COURT OF APPEAL FOR ONTARIO

BEFORE: FAVREAU J.A.

HEARD: SEPTEMBER 25, 2024

DISPOSITION OF COURT HEARING:

COURT FILE NO.: M55386
(COA-24-CV-0365)

TITLE OF PROCEEDING:
THE PERSONAL INSURANCE COMPANY V. TAGOE, SAMUEL

DATE RELEASED: OCTOBER 1, 2024

Alexander M. Voudouris, M. Steven Rastin and Jessica M. Golosky, for the proposed intervener Ontario Trial Lawyers Association

Patrick M. Baker, for the appellant/responding party The Personal Insurance Company

The Ontario Trial Lawyers Association ("OTLA") brings a motion for leave to intervene as a friend of the court in this appeal. The respondent on the appeal, Samuel Tagoe, consents to the motion. The appellant, The Personal Insurance Company ("The Personal"), opposes the motion.

Mr. Tagoe was involved in a motor vehicle accident on April 28, 2016. He returned to work two days after the accident. He applied to The Personal for accident benefits on May 9, 2016. As part of its response, on May 20, 2016, the Personal provided an Explanation of Benefits advising Mr. Tagoe that he did not qualify for income replacement benefits under the *Statutory Accident Benefits Schedule*, O. Reg. 34/10 ("*SABS*"). Under s. 56 of the *SABS*, an applicant has two years to apply to the Licence Appeal Tribunal ("LAT") in respect of a denial of benefits from the date that an insurer refuses to pay the amount claimed.

In July 2017, Mr. Tagoe stopped working, claiming that he could no longer work due to the injuries he suffered as a result of the 2016 motor vehicle accident. In January 2019, Mr. Tagoe applied to The Personal for income replacement benefits. The Personal denied his claim.

Mr. Tagoe applied to the LAT for dispute resolution in February 2021. The LAT dismissed his application, finding that Mr. Tagoe's challenge to The Personal's denial of benefits was commenced beyond the two-year limitation period set out in s. 56 of the *SABS*. The LAT relied on The Personal's initial denial of income replacement benefits made on May 20, 2016 and determined the s. 56 limitation period had expired on May 20, 2018.[1]

[1] The LAT also denied Mr. Tagoe's request for reconsideration. The original decision and the reconsideration decision were appealed together at the Divisional Court

The Divisional Court overturned the LAT's decision on the basis that the arbitrator should have applied the discoverability principle to determine when Mr. Tagoe's dispute resolution application became statute-barred under s. 56 of the *SABS*, in accordance with this court's decision in *Tomec v. Economical Mutual Insurance Company*, 2019 ONCA 882, 148 O.R. (3d) 438. In *Tomec*, the court had found that the discoverability principle applied to a previous version of the limitation period provision in the *SABS*. The Divisional Court held that Mr. Tagoe only discovered the injuries that would have allowed him to qualify for income replacement benefits in July 2017; the statutory limitation could not have begun to run before then. This court granted leave to appeal from the Divisional Court's decision on the issue of the applicability of the discoverability principle.

On a motion for leave to intervene as a friend of the court, the court considers: a) the nature of the case, b) the issues that arise and c) the likelihood that the applicant can make a useful contribution to the resolution of the appeal without causing prejudice to the parties: *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 29, at para. 8. I am satisfied that OTLA's proposed intervention meets these requirements.

In my view, the nature of this case justifies granting leave to intervene. Generally, the court applies a higher threshold before granting leave to intervene in a dispute between private parties: *Jones v. Tsige* (2011), 106 O.R. (3d) 721 (C.A.), at para. 23. This threshold can be lowered where the proposed appeal raises issues of broader importance: *Jones*, at para. 23. This appeal involves issues in relation to the application of the discoverability principle to the limitation period in s. 56 of the *SABS* that go beyond the interests of the private parties.

While on the motion The Personal suggested that this appeal is about the application of the law to the specific facts in this case, this is inconsistent with The Personal's factum filed for the appeal. In its factum on appeal, The Personal claims that the Divisional Court's application of the discoverability principle in the circumstances of this case was an error "with clear systemic effects on accident benefits claims and disputes". The Personal effectively argues that the Divisional Court made a legal error when it did not follow prior case law of this court to the effect that a claimant can only make one claim for income replacement benefits under the *SABS*, and that the claimant cannot reapply later on the basis that he is now eligible for income replacement benefits. Once an application is denied, the claimant must challenge the decision within the two-year limitation period. In the circumstances, I am satisfied that this case raises issues regarding the application of the discoverability principle that go beyond the interests of the parties to this appeal.

There is no doubt that OTLA can make a useful contribution. OTLA has extensive experience as an intervener in cases involving personal injury and insurance law. In fact, OTLA was an intervener before this court in *Tomec*. Based on its experience, I expect OTLA's submissions will make a useful contribution to the interpretation of s. 56 of the *SABS* and how the discoverability principle is to be applied in practice in the accident benefits context.

Although this appeal is scheduled to be heard on November 8, 2024, I do not expect that granting intervener status to OTLA will cause any delay or prejudice to The Personal. OTLA has already prepared a draft factum, which was provided on this motion and can

readily be served and filed with the court. The Personal will be given an opportunity to file a brief factum in reply to OTLA's factum.

Accordingly, I make the following order:

a. OTLA is granted leave to intervene in this appeal pursuant to rule 13.03(2) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;

b. OTLA shall accept the appeal records filed by the parties and shall not add or seek to add new evidence;

c. OTLA may file a factum not exceeding 10 pages in length (excluding schedules) and a book of authorities, within 7 days of the date of the order granting leave;

d. OTLA may make oral submissions of up to 15 minutes in length, or such time as permitted by the panel of the court hearing the appeal;

e. OTLA's factum and oral submissions shall not duplicate any submissions made by other parties;

f. The appellant may file a reply factum not exceeding 5 pages in length in response to OTLA's factum, by no later than October 17, 2024;

g. OTLA shall not seek costs nor shall costs be awarded against it; and

h. There are no costs on this motion.

C. Fairburn J.A.