

LIMITATIONS IN MEDICAL NEGLIGENCE ACTIONS

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Introduction: The Courts Have Been Busy

Limitation periods continue to provide much fodder for litigation in Ontario. Due to the short time limits in actions against health professionals and municipalities, most of the principles are enunciated in the context of actions against them. Since writing about this subject two years ago,² the Court of Appeal of Ontario has rendered at least eight decisions dealing with limitation periods and their interpretation. The Supreme Court of Canada has contributed one major decision. The landscape is changed by each case somewhat, creating opportunities for plaintiffs, defendants, and an increased case load at LPIC. Giving advice in this area is fraught with difficulty. It isn't about to get any easier. Draft legislation to change the Limitations Act³ is not an easy read, and has much latitude for interpretation.

This paper updates the cases, setting out the legislation, the delayed discoverability rule and the factors to be considered under that rule, the meaning of incapacity interpreted for the first time by the Court of Appeal, the inter-relationship of delayed discoverability and capacity, some considerations for the beleaguered practitioner and some brief thoughts about the new draft legislation.

The Legislation

The Regulated Health Professions (Code) s. 89 provides as follows:

No person ... is liable to any action arising out of negligence or malpractice... unless the (such) action is commenced within one year after (from) the date when the person commencing the action knew or ought to have known the fact or facts upon which the (person alleges) negligence or malpractice is alleged. (words appearing in parenthesis are the words of the Health Disciplines Act s.17 which applied to actions before January 1, 1994)

These provisions apply to any member of a health profession. They are listed in Schedule 1 to the *Regulated Health Professions Act*⁴.

¹ The assistance of Ryan St. Aubin in the preparation of this paper is gratefully recognized.

² This paper updates one published as Medical Negligence Limitations Post-Peixeiro (1998) 20 Advocates' Quarterly 326

³ R.S.O. 1990, c.L.15

⁴ S.O. 1991, c.18 as amended

Section 31 of the *Public Hospitals Act*, R.S.O. 1990, c. P.40 prescribes a two year limitation period. When the two years begins to run is defined by the Act as follows:

Any action against a hospital or any nurse or person employed therein for damages for injury caused by negligence in the admission, care, treatment or discharge of a patient shall be brought within two years after the patient is discharged from or ceases to receive treatment at the hospital and not afterwards.

There is a potentially significant distinction between the two provisions. The delayed discoverability rule is essentially codified into the limitation period applicable to health professionals. In the case of hospitals and its employees, the period appears to begin to run from a fixed event and therefore a fixed date. How this will be interpreted in light of the rules being developed by the Court of Appeal remains to be seen.

Incapacity Under the Limitations Act

Section 47 of the Limitations Act applies to actions based on medical negligence.

Section 47 of the Limitations Act of Ontario provides as follows:

47. Where a person entitled to bring an action mentioned in section 45 or 46 is at the time the cause of action accrues a minor, **mental defective, mental incompetent or of unsound mind**, the period within which the action may be brought shall be reckoned from the date when such person became of full age or of **sound mind**. (emphasis added)

This section has been held to apply to notice provisions under the Municipal Act⁵, and to all limitation periods unless the enabling legislation otherwise provides.⁶ The history, although interesting, is not repeated here, as the matter is now considered settled.

Recently, the Ontario Court of Appeal had its first opportunity to directly consider the meaning of the words highlighted above in the case of *Bisoukis v. The Corporation of the City of Brampton et al*⁷ and *Novak v. Bond*.⁸

⁵ *infra*, note 7 at 34, citing *Murphy v Welsh* [1993], 2S.C.R. 1069

⁶ *ibid* para 39

⁷ (1999), 180 D.L.R. (4th) 577, leave to appeal to the Supreme Court of Canada refused, August 17, 2000.

⁸ [1999] 1 S.C.R. 808, [1999] S.C.J. No. 26, (1999) 172 D.L.R. (4th) 385 (SCC)

The Ontario Court of Appeal adopted a test which developed out of an appeal from British Columbia in *Novak*, a medical negligence action. The two-year medical negligence limitation in British Columbia may be extended:

s. 6(4)(b) allowed for the postponement of the running of the limitation period until a properly advised reasonable person would consider that the plaintiff "ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action"⁹.

When evaluating the facts of each case, the apparent additional latitude of the BC statute should be considered. As will be seen, however, it does not abrogate from the general principle adopted by the Ontario Court of Appeal. Due to limitations of space, the entirety of the Limitations Act applicable in *Novak* are not reproduced, but ought to be reviewed to understand the broad interpretation given by the Ontario Court of Appeal to apparently much less expansive legislation.

In *Bisoukis*, the Court of Appeal confirmed the modern approach to interpretation of the Ontario statute, notwithstanding the Act has remained essentially untouched for 90 years:

It is sufficient to extract the approach which, in my view, should guide the court in the interpretation of s. 47 of the Ontario Act, which I take to be as follows:

§ The cardinal principle of statutory interpretation is that a legislative provision should be construed in a way that best furthers its objects.

§ A provision extending a limitation period should be interpreted in a way that best furthers its goals.

§ *Although the traditional interpretation of limitation statutes has reflected the interests of potential defendants, modern interpretation has become more balanced, to take into account the plaintiff's interests, by favouring a more contextual view of the parties' actual circumstances.*

§ Thus, the contemporary approach is that when construing a limitation statute *the plaintiff's concerns must be considered together with the defendant's need to be protected from stale claims brought by dilatory plaintiffs.*

(emphasis added)

⁹ *Novak*, *supra* note 8, summary from headnote.

The conclusion, in Ontario, is that the provisions of s. 47 will apply whenever there is a limitation period under consideration, unless it expresses the contrary intention. Further, when interpreting a statute, the modern approach, which seeks to balance interests and to read the legislation in context, must be followed. What is perhaps most salient in the analysis however, is the assertion by the Ontario Court of Appeal that one must consider and account for **“the plaintiff’s interest, by favouring a more contextual view of the parties’ actual circumstances”**.

The facts in Novak:¹⁰

The defendant allegedly misdiagnosed a lump on the plaintiff's breast as a benign condition from October 1989 until October 1990. A specialist then diagnosed breast cancer, performed a partial radical mastectomy, and discovered that the cancer had spread to most of the plaintiff's lymph nodes. After recovering from a year of illness and debilitating cancer treatment, the plaintiff considered suing the defendant and discussed the matter with her parish priest. She decided not to sue at the time, preferring to concentrate on maintaining her health and a positive belief that she had been cured. On discovery, she stated that “well I'm well, I have to believe that I'm well, I have to believe that I've been cured, if I go for litigation it brings back all the horrible memories and I won't at this point, we'll wait to see for a few years what's going to happen down the road.” There were no signs of cancer between April 1991 and May 1995. At that time it spread to the spine, liver and lung. The action was started on April 9, 1996. The action was brought not for the first diagnosis of cancer, *but for the recurrence caused by the alleged late diagnosis of cancer.*

The minority held that this set of facts led one to conclude that Mrs. Novak was reasonable in delaying the commencement of the action, but that did not support a finding that the commencement of the action could be delayed. The majority, per McLachin J. found that these facts led to a delay in the commencement of the Limitation Period.

The Analysis in Novak

McLachlin J., for the majority states the principal to be followed this way:

I conclude that delay beyond the prescribed limitation period is only justifiable if the individual plaintiff's interests and circumstances are so pressing that a reasonable person would conclude that, in light of them, the plaintiff could not reasonably bring an action at the time his or her bare legal rights crystallized. The task in every case is to determine the point at

¹⁰ The facts are set out in paragraphs 42-47 of the judgement of the majority.

which the plaintiff reasonably could bring an action, taking into account his or her own interests and circumstances.¹¹

The policy reasons behind the decision are outlined by the Court as follows:

Practically speaking, the reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling. For example, a plaintiff may not reasonably be able to bring an action when, viewed objectively but with regard to the plaintiff's own situation, the costs and strain of litigation would be overwhelming to him or her, the possible damages recoverable would be minimal or speculative at best, or other personal circumstances combine to make it unfeasible to initiate an action. Litigation is never a process to be embarked upon casually and sometimes a plaintiff's individual circumstances and interests may mean that he or she cannot reasonably bring an action at the time it first materializes. This approach makes good policy sense. To force a plaintiff to sue without having regard to his or her own circumstances may be unfair to the plaintiff and may also disserve the defendant by forcing him or her to meet an action pressed into court prematurely: see generally B. Legate, "Limitation Periods in Medical Negligence Actions Post-Peixeiro" (1998), 20 *Advocates' Q.* 326, at p. 334.¹²

The principle enunciated by the Court clearly depends on an acceptance of the reasonableness of the Plaintiff's decision. Quaere whether the decision was influenced by the fact that the action was brought for the recurrence of the cancer. The plaintiff's decision to proceed apparently related to the fact that the cancer was not cured, but returned, making an action much more feasible from a damages point of view. It should also be noted that the action was not decided on the basis of incapacity *per se*, and although the Ontario Court of Appeal adopts the reasoning of the Supreme Court in *Novak*, it cannot be said that the same disposition would have resulted in Ontario if the facts in *Novak* were to be presented for consideration.

The facts in Bisoukis

The action came before the Ontario Court of Appeal following a trial, in which the City of Brampton was found 70% responsible for Mrs. Bisoukis' injuries. The three-month limitation period under the Municipal Act applied. The Court, per Borins J.A., extensively reviewed the facts. The plaintiff was a hard-working woman before the crash, with extensive accomplishments. She was the major

¹¹ *Supra* note 8 at para 91

¹² *Supra* note 8 at para 85

support for her family, and appeared to work tirelessly and endlessly for their benefit. On March 18, 1993, while driving she lost control on black ice, and suffered from a compound fracture of her right distal ulna, lacerated forearm and soft tissue injuries. Her fracture was plated and the laceration required plastic surgery. In all she spent 23 days in hospital. She was observed to exhibit signs of depression while there, but no psychiatric consultation was undertaken. She was followed by her family doctor who provided supportive therapy since he viewed her as extremely agitated and depressed. The statement of claim was issued on September 23, 1993, some 6 months after the crash. Not until May of 1994 was a referral to a psychiatrist completed.

The psychiatric evidence is startling, when one considers its use to avoid the running of a limitation period.¹³ Although the plaintiff did not return to work, she continued to be the family's resource for *guidance, advice and support*. When asked about her ability to instruct counsel, the evidence the Court emphasized was that given about her ability to make decisions about treatment: "...she dithers, and has enormous difficulty feeling worthy of making the treatment decisions. She feels that she is worthless, and that no one should care for her..." It was noted that she could seek help, follow instructions, but had trouble initiating the "expression of her choices". She felt that asking for help was to impose on another. "Her depression has prevented her from expressing her wishes, especially about receiving help. ... it probably interfered with her ability to direct counsel to act on her behalf. .. **there is no evidence of inability to appreciate the options and consequences, and there is no evidence of psychotic thought... her depression probably, in my opinion, amounts functionally to mental incompetence in her ability to direct counsel.**"(emphasis added) She was able to make many decisions, but not those that required her to initiate some kind of activity for herself. Her husband took photos of the scene the day following the collision, but his evidence is considered of little interest to the court since his claim is derivative¹⁴. She was able to consent to surgery, inquired of her business and family while in hospital and on her own, attended a hectic regimen of medical appointments.

The Analysis in Bisoukis

Borins J.A. stated that the court must determine not just if the plaintiff was a mental defective (the trial judge's approach) , but whether or not she was mentally incompetent or of unsound mind. For the first time, the court recognized that these words must mean something distinct, and are not merely the repetition of the same concept.¹⁵ He considered her to be of unsound mind.¹⁶

¹³ *Supra* note 7, see generally paras 5- 27 (CA)

¹⁴ *Supra* note 7 at para 23 (CA)

¹⁵ *Supra* note 7 at para 39

¹⁶ *Supra* note 7 at para 32

In reaching that decision, the Court relied on *Kirby v. Leather*,¹⁷ the only authority to consider the meaning of unsound mind. Lord Denning, M. R. relates the meaning of the words to the subject matter with which the statute is dealing. He states:

So here it seems to me in this statute a person is “of unsound mind” when he is, by reason of mental illness, incapable of managing his affairs in relation to the accident as a reasonable man would do.¹⁸

This quote, and its approval by the Court of Appeal of Ontario¹⁹, is significant in two respects. First, it injects the concept of the reasonable man, one the SCC in *Novak* considered central to the analysis, thus paving the way for the interpretation of the Ontario Limitation Act using *Novak* as a guide. Second, and important to Plaintiffs struggling with difficult concepts such as thresholds, limited pecuniary loss, protected and unprotected defendants, engineering evidence and complicated medical concepts, *the competence of the individual must be viewed in relationship to the task at hand*. The more complicated the task, the higher the level of competence or “soundness of mind” required to manage one’s affairs. Borins J.A. rejected the trial judge’s finding, because it relied too much on her ability to deal with routine matters. While accepting that had some evidentiary value, it was *not determinative of her capacity to manage her affairs in relation to the accident*. “*The trial judge erred in equating the two*”.²⁰ The Court states further that the trial judge did not appreciate what is involved in bringing an action:

The act of bringing an action requires that a person make several informed decisions arising out of a complex of facts which form the basis for a potential cause of action. Such facts would include the existence of a duty owed to the person by the prospective defendant and a breach of that duty causing injury, damage or loss. For a person’s decision to commence an action to be informed, he or she will require the advice of competent persons, such as lawyers, doctors and accountants. As well, a decision to commence a lawsuit must be informed by a competent legal assessment of its chances of success and the range of recoverable damages, and whether these factors justify the expenditure involved, including the cost to the plaintiff if the action should fail. None of these factors was considered by the trial judge. Yet they underscore why it

¹⁷ [1965] 2 Q.B.367 (C.A.)

¹⁸ *Supra* note 17 at 383-4

¹⁹ *Supra* note 7 at para 44

²⁰ *Supra* note 7 at para 48

would be unfair to force a person under a disability to bring an action when prevented by her disability of managing her legal affairs.²¹

The Court of Appeal, using this analysis, finds Mrs. Bisoukis of unsound mind “because she was, on that day, by reason of mental illness, *incapable of managing her affairs in relation to the accident as a reasonable person would do*, a condition which was continuing when she commenced her claim against the City. Accordingly, her claim was not barred by s. 284(2) of the Municipal Act.”(emphasis added)²²

A comparison of the analysis in Novak and Bisoukis.

In Ontario, one must be *incapable* of managing one’s affairs in relation to the accident. In B.C., following *Novak*, the test is: when could a plaintiff reasonably bring an action, taking into account her circumstances and interests.

In both, the conclusion is reached based on an analysis of the particular statute, and the interpretive guide set out at the beginning of this article. The goal achieved in each was balancing of the plaintiff’s interests with those of the defendant, and to view those interests in light of the objective of the provision granting relief from the expiry of the limitation period.

In the medical negligence arena, the complicated nature of the litigation will no doubt be used by plaintiffs who will seek to delay the commencement of the limitation period. The long line of authorities used in defending medical negligence actions from being tried by juries due to their complexity, will be available to a plaintiff wishing to demonstrate incapacity, *in relation to the incident*.

The Application and Refinement of Bisoukis and Novak in Ontario: Smyth²³ and Bannon²⁴

In *Bannon*, the “limitation period within a limitation period” imposed by the Municipal Act was under consideration. Ms. Bannon slipped and fell on ice, fracturing her right leg. The fall occurred on December 29, 1995. Notice was served on the city on January 16, 1996. The plaintiff had to show she was “unsound” until January 10, 1996, to avoid the “draconian” effect of the notice provision. Once again, the applicability of s. 47 to the provisions of the Municipal Act were confirmed. Her action was dismissed.²⁵

²¹ *Supra* note 7 at para 49

²² *Supra* note 7 at para 47

²³ *Infra* note 66.

²⁴ *Bannon v. Thunder Bay (City)*, [2000] O.R. (3d) 1

²⁵ *Supra* note 24, the facts are set out starting at paragraph 37

The sad outcome of this case relates to the absence of evidence available for the entire time following the fall up to January 10th. Justice Doherty notes that s. 47 declares that the limitation date shall be reckoned from the date on which the person becomes of sound mind. This requires the plaintiff to adduce evidence of incapacity continuously from the date of the incident to the operative date, in this case January 10th.

Ms Bannon was on morphine and then Percocet until January 8th. Her medication was then changed to Leritine, a pain analgesic which was less potent than Percocet, but more than Tylenol 3. The medical witness called at trial had no independent recollection of the plaintiff's condition or capacity to instruct counsel. He did however give evidence that it was improbable, during the first 5-7 days following a femur fracture, that a person would be able to instruct counsel, due entirely to the pain they are in. What is frustrating when one reads this case, and apparently the same frustration was felt by the Court of Appeal, is that there appears to be no evidence of her condition *following the first seven days*. There is unclear evidence from a family member, and the plaintiff, about her condition and ability to appreciate what was being said to her about suing the City. Evidence was called about the effect of the drugs taken, and a nurse was called to offer evidence about her apparent level of consciousness, by the defendant. What is significant here, is the Court of Appeal seems to emphasize the absence of a finding that she was delirious, or that her neurological state was impaired.

In *Bisoukis*, there was a specific finding of fact that the plaintiff suffered from a mental condition – depression. No such diagnosis was made by anyone at any time relating to Ms Bannon. This appears to be the reason for the exploration of the Plaintiff's mental state. It should not be interpreted as a requirement for a state as significant as delirium to exist. Rather, in this case, the evidence of incapacity arose from pain, and drugs, the effect of which was potentially delirium.

Applying *Bisoukis*, Doherty J. A. set out this test for incapacity:²⁶

I would hold that a person is capable of managing his or her affairs as a reasonable person would if that person is:

1. capable of considering whether steps should be taken to protect any claim he or she might have arising out of the accident;
2. capable of making, or directing others to make, the appropriate inquiries to determine what steps, if any, should be taken to protect those interests;
3. capable of understanding any advice that might be received as a result of those inquiries; and
4. capable of effectively directing that procedural steps required by the Act be taken following receipt of that advice.

²⁶ *Supra* note 24 at para 35

This is an attractive step-by-step analysis of what is required of a person who is facing the prospect of litigation, and instructing counsel. However, if one is tempted to use it as a checklist, the qualitative component of the enquiry required by Borins J. A. may be lost. Reflecting on Ms Bisoukis' situation, would her action have failed using this checklist? Missing from the list is the real meat of the enquiry: what does being "capable" mean?

Mr. Justice Doherty offers this as his analysis:

The standard set by s. 47 for establishing that a person is of "unsound mind" is a high one. A plaintiff must demonstrate incapacity. A debilitating condition short of incapacity cannot be relied on even though it makes compliance with a notice requirement or a limitation period more difficult. Nor can s. 47 be approached by asking whether the plaintiff, given his or her condition, could reasonably have been expected to give notice within the required time. While it might be eminently reasonable to conclude that an injured plaintiff was preoccupied with matters other than serving notice to the City within seven days of an accident, that preoccupation cannot be equated with incapacity for the purposes of s. 47 of the Limitations Act.

This passage causes some difficulty in interpretation. How can one be debilitated but still have capacity? Pre-occupation with health matters alone may not qualify as incapacity, but can the same be said of a person who is debilitated by health matters? Recall the essence of the test in *Bisoukis*: one must be *incapable* of managing one's affairs in relation to the accident. With respect to Mr. Justice Doherty, the decision fails to take into account the analysis undertaken by Mr. Justice Borins of the meaning of "sound mind", (Doherty J. A. was a member of the panel in *Bisoukis*) and the importance of the context of the capacity. In *Bisoukis*, the court goes to great lengths to emphasize the complexity of the litigation process, and the high level of competence required of a litigant. Those statements are at odds with the passage set out above, and do not take full account of this principle, which is central to the court's decision. There is a great difference between being "debilitated" and "preoccupied". While it is easily understood that pre-occupation may not permit the delay of the commencement of a limitation period, it is not so clear, given the law as set out in *Bisoukis*, why debilitation is not.

In the same passage, Mr. Justice Doherty adds the following observation, one that sounds very similar to the minority in *Novak*:²⁷

²⁷ The minority judgement, written by Mr. Justice Lamer, agreed with the majority as to the test, but not its application. The plaintiff acted reasonably in delaying the commencement of the action. However, the first time it was reasonable for her to commence the action was in 1991, and there was no evidence it was unreasonable for her to do so at that point.

Finally, one must also distinguish between incapacity and a simple failure to address one's mind to the steps, if any, which should be taken to protect one's legal interests after an accident. Again, it is understandable that an injured person would be primarily concerned with his or her immediate well-being in the days following an accident and not with commencing legal action. Although understandable, a failure to advert to the need to take steps to preserve one's rights does not constitute incapacity.²⁸

This passage is a warning to plaintiffs as to the limitations of the principle enunciated. In each case, it may really be a question of degree. Where a plaintiff legitimately cannot deal with legal matters following an injury, the Court will have to weigh the extent of the injury, mental condition and complexity of the decision faced.

Perhaps that explains the return to a less strict interpretation in the *Smyth*²⁹ case. At this juncture, a review of the sequence of release of these decisions is in order.

Novak was released in May of 1999, followed by *Bisoukis* in December of 1999, *Bannon* in April of 2000, and on August 17, 2000, leave to appeal in *Bisoukis* was denied, and on the same day *Smyth* was released. To the extent the *Bannon* case abrogates the principles outlined in the other three cases, it is of less force, due to the timing of the release of these various decisions and their import. Or, falling on ice and suffering a fracture is just a very straightforward lawsuit, especially when compared to the facts in *Novak and Smyth*, medical negligence actions requiring expert opinion. So too does an action against a Municipality relating to ice on the roadway.

Delayed Discoverability – What does a Plaintiff Have to Know?

The Origin of the Rule

The origin of the discoverability rule is found in a judgement of the English Court of Appeal in *Sparham-Souter v. Town & Country Developments (Essex) Ltd.*³⁰, per Lord Denning, M.R., citing *Cartledge v. E. Jopling & Sons Ltd.*³¹:

It appears to me unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury

²⁸ *Supra* note 24 at para 34

²⁹ See the discussion, *infra*, under the heading Delayed Discoverability Meets Incapacity

³⁰ [1976] Q.B. 858 at p. 868

³¹ [1963] A.C. 758 (H.L.) (at 772)

and, therefore, before it is possible to raise any action... a cause of action ought not to be held to accrue until either the injured person **has discovered the injury** or **it would be possible for him to discover it if he took such steps as were reasonable** in the circumstances. (emphasis added)

In *Cartledge*, the limitation period started when the cause of action "accrued". The House of Lords in that case acknowledged the harshness or injustice of the rule that a cause of action for negligence may arise for the purposes of the statute of limitations before the injured party has discovered or could have discovered the negligence. They held that the rule could only be changed by legislation.

The House of Lords again rejected the delayed discoverability rule in *Pirelli General Cable Works Ltd. v. Oscar Faber & Partners*³². It held that issues such as discoverability should be left to the legislature.

However, the Supreme Court of Canada in *Kamloops (City) v. Nielsen*,³³ rejected the *Pirelli* approach and adopted the reasoning in *Sparham-Souter*.

In *Kamloops*, the Court dealt with a one-year limitation period against the municipality in the *Municipal Act* which provided that such an action must be brought within one year "after the cause of such action shall have arisen". The notice provision in the *Municipal Act* provided that notice of the damage must be given to the municipality within two months "from and after the date on which such damage was sustained". Counsel for the municipality conceded that time began to run under both sections from the date the plaintiff actually discovered the damage or ought to have discovered it by the exercise of reasonable diligence. The issue became when he should have discovered it.

In *Consumers Glass Co. v. Foundation Co. of Canada*³⁴, the Ontario Court of Appeal held that the "cause of action arose" against a contractor when the plaintiff had sufficient knowledge to institute the proceeding. Similarly, this principle was applied with regard to the same limitation language in an action against a solicitor for negligence in *Central Canada Co. v. Refuse*³⁵. The Supreme Court, per Le Dain J. at p.535, held that the judgement of the majority in *Kamloops*:

... laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence....There is no principled reason, in my

³² [1983] 1 All E.R. 65

³³ [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641

³⁴ (1985), 51 O.R. (2d) 385

³⁵ (1986), 31 D.L.R. (4th) 463 (S.C.C.)

opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence...

The issue was revisited by the Supreme Court of Canada in *M(K) v. M.(H)*³⁶. The plaintiff in that case brought an action against her father for damages for incest shortly after beginning therapy. The relevant limitations statute imposed a period of four years from the date the cause of action in assault and battery arose. The majority of the Supreme Court, in a decision written by La Forest J. (starting at p. 312), held that because the victim of incest is typically psychologically incapable of recognising that a cause of action exists until long after the abuse has ceased, the limitation period for incest does not begin to run until the victim is reasonably capable of discovering the wrongful nature of the perpetrator's acts and their nexus to her injuries. A hypothetical reasonable person in the position of the plaintiff could not, and the plaintiff did not, discover the wrongful nature of the defendants' acts and her injuries until she entered therapy.

In reaching its decision that the application of the discoverability principle was not precluded in a personal injury action, the Court also applied the three rationales of limitation statutes (at 301):

There are three, and they may be described as certainty, evidentiary, and diligence rationales...

Statutes of limitation have long been said to be statutes of repose....The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations....

The second rationale is evidentiary and concerns the desire to foreclose claims based upon stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim....

Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely matter.

In summary, the delayed discoverability rule provides that the proscription period will not begin to run until the plaintiff has knowledge of the material facts upon which the cause of action is based.

Knowledge of the Conditions Precedent to Action: Peixeiro v. Haberman³⁷

The significance of *Peixeiro* lies in the historical treatment of the two-year limitation period contained in the *Highway Traffic Act*³⁸. It was treated as

³⁶ (1992), 96 D.L.R. (4th) 289 (S.C.C.)

³⁷ (1995) 127 D.L.R. (4TH) 475, 25 O.R. (3d) 1, 42 C.P.C. (3d) 37 (C.A.), aff'd 151 D.L.R. (4TH) 429., [1997] 3S.C.R. 549, 12 C.P.C. (4TH) 255

immutable, fixed and a complete bar to any action commenced two years after the date of the collision. Section 206 (1) of the Act provides:

...no proceeding shall be brought against a person for the recovery of damages occasioned by a motor vehicle after the expiration of two years from the time when the damages were sustained.

Mr. Peixeiro was injured at a time when the *Insurance Act* of Ontario required, *inter alia*, an impairment caused by an injury to be both *serious and permanent*. The Court of Appeal described the material facts as follows:

He was injured in a motor vehicle accident in October 1990. He was diagnosed to have suffered soft tissue damage to his lower back. This injury was not considered permanent; it was to have healed with time. In June of 1993, the appellant learned that he had disc herniation requiring surgical treatment and that the injury may be serious and permanent. He then commenced this action.³⁹

Mr. Justice Major wrote for the seven-member panel at the Supreme Court of Canada. To appreciate the significance of the decision, it is important to note that it was conceded that *ignorance or mistake as to the extent of damages does not delay time under a limitation period. The exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent of damage nor the type of damage need to be known.*

With this conceded, it would appear difficult for the plaintiff to make the case that the commencement of the limitation period ought to be extended. Is he not alleging that he did not know the extent or type of damage done until after the two-year period, but clearly knew he had some damage? It is here that the subtlety of the decision, and its potential application in cases where prognosis is not clear, is exposed.

Major J. begins his analysis by concluding the discoverability rule applies. He confirms:

Whatever interest a defendant may have in the universal application of a limitation period must be balanced against the concerns of fairness to the plaintiff who *was unaware that his injuries met the conditions precedent* to commencing an action. Since this Court's decisions in *Kamloops... and Central Trust...discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it.*⁴⁰

³⁸ R.S.O. 1990, c.H.8

³⁹ *Supra* note 37 at 477.

⁴⁰ *Supra* note 37 at 480.

From these passages, it is noted that the rule is one applicable to all limitation statutes. Secondly, the rule is expressed in terms of having knowledge of the conditions precedent to the action, not merely the fact that damages have occurred. The Court quite properly refocuses the inquiry onto *all* components of the cause of action, not merely the knowledge of the existence or not of damage.

The Appellant-defendant in the action sought to rely upon this passage from *Fehr v. Jacob*⁴¹:

When time runs from “the accrual of the cause of action” or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party’s knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

It was argued that a limitation period that begins from the date the “damages were sustained” is unlike the “accrual” periods and is a fixed date, which will not be subject to the discoverability rule. The Court rejected this argument stating that the legislature did not intend the starting point of the limitation period should take place without regard to the injured party’s knowledge. The Court noted it has applied the discoverability rule “even to statutes of limitation in which plain construction of the language used would appear to exclude the operation of the rule.” The court held that there was no principled reason to suggest that the delayed discoverability rule should not apply to personal injury actions.

Knowledge of the Identity of the Tortfeasor and his/her Act or Omission

As a starting point it must be accepted that there must be a wrong-doer and that person must fail to achieve a standard of care. Those are constituent components of any negligence action, and as such the delayed discoverability rule will apply to them.

The plaintiff must have knowledge of the identity of the defendant before the limitation period will begin to run. What if the plaintiff is aware of the fact of her damages, and knows that she was the victim of medical negligence but is not certain who from among the list of potential defendants is at fault? She has two options: try the shot-gun approach or determine who is the target defendant and sue that party. If she sues everyone she may risk significant costs orders at the point non-culpable defendants are let out. Less likely but still potentially troublesome, are motions for dismissal. If she waits until she has enough information to determine who was at fault she runs the risk of missing the

⁴¹ (1993) 14 C.C.L.T. (2d) (Man. C.A.) at p. 206

limitation period. Does mere knowledge that the defendant is in a group of potential defendants start the period running?

Whether the plaintiff has to sue all potential defendants regardless of knowledge of the act or omission, was answered in *Aguonie v. Galion Solid Waste Material Inc.*⁴²

The facts are as follows: the deceased was an employee of the defendant. He was killed on October 4, 1993 while carrying out repairs to a water tank truck when the tank suddenly lowered and crushed him. Counsel were retained on February 2, 1994. An action was commenced against the employer and others on March 30, 1994, but not against the manufacturer. A report commissioned by counsel and delivered to him on January 27, 1995 concluded there was negligence against the manufacturer. The plaintiffs' counsel concluded the action against the manufacturer had a six-year limitation period based on products liability and through inadvertence overlooked the F.L.A. claim. The plaintiffs had to bring their action under the Family Law Act within two years of the "time the cause of action arose." The action was started two years, two months and eleven days after the date of death. The defendants moved to dismiss the action under Rule 20. The motions court judge agreed and the plaintiffs appealed.

On the applicability of the delayed discoverability rule, Borins J. stated emphatically that:

Since the decision of the Supreme Court of Canada in *Peixeiro, supra*, it is clear that the discoverability rule applies to all cases in which a limitation period applies. It is a rule of general application.⁴³

The Court went on to state that there is no principled reason to hold that the rule should not apply to the Family Law Act. In this case, the court held that the *identity* of the tortfeasor is a fact which is caught by the rule.

The discovery of a tortfeasor involves more than the identity of one who may be liable. **It involves the discovery of his or her acts, or omissions, which constitute liability.**⁴⁴ (emphasis added)

Borins J. emphasized that *each component* of the cause of action must be known.⁴⁵

⁴² (1998), 38 O.R. (3d) 161

⁴³ *Supra* note 42 at page 12 para 21-but see the discussion which follows under the heading: When will Delayed Discoverability not apply to a statute?

⁴⁴ *Supra* note 42 at page 14 para 24

⁴⁵ *Supra* note 42 at page 15 para 24

It is not enough to have a list of names of potential defendants taken from a hospital record. In order to bring the action, the act of negligence alleged, attached to a specific defendant, must be within the knowledge of the plaintiff. In *Aguonie*, the motions court judge held against the Plaintiff, stating that the identity of the manufacturer was known or could have been known with reasonable diligence. Further, the fact that there could have been some negligence on the part of the manufacturer could have been readily concluded. Borins J.'s rejection of this conclusion clarifies for counsel that a guessing game is not necessary, nor is the scatter-gun approach to litigation. The merely-protective practice of suing everyone to ensure the correct defendant is caught within the net, should no longer be necessary.

As a practical matter, the Plaintiff may have to sue all defendants to learn enough about what happened to her to get to the point of identifying the target defendant.

A second issue arises when the plaintiff learns, after the expiry of the limitation period, the identity of a defendant through the discovery process, the receipt of clinical notes and records, or the receipt of an opinion alleging a breach that had not previously been contemplated. If the information obtained from the defendants involved in the action leads the plaintiff to the new party, the limitation period will not begin to run until the time the plaintiff obtains that information.⁴⁶

Tying a breach of the standard of care to a target defendant was dealt with in *Urquhart v. Allen Estate*⁴⁷. The Plaintiff suffered from breast cancer that was undiagnosed. She retained counsel who sued two doctors but not the radiologist. In the course of investigation, a medical opinion was received on June 19, 1995, it was learned that a mammogram read by Dr. Stewart in March of 1991 had not been interpreted properly. Defence counsel argued before the motions judge and later before the Court of Appeal, that the plaintiff had the clinical notes and records, the mammogram results, the name of the doctor, in fact everything she needed to commence an action. All of the facts and information required to found the action were known to her.

The motions judge agreed. The Court of Appeal did not. In allowing the appeal the Court stated:

In our view, he erred in that conclusion. In Soper v. Southcott (1998), 39 O.R. (3d) 737 (C.A.), this court held, at p.744:

In some cases, a medical opinion will be necessary to know whether to institute an action. In other cases, it will be possible to

⁴⁶ See, for example, *Law v. Kingston General Hospital et al* (1983) 42 O.R. (2d) 476 (H.C.J.) where production of records at discovery disclosed new defendants who were added after the one-year period. On appeal from the Master to Justice Griffiths.

⁴⁷ [1999] O.J. No. 2985.

know material facts without a medical opinion, and the medical opinion itself will simply be required as evidence in the litigation. In the latter instances, the time of receipt of the medical opinion is immaterial to the commencement of the running of the limitation period.

In our view, this case falls within the first category. Clearly, a medical opinion was necessary in order to know that there may have been negligence by a radiologist in respect of the mammograms.

The medical records, including the 1991 mammogram report, did not contain all the facts necessary to found a claim in negligence. In addition to the facts already in the knowledge of the appellant, it was also necessary for the appellant to find out that Dr. Stewart had made an error in her interpretation of the March 1, 1991 mammogram. The appellant was in no position to recognize that she had a cause of action against Dr. Stewart on the basis of the mammogram report and other medical records alone.⁴⁸

The conclusion is that both the identity of the tortfeasor and his or her wrong must be within the knowledge of the plaintiff. Whether the bare facts or an opinion will be required by the plaintiff to find the plaintiff has that knowledge is a fact-specific enquiry. It will be a subjective evaluation by the judge hearing the facts. As a consequence, as a practical matter, I return to the view that the safe route is to sue everyone, and to use the date of the receipt of the clinical notes and records as the effective last date for calculation of the limitation period.

Knowledge of Damage and Causation

Lack of knowledge of the extent of damage is not sufficient to delay the commencement of the limitation period. The Supreme Court of Canada has re-framed and clarified the rule in *Peixeiro* by confirming its applicability to conditions precedent to an action being successful. Each element of the cause of action must therefore be known to the plaintiff or with reasonable diligence known to her. Fault, causation and damage are each elements of the cause of action.

This raises an interesting issue in many cases. Although it may be clear that there is a breach of the standard of care, the impact on the prognosis of the plaintiff must be proven in many cases. Depending on the case, it will be expressed as either a causation or damages issue. Take for example a failure to diagnose cancer case. The plaintiff knows he has it, knows the first doctor

⁴⁸ *Supra* note 42 at paras 4-6

missed it, but often does not know for years (following surgery this period is often thought of as being five years) if his prognosis has been affected by the delay in diagnosis. Does he start an expensive lawsuit, not knowing if he will ultimately have provable damages? Can he prove causation before his prognosis is clear? From the perspective of a plaintiff who is not working due to his health, it is a very difficult decision to make. From the perspective of the physician, why be involved in an action that may lead to nothing? All parties are better served by waiting, despite the passage of time and failing memories.

To be consistent with the rule, if the prognosis is part of the proof of damages or causation, then the limitation should not commence until it is known. I note in passing that many actions are not fought so much on the standard of care, but whether the breach if there is one, made any difference to the Plaintiff's prognosis.⁴⁹

Peixeiro is helpful in this area, because of the fact that the plaintiff in that case had to wait for a negative prognosis before he met the conditions precedent for taking an action under Ontario's threshold legislation. The argument is precisely the same in principle, where the plaintiff can only prove damages if he can demonstrate there was a causal connection between the alleged wrong and the loss suffered. Whenever a defendant raises causation, I would submit that the plaintiff's cause of action is protected until the receipt of an opinion linking prognosis to the alleged wrong.

This issue was before the Court of Appeal in *Findlay v. Holmes*⁵⁰. In that action, the plaintiff complained that he suffered from prednisone-induced osteoporosis. He raised knowledge of the standard of care, and causation, specifically knowledge of the cause of his symptoms in response to a limitation period defence raised by the treating physician. The doctor "testified, and his office notes confirm, that in December 1985, he told the appellant he had sustained a vertebral fracture due to osteoporosis caused by the prednisone. In February 1986, the hospital notes record that Dr. Parvez Ansari, an orthopaedic surgeon, Dr. Leon and the respondent, discussed with the appellant the further process of ompression in the region of L1 and L4. Dr. Ansari noted that "basically it is a steroid type. He is having compression with regard to the fragile bones and this was explained clearly to him.... We had quite an extensive discussion with the patient and this was explained to him clearly, what the problems he has".⁵¹

The Court found, that

⁴⁹ Given the frequency with which this defence is raised, one can only wonder what is the value of obtaining medical advise.

⁵⁰ [1998] O.J. No. 2796.

⁵¹ *Supra* note 50 at paragraph 33

“the evidence as a whole, therefore, leads to the inevitable conclusion that the appellant must have known of the relationship between his osteoporosis, vertebral fractures and the prednisone treatment. There was, therefore, ample evidence to support the trial judge's finding that the appellant had actual or deemed knowledge by March of 1987 at the latest, of the material fact or facts upon which he alleged negligence against the respondent. Thereafter he failed to commence his action within the applicable statutory period under the Act. Accordingly, there is no error in the trial judge's finding that the action is statute-barred.”⁵²

What is significant about this case is the fact that the Court accepts the argument that knowledge of causation was necessary.

Due Diligence

From its inception, the rule has required the plaintiff to act with due diligence. Lord Denning M.R., in formulating the rule, stated the time begins to run when the plaintiff knew of his injuries or “it would be possible for him to discover it *if he took such steps as were reasonable* in the circumstances.”

Although Lord Denning M.R. was speaking of the injury, since the Supreme Court of Canada has re-framed the rule as one relating to conditions precedent to action, presumably the due diligence component of the rule will apply. Certainly, it has been held to relate to obtaining opinions relating to negligence and the standard of care.

Once in possession of primary facts, the prospective plaintiff cannot wait indefinitely to ask or receive a medical-legal opinion supporting actionable negligence, and so delay triggering the limitation period.⁵³

A recent decision considers the question squarely, and refers specifically to Justice Major's reasons in *Peixeiro*. In *Soper v. Southcott*⁵⁴, the motions judge considered a claim resulting from surgery conducted on November 6, 1991. The plaintiff remained in Dr. Southcott's care until October of 1992, and then retained another surgeon who ultimately replaced her knee in December of 1994. The plaintiff retained counsel on April 26, 1993. She instructed him to investigate the claim, but she could not fund it. Therefore, a legal aid certificate was sought. That was ultimately obtained, and the records of the hospital were requested in August of 1993. The records were received on December 20, 1993 and sent to a consultant to organise and collate the records on December 21st, 1993. The claim was issued on March 30, 1995, but the expert's opinion was not sought until May of that year, and not received until July of 1995.

⁵² *Supra* note 50 at para 35.

⁵³ *Shanfield v. Smeeton*, (1995) 25 C.C.L.T. (2d) 79, referred to in *Johnston v. Patel* [1995] O.J. No. 2356 DRS 95-17167, (Ont. Ct. Gen.Div.) per Ground J.

⁵⁴ [1997] O.J. No. 4573 per McDermid J. (London Court file no., 20095/95)

Justice McDermid correctly states the law at paragraph 14 of his reasons on motion:

...once a plaintiff has in her possession the facts upon which an expert can render an opinion as to whether the defendant failed to meet the applicable standard of care, the plaintiff cannot wait indefinitely to obtain that opinion. To permit this to occur would thwart the very purpose for which limitation periods exist.

Ultimately, Justice McDermid held that the limitation period ran from receipt of the clinical notes and records, since the plaintiff was able to issue the statement of claim without benefit of the expert opinion. In that case, it could not be said that the expert opinion was needed to learn if the plaintiff had a cause of action. Further, the plaintiff's daughter was a nurse who expressed, apparently, concerns about the care given by Dr. Southcott that matched the allegations of negligence that were made in the claim.

This interpretation was confirmed by the Court of Appeal⁵⁵. It is important to note that the plaintiff in this case was being advised by a nurse, and that fact is often cited when this case is referred to. It points out that it is all very subjective, making its application uncertain.

The warning for counsel in this case is clear. As a matter of prudent practice, if not law, the latest date for calculation of the limitation period is the receipt of the clinical notes and records. If the court ultimately decides you did not need an opinion before commencing your action, it will fail due to the passage of time. Better to be safe than sorry. It would be wise to follow the practice of attaching a letter to the statement of claim which confirms the claim is issued to protect a limitation period while the case is under investigation. If you issue between receipt of the notes and records but before receipt of the expert opinion you run the risk otherwise of running afoul of the inference drawn by Justice McDermid in the *Soper* case.

Motions to Dismiss

The Court of Appeal has been clear about three important matters; first, the opening of trial is too late to bring the motion (*Urquhart*). The motion judge should not attempt to resolve conflicts in the facts or act as trial judge (*Aguonie; Dawson v. Rexcraft*⁵⁶). If the defendant is not virtually certain of a win, he ought not bring the motion, or he faces a solicitor and client costs award (*Smyth*).

In *Aguonie* the Court of Appeal commented on the role of the motions judge on a motion to dismiss under the Rules. The Court did not determine the "due

⁵⁵ [1998] O.J. No. 2799.

⁵⁶ (1998) 164 D.L.R. (34TH) 257 (Ont. C.A.)

diligence” issue at this juncture. It was left to the trier of fact to determine whether the plaintiff acted diligently in attempting to discover the identity of the tortfeasors and the facts relative to their alleged negligence. In respect of limitation issues at the motions stage, where evidentiary issues must be resolved, the Court made it clear the judge hearing the motion must “stop short” of resolving those issues and only give judgement where satisfied the only genuine issue for trial is a question of law.⁵⁷

In *Urquhart*, the issue of due diligence was left to the trial judge. The appeal was not argued on the issue of due diligence. However, one is left with the question: why in the case of a failure to diagnose cancer case, would counsel not investigate the possibility of the radiologist’s negligence? The Court of Appeal notes that the clinical notes and records led to the conclusion that the mammogram was non-diagnostic, and an opinion to the contrary was needed.

In *Stell et al v Obedkoff ; Stell et al v. May et al*⁵⁸ a motion for dismissal was brought after *Aguione* and *Dawson*, but before *Smyth*. The plaintiff raised delayed discoverability in defence of the motion. The motion was granted, because the Court found that the evidence in support of the motion was deficient. He disagreed with the Plaintiff’s interpretation of *Aguione* that every time delayed discoverability was raised, there was also raised a triable issue. It is not possible to determine from the reasons just what evidence was available to the motions judge. Neither was it possible to determine if any of it was in need of evaluation. The motion judge held that he is to assume that no more evidence than that which is before him will be heard at trial. This decision stands uncomfortably beside *Smyth*, and its rather stern admonition to defendants. Unfortunately, what is a rather comprehensive decision on the law, is not helpful on the facts. One can only assume that the motion judge had no evidence to support the plaintiff’s position, only the assertion of a delayed discoverability defence.

When will Delayed Discoverability not apply to a Statute?

Whereas the Court of Appeal originally stated that the rule applied to all statutes of limitation, and was a rule of construction generally applicable, it has abandoned that position in light of the Supreme Court of Canada’s statements on this matter. What appears to be waffling is becoming somewhat less of a moving target with some consistent principles emerging.

In *Greeneier v. Canadian General Insurance Company*⁵⁹ the Court was considering the provisions of s. 258 (2) of the Insurance Act⁶⁰. What is of importance here is that the Court was of the view that the first question to be

⁵⁷ *Supra* note 42 at page 20 para 33

⁵⁸ (1999) 45 O.R. (3d) 120 (S.C.J.)

⁵⁹ (1999) 43 O.R. (3d) 715 (Ont CA)

⁶⁰ R.S.O. 1990, c.I.8.

answered was whether the delayed discoverability rule applied to this provision. Mr. Justice Morden considered the *Fehr v Jacob*⁶¹ decision, which has been oft-quoted as standing for the principle that "the discoverability rule is an interpretative tool for the construing of limitation statutes which ought to be considered each time a limitations provision is in issue." But further he cites this passage:

In the case at bar, [*Fehr*] the statute bars an action if it is commenced more than two years after the termination of the doctor's professional services. That is an event which occurs without regard to the patient's knowledge of any injury. There is consequently no room for the application of the judge-made discoverability rule. The present plaintiff could only resort to the statutory discoverability rule. This she failed to do on a timely basis and her action was consequently barred.⁶²

Mr. Justice Morden concludes

that Major J. did not adopt this court's conclusion that the discoverability rule applies irrespective of the wording of the provision in question...

The expression "without regard to the injured party's knowledge" **means knowledge of the injury which is an element of the cause of action asserted.** A statute which provides that the limitation period set forth in it is to begin on the accrual of the plaintiff's cause of action is susceptible to the interpretation that a plaintiff knows, or reasonably should know, the facts which comprise his or her cause of action before it can be said that the cause of action has "accrued". (emphasis added)

The last line of this passage is significant. It would be tempting to interpret these passages as meaning this: if the limitation period starts on the happening of a fixed event, then it will run regardless of the plaintiff's state of knowledge. In comparing the Manitoba statute being considered in *Fehr*, where the triggering event was the cessation of provision of medical services, to the case at bar, where the cause of action of an insured is to be brought within a time frame

⁶¹ (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at p. 206

⁶² *Supra* note 62 at p. 206

determined by obtaining judgement against a third party, the Court drew a significant distinction. In *Fehr*, the triggering event was not part of the cause of action but in effect not a “constituent element of the cause of action” , whereas in *Grenier* it was, the Court held the triggering event does not come into existence until the plaintiff has, or should have, knowledge not only that her or she has a judgment but also that the judgment is against an insured person. It was held to apply to the limitation period in this case.

In a subsequent case, a limitation statute was found to exclude the operation of the rule. In *Waschkowski v. Estate of Hopkinson*⁶³ the Court had occasion to consider s. 38 of the Trustee Act , which provides, in ss (3):

An action under this section shall not be brought after the expiration of two years from the death of the deceased. R.S.O. 1980, c. 512, s. 38(7).

Madam Justice Abbella succinctly states when the rule will not apply:

...the delayed discoverability rule does not apply when , based on that wording, the limiting time runs from a fixed event *unrelated to the injured party’s knowledge or the basis of the cause of action.*

She goes on to note that the limitation period in the Trustee Act runs regardless of the cause of action, regardless of the plaintiff’s knowledge of the death, and is a definite event. Therefore, delayed discoverability does not apply to the construction of this limitation period.

The limitation provided for under the Public Hospitals Act must be revisited in light of these decisions. It would appear more analogous to the situation in *Fehr*, where the cessation of treatment, as it is with the Public Hospitals Act, which may nothing to do with the accrual of the cause of action, is the triggering event. Given Justice Major’s comments in *Grenier* approving of *Fehr*, it would seem that the Hospitals Act limitation period is a fixed one, and the delayed discoverability rule has no applicability. I am not aware of any appellate level authority on this point.

Can Counsel Continue to Act If There is Reliance on Delayed Discoverability?

Herein lies another reason to use the date of the receipt of the clinical notes and records as the latest limitation date, and the “scatter-gun” approach to litigation. If a decision of a London judge is correct, this method of approaching litigation is forced. If the learned motion judge (or was she trial judge?) is not correct, there

⁶³ unreported, released February 23, 2000 Court of Appeal docket C32484

may be sanity in the practice of law in this area. Unfortunately, her decision is not going to the Court of Appeal, and that is regrettable.

In the *Urquhart* matter, the action was finally reached for trial. The defendant accepted the Court of Appeal's direction respecting the motion for summary judgement now being too late. However, the Court's directions were sought as to how to proceed with the trial. The defence argued, *inter alia*, that counsel for the plaintiff was a necessary witness at trial on the issue of delayed discoverability and could not therefore continue to act.

Gillese J. agreed with defence counsel's arguments⁶⁴. In the *Urquhart* matter, that effectively left a litigant on the doorstep of trial, without counsel. With the greatest of respect to Madam Justice Gillese, it left the profession with a completely unworkable and impractical result, when another was quite open to the court.

From the perspective of the defendants, they are now to be forced into litigation that may never go anywhere. Huge numbers of potential defendants participate in the care of a potential plaintiff. If one is overlooked, and the plaintiff later brings him or her in based on an expert report, the risk is the result in *Urquhart*. It represents an undue expense to the Canadian Medical Protective Association and unnecessary upset to the health practitioners who will have to be dragged into litigation in order to avoid its result.

From the perspective of the Plaintiff, this already-expensive litigation just got worse.

Delayed Discoverability Meets Incapacity

Returning to *Smyth*⁶⁵, the Court of Appeal was dealing with a medical negligence action. The defendant doctor brought a motion for summary judgement under Rule 20.01(3) based upon an expired limitation period. The defendant is alleged to have negligently ruptured Ms Smyth's oesophagus on October 12, 1993. The action was not commenced until October 11, 1995. The limitation period is one year from the date the plaintiff knew or ought to have known the facts upon which the negligence is alleged.

The facts we have from the decision of the Court of Appeal regarding incapacity are sparse and modest. Consider that the Court's decision appears to be based on *both* delayed discoverability and capacity. The Court noted the salient facts. Ms Smyth was 72 at the time of the operation. The complications of the perforation kept her in hospital for 27 days during which she experienced periods of heavy pain and unconsciousness. She was released to her daughter's home,

⁶⁴ unreported. October 25, 1999 O.J. Court file No. 14880/93 (SCJ)

⁶⁵ *Smyth v. Waterfall*, [2000] O.J. No. 3494.

required homecare assistance for three months and nursing assistance for three months. In general her physical and mental health was described as “poor” through the summer of 1994.⁶⁶

Ms Smyth consulted counsel on September 27, 1994. Counsel wrote for her medical file, sometime in October⁶⁷. The file was not sent to counsel until December 15, 1994. It contained the operative note. The Court states that is the first time Ms Smyth had a detailed account of the procedure. “Although the appellant’s lawyer was unable to obtain an expert medical opinion supporting the appellant’s negligence claim until May, 1998, he nevertheless issued a statement of claim on her behalf on October 15, 1995, less than one year from the receipt of her medical file from the hospital.”⁶⁸

The decision of the Court was delivered by Mr. Justice Borins, who wrote for the Court in *Bisoukis*. He notes the starting point of the analysis must be when the limitation period begins to run. He repeats Justice McLachlin’s guide to the interpretation of limitation statutes, set out above. He then notes the role of the court on a summary judgment motion is not to resolve issues of fact, but rather to determine if there is a genuine issue for trial. His reasons are instructive on the issue of capacity and discoverability (commenting on the motion court judge’s decision to dismiss the plaintiff’s claim):

Either he assumed the role of a trial judge and resolved the discoverability rule issue by making a finding of fact when Ms. Smyth knew, or through the exercise of reasonable diligence ought to have known, the facts in support of her claim against Dr. Waterfall. Or, he failed to recognize that the evidence relied on by Ms. Smyth in satisfaction of her evidentiary burden to provide evidence which raises a genuine issue for trial, as I believe it does, raised a genuine issue for trial. Whether the motions judge followed either, or both of these routes, he erred⁶⁹.

This is a hybrid decision. Mr. Justice Borins reviews her physical and mental capacity. There is no suggestion anywhere that, during her convalescence, she was unaware of the fact that her oesophagus had been perforated, and that was not the expected outcome! Rather, “poor mental and physical health” is clearly a reason to accept that she could not reasonably have known the facts of the negligence during that convalescence. In other words, the plaintiff’s capacity informs the court on the due diligence test required of a plaintiff when raising delayed discoverability in answer to the expiry of a limitation period.

⁶⁶ *Supra* note 66 at para 4

⁶⁷ the dates set out in the decision suggest counsel wrote before being retained

⁶⁸ *Supra* note 66 at para 5

⁶⁹ *Supra* note 66 at para 11

Another hybrid decision is *M(K) v M(H)*.⁷⁰ In that case, as already noted above, the Supreme Court of Canada held that the limitation period for incest does not begin to run until the victim is reasonably capable of discovering the wrongful nature of the perpetrator's acts and their nexus to her injuries. What makes the victim unable to discover this is her own psychological condition. Her condition and her inability to link the events due to that condition delays the commencement of the lawsuit. This is not incapacity as thought of in the traditional sense. She is not an "incapable" person. She is incapable of making the key connection, and hence, the commencement of the limitation period is delayed. However, where capacity is impaired to some extent, even absent a diagnosable condition, it would appear that the Courts will view the discoverability of the action through the lens of the plaintiff. If his or her mental (quaere physical?) state impacts one's ability to link events that might be obvious to others, the commencement of the period will be delayed.

What if the court finds incapacity due to physical injuries? Would it be permissible to extend the commencement of the limitation period until the individual was capable of undertaking the physical tasks associated with discovering the facts pertinent to their claim? What if the task of staying alive following injury is so enormous, no person in their right mind would even consider thinking about a lawsuit let alone taking steps to preserve one? Take the extreme example of quadriplegia, rendering one physically incapacitated, although mentally alert? What would be the principled reason to distinguish the two?

If we consider the facts in *Smyth*, and the principle enunciated in *M(K)*, I would submit there is no reason in principle, nor in law. At first blush, this assertion runs afoul of *Bannon*. However, *Bannon*, unlike *Smyth* and *M(K)*, did not deal with the issue of delayed discoverability, but just incapacity.

Return to Lord Denning's initial pronouncement of the test: "...a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances." It may not be reasonable, in the circumstances of a significant physical injury, to take steps to discover the cause of action. Application of the principle to physical injuries is consistent with the rule's original object. In the result, I would argue that the Courts can, and indeed in *Smyth* already have, considered not only the plaintiff's mental but her physical health in determining what was reasonable in the circumstances.

The Proposed Changes to the Limitations Act

The draft reviewed at recent hearings provides for a 2-year limitation period, the time beginning to run from the discovery of the claim. (s. 4). Potentially significant in a medical negligence action, is s. 15(11) which defines the date on which an

⁷⁰ *Supra* note 36

act or omission occurred. If it is continuous, it shall be the last day on which it occurred. If a series of acts or omissions *in respect of the same obligation, the day on which the last act or omission occurs*. Can a plaintiff extend the limitation period by attending follow-up visits with a physician after the patient has complete knowledge of the cause of action? Is follow up that is in the usual course of treatment not part of the act or omission?

Discovery occurs on the day on which the person first knew of injury, an act or omission caused or contributed to the injury, who committed the act or omission, and *having regard to the nature of the injury, loss of damage, a proceeding would be an appropriate means to seek to remedy it and the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to.* (s. 5)

There is a presumption that discovery occurs on the day the act or omission occurred, unless proven otherwise by the plaintiff.

Minors are protected as before, unless represented by a court-appointed litigation guardian.

Incapacity prevents the running of the limitation period. This is expanded to include *physical, mental or psychological condition or physical restraint.* (s. 7). Appointment of a court-appointed litigation guardian will start the time. This type of incapacity has a significant and in future, a difficult and much –litigated, limitation. If the plaintiff is no longer incapable when *the period has less than six months to run...* it will be extended for six months after the incapacity ends. It appears to mean that a person who becomes capable at 6 months less a day before the end of the period (which must factor in s. 5 considerations) will have the period extended, effectively, one day.

Family Law Act claims appear to be affected by s. 11, and impact upon limitation periods affecting the injured party. The knowledge of the derivative plaintiff is imputed to the injured party for the purposes of delayed discovery. Family Law Act claims, in some cases, may become very prejudicial to the main claimant, since this section applies in the case of a proceeding “commenced by a person claiming through a predecessor...”

Fatalities have a one-year limitation period from the date of death, if the two-year limitation period expires within one year of the person’s death. (I don’t know about you, but if this ever becomes law, I am going to draw a timeline and post it somewhere obvious in my office!) (s. 12)

A significant provision is found in s. 8. Any one can move to appoint a litigation guardian. That appointment commences the limitation period if incapacity is claimed, or minority. This must be read with s. 14, which permits a potential

defendant to serve a *Notice of Possible Claim* on the potential plaintiff. This can be considered by the Court in evaluating a claim of delayed discoverability. It is not applicable in the case of a minor or incapable person *who is not represented by a litigation guardian*. In order to force the commencement of a limitation period, I suspect it may be to the advantage of defendants in some cases to serve the notice or appoint a guardian. One such circumstance may be in cases where prognosis is not clear, and the plaintiff is uncertain of the feasibility of proceeding with the claim. The fight will then no doubt come down to whether or not it was reasonable for the plaintiff, having regard to his or her damages, to have commenced the action.

There is an ultimate limitation period, still subject to incapacity and minority, of ten years. However, leaving the sponge in the patient will not be protected by this provision. (s. 15) Wilful concealment, or misleading the person with the claim as to its appropriateness by the tortfeasor suspends the running of the period. (s.15)

For some of these provisions, guidance will be found in the interpretation of Limitation Acts from other provinces. See, for example, the discussion of *Novak*, above, under capacity. The BC legislation is very similar to this draft. We will be instructed in our interpretation of the delayed discoverability provisions of this Act by *Novak*.

Summary

1. Delayed discoverability as a principle applies to health practitioners but may not apply to Public Hospitals.
2. Delayed discoverability applies to limitation statutes except when the limiting time runs from a fixed event, which event is unrelated to the plaintiff's knowledge or the basis of the cause of action.
3. The delayed discoverability principle:
 - a. Delays the commencement of the limitation period;
 - b. Requires the plaintiff knows or be capable of knowing each condition precedent to his/her cause of action;
 - c. Applies to knowledge of the tortfeasor, the wrongful act or omission, causation and damages, all of which have been found to be conditions precedent;
 - d. Requires the plaintiff act with due diligence;
 - e. Considers, when assessing due diligence, the plaintiff's circumstances, and will include mental and likely physical capacity to discover the elements of the cause of action;
 - f. Considers whether the delay if any was reasonable having regard to the factors in (e).
4. Motions to dismiss by defendants based on the limitation period must meet a high threshold. The plaintiff nonetheless has an evidentiary

burden to disclose facts in support of an allegation that the rule applies.

5. Due to the subjective nature of the judicial enquiry, and the potential for removal from the action as solicitor of record, prudence suggests the last date for calculation of the limitation period is the receipt of the clinical notes and records, if not the date of the act complained of itself.
6. Section 47 of the Limitations Act respecting incapacity applies to all medical negligence limitation periods in Ontario.
7. The incapacity test now requires the Court to balance the rights of the Defendant with the Plaintiff's interests, by favouring a more contextual view of the parties' actual circumstances.
8. The individual must be incapable of managing her affairs in relation to the accident as a reasonable person would do, to meet the test under the Act. The test will vary according to the level of complexity of the task at hand.
9. The competency of derivative claimants is not a significant consideration.
10. The ability to deal with routine matters is of some evidentiary value but to equate it with capacity in a legal matter is an error.
11. Incapacity must be continuous, from the date of the incident to the time the period commences.
12. The four part test for incapacity set out in *Bannon* must be met.
13. It is likely negligence on the part of counsel to dismiss a claim based on the expiry of a limitation period without enquiring into issues of delayed discoverability, capacity, and the relationship of capacity and delayed discoverability. This will be particularly true where there is a complicated action, expert opinions are required, causation is in issue, or the plaintiff suffers from any condition affecting mental status.