

WHEN IS AN ACTION FOR MEDICAL MALPRACTICE OUT OF TIME?

By Bill McNally and Barb Cotton

I. Introduction

With the enactment of the *Limitations Act*¹ in Alberta, it seems clear that a medical malpractice action commenced post March 1, 1999 will be out of time if an action is not commenced within 2 years from when the plaintiff knew or ought to have known: (1) that the injury has occurred; (2) that the injury is attributable to the conduct of the defendant; and (3) that the injury warrants bringing a proceeding, or within 10 years after the claim arose, whichever period expires first.²

This is subject to the proviso that if the plaintiff knew, or ought have known, of his or her injuries before March 1, 1999, the plaintiff will be out of time if the action was not commenced within 1 year from the date of termination of professional services or by March 1, 2001, whichever is earlier.³

Thus the issue then becomes when the plaintiff knew or ought to have known these requisite elements.

The bottom line appears to be that there is a continuum of injuries. At the one end of the spectrum are those injuries that are manifestly resultant from the negligence of the defendant. On the other end of the spectrum, and at points in between, are those injuries that are not so obvious and require some investigation by the plaintiff in order to ascertain one or more of the three requisite elements. For example, need the medical records and charts be obtained and reviewed in order to obtain facts that were not otherwise available to the plaintiff regarding the conduct of the defendant? Perhaps the plaintiff needed to obtain an expert report in order to interpret the raw data and ascertain whether the defendant had met the standard of care? Was this a case of misdiagnosis such that the injury to the plaintiff was not known until such time as the misdiagnosis was pointed out? At these points on the spectrum case law suggests that time will only begin to run as against the plaintiff following the plaintiff's investigation and discovery of the requisite facts, provided always that the

plaintiff has proceeded with due diligence.

This article will begin by reviewing the statutory framework governing limitations in a medical malpractice suit in Alberta. It will then review several illustrative cases which suggest the courts' approaches in assessing where a fact pattern falls on the spectrum.

II. Statutory Framework

The *Limitations Act* incorporates the principle of discoverability and provides in s. 3:

- “3(1) Subject to section 11, if a claimant does not seek a remedial order within
- (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
 - (i) that the injury for which the claimant seeks a remedial order had occurred,
 - (ii) that the injury was attributable to conduct of the defendant, and
 - (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding, or
 - (b) 10 years after the claim arose,

whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.⁴”

There are situations in which the injuries occurred to the plaintiff before March 1, 1999, the date the *Limitations Act* was proclaimed into force in Alberta. The Act directs:

- “2(1) This Act applies where a claimant seeks a remedial order in a proceeding commenced on or after March 1, 1999, whether the claim arises before, on or after March 1, 1999

- (2) Subject to sections 11 and 13, if, before March 1, 1999, the claimant knew, or in the circumstances ought to have known, of a claim and the claimant has not sought a remedial order before the earlier of
- (a) the time provided by the *Limitations of Actions Act*, R.S.A. 1980 c.L-15, that would have been applicable but for this Act, or
 - (b) 2 years after the *Limitations Act*, S.A. 1996, c. L-15.1, came into force,

the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim . . .”⁵

The limitation period prescribed by s. 55 of the *Limitations of Actions Act* is as follows:

“Except as provided in sections 57 to 61, an action against

- (a) a physician registered under the *Medical Profession Act*,
- (b) a dentist registered under the *Dental Profession Act*,
- (c) a registered member, registered practitioner or professional corporation under the *Chiropractic Profession Act*,
- (d) a podiatrist registered under the *Podiatry Act*, or
- (e) an optometrist registered under the *Optometry Profession Act*,

for negligence or malpractice by reason of professional services requested or rendered may be commenced within one year from the date when the professional services terminated in respect of the matter that is the subject of the complaint, and not afterwards.”

The Supreme Court of Canada has stated in *Peixeiro v. Haberman*,⁶ that the discoverability principle

is to be incorporated into what otherwise would seem to be rigid limitation periods. In *Peixeiro*⁷ the plaintiff was injured at a time when the *Insurance Act* of Ontario required that an impairment caused by an injury be both serious and permanent in order to meet the threshold required for actionability. Mr. Peixeiro was injured in a motor vehicle accident and was originally diagnosed to merely have soft tissue injury to his lower back. Not until some three years later did he learn that he had a disc herniation requiring surgical treatment and that the injury could be considered serious and permanent so as to meet the threshold requirement. He commenced his action and was met by a limitations defence. The Supreme Court of Canada affirmed the discoverability principle would apply notwithstanding the apparently rigid limitation period in the Ontario *Highway Traffic Act*. In doing so it affirmed that it was not merely sufficient to know that damages had occurred in order to trigger a limitation period, but rather the plaintiff had to have knowledge of all of the conditions precedent to the action, provided that the plaintiff acted with reasonable diligence to ascertain these elements.

As an interesting aside it is interesting to note that Binder J. of the Alberta Court of Queen's Bench anticipated *Peixeiro* in *Hygaard v. Gailunas*⁸ in holding that the discoverability principle should be imported into the seemingly rigid limitation period of s. 55 of the Alberta *Limitation of Actions Act*, which required that an action be commenced within one year from the date of termination of the services of a medical professional.

The Alberta Court of Appeal has nonetheless stated that the principle of discoverability will not be imported into s. 55: *Czyz v. Langenhahn*⁹ and *V.A.H. v. Lynch*.¹⁰

The Supreme Court of Canada in *Novak v. Bond*¹¹ has summarized the effect of the importation of the discovery principle into limitation periods in the following passage:

“The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost in the passage

of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion and, (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the effect they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics."¹²

III. Illustrative Cases

The question becomes when the plaintiff knew or should have known of the requisite elements necessary to give rise to a cause of action against the defendant.

The Ontario courts have grappled with this issue over recent years and their cases are illustrative of typical approaches by the courts.

Perhaps the leading case in this regard is *Soper v. Southcott*¹³ a decision of the Ontario Court of Appeal.¹⁴ In this case the plaintiff suffered a knee injury in 1974. In November 1991, the defendant performed a posterior cruciate ligament reconstruction of the knee. For about a year following the surgery, the plaintiff was admitted to hospital several times for further treatment. She sought treatment from another surgeon who in March 1993 treated her for an infection in her knee. In April 1993, the plaintiff consulted a lawyer about a potential medical negligence claim against the defendant. The lawyer requested the hospital records in August and he received them in December 1993. In December 1994 the plaintiff had a total knee replacement. The statement of claim was issued in March 1995. In July 1995 the plaintiff obtained an expert opinion that infection might have been avoided if more aggressive therapy had occurred initially.

The motions judge concluded that by December 1993, the date when the solicitor received the hospital records, the plaintiff had all the necessary facts to determine whether or not to proceed with a negligence claim, and as such one year from that time to bring the action. The plaintiff submitted that she had no reason to believe that the infection was caused by inadequate or inappropriate

treatment until such time as she had received the expert opinion in 1995.

In the result the action was dismissed as barred by the limitation statute. The plaintiff was held to have been required to act with due diligence in acquiring information. The plaintiff had the requisite information when she was in receipt of the medical records. No evidence was given that the medical records were missing in material facts which the plaintiff required before she could recognize a cause of action. It was not necessary to wait for the expert report as the information could have been gleaned from the hospital records.

This case is considered a seminal decision and is frequently applied for the following passage:

“Limitation periods are not enacted to be ignored. The plaintiff is required to act with due diligence in acquiring facts in order to be fully apprised of the material facts upon which a negligence or malpractice claim can be based. This includes acting with diligence in requesting and receiving a medical opinion, if required, so as not to delay the commencement of the limitation period. In some cases, a medical opinion will be necessary to know whether to institute an action. In other cases, it will be possible to 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.”¹⁵

Soper v. Southcott makes reference to the earlier leading case of *Law v. Kingston General Hospital*,¹⁶ a decision of the Ontario High Court¹⁷ suggesting that it may not be sufficient for the lawyer for the plaintiff to merely have possession of the hospital records, but rather the lawyer must have been given a reasonable opportunity to review all the pertinent hospital medical records before the time period will run.

Another early case is *Gaudet et al. v. Levy et al.*,¹⁸ a decision of the Ontario High Court of Justice¹⁹ which suggests that in certain circumstances it may also be necessary to get an expert opinion in order to interpret the raw medical data available in the hospital records and charts in order to know whether the professional has been negligent. “Without medical advice interpreting it, the raw

medical data could not be presumed to mean anything to a layman.”²⁰

Another leading case is *Urquhart v. Allen Estate*,²¹ a further decision of the Ontario Court of Appeal.²² In this case the plaintiff was diagnosed with breast cancer in May 1992. She sued Dr. Stewart on the basis that he failed to correctly interpret a mammogram on March 1, 1991. The issue on the appeal was whether the plaintiff knew or ought to have known the facts upon which she based her action more than a year before Dr. Stewart was added as a party defendant on September 12, 1995. The plaintiff took the position that she did not have all the material facts necessary to found her action until June 19, 1995 when she received a medical opinion informing her that the 1991 mammogram had not been interpreted properly by Dr. Stewart. The defendant took the position that the limitation period ran from the time the plaintiff's counsel received the medical records, *inter alia*.

It was held that a medical opinion was necessary to know that there had been negligence with respect to the interpretation of the mammogram. *Soper v. Southcott* was distinguished on the basis that in that case the plaintiff clearly knew she had an infection in her knee joint which had persisted for some time. In *Urquhart* the plaintiff had no reason to believe that the 1991 mammogram was other than non-diagnostic of cancer as reported by Dr. Stewart until she was informed to the contrary.

In *McSween v. Louis*,²³ another decision of the Ontario Court of Appeal²⁴ the plaintiff underwent routine electrocautery surgery on February 26, 1991 in order to remove some skin tags or anal warts. The equipment was defective and she sustained a second degree burn to her left buttock which became seriously infected and resulted in significant and long term discomfort for her. On November 26, 1992, she sued the surgeon Dr. Louis and the hospital. She was successful as against the doctor and he appealed. He alleged on appeal that the trial judge had erred in failing to apply the one year limitation period found in the *Health Disciplines Act* of Ontario.

The majority of the Court of Appeal agreed with the doctor and allowed the appeal. The trial judge

had found that it was reasonable for the plaintiff to have waited for an expert opinion in order to commence her action and that the action was not out of time. The majority of the Ontario Court of Appeal found that it was not necessary to wait for the expert opinion to have all the facts upon which to allege negligence against the doctor. The expert opinion did not contain any suggestion of negligence on the part of Dr. Louis and thus none of the facts which formed the basis for the allegations for negligence against Dr. Louis were derived from the expert opinion. The case proceeded to trial on the basis of speculation as to what had happened. The trial judge drew inferences based on the balance of probabilities. It was held by the majority that a medical opinion was not necessary in order to know the facts.

“... , this is not the type of case which would normally require the opinion of an expert in order to know the necessary facts. In some situations, often where an injury occurs and manifests itself immediately, for example during a medical procedure such as an operation, the patient knows that the injury must have been caused through some act or failure to act by one or more of the professionals involved in the procedure and that there was the likelihood of negligence of some kind, either in what was done or what was not done but should have been done.

In other situations the plaintiff either learns that he or she has suffered an injury, but does not know whether it occurred during or as a result of a medical procedure, or learns of an untimely diagnosis of a disease. In those situations, the patient requires the assistance of experts to advise whether the injury was suffered because of something which occurred during a past medical procedure, or whether there was at some point a mis-diagnosis of symptoms which could and should have been noted earlier.”²⁵

The court further stated: “To say that a plaintiff must know the precise cause of her injury before the limitation period starts to run, in my view places the bar too high.”²⁶

In the result it was held that this was the type of case referred to by the court in *Soper v. Southcott* where the circumstances of the event in which the injury occurred provided the facts upon which to base the allegation of negligence against the surgeon who performed the operation. The plaintiff had those facts right after the operation. The hospital record of the operation added nothing; neither did

the expert opinion.

In *Nichols v. Young*²⁷ a decision of the Ontario Superior Court of Justice²⁸ the nineteen year old plaintiff Julie Nichols was a highschool student suffering from severe menstrual cramps and acne. She went to her family doctor and asked him whether birth control pills would be appropriate to control these problems. There was concern about the possibility of blood clots associated with taking the birth control pill. Her mother had once been on the pill briefly and had had to be taken off it because of swelling developed in her leg. There was a history of health problems in her extended family, including strokes and blood clots. When the plaintiff raised these matters with the doctor he brushed them aside and told her she would be fine.

The plaintiff went on the birth control pill and had a severe reaction. She developed deep vein thrombosis, (a blood clot in the deep veins of the leg), and pleural effusion, and was hospitalized for ten days. As a result she developed post-phlebitic syndrome, which was a chronic and progressive disease.

She sued her doctor for negligence in the prescription of the birth control pill; negligence in his failure to diagnosis a pulmonary embolism and negligence in his failure to treat her promptly prior to her hospitalization.

The action was commenced on August 5, 1999. The defence argued that the plaintiff knew or ought to have known all of the necessary facts by March or April, 1998, and thus the action was statute barred. The court accepted the plaintiff's evidence that she did not understand that her injury might have been caused by the negligence of the doctor until the early fall of 1998.

On the issue of due diligence it was stated:

“ . . . Indeed, in my view, it would be unreasonable to conclude that she knew or ought to have known of his possible negligence at the time she was hospitalized with

the DVT. At that time, she was very ill and in severe pain, and was undergoing treatment for a serious medical condition. This was not a time when she could reasonably be expected to start thinking about a lawsuit. Even when she was released from the hospital, she was bed-ridden at home for a significant period. I accept her evidence that she began to consider whether there had been some negligence after discovering she was Factor V Leiden in the fall of 1998, and after she did further research and reflecting. In my view she acted with reasonable diligence, and she had the necessary facts to believe she had a cause of action against Dr. Young around that time. As her action was commenced within the following year, I find that the action was commenced within the limitation period.”²⁹

In *Bearden v. Lee*,³⁰ a decision of the Ontario Superior Court of Justice³¹ Bearden went to a hospital emergency department complaining of abdominal pain and nausea in 1991. He was examined by the defendant Abramson, who was working her first shift as an intern. The test results were normal and Bearden was given a painkiller, diagnosed with gastro-enteritis and discharged with written instructions to follow up with his family doctor if the pain increased. Two days later his appendix ruptured and he required emergency surgery. He then developed hernias, which required more operations. In August 1995, he complained to his family doctor about the adverse effects on his life. The doctor suggested a lawsuit, which Bearden had never before considered. He called his lawyer and an action was commenced in August 1996 against both Abramson and Lee, who was the attending emergency physician. The defendant submitted that the action was time barred, *inter alia*.

In the result the action was allowed. Previous authorities were reviewed and it was held that the authorities recognized that plaintiffs often will need the input of medically trained persons before he or she will be in a position to discover all of the facts to know whether he or she has a right to relief against a doctor.³² It was held that it was not obvious that a diagnosis of appendicitis was missed when the plaintiff attended at the emergency department. It would be unfair to conclude that the one year limitation period began to run at that time because the existence of a cause of action should have been obvious to Bearden when the medical experts called by the defendant expressed the opinion at trial that it was not obvious at all. Further, it was not obvious from the medical records in isolation that Lee and Abramson were negligent. Bearden was clearly in need of medical input before he could know about a potential cause of action. The time period began to run after his

consultation on August 3, 1995 with the other doctor who recommended that he consider a lawsuit. Following this an investigation was initiated and the action was commenced within one year. Bearden had therefore acted with reasonable diligence in acquiring knowledge of the material facts.

In *Morton v. Cowan*³³ a decision of the Ontario Court of Appeal³⁴ the plaintiff Morton was treated by his family doctor for back pain. The plaintiff also sought treatment for a non-existent pain in his hip as a pretext for obtaining more drugs. He told the doctor he was going on trips, when he was not, in order to increase his drug supply. Ultimately the plaintiff developed a drug dependency and was admitted to an addiction treatment facility on April 17, 1996. He was discharged on June 18, 1996. Just prior to the plaintiff's admission to the addiction treatment facility the wife had complained to the College of Physicians and Surgeons of Ontario with respect to the over-prescription of medication by the family doctor. On February 11, 1998 the College replied to Mrs. Morton's complaint. The action was commenced on October 14, 1998.

The defendant moved for an order dismissing the action on the basis that it was statute barred, arguing that the plaintiff and his wife were aware of the facts which supported the cause of action for medical malpractice in April 1996, when the complaint was made to the College. The motion judge held that the alleged negligence was known in April of 1996 when there was a diagnosis of prescription addiction. It was not a condition or injury which required any further elaboration. Further, the family doctor was the only source of the prescriptions. This was upheld on appeal.

The Ontario Court of Appeal further held that it was not necessary for an independent medical opinion to inform the plaintiff of the material facts upon which the cause of action for medical malpractice could be asserted. The plaintiff knew of his misrepresentations to the doctor for the purpose of increasing his drug supply and his wife had obtained computer records of the particular drugs prescribed. Further, both the plaintiff and his wife were aware of the diagnosis by the addiction treatment centre of prescription addiction.

This issue has recently been addressed by Veit J. of the Alberta Court of Queen's Bench in *Schneider*

v. *Zuege*.³⁵ Dr. Zuege had treated the plaintiff Schneider for various visual difficulties resulting from Mr. Schneider's diabetes. Mr. Schneider's last treatment by Dr. Zuege was on January 11, 1999. On December 17, 1998 Dr. Zuege performed laser surgery on Mr. Schneider's left eye. Mr. Schneider was dissatisfied with his post-operative vision. On December 22, 1998, Mr. Schneider's family doctor made an appointment for him to see another ophthalmologist, Dr. Hinz, On February 11, 1999. Dr. Hinz measured Mr. Schneider's interocular pressures and found them to be very high. Dr. Hinz arranged immediately for Mr. Schneider to be examined by Dr. Casey, a glaucoma specialist. Dr. Casey told Mr. Schneider that the pressures were "way out of line . . . way too high". Dr. Hinz reexamined Mr. Schneider on February 16, 1999 and diagnosed a hemorrhage and probable retinal detachment. He immediately admitted Mr. Schneider to hospital and performed surgery the following day. On February 19, 1999 Dr. Casey performed a further laser procedure on Mr. Schneider to reduce the pressures. In the result Mr. Schneider lost a good deal of sight in his left eye that would likely not be recovered.

The action against Dr. Zuege was commenced on December 21, 2000.

Dr. Zuege argued that Schneider should have discovered his cause of action prior to March 1, 1999 and that the limitation period expired on March 1, 2000. He brought an application for summary dismissal of Schneider's claim.

In the result the application was dismissed with Veit J. holding that there were factual issues which must be tried.

Veit J. stated:

" . . . The discoverability issues elucidated by the Supreme Court of Canada in *Peixeiro* make it plain that the facts which must be able to be known include all facts necessary to ground a cause of action. In medical malpractice situations, for example, it may not be enough to know the facts of treatment, it may also be necessary to know the facts relating to standards of practice."³⁶

And further:

“Here, Mr. Schneider knew, before March 1, 1999, that pressure was a danger. There is, however, no evidence to suggest that Mr. Schneider knew, or had reason to believe, prior to that date that Dr. Zuege either did something or omitted to do something in relation to that pressure. On the contrary, this is one of the situations where it may be that, until the medical opinion expressed in the March 17, 1990 letter was communicated to him, Mr. Schneider had no medical basis for assuming that there may have been negligent treatment by Dr. Zuege. This may be the second medical opinion to which the *Soper and Urquhart* decisions refer.”³⁷

It is interesting to note in passing the views of Veit J. on the burden of proof. She states:

“Dr. Zuege suggests that, once he pleads a statutory limitation period, the burden shifts to Mr. Schneider to prove that the limitations defence does not apply to him. Dr. Zuege relies on the following extract from *Soper* as authority for that proposition:

“Where a defendant pleads a statutory limitation period, the plaintiff has the burden of proving that the cause of action arose within the limitation period . . . Where a defendant brings a motion for summary judgment based on a statutory limitation period and the plaintiff adduces evidence giving rise to material facts requiring a trial in order to evaluate credibility, weigh evidence and draw factual inferences, if the defendant satisfies the court that there is no issue of fact requiring a trial for its resolution, the defendant will have satisfied the requirements of Rule 20. The limitation defence will be made out.”

With respect, that passage merely emphasizes the point that it is the defendant who bears the burden of proving that the plaintiff could not possibly win the lawsuit. As in any situation, if the proponent puts forward a case which appears decisive, and there is no response, the proponent may well succeed. This should be viewed not so much as a change or shift of burden but as a reminder that the court must make its decision on the basis of all of the evidence before it.”³⁸

On this point the *Limitations Act* of Alberta is express that, for limitation periods governed by s.

3(1)(a) of the Act, the claimant has the burden of proving that a remedial order was sought within the two year period.³⁹ For a limitation defence claimed on the basis of s. 3(1)(b), that is, on the basis that ten years have elapsed from the time the claim arose, the defendant has the burden.⁴⁰

IV. Conclusion

Thus it seems clear from the case law that whether a plaintiff in a malpractice action is out of time will only be decided following a very close scrutiny of the facts by the court. When did the plaintiff know or when should the plaintiff have known the requisite elements of the cause of action? Was the injury of such a nature that the plaintiff was in possession of all of the facts giving rise to the cause of action? Or were all the facts not available to the plaintiff immediately and was further investigation required? Was it necessary to obtain and review the hospital records and charts and other information in order to establish the facts that would support the allegations of negligence? Was it necessary to obtain an expert medical opinion to establish that the defendant was in breach of his or her standard of care? Was an expert medical opinion necessary to establish that an injury such as a misdiagnosis had occurred? Did the plaintiff proceed with due diligence in the investigation? Only a close scrutiny of the facts will answer these and other questions, and thus establish whether or not the plaintiff was out of time.

ENDNOTES

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1. R.S.A. 2000, c.L-12
 2. S. 3(1)
 3. S. s. 2(2)
 4. Section 11 deals with a judgment for payment of money.
 5. Section 11 deals with a judgment for payment of money; section 13 deals with actions by aboriginal people.
 6. [1997] 3 S.C.R. 549
 7. As paraphrased from Barbara Legate, "Limitation Periods in Medical Negligence Actions Post Peixeiro" (1998), 20 *Advocates' Quarterly* 326.
 8. (1997), 202 A.R. 161
 9. (1998), 219 A.R. 9; leave to appeal to the Supreme Court of Canada dismissed at [1998] S.C.C.A. No. 293
 10. (2000), 255 A.R. 359
 11. [1999] 1 S.C.R. 808
 12. Page 841
 13. (1998), 39 O.R. (3d) 737
 14. Per Dunnet J. for the court
 15. Page 744
 16. (1983), 42 O.R. (2d) 476
 17. Per Griffiths J.
 18. (1984), 47 O.R. (2d) 577

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19. Per White J.
 20. Page 583
 21. (1999), 124 O.A.C. 11
 22. *Per curiam*
 23. (2000), 187 D.L.R. (4th) 446
 24. Per Feldman J.A. for the majority
 25. Pages 457, 458
 26. Page 459
 27. [2002] O.J. No. 515
 28. Per Swinton J.
 29. Paragraph 84
 30. [2003] O.J. No. 1261
 31. Per Sanderson J.
 32. Paragraph 37
 33. [2003] O.J. No. 3204
 34. Per Armstrong J.A. for the court
 35. [2002] A.J. No. 1113
 36. Paragraph 32
 37. Paragraph 37
 38. Paragraphs 26, 27
 39. *Limitations Act*, R.S.A. 2000, c.L-12, s. 3(5)(a)
 40. *Limitations Act*, R.S.A. 2000, c.L-12, s. 3(5)(b)