CITATION: Huang v. Mai, 2014 ONSC 1156
COURT FILE NO.: 09-CV-393770
DATE: 20140226

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
XIAO JUN HUANG	)	*William G. Scott*, for the Plaintiff
Plaintiff	)	
– and –	)	
YIN SONG MAI and XIONG WANG CHEN	)	*Jonathan J. Barr* and *Zofia Vorontsova*, for the Defendants
Defendants	)	
	)	**HEARD**: January 30, 2014

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION AND OVERVIEW

[1] What is it "to know" whether a litigant has a cause of action? This summary judgment motion raises questions about when a plaintiff and her lawyer knew or ought to have known about the existence of a motor vehicle negligence cause of action that meets the threshold requirements of s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8.

[2] In this action, Xiao Jun Huang sues Yin Song Mai and Xiong Wang Chen in a personal injury action arising from a collision between a bicycle, which was being ridden by Ms. Huang, and a motor vehicle, which was being driven by Ms. Mai.

[3] Ms. Mai and Mr. Chen, who was the owner of the vehicle, bring a summary judgment motion to dismiss the action on the ground that it is statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched B. The Defendants submit that that there is no genuine issue requiring a trial and that Ms. Huang's action is untimely because her lawyer, who admitted to having intended to issue a Statement of Claim within two years of the accident, negligently failed to do so.

[4] Ms. Huang resists the summary judgment motion and brings a cross-motion to amend her Statement of Claim as follows:

> This action has been brought within 2 years of when it was discoverable pursuant to ss. 4 and 5 of the *Limitations Act, 2002* that the plaintiff's injuries met the requirements of s. 267(5) of the *Insurance Act* and ss. 4.1, 4.2 and 4.3 of *O. Reg. 461/96*.

[5] Ms. Huang submits that regardless of what her lawyer intended, her claim was not discovered until after she had commenced the action and her lawyer obtained medical reports that revealed that her injuries were serious enough to satisfy the statutory threshold for a claim under the *Insurance Act*.

[6] For the reasons that follow, I dismiss the Defendants' summary judgment motion and I grant Ms. Huang's motion to amend her Statement of Claim.

B. FACTUAL AND PROCEDURAL BACKGROUND

[7] Ms. Huang was injured on October 15, 2007 when her bicycle was struck by Mr. Chen's motor vehicle. At the time of the accident, Ms. Huang was riding her bicycle on McCowan Road, near its intersection with Huntingwood Drive, in the City of Toronto.

[8] Pursuant to s. 4 of the *Limitations Act*, but subject to the principle of discovery set out in s. 5 of the *Act,* Ms. Huang had until October 15, 2009 to commence an action.

[9] Section 4 of the *Limitations Act, 2002* provides the basic limitation period of two years from the day the claim was discovered for all claims unless otherwise provided in the *Act*.

[10] Section 5 of the *Act* defines discoverability for the purposes of the *Act* as follows:

> 5 (1) A claim is discovered on the earlier 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 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 in clause (a).
>
> (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.

[11] Ms. Huang quit her job two days after the accident and has yet to return to full time employment. After the accident, she complained of injuries to her left arm and right knee, as well as dizziness, headaches, nausea, jaw problems, sleep disturbance, and suicidal thoughts. She also complained of serious back pain.

[12] As will be seen, however, the early medical evidence did not necessarily support the existence of a serious medical problem and Ms. Huang did not seek legal advice for some many months after the accident.

[13] About 21 months after the accident, on June 17, 2009, Ms. Huang advised her Ontario Works caseworker that she might seek compensation for the injuries she had suffered in the accident.

[14] The next month, on July 9, 2009, Ms. Huang retained a lawyer, Andrew M. Lee, and on July 16, 2009, Mr. Lee sent the Defendant Ms. Mai a letter giving notice of the plaintiff's claim for damages. He also put the Defendants` insurer, State Farm Insurance Company, on notice of the claim.

[15] Although retained to commence an action for Ms. Huang, in July 2009, Mr. Lee had not formed any opinion as to whether Ms. Huang had sustained injuries that met the requirements of s. 267.5(5) of the *Insurance Act* and ss. 4.1, 4.2 and 4.3 of *O. Reg. 461/96*.

[16] Subsection 267.5(5) of the *Insurance Act* provides:

> 267.5 (5) Despite any other Act and subject to subsection (6), 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.

[17] After taking on the file, Mr. Lee obtained a variety of reports of medical and other examinations that had occurred during 2008 before his retainer. These reports included: (a) Employment Evaluation and Physical Demands Analysis dated January 3, 2008; (b) Report of Dr. Jason W. G. Kwok dated January 14, 2008; (c) Functional Abilities Evaluation Report dated March 26, 2008; (d) Independent Orthopaedic Assessment of Dr. C. B. Paitich dated March 26, 2008; (e) Independent Orthopaedic Assessment Addendum – Response to Rebuttal Report dated June 6, 2008; (f) The Independent Neurological Assessment Report dated August 5, 2008; (g) Medical Report dated September 9, 2008 of Dr. P. Ansari; and (h) Psychiatric Assessment Report dated July 29, 2009.

[18] Dr. Paitich's Orthopaedic Assessment Report indicated that Ms. Huang had sustained a cervicothoracic spine strain as a direct result of her motor vehicle accident as well as a contusion over her right knee. However, it was Dr. Paitich's opinion that there was not an accident related impairment of sufficient magnitude to disable her from her pre-accident housekeeping tasks, home maintenance tasks, activities of normal life, or her occupation.

[19] The Independent Neurological Assessment Report dated August 5, 2008 concluded that: "from the paper review it does not appear the claimant suffered any neurological sequellae as far as the motor vehicle accident is concerned and hence the OCF-22 for a neurological assessment is deemed neither reasonable nor necessary."

[20] On December 18, 2009, Ms. Huang's Statement of Claim was issued. Mr. Lee had intended to issue the Statement of Claim within two years of the motor vehicle accident, but he failed to properly diarize the two-year anniversary of the accident. The Statement of Claim was 63 days late.

[21] However, at the time the Statement of Claim was issued, Mr. Lee still had not formed an opinion as to whether the Plaintiff's injuries met the requirements of s. 267.5(5) of the *Insurance Act*.

[22] On January 27, 2010, the Defendants delivered a Jury Notice and Statement of Defence that denies that Ms. Huang sustained permanent serious disfigurement or permanent serious impairment of an important physical, mental or psychological function.

[23] In 2011, Mr. Lee obtained a Report from Dr. Michael West of August 30, 2011. This Report states, in part, as follows:

> Does our client have an impairment which can be considered "permanent and serious"?
>
> From an orthopedic perspective, it is substantially possible that Ms. Huang has sustained significant injury to her right knee due to the accident of October 15, 2007. I would recommend an MRI scan of the right knee with a view towards possible arthroscopic examination. My suspicion is that she has a tear of her medial meniscus and tear of anterior cruciate ligament. In my opinion, these injuries are of a permanent and serious nature. Ms. Huang continues to have a knee which is painful, unstable and frequently giving way. As a result, she has had difficulty with employment over the past almost four years since the accident. There has been essentially no improvement in her symptoms. They have persisted on an ongoing and indefinite basis. She has developed a chronic pain syndrome as a result. Her symptoms are of a daily nature and are intrusive in nature, interfering with essentially all of her activities of daily living.
>
> As a result of her impairment, she has not been able to work, she has not been able to resume her pre-accident level of family, social and recreational activities (see question 4 below), she has not been able to help out in the family home with respect to housekeeping and home maintenance chores. She has, in my opinion, suffered an impairment which impacts on essentially all of her activities of daily living and has caused her to suffer a significant overall diminution in her quality of life.

[24] It was Mr. Lee's opinion that there was not sufficient medical evidence to persuade a judge that Ms. Huang had sustained an injury that met the requirements of s. 267.5(5) of the *Insurance Act* until the report of Dr. West was received in 2011.

[25] In 2011, Mr. Lee also obtained a Report of Dr. Jerry J.I. Cooper dated September 9, 2011, which is consistent with Dr. West's opinion. This report states, in part, as follows:

> As a consequence of the motor vehicle accident of October 15, 2007, Ms. Huang has suffered moderately severe emotional problems and functional limitations. Ms. Huang has sustained impairments due to the motor vehicle accident of October 15, 2007, which have resulted in a complete inability to perform her activities of daily living including housekeeping, home maintenance and work related duties which she normally engaged in prior to the motor vehicle accident of October 15, 2007.

C. ANALYSIS AND DISCUSSION

[26] As I shall explain below, there is a genuine issue requiring a trial about when Ms. Huang discovered that the extent of her personal injury justified commencing an action against the Defendants. I come to this conclusion applying the approach directed by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 and *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8.

[27] In these circumstances, it is not necessary, if it ever was, for Ms. Huang to plead that her action is not statute-barred. That issue would have been pleaded by her simply joining issue with the Statement of Defence. That said, there is no reason to refuse Ms. Huang's request to amend the Statement of Claim and, therefore, I grant her cross-motion without costs.

[28] Turning to my explanation for dismissing Ms. Mai's and Mr. Chen's summary judgment motion, I begin with the test to be applied.

[29] In *Hryniak v. Mauldin*, the Supreme Court of Canada held that on a motion for summary judgment under Rule 20.04, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the new fact-finding powers enacted when Rule 20 was amended in 2010.

[30] I take the Supreme Court as directing the court on a summary judgment motion to use the approach that existed before Rule 20 was amended and to determine first whether there is a genuine issue requiring a trial about when Ms. Huang discovered or ought to have discovered that she had a claim against the Defendants that might satisfy the *Insurance Act* threshold.

[31] This analysis should be done without using the enhanced fact-finding powers available under rules 20.04 (2.1) and (2.2) by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure, under rule 20.04(2)(a).

[32] In the case at bar, for the reasons set out below, based on the evidence presented and without the use of the powers provided by rules 20.04 (2.1) and (2.2), I am satisfied that there is a genuine issue requiring a trial about whether Ms. Huang's action is statute-barred.

[33] Applying the approach mandated by *Hryniak v. Mauldin,* if, however, there appears to be a genuine issue requiring a trial, then second the court should determine if the need for a trial can be avoided by using the new powers under rules 20.04 (2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

[34] In the case at bar, for the reasons set out below, applying the powers of rules 20.04 (2.1) and (2.2) does not change my analysis and I am, therefore, satisfied that there is a genuine issue requiring a trial about whether Ms. Huang's action is statute-barred.

[35] I begin my explanation of these conclusions by noting that the case law that established the discovery principle and the *Limitation Act, 2002*, which codifies the principle, starts a

limitation period running from the date the plaintiff **knew** or **ought to have known** that a cause of action existed through the exercise of reasonable diligence: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549.

[36] Given the statutory presumption that a limitation period begins to run from the date of the accident, the onus is on the plaintiff to persuade the court that the seriousness of his or her injury was not discoverable within the applicable limitation period and the plaintiff must also persuade the court that he or she acted with due diligence to discover if there was a cause of action: *Yelda v. Vu*, 2013 ONSC 4973 at paras. 29-30.

[37] In *Everding v. Skrijel*, 2010 ONCA 437, approving *Vosin v. Hartin*, [2000] O.T.C. 931 (S.C.J.), the Court of Appeal held that in applying the discoverability principle of the *Limitation Act, 2002*, the court should consider the threshold requirements of the *Insurance Act,* and the Court held that a plaintiff will not have discovered his or her claim before the plaintiff **knows** that he or she has a substantial chance to succeed in recovering a judgment for damages. A person cannot be expected to commence an action before he or she knows that the necessary elements as set out in the legislation can be established on the evidence: *Hoffman v. Jekel*, 2011 ONSC 1324 at para. 9.

[38] Under the case law, for the limitation period to begin to run, the plaintiff must have knowledge that his or her damages could be considered permanent and serious. I emphasize that the plaintiff must have knowledge because the limitation period does not begin simply because the plaintiff believes or ought to believe that he or she has a claim. Rather, the limitation period begins when the plaintiff first knew - which I take to be when he or she had an objective appreciation - that a proceeding would be an appropriate means to seek a remedy.

[39] That there is a distinction between what a plaintiff believes and what he or she objectively knows was a point made by Justice Langton in *Ionnideis v. Hawkings* (1998), 39 O.R. (3d) 427 at pp. 433-434 (Gen. Div.), where he stated:

> ... [N]o one can seriously argue that the decision whether a particular injury meets the statutory criteria is an easy one or, perhaps more important, that it will be easy to predict the outcome of a motion to dismiss a claim which the defendant asserts is unworthy. Even in such a motion, the onus is upon the plaintiff to demonstrate that his or her injuries meet the statutory criteria. When one is seeking to apply the discoverability rule to the plaintiff in a case such as this, it behooves the court to grant a degree of latitude to a plaintiff before declaring that the limitation period has begun to run. ... 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.

[40] *Ionnideis v. Hawkings, supra*, was applied in: *Fuller v. McCartney* (2003), 63 O.R. (3d) 393 (S.C.J.); *Simonelli v. Halifax Insurance Co.*, [2002] O.J. No. 1354 (S.C.J.); *Hoffman v. Jekel, supra; Phung v. Mais*, 2012 ONSC 7153; and *Chan v. Abdo*, 2013 ONSC 3017.

[41] In the case at bar, Ms. Huang obviously believed that she had a claim that ought to be pursued when she retained a lawyer in the summer of 2009, but her lawyer's professional

opinion was that there was not sufficient medical evidence to have a reasonable chance of persuading a judge that the Plaintiff had sustained an injury that met the requirements of s. 267.5 (5) of the *Insurance Act*. Sufficient evidence was not obtained until the report of Dr. West dated August 30, 2011 was received.

[42] If Mr. Lee's view is correct, which is a genuine issue requiring a trial, then Ms. Huang's action commenced in 2009 was not late but rather premature until perhaps as long as 2011.

[43] In *Phung v. Mais*, *supra*, Justice Morgan dismissed a summary judgment motion because there was a genuine issue requiring a trial about whether the plaintiff's claim was statute-barred, and he noted the problem of prematurity posed by the discoverability rule where there is no cause of action until the threshold conditions could be satisfied. He stated at para. 14:

> 14. I am conscious of the difficulties that the "discoverability" rule poses for a plaintiff and his counsel. As has been noted in other cases, "if the plaintiff issues suit prematurely, he or she may be faced with an almost immediate motion to dismiss the claim...On the other hand, the longer the plaintiff waits, the greater is the risk that he or she will wait too long and the action will be statute-barred." *Ioannidis v. Hawkings* (1998), 39 OR (3d) 427, at para. 35 (SCJ). Plaintiff and his counsel must be confident of credibly "assessing the medical and other evidence" as to whether the injured person has sustained permanent impairment, whether the impaired bodily function is an important one, and whether the impairment is a serious one. *Meyer v. Bright* (1993), 15 OR (3d) 129, at 138 (Ont CA).

[44] It is worth noting that in the case at bar, the onus on Ms. Huang is to show that her action was not statute-barred at the time it was commenced, which was 63 days past the statutory presumption for the completion of the running of the limitation period. After she commenced her action in December 2009, her state of belief or knowledge is irrelevant.

[45] In my opinion, there is a genuine issue for trial about when, between the date of the accident and the date she commenced her action, the limitation period began to run.

[46] The case at bar is similar to *Chan v. Abdo*, *supra*. In that case, Ms. Chan was involved in a car accident on October 19, 2005 and over the next 24 months, she had communication with four lawyers and with the defendant's insurer. Ms. Chan commenced her action on October 26, 2007. Pleadings were completed. The defendant pleaded that Ms. Chan's claim was statute-barred. The action proceeded to examinations for discovery, and just before the trial was to be scheduled, the defendant brought a summary judgment motion. On the summary judgment motion, Ms. Chan's lawyer deposed that it was through inadvertence that the action had been commenced seven days after the two-year anniversary of the accident. On her examination for discovery, Ms. Chan had testified that she felt that she had suffered serious injuries on the day of the accident. The evidence on the summary judgment motion established that Ms. Chan knew about the pending limitation period before its potential end date of October 19, 2007.

[47] In *Chan v. Abdo*, Justice Rady dismissed the motion for summary judgment, and she concluded that there was a genuine issue for trial on the issue of discoverability. Justice Rady noted that the solicitor's admitted inadvertence was not determinative of the outcome. She stated at paragraphs 36-37:

> 36. The uncontroverted evidence is that Ms. Chan did not seek medical attention until six days after the accident. At that time, her family physician did not suspect a serious and permanent

> injury or that her patient might not recover. The fact that Ms. Chan was concerned about her injuries immediately after the accident (as her examination for discovery evidence might be interpreted) is not sufficient to start the limitation period running. There was simply not a sufficient body of credible evidence to establish that her injuries met the threshold at that time.
>
> 37. Mr. Medcalf's affidavit suggesting solicitor's inadvertence is not determinative. In fairness, he also addressed the issue of discoverability and that evidence that Ms. Chan had suffered sufficiently significant injuries was not available until after more than seven days following the accident.

[48] In *Fuller v. McCartney, supra*, Justice Epstein held that the fact that the plaintiff instructed counsel to commence an action before the two-year anniversary of the accident did not preclude the operation of the discoverability rule to show that the limitation period had not begun to run.

D. CONCLUSION

[49] For the above reasons, I dismiss Ms. Mai's and Mr. Chen's motion and I grant Ms. Huang's motion.

[50] In *Hryniak v. Mauldin*, *supra* at paras. 78-79, the Supreme Court held that when a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, he or she should remain seized of the matter as the trial judge. This direction was made under the heading "Salvaging a Failed Summary Judgment Motion" and in the context of a discussion of how a failed summary judgment motion adds costs and delay. In that context, Justice Karakatsanis observed the added costs and delay could be attenuated by a judge making use of the trial management powers provided in rule 20.05 and the court's inherent jurisdiction.

[51] There is an argument that Justice Karakatsanis' direction was *obiter* dicta, but I will treat it as binding on lower courts.

[52] In the case at bar, however, like some summary judgment motions, there are no economies to be achieved and nothing to carry forward in having me remain seized of the matter. I have made no findings about the medical or other evidence presented on the motion beyond saying that there is a genuine issue for trial about whether the action is statute-barred. There are obviously genuine issues for trial about whether the statutory threshold has been satisfied and, if so, the extent of Ms. Huang's injuries.

[53] Put shortly, the parties would be better served by having this action now proceed in the normal course without case management, which does not appear to be necessary. I, therefore, decline to exercise my discretion to remain seized of the matter.

[54] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Huang's submissions within twenty days of the release of these Reasons for Decision followed by Ms. Mai's and Mr. Chen's submissions within a further twenty days.

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Perell, J.

Released: February 26, 2014

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