CITATION: Landrie v. Congregation of the Most Holy Redeemer, 2014 ONSC 4008
COURT FILE NO.: CV-10-414852
DATE: 20140702

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ELAINE LANDRIE	)	*Jillian Van Allen*, for the Plaintiff
	)	
Plaintiff	)	
	)	
– and –	)	
	)	
CONGREGATION OF THE MOST HOLY REDEEMER, ST. PATRICK'S CHURCH AND THE ROMAN CATHOLIC EPISCOPAL CORPORATION FOR THE DIOCESE OF TORONTO AND LNN STUDIOS LIMITED O/A FOREST HILL SNOW REMOVAL	)	*Daniela Corapi*, for the Defendant
	)	
Defendants	)	
	)	
	)	**HEARD**: June 24, 2014

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] Elaine Landrie is the Plaintiff in a slip and fall personal injury action that occurred on November 19, 2008.

[2] The Defendants, the Congregation of the Most Holy Redeemer and St. Patrick's Church, which were sued on November 22, 2010, move for a summary judgment dismissing Ms. Landrie's claim as statute-barred. They argue that her claim was commenced outside the two-year limitation period prescribed by s. 4 of the *Limitations Act*.[1] They submit that the claim is three days late.

[1] S.O. 2002, c. 24, Schedule B.

[3] Ms. Landrie resists the motion. She submits that there is a genuine issue requiring a trial and that she did not discover her claim until after November 22, 2008, making her action timely. Alternatively, she submits that there is a genuine issue about whether she was capable of commencing a proceeding within the meaning of s. 7 of the *Act*, between November 19, 2008 and November 22, 2008.

[4] For the reasons that follow, I find as a fact that Ms. Landrie's action is not statute-barred.

[5] Although she did not bring a cross-motion for summary judgment, I grant Ms. Landrie a partial summary judgment, dismissing the Defendants' limitation period defence. Her action should proceed to trial on the issues of whether the Defendants are negligent and, if so, what the quantification of her claim for damages is.

B. THE RELEVANT PROVISIONS OF THE *LIMITATIONS ACT*

[6] For the purposes of deciding this summary judgment motion, the relevant sections of the *Limitations Act, 2002* are sections 4, 5, and 7, which state:

> *Basic Limitation Period*
>
> 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.
>
> *Discovery*
>
> 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).
>
> *Presumption*
>
> (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.
>
> ….
>
> *Incapable persons*
>
> 7. (1) The limitation period established by section 4 does not run during any time in which the person with the claim, is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and is not represented by a litigation guardian in relation to the claim.

Presumption

(2) A person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved.

C. FACTUAL AND PROCEDURAL BACKGROUND

[7] Ms. Landrie was born on December 31, 1939.

[8] On November 19, 2008, Ms. Landrie went to St. Patrick's Church in the City of Toronto. After exiting the Church, she slipped and fell and injured her left ankle. She suffered no head injury and she did not lose consciousness at the time of the accident.

[9] Immediately after the accident, Ms. Landrie was transported by ambulance to Mount Sinai Hospital, where she was admitted as a patient. She was x-rayed and diagnosed to have a commuted fracture/dislocation of the left ankle. She was placed under conscious sedation, and the bone was reset. She was not discharged from the hospital.

[10] Ms. Landrie remained in hospital, and on November 24, 2008, she was again placed under conscious sedation so that the bone could be reset a second time. Again, she was not discharged from the hospital.

[11] On November 27, 2008 the Plaintiff underwent surgical repair of her left ankle, which included open reduction and internal fixation of the medial lateral malleoli. I understand that she was likely unconscious for the surgery. Because of her pre-existing poor health including the condition of her heart, diabetes, hypertension, and renal stenosis there was significant risk of surgical complications including amputation and death.

[12] She remained in the hospital after her surgery until December 3, 2008.

[13] Between November 19, 2008 and December 3, 2008, Ms. Landrie was administered significant doses of medication, including strong morphine-based painkillers. Much of the time she was sedated, confused and disoriented, but she was not unconscious.

[14] On December 3, 2008, Ms. Landrie was released from Mount Sinai Hospital into the care of Bridgepoint Health, where she received post-operative treatment.

[15] On March 18, 2009, Ms. Landrie was discharged from Bridgepoint Health.

[16] On October 28, 2010, Ms. Landrie retained Benson Percival Brown LLP as her lawyers. She mistakenly told her lawyers that the accident had occurred on November 24, 2008.

[17] On November 22, 2010, Ms. Landrie issued a Statement of Claim, and she pleaded that the accident had occurred on November 24, 2008 at the premises of St. Patrick's Church.

[18] Over a year passed, and on December 23, 2011, Ms. Landrie's lawyers noticed a discrepancy about the date of the accident, and they met with her on January 9, 2012.

[19] The next day, on January 10, 2012, Ms. Landrie advised her lawyers that she had reviewed her calendar and believed that the incident occurred on November 19, 2008 and not on November 24, 2008. She believed she had confused the date of her surgery of November 24, 2008 with the date of the accident.

[20] In February and March 2012, the lawyers received and reviewed the medical records, and by July 2012, they had determined that the slip and fall had occurred on November 19, 2008.

[21] On October 17, 2012, Ms. Landrie amended her Statement of Claim to specify the date of the accident as November 19, 2008 and added the following paragraphs:

> 6A. Immediately after the accident, the Plaintiff was hospitalized and in severe pain after having sustained very serious injuries. Significant doses of medication, including strong morphine-based painkillers, were being administered to Ms. Landrie. She spent much other time at the hospital sedated and disoriented. The Plaintiff claims that for a period of at least a week following this incident, she was suffering from the accident trauma and recovering from various treatment procedures including surgery.
>
> 6B. The Plaintiff claims that during her hospital stay her family and friends who visited her commented on her disorientation and her incapacitated state.
>
> 6C. The Plaintiff was transferred from the scene to Mount Sinai Hospital where she underwent x-rays which revealed a commuted fracture/dislocation of the ankle. She was placed under conscious sedation. She recalls initially being advised that she may have to undergo amputation of the right (sic left) foot. She reported feeling nervous and afraid.
>
> 6D. She was admitted to the hospital on November 20, 2008 and ultimately underwent surgical procedure to her left ankle on or about November 27, 2008. The Plaintiff remained hospitalized until December 3, 2008 at which time she was released to the care of Bridgepoint Health where she received post-operative care. She remained at Bridgepoint until March 18, 2009. At the time of her discharge she was finally able to ambulate using a mobility aid.
>
> 6E. The Plaintiff claims that as a result of her injuries she was of "unsound mind" during the months following the slip and fall accident and by reason of mental illness, was incapable of managing her affairs as a reasonable person would do in relation to the incident, or event, which entitles the person to bring an action.
>
> 6F. The Plaintiff further states that she was not in the position to appreciate the nature and extent of any claim she may have had prior to March 18, 2009 when she was released from Bridgepoint Health.
>
> 6G. The Plaintiff pleads and relies on the relevant provisions of the *Limitations Act,* S.O. 2002, c. 24.
>
> 6H. The Plaintiff specifically pleads that she was incapable of commencing a proceeding in respect of the claim because of her physical mental and/or psychological condition.
>
> 6I. In the alternative, the Plaintiff pleads and relies on the principle of discoverability.

[22] On March 5, 2013, Ms. Landrie was examined for discovery, and she confirmed that the accident occurred on November 19, 2008.

[23] Subsequently, the Congregation of the Most Holy Redeemer and St. Patrick's Church brought this motion for summary judgment.

[24] On April 17, 2014, Ms. Landrie was cross-examined on her affidavit for the summary judgment motion. Her counsel, Daniel Holland, was also cross-examined on his affidavit.

D. DISCUSSION AND ANALYSIS

1. Incapable Persons and the Running of Limitation Periods

[25] Ultimately, this summary judgment motion will turn on the interpretation of s. 7 (1) of the *Limitations Act, 2002*, which states:

> *Incapable persons*
>
> 7. (1) The limitation period established by section 4 does not run during any time in which the person with the claim, is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and is not represented by a litigation guardian in relation to the claim.
>
> *Presumption*
>
> (2) A person shall be presumed to have been capable of commencing a proceeding in respect of a claim at all times unless the contrary is proved.

[26] Under s. 7, the two-year limitation period established by s. 4 of the *Act* "does not run during any time in which the person with the claim is incapable of commencing a proceeding." The practical effect of the limitation period not running during the period of incapacity is that the limitation period is extended commensurate with the period of incapacity. The effect of s. 7 is to extend the limitation period by the period of the incapacity.[2]

[27] In the context of the facts of the case at bar, there is a dispute between the parties about whether Ms. Landrie discovered her claim on November 19, 2008, the date of her slip and fall. For the purposes of deciding this summary judgment motion, I shall assume that November 19th was indeed the date of discovery. Thus, since she commenced her action on November 22, 2010, but for an extension of the limitation period, her action is three days late.

[28] With that assumption, the issue to be decided on this motion is whether s. 7 tolled the running of the limitation period. In other words, returning to the language of s. 7, the issue to be decided is whether Ms. Landrie was incapable of commencing a claim "because of her physical, mental or psychological condition."

[29] It is interesting and informative to note that s. 7 of the *Limitations Act, 2002* is more liberal and generous than s. 47 of the former *Limitations Act*,[3] which recognized that it is unfair to run a limitation period against a plaintiff who is incapable of commencing an action. However, s. 47 provided an extension only for a person who was "a minor, mental defective, mental incompetent or of unsound mind." Section 47 stated:

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

[30] Section 47 of the former *Act* allowed an exception to the running of the period for a plaintiff who was of "unsound mind," which meant that the plaintiff had to demonstrate serious mental incapacity to commence his or her action.

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[2] *Andriano v. Napa Valley Plaza Inc.*, 2010 ONSC 5492 at para. 16.

[3] R.S.O. 1990, c. L.15.

[31] The Ontario Law Reform Commission in its *Report on Limitation of Actions* (Department of the Attorney General, 1969) at p. 100 recommended that disability "should be defined in such a way as to extend the meaning of unsound mind to all situations where a person cannot manage his affairs because of any disease or any impairment of his physical or mental condition."

[32] Section 7 of the current *Act* does not require the plaintiff to be a mental incompetent to stop the running of the limitation period; s. 7 requires only that the plaintiff be incapable of commencing a proceeding in respect of the claim because of a physical, mental or psychological condition.

[33] Section 7 was applied in *Leone v. University of Toronto Outing Club*.[4] In this case, on August 1, 2004, Mr. Leone was thrown from his bicycle while mountain biking on Crown lands. He sustained a compression fracture of his thoracic spine. Under s. 7 (3) of the *Proceedings Against the Crown Act*,[5] no proceeding shall be brought against the Crown unless notice is served on the Crown within 10 days after the claim arose, which meant that Mr. Leone needed to give notice by August 11, 2004, which he did not do. The explanation for his failure to give notice was that he was hospitalized for four days and upon his discharge was taking pain relief medication into October. His pain was not well controlled and he was sleep deprived. He used a cane for walking until the end of October. His doctor's opinion was that for the first 10 days following the accident Mr. Leone would not be behaving in a normal manner. On September 7, 2004, Mr. Leone wrote to a solicitor requesting that a title search be performed and on September 17, 2004, Mr. Leone learned that his accident occurred on Crown land, and on September 20, 2004, the next working day, his lawyer gave of notice of Mr. Leone's claim.

[34] Justice Jenkins held that the discoverability rule applied to the action and that Mr. Leone was unable to make a decision and notify the Crown within 10 days because of the severity of his injuries. Justice Jenkins dismissed the Crown's motion for a summary judgment to bar the action for the failure to give timely notice.

[35] The evidentiary onus to show incapacity is on the party relying on s. 7, and in other cases, plaintiffs have failed to toll the running of the limitation period when they have failed to provide evidence, particularly medical evidence, to establish incapacity.[6]

2. The Test for Summary Judgment

[36] Under rule 20.04(2)(a), on a motion for summary judgment, the court must decide whether the moving party has established that there is "no genuine issue requiring a trial with respect to a claim or defence". Under rule 20.04(2)(b), the court shall grant summary judgment if the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.

[37] Until 2010, there was controversy about the interpretation and application of the former test, which was regarded as unreasonably narrow, making it too difficult to obtain a summary

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[4] [2006] O.J. No. 4131 (S.C.J.).
[5] R.S.O. 1990, c. P.27.
[6] *Kim v. Manufacturers Life Insurance Co. (c.o.b. Manulife Financial)*, 2014 ONSC 1205; *Reid v. Crest Support Services (Meadowcrest) Inc.*, 2013 ONSC 6264; *Hussaini v. Freedman*, 2013 ONSC 779; *Aletkina v. Hospital for Sick Children*, 2014 ONSC 716 (Div. Ct.); *Aletkina v. Hospital for Sick Children*, 2013 ONSC 4709 (Master); *Deck International Inc. v. Manufacturers Life Insurance Co.*, 2012 ONCA 309; *Klimek v. Klos*, [2013] O.J. No. 3740 (Sm. Cl. Ct.).

judgment. Also troublesome to the utility of the rule was the case law that had held that a judge could not assess credibility, weigh evidence or find facts on a motion for summary judgment.[7]

[38] The amendments to Rule 20 introduced significant changes in the manner in which summary judgment motions are to be decided. The restrictions on the ability of the motions judge to weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence were removed.

[39] The policy to broaden the powers of the court on a motion for summary judgment and to make it less difficult to obtain a summary judgment was activated by the amendments that accompanied the new version of rule 20.04(2)(a). Rule 20.04(2.1) states:

> (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
>
> 3. Drawing any reasonable inference from the evidence.

[40] In *Hryniak v. Mauldin*,[8] 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. The analysis of whether there is a genuine issue requiring a trial should be done 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.

[41] If, however, there appears to be a genuine issue requiring a trial, then 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 their use 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.

[42] Subject to the directive of the Supreme Court of Canada in *Hryniak v. Mauldin*, that the court should first determine whether a summary judgment is possible without using the enhanced powers of rule 20.04(2.1), this rule is a legislative reversal of the case law that had held that a judge could not assess credibility, weigh evidence, or find facts on a motion for summary judgment,[9] and it permits a more meaningful analytical review of the paper record.[10] The amendments were designed to transform the summary judgment rule from a means to weed out unmeritorious

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[7] *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 (C.A.).

[8] 2014 SCC No. 7.

[9] *Cuthbert v. TD Canada Trust*, [2010] O.J. No. 630 at para. 10 (S.C.J.); *Canadian Premier Life Insurance Co. v. Sears Canada Inc.*, [2010] O.J. No. 3987 at paras. 68-69 (S.C.J.); *Lawless v. Anderson*, 2010 ONSC 2723 at paras. 19-22.

[10] *Hino Motors Canada Ltd. v. Kell*, [2010] O.J. No. 1105 (S.C.J.); *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1037.

claims to a significant model of adjudication.[11] *Hryniak v. Mauldin* encourages the use of a summary judgment motion to resolve cases in an expeditious manner, provided that the motion can achieve a fair and just adjudication.[12] The new approach to summary judgment was not designed to eliminate trials but rather to determine when trials are unnecessary and when the summary judgment process provides an appropriate means for effecting a fair and just resolution of the litigation.[13] Under *Hryniak v. Mauldin,* the trial is no longer the centre of the procedural universe and other proportionate procedures may provide fair access to justice.[14]

[43] The Supreme Court of Canada in *Hryniak v. Mauldin*, developed a test and an approach for determining when to grant a summary judgment that is more robust than the full appreciation test that had been developed by the Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*.[15] In *Hryniak v. Mauldin* and in the companion case of *Bruno Appliance and Furniture, Inc. v. Hryniak*,[16] the Supreme Court of Canada developed an approach to summary judgment that uses different measures, and the Supreme Court signaled that a change in legal culture was required that did not privilege the trial as the means to obtain substantively fair and just access to justice.

[44] The Supreme Court of Canada held that the Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch* had placed too high a premium on the full appreciation of evidence that can be gained at a trial.[17] The appreciation of the evidence necessary to make findings of fact and to reach a just and fair outcome could be achieved by procedures that took into account proportionality, timeliness, and the affordability of access to justice.[18] *Hryniak v. Mauldin* encourages the use of a summary judgment motion to resolve cases in an expeditious manner provided that the motion can achieve a fair and just adjudication. Speaking for the Supreme Court, Justice Karakatsanis opened her judgment by stating:[19]

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. ... Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

Later in her judgment, she stated:[20]

> There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This

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[11] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 44-45.
[12] *2329131 Ontario Inc. v. Carlyle Development Corp.*, 2014 ONCA 132 at para.13.
[13] *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 at para. 38.
[14] *Fehr v. Sun Life Assurance Co. of Canada*, 2014 ONSC 2183.
[15] *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 at para. 38.
[16] 2014 SCC 8.
[17] 2014 SCC 7 at para. 4.
[18] 2014 SCC 7 at paras. 52-60.
[19] 2014 SCC 7 at paras. 1-2.
[20] 2014 SCC 7 at para. 27.

> balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

[45] Justice Karakatsanis summarized the approach to determining when a summary judgment may or may not be granted; she stated:[21]

> Summary judgment may not be granted under Rule 20 where there is a genuine issue requiring a trial. As outlined in the companion *Mauldin* appeal, the motion judge should ask whether the matter can be resolved in a fair and just manner on a summary judgment motion. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. If there appears to be a genuine issue requiring a trial, based only on the record before her, the judge should then ask if the need for a trial can be avoided by using the new powers provided under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice.

[46] Justice Corbett provided a useful summary of the *Hryniak v. Mauldin* approach in *Sweda Farms Ltd. v. Egg Farmers of Ontario*, where he stated at paras. 33 and 34:[22]

> 33. As I read *Hryniak*, the court on a motion for summary judgment should undertake the following analysis:
>
> > (1) The court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial;
> >
> > (2) On the basis of this record, the court decides whether it can make the necessary findings of fact, apply the law to the facts, and thereby achieve a fair and just adjudication of the case on the merits;
> >
> > (3) If the court cannot grant judgment on the motion, the court should:
> >
> > > (a) Decide those issues that can be decided in accordance with the principles described in (2), above;
> > >
> > > (b) Identify the additional steps that will be required to complete the record to enable the court to decide any remaining issues;
> > >
> > > (c) In the absence of compelling reasons to the contrary, the court should seize itself of the further steps required to bring the matter to a conclusion.
>
> 34. The Supreme Court is clear in rejecting the traditional trial as the measure of when a judge may obtain a "full appreciation" of a case necessary to grant judgment. Obviously greater procedural rigour should bring with it a greater immersion in a case, and consequently a more profound understanding of it. But the test is now whether the court's appreciation of the case is sufficient to rule on the merits fairly and justly without a trial, rather than the formal trial being the yardstick by which the requirements of fairness and justice are measured.

[47] As may be noted from Justice Corbett's summary, *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have respectively advanced their best case and that the record contains all the evidence that the parties

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[21] 2014 SCC 8 at para. 22.

[22] 2014 ONSC 1200 at paras. 33-34.

will respectively present at trial.[23] The onus is on the moving party to show that there is no genuine issue requiring a trial, but the responding party must present its best case or risk losing.[24]

3. Weighing the Evidence, Evaluating Credibility, and Drawing Inferences

[48] Applying the approach mandated by *Hryniak v. Mauldin*, based only on the evidence in the motion record, and without using the fact-finding powers provided by rules 20.04(2.1) and (2.2), I am satisfied that there are genuine issues requiring trial about when Ms. Landrie discovered her claim and about whether there was a time in which she was incapable of commencing her claim because of her physical, mental or psychological condition.

[49] There being these genuine issues requiring a trial, I shall move on to determine if the need for a trial can be avoided by using the powers under rules 20.04(2.1) and (2.2). In my opinion, in the immediate case, the use of these forensic powers is not against the interest of justice. And, in my opinion, in the case at bar, using these resources 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.

[50] Using the resources of rules 20.04(2.1) and (2.2), I grant a summary judgment – not to the moving parties – but to Ms. Landrie. I can resolve the issue of whether there is a limitation period defence at this juncture.

[51] The court does not require a cross-motion for summary judgment when it can decide the issue that is the subject matter of the motion for summary judgment. In *King Lofts Toronto I Ltd. v. Emmons*,[25] on appeal, the defendants argued that I had erred in granting a summary judgment to a party who had not given advance notice of a request for summary judgment. Relying on the culture shift mandated by the Supreme Court in *Hryniak*, the Court of Appeal dismissed this ground of appeal and stated that the principles of proportionality and sensible management of the court process supported granting a summary judgment.

[52] I find as a fact that Ms. Landrie was not capable of commencing a proceeding before her discharge from Mount Sinai Hospital. Placing the evidentiary onus on her, I am satisfied that she has tolled the limitation period pursuant to s. 7 of the *Act*. I find as a fact that the evidence establishes that Ms. Landrie had a physical condition that made her incapable of commencing a proceeding in respect of her claim. In my opinion, the evidence establishes that Ms. Landrie had a mental or psychological condition that made her incapable of commencing a proceeding in respect of her claim until she was discharged from Mount Sinai Hospital.

[53] The Defendants submitted that these findings of fact are not open to me because: (a) Ms. Landrie did not deliver an expert's opinion to establish that she was incapable of commencing the claim within the two-year limitation period because of her physical, mental or psychological condition; (b) she did not provide objective evidence with respect to low tolerance for medication or the impact that the medication had on her capacity; (c) she failed to produce any will say statements from family members who visited her at the hospital; (d) the absence of any

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[23] *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240; *Bluestone v. Enroute Restaurants Inc.*, (1994), 18 O.R (3d) 481 (Ont. C.A.); *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 11.

[24] *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 255 (Gen. Div.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. No. 3754 (C.A.).

[25] 2014 ONCA 215, affg. 2013 ONSC 6113.

notation in the hospital records that she was suffering from unusual grogginess or inattentiveness suggests that her state did not constitute a "physical, mental or psychological condition," as defined in s. 7(1)(a) of the *Limitations Act*; (e) she presented no evidence about her ability to consent to surgical treatment; and (f) there was no evidence that she needed assistance to understand or consent to the various treatments she received.

[54] I disagree with the Defendants' argument. From an evidentiary perspective, Ms. Landrie can be taken as putting her best case forward, and in my opinion, she has proven that in the circumstances of this case, her claim was timely and not statute-barred.

[55] From an evidentiary perspective, the Defendants may also be taken to have putting their best case forward, and in this regard, it may be noted that they did not provide the court with an expert's assistance. They provided only argument about what might be inferred or not inferred from the medical record of Ms. Landrie's stay in hospital.

[56] It may be that either party could have presented a better evidentiary record than what the court will take as their best evidentiary record, but in the case at bar while Ms. Landrie might have done more, in the result she did enough to persuade me that her claim was timely.

E. CONCLUSION

[57] For the above reasons, I grant Ms. Landrie summary judgment as aforesaid.

[58] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Ms. Landrie's submissions within 20 days of the release of these Reasons for Decision followed by the Defendants' submissions within a further 20 days.

Perell, J.

Released: July 2, 2014

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SUPERIOR COURT OF JUSTICE

BETWEEN:

ELAINE LANDRIE

Plaintiff

– and –

CONGREGATION OF THE MOST HOLY REDEEMER, ST. PATRICK'S CHURCH AND THE ROMAN CATHOLIC EPISCOPAL CORPORATION FOR THE DIOCESE OF TORONTO AND LNN STUDIOS LIMITED O/A FOREST HILL SNOW REMOVAL

Defendants

REASONS FOR DECISION

PERELL J.

Released: July 2, 2014