

CITATION: Francis v. McIntosh, 2016 ONSC 5990
COURT FILE NO.: 14-2605 (Stratford)
DATE: 20160929

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
Richard Francis)	
)	
)	Morgan Cassidy, for the Plaintiff
Plaintiff)	
- and -)	
David McIntosh)	Talaal F. Bond, for the Defendant
)	
Defendant)	
- and -)	
Joseph Lam)	Jillian Van Allen, for the Intervener
)	
Intervener)	
)	
)	
)	
)	HEARD: March 30, 2016

RULING ON MOTION

HEBNER J.:

[1] This motion for summary judgment dismissing the plaintiff's claim was brought by the defendant, Mr. McIntosh. The motion was opposed by the intervener, Mr. Lam. The plaintiff, Mr. Francis, took no position on the motion.

Background facts

[2] The plaintiff was involved in a motor vehicle accident on January 28, 2010. According to the motor vehicle accident report, the collision took place at the intersection of Ontario Street and Barritt Street in Stratford, Ontario. The drivers of the two vehicles involved are identified in the motor vehicle accident report as Mr. Francis (the plaintiff) and Mr. McIntosh (the defendant).

[3] The plaintiff retained Joseph Lam of the law firm Krylov & Company to advance claims on his behalf with respect to the motor vehicle accident. According to Mr. Francis, he

retained Mr. Lam on January 31, 2010. According to Mr. Lam, he was retained December 14, 2010. On December 19, 2011, Mr. Lam had a statement of claim issued on behalf of the plaintiff bearing Court file number CV-11-441889. The defendant named in the statement of claim was James Johnson. Mr. Johnson's name does not appear anywhere on the motor vehicle accident report. Mr. Lam did not have the accident report at the time the claim was issued, nor does it appear as though he took any steps to obtain it. In Mr. Lam's cross-examination, he gave the following evidence:

Q: Who is James Johnson?

A: I don't know.

- [4] There is no evidence that anyone by the name of James Johnson was ever served with the statement of claim. A statement of defence was certainly never served and filed. Mr. Lam finally obtained the accident report on October 1, 2014 and realized he had named the wrong defendant on the statement of claim. On October 23, 2014, Mr. Lam wrote to Mr. Francis terminating his retainer due to a conflict of interest and advising Mr. Francis to seek independent legal advice.
- [5] On December 22, 2014, a statement of claim was issued by the plaintiff's current lawyer on behalf of Mr. Francis naming Mr. McIntosh as the defendant. There was no evidence that Mr. McIntosh received notice of claim in respect of the motor vehicle accident prior to service of the statement of claim upon him. On March 5, 2015, the defendant served a statement of defence that did not plead a limitation period defence. On October 14, 2015, the statement of defence was amended to include a limitation period defence.

The issue

- [6] The sole issue before the court was whether the action against Mr. McIntosh was commenced within the applicable limitation period.

The limitation period

- [7] The applicable limitation period is set out in sections 4 and 5 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, as follows:

4. Unless this act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

5. (1) A claim is discovered on the earliest of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the date 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 in clause (a).

5. (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

- [8] In the Court of Appeal decision of *Fennell v. Deol*, 2016 ONCA 249, 97 M.V.R. (6th) 1, the application of the limitation period is described at para. 20 as follows:

The basic two-year limitation period begins to run on the day the claim was discovered. The date of discovery is the earlier of the two dates under s. 5(1) – when (a) the person with the claim had knowledge of, or (b) a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have had knowledge of, the matters referred to in s. 5(1)(a)(i) to (iv). If either of these dates is more than 2 years before the claim was issued, the claim is statute barred.

- [9] The operation of the limitation period in this case requires a determination of (a) when the claim was discovered, or (b) when the claim ought to have been discovered. If that date is prior to December 22, 2012, then the claim is statute barred.

The Insurance Act

- [10] Section 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8, provides as follows:

(5) Despite any other Act and subject to subsections (6) and (6.1), the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for non-pecuniary loss, including damages for non-pecuniary loss under clause 61 (2) (e) of the *Family Law Act*, from bodily injury or death arising directly or indirectly from the use or operation of the automobile, unless as a result of the use or operation of the automobile the injured person has died or has sustained,

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important physical, mental or psychological function.

[11] Section 4.2(1) of *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, O. Reg. 461/96, passed under the *Insurance Act*, includes the following:

4.2 (1) A person suffers from permanent serious impairment of an important physical, mental or psychological function if all of the following criteria are met:

1. The impairment must,

i. substantially interfere with the person's ability to continue his or her regular or usual employment, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,

...

iii. substantially interfere with most of the usual activities of daily living, considering the person's age.

2. For the function that is impaired to be an important function of the impaired person, the function must,

i. be necessary to perform the activities that are essential tasks of the person's regular or usual employment, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment,

...

iv. be important to the usual activities of daily living, considering the person's age.

3. For the impairment to be permanent, the impairment must,

i. have been continuous since the incident and must, based on medical evidence and subject to the person reasonably participating in the recommended treatment of the impairment, be expected not to substantially improve,

ii. continue to meet the criteria in paragraph 1, and

iii. be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

- [12] The limitation period set out in the *Limitations Act* does not begin to run until it is reasonably discoverable that the plaintiff's injuries meet the threshold of "permanent serious impairment" within the meaning of the *Insurance Act*. In *Ioannidis v. Hawkings* (1998), 39 O.R. (3d) 427 (Ont. Gen. Div.), Langdon J. succinctly set out the question as follows:

In practical terms, the question is not whether the plaintiff believes that her injury meets the criteria but whether there is a sufficient body of evidence available to be placed before a judge that, in counsel's opinion, has a reasonable chance of persuading a judge, on the balance of probabilities, that the injury qualifies. When such a body of material has been accumulated, then and only then should the limitation begin to run. This is not to say that the plaintiff is entitled to wait until he or she has an overwhelming case. It is only to say that the court must afford a degree of latitude to a plaintiff in making this very individual and complicated determination.

The plaintiff's injuries as pleaded in 2011

- [13] In the statement of claim issued December 19, 2011, the plaintiff claimed the following injuries:

8. As a result of the defendant's negligence, Mr. Francis sustained a permanent serious disfigurement and impairment of an important physical, mental and psychological function, and internal injuries, injuries to his neck, back and both knees and a spraining, straining and tearing of the muscles, tendons, ligaments, disks, nerves and vessels throughout his body.

9. Mr. Francis's injuries are accompanied by headaches, dizziness, shock, anxiety, depression, emotional trauma, chronic pain, insomnia, weakness, diminished energy and stiffness, which continued to the present and will continue in the future. He has sustained and will continue to sustain pain and suffering, a loss of enjoyment of life and a loss of amenities.

- [14] The statement of claim goes on to plead that Mr. Francis is unable to perform household, handyman and caregiving chores (para. 11); and that Mr. Francis' ability to continue with his work continues to be impaired and he has suffered a loss of income and earning capacity (para. 12).

The plaintiff's injuries as pleaded in 2014

- [15] In the 2014 statement of claim, the plaintiff claimed the following injuries:

8. As a result of the collision and the negligence of the Defendant, the Plaintiff sustained permanent serious impairment of important physical and psychological function, including but not limited to injuries to his neck, back, shoulders and knees.

9. The injuries were accompanied by headaches, anxiety, depression, driving phobia, emotional trauma, chronic pain, weakness, diminished energy, disturbed sleep and stiffness, which continued to the present and will continue in the future.

[16] The statement of claim goes on to plead that the plaintiff has suffered a loss of enjoyment of life and amenities and is unable to participate in recreational, social and household activities (para. 10); and that the plaintiff has incurred damages for loss of income, present and future (para. 13).

[17] The plaintiff's injuries as pleaded in both of the statements of claim are similar, and can be characterized as soft tissue injuries.

The medical evidence

[18] The following can be gleaned from the various medical records and reports that were filed on the motion:

1. The plaintiff has a complicated pre-accident history. At the time of the accidents, the plaintiff was off work for unrelated issues.

2. The plaintiff's family doctor during the period in question was Dr. Charles Gatfield of St. Mary's Medical Clinic. His clinical notes and records disclosed the following:

a. On the day of the accident, presumably before the accident occurred, the plaintiff underwent cervical spine x-rays. The impression was mild degenerative disc disease with no evidence of fracture.

b. Mr. Francis was seen on February 11, 2010 specifically for injuries he suffered in the motor vehicle accident. The note reads "left shoulder and chest wall and shoulder pain"; and "pain ant seat belt ant midclavical T4".

c. On February 12, 2010 Mr. Francis underwent x-rays with respect to the chest and left shoulder. The note reads "no fracture or dislocation".

d. On April 14, 2010 the clinical note reads "I am still very sore the shoulder is grinding but in physio [massage] acupuncture for shoulder; ribs slowly and steadily improving".

e. On July 14, 2010 the note reads "awaiting MRI shoulder after seen by apostle"; and "left shoulder await ortho consult consistent with rotator cuff injury".

f. On August 14, 2010 an MRI scan was completed at St. Joseph's Health Care in London. The note reads "the supraspinatus tendon demonstrates tendinosis, but no frank tear."

g. On September 10, 2010 the note reads "[R]ichard having 'something like a cortisone shot' for his shoulder on Sept[ember] 16 [at] 1130 by Dr. Apostle says he needs something for the pain after the shots and was told to contact family [doctor]."

h. There appears to be a hiatus between May 2011 and March 2013. A note on April 11, 2013 reads "I have been going to physio- and specialists sore left shoulder; lawyer involved; have shoulder pops it make clunk it hurts at times it feels numb". On the same day, a fax was sent to Dr. Apostol which reads, "You last saw this fellow in 2010. He has been lost to follow-up to both of us. He continues to suffer from left shoulder pain and instability. We would appreciate your opinion."

3. On May 28, 2013 Dr. Apostol reported to Dr. Gatfield. The report includes:

I saw this 37 year old patient of yours regarding his left shoulder pain that has been present following an MVA that occurred January 8 2010. He has been off work since then. I saw him back the fall of 2010 and did a cortisone injection for his left shoulder. Unfortunately that only helped him by about 30%.

ON EXAMINATION: His left shoulder has [full] range of motion with pain. Rotator cuff strength is normal but there is pain during the testing maneuvers. There is tenderness over the entire shoulder on palpation.

DIAGNOSIS: Chronic left shoulder strain with no rotator cuff tear.

RECOMMENDATION: Since the injection that I did 20 months ago helped him only minimally I don't see the point in repeating it. There is nil else I can offer this patient. I do not see anything surgical at the present time. Since there is nothing else I can do for this patient I have not given him a re-appointment. You could try a referral to a Physiatrist.

4. In addition to Mr. Lam's retainer for this litigation, he was retained to deal with the plaintiff's claim for accident benefits. An in-home assessment report of Dr. Gallinaro was completed in May 2010. That report includes, "The client's limitations are mainly due to ongoing pain in his neck and low back. He is currently experiencing difficulty with his housekeeping duties. At this time, Mr. Francis continues to require assistance with activities of daily living." The report recommended assistive devices and continued participation in active and passive rehabilitation. Five hours per week of housekeeping assistance and ten hours per week of child care assistance was recommended.

5. A section 24, independent orthopedic medical examination was completed by Dr. Getahun of Century diagnostic and assessment Centre. The report, dated August 3, 2010

concludes, "Mr. Francis reports continued disability for musculoskeletal injuries sustained in a motor vehicle collision of January 28, 2010. Based on history and physical examination and without benefit of radiographs, it is my impression that the injuries are as follows.

1. Myofascial strain of the cervical, thoracic, and lumbar spine.
2. Bilateral shoulder strains.
3. Anxiety and sleep disturbance post motor vehicle collision."

6. A section 24, psychological assessment was completed by Dr. Romeo Vitelli of Century Diagnostic and Assessment Centre. The report, dated August 3, 2010 includes the following:

a. "This client has developed physical and emotional problems directly related to the car accident. Mr. Francis meets according to DSM-IV the criteria for Post Traumatic Stress Disorder and Mixed Anxiety and Depressive Disorder."

b. In response to the question, "Does Mr. Francis suffer from a substantial inability to perform the essential tasks of his daily living?" Dr. Vitelli answered, "From a psychological perspective, Mr. Francis suffers from a substantial [in]ability to perform pre-accident work-related activities as a driver or his activities of daily living, including recreational activities and housekeeping."

c. In response to the question, "What are the prognosis and the expected duration of Mr. Francis's disability at this time?" Dr. Vitelli answered, "Mr. Francis' prognosis is optimistic and an improvement in his affective functioning is anticipated. From psychological perspective, he may benefit from 10 psychotherapy sessions of supportive and behavioural nature... The goal of this course of treatment is to increase Mr. Francis' functional level, lift his anxiety and help his return to normal life activities."

7. On October 7, 2010 Mr. Francis underwent a section 24 neurological evaluation report by Dr. Rehan Dost. The report includes the following summary:

The client was involved in a motor vehicle collision on January 28, 2010. He currently has ongoing cervical left shoulder pain, non-neurological, which should be addressed by a physiatry/orthopedic evaluator.

He has evidence for right S1 radiculopathy clinically, which began recently, the temporal leg is not compatible with traumatic causation. Nonetheless requires MRI of lumbar spine, nerve conduction EMG study of right lower limb.

He is having episodic tension-type headache for which he can use Advil or Tylenol as needed.

...

He is reporting psychological symptoms I suggest psychiatric assessment if not complete already.

8. On November 29, 2010 Mr. Francis was assessed by Dr. Franko Tavazzani for an independent medical examination. Dr. Tavazzani's report includes:

Richard is reporting and demonstrating impairment of body function as a result of injuries sustained in a motor vehicle collision in January 2010. Based on history and physical examination without the benefit of radiographs, it is my impression that his ongoing impairments are related to the following diagnoses:

1. Myofascial dysfunction of the cervical spine.
2. Myofascial dysfunction of both shoulder girdles.
3. Myofascial dysfunction of the lumbar spine.
4. Painful rotator cuff dysfunction of the left shoulder.

...Although his prognosis for overall recovery is good, the functional outcome of whiplash and other soft tissue injuries is not necessarily that of quick resolution and early return to pre-injury activities.

With respect to his left shoulder, he is demonstrating painful rotator cuff dysfunction...

...

He is impaired from performing essential pre-injury activities as a result of injuries sustained in the MVC and his current impairments are consistent with these injuries.

9. On August 3, 2011 an Occupational Therapy In Home Assessment was completed on Mr. Francis. The assessment was requested under section 44 of the Statutory Accident Benefits Schedule as an insurer's examination. That assessment report, dated August 12, 2011 included the following:

Does this individual suffer an impairment that causes a substantial inability to perform his/her pre-accident housekeeping and home maintenance activities?

Yes – based on [Mr.] Francis' ongoing reported pain symptomatology, decreased ability/tolerance to use left arm for heaviest outdoor tasks, and reduced tolerances for the more heavy/physical tasks, assistance is suggested for the most physical/heavy tasks (lawn mowing; lawn trimming) to ensure task completion.

However, from a functional perspective, Mr. Francis does not suffer from a substantial inability to perform all remaining housekeeping tasks at this time.

10. On October 17, 2011 Mr. Francis underwent a section 44 insurer's examination – chiropractic assessment. The report is dated October 24, 2011. The opinion expressed by Dr. Goldsworthy is set out on page 9:

The injuries that Mr. Francis suffered appear to be soft tissue in nature. These types of injuries usually resolve within a few months post-accident. Since Mr. Francis still suffers from a moderate shoulder disability, it would be wise to do an MRI to rule out a possible rotator cuff injury. Mr. Francis reports that he is much better since the accident and continues to get better with his current treatment. It is unclear to this examiner how much is the treatment and how much is healing with time.

11. On November 9, 2011 an occupational therapy in home assessment was completed. The report is dated November 18, 2011. Again, the assessment was requested under section 44 of the Statutory Accident Benefits Schedule as an insurer's examination. In the assessment summary, Mr. Mills, the registered occupational therapist, stated:

When seen on November 9, 2011, Mr. Francis complained of pain in his left shoulder, pectoral, scapula, trapezius, neck, and skull, as well as pain in his right knee, low back (descending through buttocks and into leg), headaches, numbness in left hand/fingers, and issues with his eyes. He ingests a variety of medication (for pain relief and otherwise).

Mr. Francis is greater than 21 months post-accident, he is well beyond the acute phase of his recovery where rest to decrease pain and inflammation is recommended. At this point in his recovery, engagement and activities – household and otherwise – will serve to expedite his recovery despite any residual pain or stiffness that may occur.

The positions of the parties

- [19] The position of the defendant, David McIntosh, is that Mr. Lam had the medical records summarized above and understood the opinions expressed in those medical records. Mr. Lam had sufficient medical information to start the limitation period running. Mr. Lam knew that he had sufficient information and that was why he commenced the action on December 19, 2011, specifically to preserve the limitation period. Thereafter, this case became a solicitor's negligence case and not a personal injury case.

- [20] The plaintiff took no position on the motion, as previously indicated.
- [21] The intervener, Mr. Lam, takes the position that the action issued in December 2011 is a red herring. The actions and inactions of Mr. Lam throughout the period of his retainer are, for the most part, irrelevant. The first indication based on the medical evidence that Mr. Francis's injuries may meet the threshold came in June 2013 with Dr. Apostol's report to the family doctor. Accordingly, the limitation period commenced June 3, 2013, and the statement of claim issued against Mr. McIntosh on December 22, 2014, is not statute barred.

Analysis

- [22] The Supreme Court of Canada in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, addressed the importance of limitation periods and the expectations of plaintiffs at p. 30:

Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for the plaintiffs to bring suit in a timely fashion. This rationale again finds expression in several cases of some antiquity. For example in *Cholmondeley (Marquis) v. Clinton* (1820), 2 Jac. & W. 1, 37 E.R. 527, the Master of the Rolls had this to say in connection with limitation periods for real property actions, at p. 140 and p. 577, respectively:

The statute is founded upon the wisest policy, and is consonant to the municipal law of every country. It stands upon the general principle of public utility. *Interest reipublicae ut sit finis litium*, is a favourite and universal maxim. The public have a great interest, in having a known limit fixed by law to litigation, for the quiet of the community, and that there may be a certain fixed period, after which the processor may know that his title and right cannot be called in question. It is better that the negligent owner, who has omitted to assert his right within the prescribed period, should lose his right, than that an opening should be given to interminable litigation, exposing parties to be harassed by stale demands, after the witnesses of the facts are dead, and the evidence of the title lost. The individual hardship will, upon the whole, be less, by withholding from one who has slept upon his right...

- [23] In my view, Mr. Lam, and by extension Mr. Francis, ought to have known that the impairments from his injuries could reasonably qualify as serious and permanent after receipt of the independent medical examination of Dr. Tavazzani dated November 29, 2010. Dr. Tavazzani's report sets out Mr. Francis' dysfunction, describes the painful rotator cuff dysfunction and recommends a chronic pain assessment. The report is consistent with chronic pain, particularly in the rotator cuff, and ongoing impairment. At that point, Mr. Lam ought to have appreciated the seriousness of Mr. Francis's injuries.

At the very least, at that point, Mr. Lam ought to have asked a medical expert the specific question of whether Mr. Francis's injuries met the threshold. I therefore find that the limitation period started to run on Mr. Lam's receipt of Dr. Tavazzani's report. Although Mr. Lam doesn't specify in his affidavit the exact date he received this report, it is clear, on reading the transcript of his cross-examination, that he had the report in hand shortly after its date and well before he issued the first statement of claim.

[24] In his affidavit evidence filed on the motion, Mr. Lam asserts that he had not formed any opinion as to whether the plaintiff had sustained injuries that would meet the threshold at the time he issued the first statement of claim on December 19, 2011. I find that difficult to believe, given the issuance of the statement of claim and the particular pleading of Mr. Francis' injuries. Mr. Lam must have looked at the file and come to the conclusion that Mr. Francis had an arguable case. Accordingly, if I am wrong that the limitation period started to run in November 2010, I find that at the latest it started to run on December 19, 2011.

[25] In coming to these conclusions, I have noted the following:

1. Mr. Francis did not return to work certainly at any time prior to the issuance of the second statement of claim.

2. Mr. Francis' pain complaints, and specifically respecting his left shoulder, were consistent in all of the medical evidence that was filed. It is clear from the evidence filed that the pain went from acute pain to chronic pain by the time the first statement of claim was issued.

3. There are no medical reports from November 18, 2011 until the time that Mr. Lam discovered that he had sued the wrong defendant in 2014. The only medical evidence filed for this time were the notes and clinical records of the family doctor. It is clear that Mr. Lam took no steps to determine if the injuries of Mr. McIntosh met the threshold within that three-year time period. As indicated above, in my view, the claim was discoverable in November 2010. A reasonable person would have made further medical investigations to determine the serious and permanent nature of the shoulder injury. The fact that Mr. Lam took no steps towards confirming the threshold issue ought not to prevent the limitation period from running.

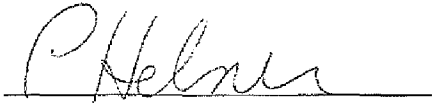
Disposition

[26] For the reasons set out above, I find that the plaintiff's claim against the defendant is statute barred. Accordingly, I grant the defendant summary judgment dismissing the plaintiff's claim.

[27] In the event the parties are unable to agree on costs, they may make written submissions, including a costs outline and any applicable offers to settle, according to the following timelines:

1. The defendant may make submissions within 20 days;

- 2 The intervener may make submissions within a further 20 days;
3. The defendant may make reply submissions within a further 10 days.



Pamela L. Hebner
Madam Justice

Released: September 29, 2016

CITATION: Francis v. McIntosh, 2016 ONSC 5990

**ONTARIO
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Richard Francis

Plaintiff

– and –

David McIntosh

Defendant

– and –

Joseph Lam

Intervenor

REASONS ON MOTION

Hebner J.

Released: September 29, 2016