Lessons learned: The *Limitations Act, 2002*

Recent case law applying the *Limitations Act, 2002* contains essential lessons and warnings for the profession. This article is a summary of these matters and what they mean for the practising bar.

It really is a catch-all statute...

Don't forget that subject to certain expressly stated exceptions, the *Limitations Act, 2002* is a broadly worded, catch-all statute. Don't assume that because a cause of action was not caught by the "old" *Limitations Act*, it is NOT caught by the *Limitations Act, 2002*.

Toronto Standard Condominium 1703 v. 1 King St. W.[1]
Section 4 of the *Limitations Act, 2002* is a "catch-all" provision that applies generally to all claims not otherwise provided for in the *Limitations Act, 2002*, or in some other statute. The old *Limitations Act*, R.S.O. 1990, had no such basket provision. It governed only causes of action which expressly fell within it.

Therefore, under the "old" limitations regime, there was no limitation period for an action to set aside a fraudulent conveyance. But now, where such a claim was discovered on or after January 1, 2004, it is subject to the two-year limitation period in the *Limitations Act, 2002*.

...including actions in equity

Be especially aware that actions in equity, which were NOT subject to limitation periods under the "old" regime, now fall under the *Limitations Act, 2002*.

Boyce v. Toronto Police Services Board[2]
Under the *Limitations Act, 2002*, claims for breach of fiduciary duty are caught by the phrase "claims pursued in court" in s. 2(1). These claims do not fall within any of the exceptions to that section. A two-year limitation period therefore applies.

Portuguese Canadian C.U. v. Pires[3]
The applicable limitation period for alleged fraud, breach of fiduciary duty, and misrepresentation under the *Limitations Act, 2002* is two years.

Fracassi v. Cascio[4]
Claims for breach of fiduciary duty and a claim for oppression are subject to the two year limitation under s. 4 of the *Limitations Act, 2002*.

Syndicate Number 963 (Crowe) v. Acuret Underwriter[5]
It was accepted that the two-year limitation period under the *Limitations Act, 2002* applied to an action arising out of a failure to account for trust funds.

Estate of Blanca Esther Robinson (Re)[6]
It was accepted by the parties and the Court that a claim for rectification is subject to s. 4 of the *Limitations Act, 2002*. Under the "old" regime, claims for rectification were not governed by the *Limitations Act*, although they could be barred by laches.[7]

The Act assumes claims facts known by all from day one

Don't forget that s. 5(2) of the *Limitations Act, 2002* imposes a presumption that plaintiffs are aware of the facts giving rise to their claims on the day the act or omission took place, unless the contrary is proved.

Muirhead v. Coulas[8]
The plaintiff's action arising from a trip and fall was summarily dismissed as statute

1 2010 ONSC 2129 (Div.Ct.), dismissing appeal from 2009 CanLII 55330
2 2012 ONCA 230
3 2012 ONCA 335, affirming 2011 ONSC 7448
4 2011 ONSC 178
5 [2009] O.J. No. 4002
6 2010 ONSC 3484; pdf available from debra.rolph@lawpro.ca
7 *Menary v. Welsh*, (1973) 1 O.R. (2d) 393 (C.A.)
8 2011 ONSC 6281

barred. The accident occurred in July, 2005. The plaintiff hurt her knee. She underwent surgery a few days later, and was unable to walk for two months. After a second accident led to further injury, she received medical reports in 2009 indicating that the first trip and fall was a contributing cause of her ongoing severe disability. The action was commenced in January, 2010.

The defendants led evidence that the plaintiff knew of her injury; that it was serious enough to require surgery; that she could not walk for some two months thereafter; that she still had pain and restrictions in her movement six months after the fall and had not been able to return to work by then. She knew who the defendants were and where to locate them. Section 5(2) of the *Limitations Act, 2002* sets out a presumption that a plaintiff has the requisite knowledge as of the day the act took place, "unless the contrary is proved." The plaintiff knew she had a claim against the defendants within the limitation period. She knew her injury was significant and she decided not to sue the defendants because of friendship and her own hope for recovery. (See also *Liu v. Silver*[9].)

When does the limitation period start to run?

Several cases point to the fact that, under the Act, one should not assume that a limitation period only begins to run when related litigation is resolved.

Isailovic v. Vojvodic[10]
The plaintiff, after making an allegedly improvident settlement, sued a solicitor who had represented him in the period immediately preceding the settlement (the retainer was terminated prior to the settlement). The settlement took place in April, 2006. The plaintiff brought a motion to set aside the settlement, which Justice Herman dismissed in 2008. The Court of Appeal dismissed the plaintiff's appeal in December, 2008. The plaintiff sued his former solicitor in December 2010, one day before the two-year anniversary of the Court of Appeal's judgment.

Justice Lauwer declined to make a finding of negligence against the solicitor, ruling instead that the plaintiff 's action was statute barred. The entire cause of action upon which the plaintiff sought to rely crystallized when the plaintiff entered into the settlement; he suffered damage at that time. The effort to set aside the settlement was an attempt to reverse the damage. The failure of that attempt did not revive the negligence action. (See also *Ferrara v. Lorenzetti Wolfe Barristers & Solicitors*[11] and *Lipson v. Cassels Brock*.[12])

Nor should you assume that the limitation period begins to run only when an expert opinion is received.

Lawless v. Anderson[13]
The Court of Appeal held that the plaintiff's medical malpractice claim was statute barred. Where a patient has knowledge of the material facts giving rise to the claim, the claim is "discovered," whether or not the patient has obtained medical records or an expert opinion.

The surgeon performed breast augmentation surgery on the plaintiff on July 3, 2003. Shortly thereafter, the plaintiff expressed concern. She met with another cosmetic surgeon, on November 20, 2003. He was critical of the first surgeon's work.

The plaintiff met with a solicitor on December 4, 2003, who explained that the CMPA "fights all malpractice cases extremely hard." The solicitor advised the plaintiff to obtain a complete copy of her medical charts as well as an expert opinion on the standard of care.

The clinic's charts were produced pursuant to a court order in May, 2004. These were sent to the second surgeon, who responded by email on July 22, 2004, stating, "...I don't believe that the consent was informed and the result was below acceptable medical standards. My full report is to follow."

The solicitor did not consider that this e-mail was sufficient to found litigation because it was not a written report admissible under the *Evidence Act* and *Rules of Civil Procedure*.

The second surgeon ultimately declined to provide an expert report and suggested that someone with greater experience with this type of procedure be retained. On June 6, 2005, a third doctor provided a report stating that the first surgeon had fallen below the standard of care. A statement of claim was issued on June 24, 2005.

The first surgeon then brought a motion for summary judgment on the basis that the plaintiff discovered her claim prior to January 1, 2004, and as a result, the one-year limitation period established in s. 89(1) of the *Health Professions Procedural Code*, S.O. 1991 applied.

The plaintiff argued that the claim was not discovered until she received the written opinion from the third doctor. The motion judge concluded that the plaintiff had knowledge of all of the material facts necessary to discover her claim prior to January 1, 2004. Because the claim was issued over a year later, he dismissed the claim.

The plaintiff's appeal was dismissed. Rouleau J.A. held that a medical opinion "simply would serve as evidence in support of her claim, not as the disclosure of necessary facts to ascertain whether she had a claim against Dr. Anderson. A medical opinion was not required given the plaintiff's knowledge of the material facts. (See also *Liu v. Silver.*)

Don't assume that damages must be fully crystallized before the limitation period begins to run.

Hamilton (City) v. Metcalfe & Mansfield Capital Corp[15]
The plaintiff suffered damage on the day he purchased credit default swaps (CDS) on the advice of the defendants, his financial advisers. It was enough that the CDSs were not worth what the plaintiff had paid for them, on the day he bought them. The plaintiff discovered his claim as soon as he

[9] (2010) 101 O.R. (3d) 702, 2010 ONSC 2218, aff'd 2010 ONCA 731
[10] 2011 ONSC 5854
[11] 2012 ONSC 151
[12] 2011 ONSC 6724 (under appeal)
[13] 2011 ONCA 202, dismissing appeal from 2010 ONSC (D.M. Brown, J.)
[14] (2010) 101 O.R. (3d) 702, 2010 ONSC 2218, aff'd 2010 ONCA 731
[15] 2012 ONCA 156, dismissing appeal from 2010 ONSC 7184

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learned that the CDS market had crashed, and a loss was almost a certainty, NOT on the date that the debtor actually defaulted.

Mansoori v. Laing[16]
The plaintiff's claim against the defendant's solicitor and real estate agent was dismissed as statute barred. His action was commenced more than two years after he learned that he did not have the first mortgage to which he claimed to be entitled, and that there would be a shortfall on the sale of the property. It was not necessary to await the sale of the property to ascertain the exact dollar amount of the loss, before the limitation period began to run.

Lipson v. Cassels Brock & Blackwell LLP[17]
The plaintiffs' action against the solicitors was dismissed as statute barred. The plaintiffs invested in a charity tax credit scheme between 2000 and 2003. The defendants opined that the Canada Revenue Agency (CRA) would not likely dispute the scheme.

In 2004, the CRA did so. The plaintiffs spent the next four years negotiating and litigating with the CRA. A settlement was reached in 2008, but the plaintiffs were assessed interest, and penalties for the tax credits were disallowed. Justice Perell held that the plaintiffs knew or ought to have known all of the elements of their cause of action in 2004. They had also suffered damages by that date.

Plaintiffs must prove action commenced promptly

Under the Act, when a limitation period is pleaded, the onus is on the plaintiff to satisfy the court that the action was commenced in time.

Ferrara v. Lorenzetti Wolfe Barristers & Solicitors[18]
An action against a solicitor was dismissed as statute barred. The statement of adjustments prepared by the defendant solicitor on behalf of the plaintiff was questioned and attacked by the opposite party in a real estate transaction.

The "other" party successfully litigated the issue. The plaintiff then sued the solicitor. The court found that the solicitor's error was discoverable when the statement of adjustments was first questioned. The burden is on the plaintiff under s. 5(2) to rebut the presumption that he knew he had a claim on the day of the incident. The plaintiff has the evidentiary burden to prove the claim was issued within the limitation period: *Findlay v. Holmes*[19] and *McSween v. Louis*[20].

The onus is on you

Don't assume that you are entitled to wait for other parties to provide information to you.

Lockett v. Boutin[21]
The plaintiffs moved to add Enbridge Gas as a defendant in an action arising from an explosion in their water heater. Lalonde, J. dismissed the motion on the basis that the plaintiffs failed to exercise due diligence in ascertaining Enbridge's involvement. Waiting for a companion action brought by Boutin against Enbridge, or waiting for information to be supplied by others, did not satisfy the due diligence requirements.

The plaintiffs' appeal was dismissed. There was no evidence of any effort by the plaintiff, prior to the expiry of the limitation period, to determine the identity and potential liability of the persons who owned, supplied, installed or maintained the water heater. The motion judge was entitled to conclude that the plaintiffs had failed to demonstrate due diligence.

Add third parties promptly

Even after a claim has been issued, be alert to the possibility that it may be necessary to add additional parties or causes of action. Investigate such possibilities promptly. Don't assume that it is sufficient to wait until discoveries to explore the matter. On a motion to add additional parties or additional causes of action, thoroughly set out your due diligence efforts.

Sloan v. Ultramar[22]
An oil spill took place in February, 2004. The action was commenced two years later. Ultramar delivered its defence on August 9, 2006, clearly indicating that an independent contractor delivered the fuel.

Counsel for the plaintiff failed to act on this information until eight months later at Ultramar's discovery. On discovery, the name of the independent contractor was provided – a name that turned out to be erroneous. The undertakings given on this discovery, several of which related to the independent contractor and the truck driver, remained outstanding until April 30, 2009. The motion to add the truck driver and the independent contractor was brought on November 13, 2009.

The Court of Appeal held that the plaintiff's application to add these parties was properly dismissed. The only step the plaintiff took to pursue this potential claim was to question Ultramar on discovery. The plaintiff failed to explain why the proposed defendants were not identified and named prior to the expiry of the *Limitations Act, 2002*.

Marcovitch v. Kurtes[23]
Justice Stinson refused to allow Sunnybrook Hospital University of Toronto Clinic to be added as a defendant, because the claim against it was statute barred.

The medical procedure giving rise to the action occurred on April 15, 2004. The action was commenced on May 8, 2006. The initial defendants were Dr. Kurtes and the Sunnybrook and Women's College Health Sciences Centre (the hospital). The hospital's defence pleaded that the plaintiff's surgery was performed at an unnamed private clinic. That defence was delivered on February 27, 2007.

[16] Unreported Judgment, Court file No.: CV-08-11132 CM (Windsor), released June 2, 2011; pdf available from debra.rolph@lawpro.ca

[17] Supra note 15 (under appeal.)

[18] 2012 ONSC 151 (under appeal)

[19] 1998 CanLII 5488 ,[1998] O.J. No. 2796 (Ont.C.A.)

[20] 2000 CanLII 5744, [2000] O.J. No. 2076 (Ont.C.A.)

[21] 2011 ONCA 809, affirming 2011 ONSC 2011

[22] 2011 ONCA 91

[23] 2012 ONSC 1496

The plaintiff moved in November, 2009, to add the clinic as a defendant. Master Hawkins allowed the motion.

Justice Stinson allowed the clinic's appeal. He applied the reasoning in *Sloan v. Ultramar*[24]. The pleading clearly stated that the surgery was performed in a private clinic, and the hospital had no legal responsibility. The delivery of this pleading was a "triggering event" that put the plaintiff on notice of the existence of a potential claim against another legal entity.

Plaintiff's solicitor made no effort to determine the name of the clinic until August 2008 – more than 18 months after delivery of the pleading. When information was finally sought and provided in September, 2008, no further steps were taken until discoveries were conducted in January, 2009.

By mid-January 2009, the plaintiff's lawyer was fully aware of the private clinic's name. This was prior to the two-year anniversary of the delivery of the hospital's defence. Even so, the plaintiff's lawyer did not initiate the motion to amend until October 27, 2009. No reason was given for this delay. The plaintiff failed to discharge the onus on her to demonstrate that the clinic's name was not discoverable within two years of the triggering event (the delivery of the hospital's defence). The lawyer's affidavit contained little information about the efforts made, and instead confirmed a lack of meaningful effort to pursue the information that was available.

Special status of some statutes

Don't forget that the *Limitations Act, 2002* abolished "special circumstances" for the purpose of adding new parties to an action after the limitation period has expired: See *Joseph v. Paramount Canada's Wonderland*[25].

However, this may NOT be true for claims brought under the *Trustee Act*, or other statutes listed in the Schedule to the *Limitations Act, 2002* – see *Bikur Cholim Jewish Volunteer Services v. Penna Estate*[26]. In that case, the court analyzed the interplay between s.38(3) of the *Trustee Act* and the provisions of the *Limitations Act, 2002* and found that cases covered by s. 38(3) (in general, cases involving fraud) are exempt from the limitation. (However, as there was no fraud alleged against the Penna estate, no such exemption was available in this case.)

The benefits of "misnomer"

Don't forget that "misnomer" may be helpful in some circumstances.

Livingston v. Williamson[27]
The plaintiff was allegedly injured when the bus on which she was a passenger braked suddenly to avoid a collision with an unidentified driver. She sued the Toronto Transit Commission (TTC) in its capacity as owner of the bus, employer of the driver, and provider of uninsured motorist coverage.

In fact, the TTC was not the insurer. The plaintiff was unaware that TTC Insurance was a separate company. The plaintiff brought a motion to correct the name of the insurer by adding TTC Insurance as a defendant. TTC Insurance argued that this was not a misnomer motion, but rather a motion to add a party after the limitation period had expired.

Master Hawkins allowed the motion. Both the TTC legal department and TTC Insurance operated from the same building, had identical postal codes and were represented by the same lawyer on the motion. A representative of TTC Insurance, upon receiving a copy of the statement of claim, would have known immediately that insofar as unidentified motorist coverage was concerned, TTC Insurance was intended. Neither TTC nor TTC Insurance suffered any actual prejudice. (See also *Streamline Foods Ltd. v. Jantz Canada Corporation*[28]; *Cappello v. Quantum Limousine Service Inc*[29]; *Ortisi v. Doe*[30]; *McCormick v. Tsai*[31]; *Stekel v. Toyota Canada*[32] and *Pufal v. Richards*[33].)

Cases involving wrongful criminal convictions

In cases which arise from wrongful criminal convictions, resolution of the criminal charges in a manner favourable to the plaintiff may be required before a cause of action can arise.

For example, in *Chimienti v. Windsor (City)*[34], the plaintiff was arrested and charged with assault on March 30, 2000, despite a lack of good evidence of his role in a multi-party brawl. On January 3, 2003, the charges against him were dropped. On July 31, 2003, he issued a statement of claim against the city of Windsor for wrongful detention. The city brought a successful motion to dismiss the action as out of time, arguing that Chimienti was aware of the facts supporting his claim on the day of his arrest. Chimienti appealed. The Court of Appeal allowed the appeal, citing *Hill v. Hamilton Wentworth Police Services Board*[35] for the principle that a plaintiff suing for wrongful conviction (or in this case, wrongful detention) cannot be held to have discovered the facts in support of his or her claim until there is a formal ruling or finding confirming the wrongful conviction (or detention).

See also: *Harris v. Levine*[36]; *Beuthling v. Hayes*[37]; and *Baltrusaitis v. Ontario*[38].

DO IT NOW

Finally, you can save yourself grief by issuing the claim within two years of the date of the occurrence which gave rise to the claim, unless there is some very good reason for not doing so. ■

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[24] (2008) 90 O.R. (3d) 401, 2008 ONCA 469, allowing appeal from 87 O.R. (3d) 473
[25] (2009) 94 O.R. (3d) 410 (C.A.)
[26] (2011) 107 O.R. (3d) 75; 2011 ONSC 3849
[27] 2012 ONCA 174, dismissing appeal from 2011 ONSC 1630, dismissing appeal from 2010 ONSC 6393
[28] 2012 ONSC 2507
[29] 2011 ONSC 5354
[30] 2011 ONSC 2057
[31] 2011 ONSC 6507, dismissing appeal from 2011 ONSC 2211
[32] 2012 ONSC 1969
[33] 2011 ONCA 16, dismissing appeal from 2010 ONSC 1699
[34] 2007 SCC 41 (CanLII), [2007] 3 S.C.R.129
[35] 2011 ONCA 530
[36] 2011 ONSC 1203
[37] 2011 ONSC 532
[38] 2011 ONCA 608