 2007, over 7 years later. The defendant brought a motion for summary judgment on the basis that the action was statute-barred under the *Limitations Act, 2002*. Summary judgment was granted at first instance, but was reversed on appeal at (2010) 100 O.R. 3rd 641 (C.A.).

The Court hearing the summary judgment motion was asked to consider the application of the *Limitations Act, 2002*; the discoverability principle; and “threshold” under section 267.5 of the *Insurance Act* applicable to automobile accidents.

The *Limitations Act, 2002* provides that, with some limited exceptions, the basic limitation period is two years. The two year limitation period runs from the date a claim is discovered: essentially, the date on which the plaintiff reasonably discovered his or her injury, the wrong which caused that injury, and the identity of the wrongdoer. This discoverability principle is now codified in section 5 of the *Limitations Act*.

The “threshold” under Section 267.5 of the *Insurance Act* prevents a person from bringing a tort action in relation to a motor vehicle accident unless he or she can demonstrate a permanent serious disfigurement or impairment of an important physical, mental or psychological function. Further, even if a person meets the “threshold,” the injured person’s non-pecuniary damages are subject to a monetary deductible (for an accident arising on May 24, 2000 that deductible would be \$15,000.00, that deductible has since been raised in accidents occurring after October 1, 2003 to \$30,000.00).

At the summary judgment motion, the defendant argued that, on the basis of the discoverability principle, the limitation period for Ms. Everding started to run, at the latest, in May 2004, when her family doctor diagnosed her as suffering from chronic pain, if not earlier. The plaintiff argued that the limitation period did not begin to run until March 2006, when she received the results of her MRI scan. The motion judge agreed with the defendant's position and granted summary judgment on the basis that the plaintiff had not commenced her action within the two years following her diagnosis with chronic pain. The plaintiff appealed this decision.

The Court of Appeal set aside the summary judgment. While the motion judge did consider the application of the "threshold" to this matter, he did not specifically consider the date upon which the plaintiff would have been aware that her claim could surpass the \$15,000.00 deductible for non-pecuniary damages applicable to her claim. The Court of Appeal felt that the motion judge's failure to consider the \$15,000.00 deductible constituted a reversible error and set aside the summary judgment.

The Court of Appeal's decision suggests that, in motor vehicle accident cases, discoverability must be assessed from the date that the plaintiff realizes or becomes aware that he or she meets the "threshold" for damages under the *Insurance Act*, and, in addition, the date on which the plaintiff realizes or becomes aware that his or her injury exceeds the statutory deductible. ■