

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Preston v. Sun Life Assurance Company of Canada*, 2024 NSSC 234

**Date:** 20241025

**Docket:** 517088

**Registry:** Halifax

**Between:**

Jean Louise Preston

Plaintiff

v.

Sun Life Assurance Company of Canada

Defendant

**Judge:** The Honourable Justice Glen G. McDougall

**Heard:** January 11, 2024, in Halifax, Nova Scotia

**Counsel:** Robert B. Carter, K.C., counsel for the Plaintiff (for this Motion only)  
Shelley A. Wood, counsel for the Defendant

## By the Court:

### Background

[1] The Plaintiff, Jean Louise Preston (the “Plaintiff”), seeks an Order disallowing the defence, based on expiry of a limitation period, as pleaded in the Statement of Defence filed on behalf of Sun Life Assurance Company of Canada (the “Defendant” or “Sun Life”).

[2] The motion is brought under *Civil Procedure Rule 78 – ORDER* – seeking relief pursuant to section 12(3) and section 12(5), of the *Limitation of Actions Act* (or the Statute of Limitations), S.N.S. 2014, c.35 (as amended) (the “LAA” or the “Act”).

### Facts

[3] Sun Life issued a group insurance plan to the Halifax Regional Centre for Education (“HRCE”) as plan sponsor (the “Policy”). The Policy provided both disability insurance and life insurance benefits to HRCE employees.

[4] The Plaintiff worked for HRCE as an Educational Program Assistant and was a member of the plan.

[5] The Policy provided Long Term Disability (“LTD”) coverage, as follows:

Long-Term Disability coverage provides a benefit to you if you are totally disabled. You qualify for this benefit if you provide proof of claim acceptable to Sun Life that:

- became totally disabled while covered, and
- you have been following appropriate treatment for the disability since its onset.

For your Long-Term Disability coverage,

- during the elimination period and the following 24 months (this period is known as the **own occupation period**), you will be considered totally disabled while you are continuously unable due to an illness to do the essential duties of your own occupation, and
- afterwards, you will be considered totally disabled if you are continuously unable due to an illness due to an illness to do any occupation for which you are or may become reasonably qualified by education, training or experience.

[6] The Policy also included a section on limitation periods:

**Legal actions**

Limitation period for Ontario:

Every action or proceeding against an insurer for the recovery of insurance money payable under the contract is absolutely barred unless commenced within the time set out in the *Limitations Act, 2022*.

Limitation period for any other province:

Every action or proceeding against an insurer for the recovery of insurance money payable under the contract is absolutely barred unless commenced within the time set out in the *Insurance Act* or other applicable legislation of the employee's province or territory.

[7] According to the Plaintiff's Affidavit, filed on December 22, 2023, in support of the motion, she states that:

I sustained personal injuries in a slip and fall incident that occurred on December 23, 2016. I had surgery on January 9, 2017. I am advised by Dr. Nathan Urquhart, Orthopedic (sic) Surgeon, and do verily believe that as a result of this fall, I sustained a complex distal radius fracture and right shoulder injury, which ultimately required surgical treatment on January 9, 2017 involving osteotomy, tendon transfer, bone graft and open reduction and internal fixation in the right wrist, carried out by Dr. Urquhart. (Paragraph 6).

[8] At paragraph 8 of the Affidavit, the Plaintiff further states that:

At the time of the injury, I was employed as an Educational Program Assistant ("EPA") with Halifax Regional Centre for Education working with special needs students. I returned to work following the initial wrist fracture injury on September 5, 2018, but I went off work again in November 2018 because of severe emotional difficulties following the death of my husband. I subsequently attempted to return to work, but on January 9, 2020 I had to take a leave of absence from my work because of my severe wrist pain and CRPS condition that had developed in my wrist and arm as a result of the injury. I have been unable to return to my regular or any employment because of this pain condition. My job involved working with children with emotional difficulties and often required physical intervention that I am no longer able to perform safely or effectively.

[9] The Plaintiff submitted a claim for LTD benefits on March 6, 2020, which was denied by Sun Life and confirmed by way of correspondence dated March 24, 2020 (the "Denial Letter").

[10] The Denial Letter included information describing an appeal process should the Plaintiff wish to avail herself of this opportunity. It further pointed to the existence of a limitation period. The Denial Letter reads, in part, as follows:

**Appeal process**

If you have new information or disagree with our decision, we will be happy to review your claim. This review of your claim is called an appeal and we will require copies of all clinical notes, investigation results and consultation reports from your general practitioner for the period from September 3, 2018 to present. As well as a completed copy of your physiotherapy file. Send us a letter within 30 days, to the address at the top of this letter, indicating your intent to appeal and outlining the reason for your concern. If you have new medical records or reports about your concern, please include them with your letter. Please note that you are responsible for the cost of providing new medical information for an appeal.

We encourage you to follow our appeal process before you consider a legal action; however; if you decide to take legal action against Sun Life, you will need to start it within a timeline called the limitation period. The timeline begins with the date of this letter and runs continuously even while a review (appeal) may be underway. Refer to your provincial insurance act or other applicable provincial legislation for information on the limitation period.

[11] The Plaintiff sent correspondence to Sun Life, dated June 24, 2020, which provided notice of her decision to appeal. On July 20, 2020, Sun Life's Disability Case Manager, Patricia A. Gillis, wrote to the Plaintiff advising her that Sun Life had maintained its decision to deny her claim. The letter stated, in part, that:

We have completed a review of the information provided on appeal and although we acknowledge that you may have been experiencing some ongoing symptoms and health concerns, it is noted you were able to return to work full duties and hours as a result of your injury in September 5, 2018. As well medical information on file does not support a severity of symptoms or support a change in your condition, that would have precluded you from performing the essential duties of your own occupation as a part-time educational program assistant as of January 8, 2020.

You may choose to appeal this decision. Please note we would be willing to review new and unreviewed records or reports that you may obtain as part of the appeal process. This can include narrative reports from your physician(s) providing details including your signs and symptoms, treatment, the results of any recent investigations and prognosis and any other information that has not already been provided to date.

Please note, the cost of providing additional medical information for an appeal situation will be your responsibility.

[12] As pointed out in her Affidavit, the Plaintiff acknowledged having received this correspondence and indicated that Sun Life, while denying her claim, had further invited her "...to appeal and to provide additional medical information."

[13] Paragraph 14 of her Affidavit further stated that (unlike the initial Denial Letter): "There is no mention of a limitation period."

[14] The Plaintiff did not respond to this correspondence nor did she provide any "new and unreviewed records or reports" or "any other information that has not already been provided to date."

[15] The Plaintiff's Affidavit sets out the steps she took to seek out further medical intervention to help address the pain and the limitations to her right shoulder and right wrist that she was still experiencing as a result of the slip and fall that occurred back in December 2016.

[16] It was not until February 22, 2022, that the Plaintiff first contacted legal counsel to discuss the situation. On February 24, 2022, she had her "first lawyer/client meeting by phone..." (paragraph 19 of the Plaintiff's Affidavit). On February 28, 2022, the Plaintiff "officially retained" legal counsel to represent her (paragraph 19 of her Affidavit).

[17] According to the Affidavit of Lathia Stubbs (the "Affidavit"), a solicitor with MacGillivray Injury and Insurance Law ("Plaintiff's counsel"), (not counsel on this motion) she, inadvertently, "missed seeing messages from [her] firm's legal data base team requesting advice as to the applicable limitation period..." and she "failed to ensure a limitation period reminder was logged in our system." (paragraph 15 of the Affidavit filed on December 22, 2023).

[18] It was not until August 10, 2022, that Plaintiff's counsel "...received an email from [her] internal firm pleadings team asking about the applicable limitation period,...". (paragraph 15 of the Affidavit).

[19] Plaintiff's counsel goes on to state that "...on reviewing the file materials and the appeal denial letter of July 20, 2020, I realized that the limitation period may have expired on July 19, 2022, or possibly earlier." (paragraph 15 of the Affidavit).

[20] According to paragraph 16 of the Affidavit filed on August 11, 2022, Plaintiff's counsel requested that a Notice of Action be prepared. The Notice of

Action and Statement of Claim were filed on behalf of the Plaintiff on August 15, 2022.

[21] A Notice of Defence and Statement of Claim was filed on behalf of Sun Life on December 6, 2022. At paragraph 8 of the Defence, Sun Life pleads that the Action was filed “...more than two years after the unequivocal denial of LTD benefits on March 24, 2020 and the unequivocal denial of the appeal on July 20, 2020.”

[22] The Defence goes on to state, at paragraph 9, that “Sun Life pleads and relies on the terms of the Policy, the *Limitation of Actions Act*, SNS 2014, c.35, and/or the *Insurance Act*, RSNS 1989, c.231, and states that the Plaintiff’s action is barred for failure to comply with applicable limitation period.”

### **Position of the Plaintiff**

[23] The Plaintiff’s position is clearly stated in the Plaintiff’s Motion Brief filed in support of the motion. Paragraphs 19 to 21 provide the following:

19. The Plaintiff’s position is that the Defendant’s correspondence of March 24, 2020 was not an unequivocal denial of the claim, as it invited and “encouraged” the Plaintiff to appeal before considering legal action, and to provide additional medical evidence of disability. That letter did make mention that if the Plaintiff decided to pursue legal action, it would need to be started within the limitation period, and then failed to advise the Plaintiff what the specific limitation period was, what would occur if the action was not commenced within that time period of did not advise that it would be relying on a limitation period as a defence to the claim if not commenced in time.

20. It is further submitted that the open-ended letter of July 20, 2020, again inviting the Plaintiff to further appeal and to provide additional medical evidence as to her disability, was equivocal and ambiguous, and that the limitation period never commenced to run. No time frame was given in that letter requiring the Plaintiff to appeal within a certain period. No mention of the limitation period was made. No further correspondence was sent by Sun Life finally advising that Ms. Preston’s claim was denied and her file was being closed.

21. In the alternative, it is the Plaintiff’s submissions that if the limitation period commenced to run as submitted by the Defendant, the Plaintiff submits that section 12 of the *Limitation of Actions Act*, SNS 2014, c.35 applies as the Plaintiff’s claim is in respect of a personal injury she sustained to her wrist when it was fractured, and the limitation period defence should be disallowed as the limitation period creates a hardship to the Plaintiff and it would just be to disallow the limitation period defence in the circumstances.

## Position of the Defendant

[24] The Defendant’s position, as reproduced from the Brief filed by its’ counsel, is as follows:

The Plaintiff now moves to disallow Sun Life’s limitations defence under section 12(3) of the *Limitation of Actions Act*. Sun Life respectfully asks this Honourable Court to dismiss the motion, for the following reasons:

First, the limitation period started to run on March 24, 2020 – the date when Sun Life denied the Plaintiff’s claim for LTD benefits. While an insurer has no legal obligation to advise a claimant about limitation periods, Sun Life’s letter explicitly stated that the timeline to bring a legal action began with the date of that letter, and would run continuously even while an appeal was underway.

Sun Life submits that the applicable limitation period was one year, pursuant to section 209 of the *Insurance Act*, meaning it expired on March 24, 2021. Even if the two-year limitation period in section 8(1)(a) of the *Limitation of Actions Act* applied instead, it would have expired on March 24, 2022.

Either way, the Plaintiff was out of time.

Sun Life submits further that section 12 is not available, such that the Court has no discretion to disallow the limitations defence in the circumstances.

Section 12 “applies only to claims brought to recover damages in respect of personal injuries.” The phrase “in respect of personal injuries” is not broad enough to encompass the facts of this case. This is a contractual claim against the Plaintiff’s LTD insurer, not a claim seeking damages for personal injuries allegedly caused by the Defendant.

Furthermore, the Plaintiff’s alleged disability is not something she suffered as a result of a tort or other misconduct committed by a third party. She has not experienced “personal injuries” within the meaning of section 12(3), and section 12 is therefore unavailable.

In the alternative, if the Court finds that it *does* have the discretion to apply section 12, the factors in subsection (5) support maintaining Sun Life’s limitations defence.

## Issues

[25] The issues, for the most part, are agreed upon by the parties.

[26] The framing of the first issue, as advanced by counsel for the Plaintiff, is approached in a somewhat different manner by counsel for the Defendant in her Brief to the Court. I accept her position over that of opposing counsel.

[27] The issues then are as follows:

- (i) What is the applicable limitation period and when did it start to run?
- (ii) Can the Plaintiff rely on section 12 of the LAA to disallow the limitation defence on the basis that her claim for disability benefits is “in respect of personal injuries”?
- (iii) If the Plaintiff is entitled to rely on section 12, is it just that the limitation period defence of the Defendant be disallowed pursuant to section 12(3), based on the relative hardship to the parties, having regard to all the circumstances of the case and, in particular, to these set out in section 12(5) of the *Act*?

**Issue (i): What is the applicable limitation period and when did it start to run?**

[28] A discussion of this issue involves a review of the LAA as well as the *Insurance Act*, RSNS, c.231 (as amended) (the “*Insurance Act*”).

[29] Under the “General Limitation Periods” section of the LAA, section 8 states:

General Rules

- 8(1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of
- (a) two years from the day on which the claim is discovered; and
  - (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
- (2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known
- (a) that the injury loss or damage had occurred;
  - (b) that the injury, loss, or damage was caused by an act or omission;
  - (c) that the act or omission was that of the defendant; and
  - (d) that the injury, loss, or damage is sufficiently serious to warrant a proceeding.
- (3) ...

[30] Section 6 of the LAA also addresses the existence of potential conflicts between the *Act* and any other enactments. It reads:

Conflict with other enactments

6 Where there is a conflict between this *Act* and any other enactment, the other enactment prevails.

[31] The *Insurance Act* defines “disability insurance” in section 3(i) to mean:

...insurance undertaken by an insurer as part of a contract of life insurance where by the insurer undertakes to pay insurance money or to provide other benefits in the event that the person whose life is insured becomes disabled as a result of bodily injury or disease;

[32] The *Insurance Act* further provides, in section 209, a limitation period as follows:

209 (1) Subject to subsection (2), an action or proceeding against an insurer for the recovery of insurance money shall not be commenced more than one year after the furnishing of evidence required by section 206, or more than six years after the happening of the event upon which the insurance money becomes payable, whichever period first expires.

(2) ...

[33] As indicated previously, the Plaintiff submitted a claim for LTD benefits on March 6, 2020. Her claim was denied by Sun Life and confirmed in the Denial Letter dated March 24, 2020.

[34] Although the Denial Letter encouraged the Plaintiff “to follow our appeal process before you consider a legal action”, it clearly and unequivocally alerted her to “a timeline called the limitation period”.

[35] It further indicated that the “timeline begins with the date of this letter and runs continuously even when a review (appeal) may be underway”.

[36] The Denial Letter then goes on to advise the Plaintiff to “Refer to your provincial *Insurance Act* or other applicable provincial legislation for information on the limitation period”.

[37] In the case of *Thornton v. RBC General Insurance Company*, 2014 NSSC 215, Wood, J. (as he then was), adopted the reasoning of the British Columbia Court of Appeal in *Bolzev v. Sun Life Assurance Co. of Canada*, 2003 BCCC 306, in stating, at paragraph 55:

... I would take the approach of the British Columbia Court of Appeal in *Bolzev* and find that the limitation period does not begin to run until there is a clear and unambiguous denial of benefits.

[38] I, too, adopt the reasoning of the British Columbia Court of Appeal and find that the limitation period in this case began no later than March 24, 2020 – the date of the Denial Letter.

[39] The denial of the Plaintiff's claim was clear and unequivocal. So, too, was the message that if the Plaintiff wished to take legal action against the Defendant, she would "...need to start it within a timeline called the limitation period." (See Denial Letter).

[40] The Denial Letter further pointed out that the timeline for the limitation period "... begins with the date of this letter and runs continuously even while a review (appeal) may be underway."

[41] The Denial Letter did not specifically set out the duration of the limitation period but it did alert the Plaintiff to "Refer to your provincial *Insurance Act* or other applicable provincial legislation for information on the limitation period." And, as indicated previously, the *Insurance Act* establishes a one year limitation period in section 209, subsection (1).

[42] In light of section 6 of the LAA, this limitation period prevails. In order to properly advance her claim against the Defendant, the Plaintiff would have had to have commenced her action no later than March 24, 2021 (i.e., one year from the date of the Denial Letter). She only first attempted to consult legal counsel on February 22, 2022 – almost a full eleven months after the expiration of the one year limitation period. Nearly six more months went by before the Notice of Action and Statement of Claim actually got filed. In all, the limitation period was missed by approximately seventeen months.

**Issue (ii): Can the Plaintiff rely on section 12 of the LAA to disallow the limitation defence on the basis that her claim for disability benefits is "in respect of personal injuries"?**

[43] In light of my decision to find the limitation period to be one year, based on the *Insurance Act*, the provision of the LAA that would allow for an extension of a two year limitation period has no application to this situation.

[44] Furthermore, the Plaintiff's cause of action is not based on a claim for damages "in respect of personal injuries." Clearly, her claim is based on an allegation of breach of contract. I agree with counsel for Sun Life that, "as a matter of statutory interpretation; a contract claim against an LTD insurer is simply not the type of claim to which section 12 was intended to apply." (Defendant's counsel's brief, at paragraph 67, on page 18).

[45] I need not address issue (iii) in light of the foregoing. If I had been persuaded that the limitation period is two years instead of one, and, if I had been further persuaded that the provision set out in section 12(2) of the LAA applied, I would have been reluctant to conclude that it would be just to disallow the limitation period defence.

[46] It was incumbent on the Plaintiff to proceed with her claim in a timely manner – she failed to do so. As such, the motion fails. Order, accordingly.

[47] I will leave it to counsel to try to resolve the issue of costs. If they cannot agree, I will receive their further written submission within thirty (30) days of the release of this decision.

McDougall J.