Foster & Company's dynamic team providing clients with responsive, high quality services while maintaining the highest level of professional integrity and ethics.

Recent Caselaw

1st Case

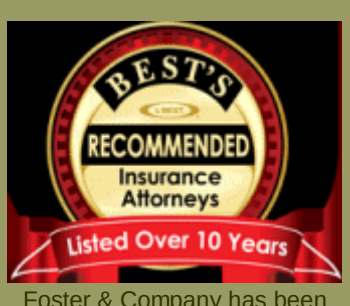
Our first case explains that Long Term Disability (LTD) insurers can apply to Court to reduce a Plaintiff's benefit for lost future earnings when the Plaintiff settles a claim by lump sum payment and refuses to agree on the amount to be deemed as lost future earnings.

2nd Case

Our second case deals with an insurers motion to strike the Plaintiffs' claims for breach of the duty of good faith and fair dealing. The Court of Appeal of Ontario held that these types of claims could not be determined within a preliminary Motion because the law governing these claims against insurers is in flux.

3rd Case

In our third case, the Supreme Court of Canada upholds a decision allowing an Ontario insurer to shorten a statutory limitation period by contract, simultaneously barring the insured's claim despite his normal right to file his court action within a two year period. This decision relies upon a special provision of Ontario's Limitation Act which grants the insurer and insured the freedom to contract out of the standard two year statutory limitation period.



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Carter v. Province of New Brunswick, 2013 NBQB 239

1st Case

The Plaintiff (Carter) was rendered fully disabled following an accident and did not return to work. She received LTD benefits from Medavie Blue Cross Life Insurance ("Medavie") from the date of the accident (November 27, 2004) until December 31, 2011.

In the course of litigation, The Plaintiff notified Medavie of a Settlement Conference which Medavie chose not to attend. The Plaintiff's policy with Medavie required that settlement funds received for lost future earnings be deducted from her future LTD benefits.

The Plaintiff's claim was settled for a lump sum of $665,000.00. No breakdown as to specific heads of damages was made. Medavie learned of the settlement and raised the issue, requesting that the Plaintiff disclose the amount awarded for lost future income.

It was argued by the Plaintiff that Medavie had consented to the settlement agreement, and now bore the onus to prove that any of the settlement should be considered lost future income. Failing this, the Plaintiff argued that Medavie would not be entitled to reduce LTD benefits in spite of the Plaintiff receiving $665,000.

The Defendant argued that its right to consent to a settlement had been violated. It also argued that the responsibility to declare the proper portion of settlement funds made for loss of future income belonged to the Plaintiff.

The Court held that Medavie was not prejudiced by it failing to attend the Settlement Conference, but having been given notice Medavie could not claim it failed to consent to the settlement.

In order to determine the proper amount to be deemed as 'future income', the Court established a three-step process:

1. Identify the portion of the global lump sum settlement amount that is reasonably attributable to the Plaintiff's loss of future income;

2. Convert the lump sum portion for loss of future income into monthly benefit amounts; and

3. Reduce the future LTD benefit payments in light of the monthly benefit amount.

To identify the proper portion of the lump sum that should be deemed as future earnings, the Court reviewed the Plaintiff's Pre-Trial Settlement Conference Brief. The Brief allocated 52.5% of the Plaintiff's total claim as being a claim for future loss of income. The Defendant argued it was appropriate to allocate this percentage of the settlement for the Plaintiff' future loss of income claim. Meanwhile, the Plaintiff refused to submit a percentage at the Motion. The Court accepted the Defendants' submission and the Plaintiff's LTD benefits were reduced accordingly.

Kang v. Sun Life Assurance Co. of Canada, 2013 ONCA 118

2nd Case

This case involved a proposed class action for Plaintiffs who had purchased four different types of universal life insurance policies sold to class members by Metropolitan Life Insurance Co. (MetLife") between 1983 and 1998.

The Defendant, Sun Life Assurance Company of Canada ("SunLife"), was the successor corporation of MetLife and was sued in that capacity.

SunLife brought a successful Motion to have a number of the Plaintiffs' claims struck, including breach of the duty of good faith and fair dealing, on the basis that the pleadings did not disclose a reasonable cause of action.

On Appeal, the Court held that in order for a claim to be struck, the onus was on the Defendant to show that it "plain and obvious" that the claim could not possibly succeed.

The Court of Appeal held that in dealing with the Plaintiffs' claim for breach of the duty of good faith, the Motion Judge had framed the claim too narrowly. It was clear that the jurisprudence on the duty of good faith and fair dealing as it applies to insurers was not settled in Canada.

As a result, the Court of Appeal held that a claim for breach of the duty of good faith and fair dealing should not be dismissed by Motion. The claim for breach of the duty of good faith and fair dealing was allowed to go forward, to be resolved at trial.

Boyce v. Co-operators General Insurance Co., 2013 CarswellOnt 14166 (Supreme Court of Canada)

3rd Case

This case arose when the insurer refused to pay out the insured for inventory losses resulting from a Halloween act of vandalism. A claim was filed by the insured more than 12 months after the loss to his business. The insurer brought a Motion for summary judgment. In the Motion, the insurer relied upon a term within the insurance contract that barred all claims not filed within one year from the date of loss. The insured claimed that the limitation found within the insurance contract was not relevant as there was a statutory limitation period of two years from the loss that superseded the contractual term, and that this was not a fire loss or some other loss with a 12 month limitation period as set by the Ontario Insurance Act, RSO 1990, c 1.8.

> *The contractual clause between the parties read as follows:*
>
> *Every action or proceeding against the insurer for the recovery 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.*

This case turned on whether an insurance contract between the business owner and the insurer was a "business agreement" as defined in Ontario's Limitation Act, S.O. 2002, c. 24. The Ontario *Limitation Act*, supra, set a two year limitation period for most claims. However, it has special language that permits parties to create shorter limitation periods in 'non-consumer' contracts:

> 22(5) The following exceptions apply only in respect of business agreements:
>
> .A limitation period under this Act, other than one established by section 15, may be varied or excluded by an agreement made on or after October 19, 2006
>
> *…*
>
> *Definitions*
> *(6) In this section,*
> *"business agreement" means an agreement made by parties none of whom is a consumer as defined in the Consumer Protection Act, 2002 …*

The Motions Judge in *Boyce v. Co-operators General Insurance Co*, 2012 ONSC 6381 held that insurance contracts could never be considered true "business contracts" but were rather a special kind of contract assuring "peace of mind". The Ontario Court of Appeal disagreed. In Boyce v. Co-operators General Insurance Co., 2013 ONCA 298, the decision was as follows:

1. So long as the language of the limitation period is explicit (i.e. the contract clearly sets out a time limit in which to bring a claim, as was the case in *Boyce*) an insurer is not obliged to advise the insured within the contract that he is abandoning his statutory right to a longer limitation period; and

2. Insurance contracts are not always *'consumer contracts'* as defined under the Consumer Protection Act ; when the loss is suffered by a business, special limitation periods set by private contract can be enforced against the insured business.

On October 17, 2013, the Supreme Court of Canada in *Boyce v. Co-operators General Insurance Co.*, 2013 CarswellOnt 14166 (SCC) refused leave to appeal the decision from out of Ontario's Court of Appeal and this stands as good law.

NOTE: The Ontario Limitation Act allows for a freedom of contract between insureds and insurers that isn't granted by statute in New Brunswick's Limitation of Actions Act, SNB 2009, c L-8.5. Therefore, the effect of this decision is not directly applicable to contracts of insurance between businesses and insurers in New Brunswick.

Our newsletter is not intended to give legal advice, however, to discuss legal matters or obtain the full text of cases, readers are welcome to contact Foster & Company.