SUPREME COURT OF NOVA SCOTIA
Citation: *Dyack v. Lincoln*, 2017 NSSC 187

Date: 2017-07-05
Docket: Hfx No. 426379
Registry: Halifax

Between:

Dr. Colin Dyack

Plaintiff

v.

Dr. Maximillian Lincoln

Defendant

Judge:	The Honourable Justice James L. Chipman
Heard:	January 24, 2017, in Halifax, Nova Scotia
Final Written Submissions:	June 23, 2017
Counsel:	Raymond F. Wagner, Q.C. and Kate Boyle, for the Plaintiff/Applicant Colin J. Clarke, Q.C. and Jack Townsend, for the Defendant/Respondent

By the Court:

Overview

[1] The Plaintiff filed his lawsuit in the spring of 2014. He sued the Defendant for medical malpractice relating to surgeries performed in 2012. In particular, the Plaintiff alleged the Defendant failed to obtain his informed consent.

[2] The matter proceeded in the standard way with an exchange of affidavits disclosing documents and discoveries of the parties. In the spring of 2016, the Plaintiff filed a Request for Date Assignment Conference and the Defendant filed a Memorandum for Date Assignment Judge.

[3] The Date Assignment Conference was scheduled for November 4, 2016. The teleconference proceeded before Justice Stewart but was adjourned by request of Plaintiff's counsel when it was pointed out that the only claim raised in the Statement of Claim related to informed consent. Mr. Wagner then advised that he intended to file a Notice of Motion to amend the pleading to allege that the Defendant's care fell below the standard of care for an orthopedic surgeon.

[4] The within motion to amend the Notice of Action and Statement of Claim was filed November 23, 2016. The motion was amended and filed December 14 to reflect that the hearing would occur on January 24, 2017. In advance of the hearing, the Court received and reviewed the aforementioned Notices of Motion and:

- Affidavits of Mr. Wagner's paralegal, Richard Crossman, sworn November 21, 2016 and January 18, 2017.
- Affidavits of co-counsel for the Defendant, Jack Townsend, sworn January 13 and 20, 2017.
- Two briefs from each party along with authorities.

[5] The affiants were not cross-examined. At the outset of the hearing, the Court advised counsel that the Nova Scotia Court of Appeal would be hearing a case involving pleading amendments on January 27, 2017. In the result, the parties

agreed to proceed with oral argument on the understanding that the Court would later receive their (likely written) arguments in the wake of the Appeal Court's decision.

[6] The Court of Appeal released *Automattic Inc. v. Trout Point Lodge Ltd*, 2017 NSCA 52, on June 14 and the parties submitted written briefs on June 23.

Background

[7] The Plaintiff, Dr. Colin Dyack, is a retired obstetrician and gynecologist. The Defendant, Dr. Maximillian Lincoln, is an orthopedic surgeon. On March 15, 2012, Dr. Dyack sustained a four-part right humerus fracture. He was treated at the Aberdeen Regional Hospital by Dr. Lincoln who performed an open reduction, internal fixation, rotator cuff repair right shoulder, and shortening of the biceps tendon with tenodesis.

[8] After surgery, Dr. Dyack had ongoing and significant shoulder stiffness. On July 11, 2012, following consultation with Dr. Lincoln, Dr. Dyack consented to surgery to remove the hardware from his right shoulder with possible acromioplasty.

[9] On August 17, 2012, Dr. Dyack underwent an open reduction internal fixation right humeral shaft fracture, acromioplasty right acromion, removal of implant, insertion of indwelling pain pump and manipulation under anesthetic. As Dr. Lincoln manipulated the patient's shoulder, there was an audible cracking noise and it became apparent that a refracture had occurred. Dr. Lincoln left the operating room to speak to Dr. Dyack's wife, but she was unavailable. Intraoperative x-rays were obtained and Dr. Lincoln proceeded with fixation of the iatrogenic fracture.

[10] Dr. Dyack went on to develop a post-surgical infection. On August 26, 2012, he was seen by Dr. Lincoln in the emergency room of the Aberdeen Regional Hospital with evidence of purulent drainage from the wound. Dr. Lincoln performed a third surgery to irrigate and debride the surgical wound. During the operation, Dr. Lincoln saw signs that the hardware he had used to fix the iatrogenic fracture had come loose. He left the operating room to speak with Dr. Dyack's wife before continuing the surgery. Following irrigation and debridement, he confirmed that the previous hardware had indeed come loose. Dr. Lincoln repaired the fracture with a longer plate. On April 12, 2013, Dr. Dyack underwent a further surgery to remove all of the hardware in his shoulder.

[11] Dr. Dyack alleges he now suffers from a partially frozen shoulder. On July 4, 2013, he met with Ray Wagner, Q.C., of the Wagners law firm. On July 9, 2013, Mr. Wagner sent Dr. Dyack a letter which stated, in part:

> Further to our meeting on July 4, 2013, I confirm we agreed to assist you with the screening of your matter. Screening entails the examination of whether or not your case meets the criteria for a medical malpractice personal injury lawsuit. …
>
> We have not accepted an official retention by you and do not represent your interests in a solicitor/client relationship in this matter. Therefore, we are not responsible for monitoring any time limitations or changes in law that would affect your claim.

[12] On July 15, 2013, Mr. Wagner sent a letter to the Aberdeen Regional Hospital requesting a complete copy of Dr. Dyack's medical file. In the letter, Mr. Wagner described his firm as "the solicitors representing Colin Dyack with respect to a litigation matter."

[13] As part of the initial screening process, Wagners sought an opinion from Dr. John Limbert of International Medical Litigation Consultants Corporation. The report, received on January 30, 2014, concluded that Dr. Lincoln breached the standard of care by failing to disclose the refracture risks of manipulation under anesthesia following open reduction and internal fixation of a complex proximal humeral fracture. According to Dr. Limbert, this failure to disclose meant that Dr. Lincoln had not obtained Dr. Dyack's informed consent to the procedure.

[14] Wagners associate Michael Dull filed a Notice of Action and Statement of Claim on Dr. Dyack's behalf on April 15, 2014. The only cause of action pleaded in the Statement of Claim was that Dr. Lincoln "breached his duty of care to disclose to Colin Dyack all the material risks associated with manipulation under anesthesia following open reduction and internal fixation of a complex proximal humeral fracture."

[15] The Defendant issued a Demand for Particulars on June 18, 2014, which the Plaintiff answered on July 17, 2014. Dr. Lincoln's Defence was filed on July 10, 2014 and included these paras:

> 5. As to the whole of the Statement of Claim, Dr. Lincoln denies that there was any negligent act or omission or any breach of duty, breach of contract, or malpractice involved in his care and treatment of the Plaintiff.

> 6. Dr. Lincoln says that at all times he treated the Plaintiff prudently, skillfully, and in a competent manner consistent with the standards of medical practitioners in his respective area of expertise.
>
> 7. Dr. Lincoln says that he provided appropriate medical care to the Plaintiff – all necessary and appropriate examinations, tests, investigations, medications, surgeries, procedures (surgical and otherwise) were conducted and/or ordered by him.

[16] The Plaintiff and the Defendant were discovered on June 29, 2015, and July 10, 2015, respectively. In August 2015, Mr. Dull wrote to three orthopedic surgeons – two in Ontario and one in New Brunswick – to ask whether any of them would be willing to provide an expert opinion. In his letters to the potential experts, Mr. Dull stated that he was, "looking for an opinion on whether a periprosthetic fracture is a material risk of manipulation under anesthesia following open reduction and internal fixation of a complex proximal humeral fracture."

[17] Mr. Dull left the Wagners law firm in early 2016. On January 20, 2016, Mr. Wagner communicated with Dr. Michael McKee, an orthopedic surgeon practicing in Toronto. Dr. McKee agreed to provide Mr. Wagner with an expert opinion. In his report dated February 28, 2016 – but bearing a received date stamp of May 9, 2016 – Dr. McKee identified several issues with Dr. Lincoln's care. In his opinion, manipulation of the shoulder under anesthetic should have been included on the consent form and the associated risk of iatrogenic fracture should have been disclosed pre-operatively. Dr. McKee opined that the iatrogenic fracture that occurred on August 17, 2012, was caused by two negligent errors on Dr. Lincoln's part: a failure to adequately surgically release the stiff shoulder joint, and the use of excessive force during the manipulation under anesthesia. Dr. McKee was also highly critical of Dr. Lincoln's failure to obtain proper radiographs at any time after the August 17 operation or before the operation on August 26, 2012, and his failure to perform (or at least document) a careful pre-operative examination of the arm's stability. In his view, Dr. Lincoln's failure to meet the standard of care in his preparation for the August 26 surgery led to the "highly unusual situation" of him having to leave the operating room – for the second time – to discuss intra-operative developments with Dr. Dyack's wife.

[18] On May 9, 2016 – the same date as the stamp on Dr. McKee's report – Mr. Wagner filed a Request for Date Assignment Conference. During the DAC, Mr. Wagner became aware that the allegations in the pleadings were limited to a failure to obtain informed consent. He asked that the call be cancelled, and advised Justice

Stewart and Defence counsel that he would be seeking leave to amend the Statement of Claim to add allegations of negligence.

[19] In the proposed Amended Statement of Claim, the Plaintiff pleads that Dr. Lincoln left the room during surgery on August 17, 2012, to speak to the Plaintiff's wife, and that no post-operative radiographs were taken. In relation to the procedure on August 26, the Plaintiff adds that no pre-operative radiographs were obtained and that there is no documentation that Dr. Lincoln performed a pre-operative examination of Dr. Dyack's arm. Paragraph 19 is entirely new and reads:

> 19. The Plaintiff also states that the Defendant, Dr. Maximillian Lincoln, breached his duty of care and was generally negligent in the care he provided to Dr. Dyack such that his care fell below the standard of care of an orthopedic surgeon. In particular, he was negligent in that he:
>
> a. inadequately planned and prepared for the operation of August 17, 2012, which resulted in the need for Dr. Lincoln to leave the operating room to discuss unexpected intra-operative developments with the Plaintiff's family;
>
> b. did not properly surgically release all possible impediments to motion of the Plaintiff's stiff shoulder joint, such as obstructing hardware, bone spurs, scar tissue and adhesions, prior to attempting a forceful manipulation under anesthetic during the August 17, 2012 operation;
>
> c. used excessive force during the manipulation under anesthetic during the August 17, 2012 operation;
>
> d. chose not to obtain post-operative radiographs at any point after the August 17, 2012 operation, which would have led to a properly planned operation on August 26, 2012;
>
> e. chose not to obtain pre-operative radiographs for the August 26, 2012 operation;
>
> f. chose not to examine the stability of the Plaintiff's arm prior to the August 26, 2012 operation, or document same, despite the presence of infection which is known to result in loss of fixation;
>
> g. inadequately planned and prepared for the operation of August 26, 2012, which resulted in the need for Dr. Lincoln to leave the operating room to discuss unexpected intra-operative developments with the Plaintiff's family; and
>
> h. such other and further negligence as may appear from the evidence.

Issues

1. Do the amendments plead new causes of action?
2. Has the limitation period for the new claims expired?
    a. Do the transition provisions of the new *Limitation of Actions Act* apply?
3. If the former *Limitation of Actions Act* applies, should the Court exercise its discretion under s. 3(2) to disallow the limitations defence?
4. If the transition provisions apply and the limitation period has expired, can the Court still add the claims to the existing proceeding?

Do the amendments plead new causes of action?

[20] In *Automattic*, the Court of Appeal considered, among other things, the ability of a plaintiff to amend pleadings to add additional causes of action under Civil Procedure Rule 83.11(3), which reads:

> A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:
>
> (a) the material facts supporting the cause are pleaded;
>
> (b) the amendment merely identifies, or better describes, the cause.

[21] Justice Farrar, for the Court, concluded as follows at para. 28:

> Rule 83.11(3) is not complicated. A motions judge may allow amendments to the pleadings to allow additional causes of action after the expiry of a limitation period **if the judge is satisfied that the facts material to the new cause of action are pleaded and the amendment merely identifies or better describes the cause.**
>
> [*Emphasis added*]

[22] In upholding the motions judge on this issue, the Court of Appeal agreed that the plaintiff's new causes of action were already outlined in its earlier pleadings, but had not been properly named. Accordingly, Justice Farrar concluded at para. 31 and 32:

> Two of the causes of action that the respondents sought to add, promissory estoppel and fraudulent misrepresentation are actually referred to in Automattic's defence. Clearly they were of the view that the pleadings were sufficient to raise these two causes of action. **Similarly, I am satisfied, as was the motions judge, that the pleadings, including the Response for Demands for Particulars which were filed, are broad enough to include the claims of copyright infringement and breach of honesty in contractual dealings.**
>
> As a result, **it did not matter what law governed the causes of action or if the limitation period had expired. The motions judge was satisfied that the material facts for the causes of action were already pleaded and the sought after amendments merely better described the causes of action**. Therefore, she exercised her discretion in allowing the amendment. In doing so she correctly interpreted the Civil Procedure Rules.
>
> [*Emphasis added*]

[23] In his submissions on the relevance of the Court of Appeal's decision, Mr. Wagner relies on Justice Farrar's reference to Automattic's Defence in reaching his conclusion that the material facts had already been pleaded. Mr. Wagner refers to Dr. Lincoln's Defence and, in particular, paras. 5, 6 and 7 (as set out at para. 15 of this decision). He then states:

> As in *Automattic*, the Defendant has defended against the very claims sought to be added by the proposed amendment. Specifically, the Defendant denies there was any negligent act or omission or any breach of duty, or malpractice in the Statement of Defence. He states his treatment was consistent with the standards of medical practitioners and that he provided appropriate medical care to the Plaintiff, including examinations, tests, investigations, medications, surgeries, and procedures. These are defences to medical negligence.
>
> The Plaintiff submits that insofar as the Statement of Defence is considered a relevant factor in evaluating what allegations the pleadings raised – persuasive to the motions judge and the Court of Appeal in *Automattic* – this factor supports the Plaintiff's position. Namely, that the pleadings were sufficient to raise medical negligence as a cause of action (hence the Defendant's defence against it), and thus that the Court has the ability to permit the sought amendment under Rule 83.11(3).
>
> In *Automattic*, the Court of Appeal concluded that determining the governing limitation period and its expiry was inconsequential, and that the motions judge had not erred, having been satisfied that the material facts for the causes of action were already pleaded and the sought-after amendments merely better described the causes of action.

> The outcome in *Automattic* with respect to this issue is precisely what the Plaintiff seeks in this motion. Moreover, *Automattic* instructs that should Your Lordship determine Rule 83.11(3) applies, you need not also make a decision on the governing limitation period, its expiry, and any interplay between the former and new acts.

[24] Mr. Clarke takes a markedly different approach in his submissions:

> However, the facts of this case are markedly different than those in *Automattic*. As outlined in our January 16, 2017 submissions, the material facts for the Plaintiff's new causes of action were not pleaded in his original Statement of Claim. Put slightly differently, the Plaintiff's proposed amendments go well beyond simply better identifying pre-existing causes of action; rather, they raise entirely new causes of action, and add the material facts necessary to sustain those new causes.
>
> …
>
> The Plaintiff's proposed amendments add a cause of action in respect of the August 26 Procedure, as well as the necessary material facts in support thereof setting out how the Plaintiff says the Defendant breached the standard of care during this procedure. The proposed amendments also add a cause of action in general negligence (i.e. in addition to the plea in informed consent) regarding the August 17 Procedure, as well as the necessary material facts particularizing how the Plaintiff says the Defendant fell below the standard of care. …

[25] In my view, the portions of Dr. Lincoln's Defence relied on by Dr. Dyack do not relieve the Plaintiff of his obligation to have pleaded the necessary material facts in his Statement of Claim. The proposed amendments clearly add new facts to the initial pleading. In relation to the surgery on August 17, 2012, Dr. Dyack alleges that Dr. Lincoln left the room during the surgery to speak to his wife, and that he failed to obtain post-operative radiographs. With respect to the surgery on August 26, 2012, the Plaintiff alleges that no pre-operative radiographs were taken and that there is no documentation that Dr. Lincoln performed a pre-operative examination of Dr. Dyack's arm. The Plaintiff then relies on these alleged actions and omissions as the basis for a claim that Dr. Lincoln inadequately prepared for both operations. The amendments also allege other negligent acts and omissions not contained in the original Statement of Claim, including that Dr. Lincoln failed to surgically release all possible impediments to motion of the Plaintiff's shoulder joint before performing manipulation under anesthesia, and that he used excessive force during the manipulation. Indeed, there is nothing in the original pleading that would have put Dr. Lincoln on notice that his actions before, during or after the

surgery – other than his alleged failure to obtain informed consent – were being challenged by the Plaintiff. Under even the most liberal approach, it cannot be said that these amendments merely plead an alternative theory of liability based on the same factual matrix. In the result, I am of the view that these amendments add to the factual matrix and advance new claims based on the additional facts.

[26] Having concluded that the amendments raise new causes of action, it is necessary to determine whether the applicable limitation period has expired. Before turning to that issue, however, it is helpful to discuss the law of limitations in general.

Purpose of Limitation Periods

[27] In *M.(K.) v. M.(H).*, [1992] 3 S.C.R. 6, at paras. 22-24, the Supreme Court of Canada identified three rationales that underlie limitations legislation. They have been described as the certainty, evidentiary and diligence rationales:

> Statutes of limitations have long been said to be statutes of repose. … The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. …
>
> The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim. …
>
> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. …

[28] There are also economic and public interest reasons for limitations legislation:

> People who provide goods and services may be adversely affected by the uncertainty of potential litigation. Economic consequences will directly flow. A potential defendant faced with possible liability of a magnitude unknown may be unable or unwilling to enter into other business transactions. Others may be unaware of a specific claim until many years after an event upon which the claim

> is based. The cost of maintaining records for many years and obtaining adequate liability insurance is ultimately passed on to the customer.[1]

[29] Finally, there are judgmental reasons for limitation periods:

> If a claim is not adjudicated until many years after the events that give rise to it, different values and standards from those prevailing at the time the events occurred may be used in determining fault. Because of changes in cultural values, scientific knowledge, and societal interests, injustice may result. Can it be said that the conduct of the "reasonable person" as perceived by a court today would accord with the view taken by a judge of an earlier generation?[2]

[30] Accordingly, limitations legislation serves many important purposes. Over the last two decades, Alberta, Saskatchewan, Ontario, New Brunswick and Nova Scotia have all reformed their limitations legislation to serve those purposes more effectively. Furthermore, in 2005, the Uniform Law Conference of Canada (ULCC) adopted the *Uniform Limitations Act*, a model uniform limitations statute based on the modernized legislation enacted in Alberta, Ontario and Saskatchewan.

[31] Nova Scotia is the most recent province to overhaul its limitations legislation. In drafting the *Discussion Paper on Limitation of Actions Act* the Nova Scotia Department of Justice relied on the discussion papers and modernized legislation of other provinces, along with the ULCC's *Uniform Limitations Act*.[3] The *Limitation of Actions Act*, S.N.S. 2014, c. 35, came into force on September 1, 2015.

Issue 2 – Has the limitation period for the new claims expired?

[32] Like its counterparts in other provinces, Nova Scotia's modernized legislation contains provisions governing the transition from the old limitations scheme to the new one. Section 23 provides:

> 23 (1) In this Section,
>
> (a) "effective date" means the day on which this Act comes into force;
>
> (b) "former limitation period" means, in respect of a claim, the limitation period that applied to the claim before the effective date.

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[1]Graeme Mew, *The Law of Limitations*, 3d ed., (Toronto: LexisNexis Canada Inc., 2016) at § 1.54. ("*Mew*")
[2]*Mew*, at §1.56.
[3]Nova Scotia, Nova Scotia Department of Justice (Halifax: Nova Scotia Department of Justice, April 2011) at p. 2.

> (2) **Subsection (3) applies to claims that are based on acts or omissions that took place before the effective date**, other than claims referred to in Section 11, **and in respect of which no proceeding has been commenced before the effective date.**
>
> (3) Where a claim was discovered before the effective date, the claim may not be brought after the earlier of
>
> (a) two years from the effective date; and
>
> (b) the day on which the former limitation period expired or would have expired.
>
> (4) A claimant may bring a claim referred to in Section 11 at any time, regardless of whether the former limitation period expired before the effective date.
>
> [*Emphasis added*]

[33] To determine whether the limitation period for Dr. Dyack's new claims has expired, the Court must first determine whether the transition provisions apply. Two different interpretations of s. 23(2) have been advanced by the parties. Dr. Dyack argues that the transition provisions would only apply if there had been no proceeding filed against Dr. Lincoln for acts or omissions relating to the medical care he provided to Dr. Dyack. He says that a proceeding has already been started within the limitation period and, as a result, the former *Limitation of Actions Act* applies to the more recent claims. Dr. Lincoln, on the other hand, argues for a more narrow interpretation of s. 23(2). He says that the relevant question is not whether a proceeding has been started against him in connection with his treatment of Dr. Dyack, but whether a proceeding has been commenced against him in respect of the particular negligence claims Dr. Dyack now seeks to add.

[34] Justice Hood had cause to interpret s. 23(2) in *Mattatall Estate v. Whitehead*, 2016 NSSC 334. In *Mattatall*, one of the defendants to an action under the *Fatal Injuries Act* and the *Survival of Actions Act* moved to add a third party after the expiry of the limitation period. The moving party argued that the former *Limitation of Actions Act* applied, and that the court had discretion under s. 3(2) of that *Act* to extend the limitation period. The proposed third party argued that the new *Limitation of Actions Act* applied to the claim, that the limitation period had expired, and that the court has no discretion under Rule 35.08 to add a third party where a limitation period has expired. Justice Hood held that the transition provisions did not apply:

> 13 Those transitional provisions in my view do not apply to this motion. **Section 23(2) deals with claims where no action has been commenced.** Although a third party action may be considered as a separate action brought by a defendant against a third party, it is part of the original action. Civil Procedure Rule 4.01(c) refers to a third party claim as being "within an action". Toothy Moose's claim against Daniel Mattatall is for contribution and indemnity and can only exist as part of the original action.
>
> [*Emphasis added*]

Justice Hood's broad interpretation of s. 23(2) supports Dr. Dyack's position.

[35] It is worth noting that Nova Scotia is not the only jurisdiction to use the language of "claims … in respect of which no proceeding has been commenced" in the transition provisions of its modernized limitations legislation. Identical terminology appears in the Ontario, Saskatchewan and British Columbia statutes. Case law emanating from these jurisdictions appears to be consistent with the approach adopted by Justice Hood in *Mattatall*. For example, in *Givogue v. Burke (Trustee of)*, 2010 ONSC 5075, the plaintiffs were members or former members of the Pension Plan for Union Employees of Voyageur Colonial Limited who brought an action against the defendants alleging that certain shortfalls to the Plan were caused by the defendants' negligence or breach of fiduciary duty.[4] The plaintiffs moved to amend their pleadings to add, among other things, allegations that two of the defendants knowingly participated in a breach of fiduciary duty by the trustees (also defendants). The original pleading already included allegations of negligence and breach of fiduciary duty against the two defendants named in the amendments.

[36] Justice Charbonneau was satisfied that the plaintiffs had asserted additional facts in their proposed amendments and that the allegations raised a new cause of action "totally independent of the causes of action contained in the existing statement of claim": para. 27. On the applicability of the transition provisions, Charbonneau J. wrote at paras. 49-57:

> A number of issues arise on the debate as to whether or not the LA applies to the amendments raising new causes of action. Unfortunately, all counsel have been less than helpful in this area.
>
> …

[4]The facts were partially set out in an earlier motion: [2003] O.J. No. 1932.

The test for determining whether s. 24 applies has been stated in many recent cases by our Court of Appeal: see for example *Pepper v. Zellers Inc.* (2006), 83 O.R. (3d) 648; *Meady v. Greyhound Canada* (2008), 90 O.R. (3d) 774; *St-Jean v. Cheung*, 2008 ONCA 815; *Placzek v. Green*, 2009 ONCA 83. In *St-Jean v. Cheung*, Gillese J.A. puts the test as follows:

> "Section 24(2) of the new *Limitations Act* determines whether the transition provisions in s. 24 apply to a claim based on acts or omissions that took place before January 1, 2004. Section 24(2) reads as follows:
>
> > (2) This section applies to claims based on acts or omissions that took place before the effective date and in respect of which no proceeding has been commenced before the effective date.
>
> There are two conditions in s. 24(2) which, if met, lead to the result that the section applies to the claim. First, the claim must be based on an act or omission that took place before January 1, 2004; and, second, no proceeding can have been commenced in respect of the claim before January 1, 2004."

Does s. 24 apply to the present case? Obviously, it is clear that condition one is met. **The issue is whether a proceeding was commenced in respect of the claim before January 1, 2004. The issue is the proper interpretation of the words "in respect of the claim".** The decisions of *Pepper* (*supra*) and *Meady* (*supra*) appear to have come to a different conclusion on that issue. In *St-Jean v. Cheung* (*supra*), the Court appears to have resolved this apparent conflict when Gillese J.A. adopted the reasons given by Feldman J.A. in *Meady*. In paragraphs 30 and 31, Gillese J.A. first cites Feldman's words and then provides her conclusion:

> > "The term 'claim' is defined in s. 1 of the new Act as 'a claim to remedy an injury, loss or damage that occurred as a result of an act or omission'. This definition focuses on particular acts or omissions, even if more than one act or omission by more than one party contributed to the same injury. The term 'proceeding' is not defined in the new Act. However, it is defined in rule 1.03(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as 'an action or application'. Thus, the words 'claims ... in respect of which no proceeding has been commenced' in s. 24(2) refer to claims resulting from particular acts or omissions by a particular party for which no court action has been commenced. This interpretation has been applied in several decisions of the Superior Court of Justice, including *Pallotta v. Marks*, [2005] O.J. No. 2963, [2005] O.T.C. 606 (S.C.J.), in which Hoy J. noted at para. 23 that it would be inconsistent with the scheme of the new Act "for 'proceeding' in s. 24(2) to be interpreted without reference to the person against whom the proceeding is made". Accordingly, although the plaintiffs commenced a proceeding within the limitation period against certain defendants in respect of their acts or omissions, no proceeding was commenced by the plaintiffs in respect of the acts or omissions of Dr.

> James. Consequently, the transition provision, s. 24 of the new Act, applies.
>
> In my view, *Pepper* has been overtaken by the more nuanced approach in *Meady*. The word 'proceeding' in s. 24(2) cannot be sensibly interpreted without reference to the party or parties against whom an action is brought. The acts or omissions had to have been performed by someone. Before the second action was commenced, there had been no proceeding based on the acts or omissions of the new defendants in 1982. In the first action, it was the acts or omissions of Dr. Makkay and the Hospital which were the basis of the claim."
>
> **I conclude that in this case the second condition has not been met**. As a consequence, the LA has no application whatsoever to this proceeding and the proceedings is governed by the law as it existed prior to January 1, 2004: *St-Jean v. Cheung* (*supra*) paragraphs 33 to 45. The then Ontario *Limitations Act* did not apply to breaches of fiduciary duty although the defendants will be entitled to plead the equitable defences mentioned earlier.
>
> [*Emphasis added*]

[37] The plaintiffs in *Givogue*, like Dr. Dyack, sought to add a new cause of action based on new facts, as against existing defendants. The court did not ask whether a proceeding had been brought against the defendants in relation to claims that they knowingly participated in a breach of fiduciary duty. Instead, the inquiry was limited to whether a proceeding had been brought against the defendants for alleged acts and omissions relating to the pension shortfalls.

[38] The British Columbia Supreme Court reached a similar conclusion in *Hanson v. Sharma*, 2014 BCSC 478. The plaintiff in that case sought leave to amend his notice of claim to add new causes of action. According to the court, the amended notice was, "in effect, a complete re-draft": para. 1. The defendants argued that the limitation period had expired for the new claims. Justice Weatherill concluded at paras. 35-37 that the defendants could not rely on a limitation defence:

> In my judgment, the new *Limitation Act* transitional rules are quite straight forward. The questions that should be asked and answered are: Did the act or omission giving rise to the cause of action occur before June 1, 2013, i.e., the date the new *Limitation Act* was enacted? If the answer is "No", the new *Limitation Act* applies and the transitional rules do not apply. If the answer is "Yes", the question becomes: **Has an action been commenced before June 1, 2013?** If the answer is"Yes", the old *Limitation Act* applies with all former limitation periods and exemptions.
>
> In this case, a court proceeding was commenced before the enactment of the new *Limitation Act*, and the old *Limitation Act* governs the limitation periods.

> Accordingly, the defendants' arguments concerning a limitation defence do not apply.
>
> [*Emphasis added*]

[39] The court went on to add at para. 40 that "the allegations the plaintiff made in the proposed further amended notice of civil claim are allegations that were raised throughout this litigation" and which "simplify the facts, law and issues between the parties."[5]

[40] Once again, in *Mattatall*, Justice Hood stated that "[s]ection 23(2) deals with claims where no action has been commenced": para. 13. There are also decisions from Ontario and British Columbia that are consistent with that interpretation. In my view, *Mattatall* should be followed and the transition provisions should be held not to apply to Dr. Dyack's new claims. Accordingly, I am of the view that the former *Limitation of Actions Act* applies, and I will consider disallowance of the limitations defence pursuant to s. 3(2).

Issue 3 – Should the Court exercise its discretion under s. 3(2) to disallow the limitations defence?

[41] Section 3 of the former *Limitation of Actions Act* sets out a detailed statutory regime under the heading "Disallowance or invocation of time limitation". In *Butler v. Southam Inc.*, 2001 NSCA 121, Cromwell J.A. (as he then was) described the law regarding the Court's exercise of its discretion under this section:

> (ii) The purposes of s. 3 of the Limitation of Actions Act:
>
> 137 Limitation and notice provisions are blunt instruments. They defeat a plaintiff's claim no matter how meritorious the case, no matter how diligent the plaintiff and no matter how little the defendant in fact has been prejudiced. Section 3 of the *Limitation of Actions Act* provides for a measure of judicial discretion to be used on equitable grounds to prevent unduly harsh results from the strict application of limitation and notice provisions. Underlying this grant of discretion is recognition by the Legislature that limitation and notice provisions may lead to harsh and unjust results by barring actions where, in the particular case, there is little reason to do so. In other words, the Legislature's decision to permit the court to disallow limitation defences recognizes that such defences may result in prejudice to the plaintiff which is disproportionate to the

[5]This comment suggests that it was open to Weatherill, J. to decide the motion on the alternative basis that the amendments did not amount to new causes of action.

importance, in a particular case, of the achievement of the purposes for which the limitation period exists.

138 The crucial assessment under s. 3 is the one required by ss. 3(2): the determination of what is equitable having regard to the degree which the decision will prejudice the plaintiff and the defendant. It may be convenient to speak of this as a comparison of the relative degrees of prejudice (see, for example, *MacCulloch v. McInnes Cooper and Robertson*, supra at para. 48 - 55). However, as Goodfellow, J. pointed out in *Smith v. Clayton*, (1994), 133 N.S.R. (2d) 157; [1994] N.S.J. No. 328 (Quicklaw) (S.C.) at para. 42 - 44, the decision about what is equitable cannot be based solely on the relative degrees of prejudice. This is because, in one sense, the prejudice to either party is total whichever decision the Court makes. If the limitation period is disallowed, the defendant is totally prejudiced in the sense that he or she is deprived of a complete defence to the action: see, Hallett, J. (now J.A.) in *Anderson v. Co-operative Fire and Casualty Co.* (1983), 58 N.S.R. (2d) 163 at para. 18; aff'd (1983), 62 N.S.R. (2d) 378 (S.C.A.D.). Conversely, if the limitation defence is not disallowed, the prejudice to the plaintiff is absolute in the sense that the cause of action is lost: see *Anderson* per Hallett, J. at para. 16; *Smith* at para. 42 - 44.

139 In considering what is equitable, **a fundamental consideration is whether the harsh result to the plaintiff of the loss of a cause of action is disproportionate to the purposes served by giving effect to the limitation provision in issue in the particular case. For example, if the primary purpose served by the relevant limitation period is finality, furtherance of this objective at the cost of the loss of the plaintiff's cause of action may often be regarded as disproportionate, particularly where the delay in relation to the limitation period is short.** This is implied by the fact that the Legislature has addressed the issue of finality by restricting the length of time by which a limitation period may be extended: see ss. 3(6) and 3(7) and by providing a mechanism for a potential defendant to apply to terminate a right of action: see ss. 3(3). The situation may well be different when other purposes of the limitation period are in issue in the particular case. For example, there may be concerns that the plaintiff's delay has prejudiced the defendants in their defence. The limitation period's objective of preserving the cogency of evidence must be carefully considered both generally, and in relation to the specific prejudice to the defendants in the particular case.

140 Where … the limitation provision in issue has purposes in addition to those of finality and preservation of the cogency of evidence, the extent to which these other purposes are defeated by the disallowance of the limitation period should be considered as an aspect of assessing the relative degrees of prejudice to the plaintiff and the defendant.

> 141 **The prejudice to the plaintiff flowing from the loss of the cause of action cannot generally be controlling on its own; if it were, disallowance of the limitation defence would be virtually automatic because such prejudice is absolute**: see *Smith* at para. 44. The specific matters to be considered which are set out by the Legislature in ss. 3(4)(a) - (g) make it clear that the diligence of the plaintiff, broadly defined, in pursuing his or her rights is an important factor in exercising the discretion to disallow a limitation defence. … All of these factors, in my view, relate to aspects of the plaintiff's diligence in pursuing the claim. Such diligence is, therefore, an important aspect of the assessment of the prejudice to the plaintiff resulting from the limitation defence.
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> 142 **This concern with the plaintiff's diligence reflects both an underlying purpose of limitation periods and a widely accepted principle of fairness.** The idea that plaintiffs should act with diligence underlies statutory limitation periods generally: see, for example, J.S. Williams, *Limitation of Actions in Canada* (2d, 1980) at 5. Moreover, concern with the plaintiff's diligence is consistent with s. 3(2)'s focus on what is equitable. It will generally be less equitable for a limitation defence to defeat the claim of a diligent plaintiff than of one who has sat on his or her rights. This reflects the old equitable maxim that delay resulting from lack of diligence defeats equity: vigilantibus, non dormientibus, jura subveniunt: see Sir Robert Megarry and P.V. Baker, *Snell's Principles of Equity* (27th, 1973) at 33.
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> 143 **In assessing the prejudice to the defendant it is important to focus on prejudice attributable to delay after the expiry of the limitation period.** This is made clear, for example, in s. 3(4)(c) which requires consideration of the impact of delay on the cogency of evidence compared to what it would have been had the action been started within the time limit. The cases have consistently recognized this … [*citations omitted*]
>
> [*Emphasis added*]

[42] In *Vantassel v. Dominion of Canada General Insurance Co*., 2015 NSSC 159, Justice Muise, after reviewing the jurisprudence, observed that "it makes sense to give more weight to the foreclosure of a plaintiff's cause of action than to a defendant's loss of a limitation period defence because, if the limitation period defence is struck, the defendant is still left with the ability to challenge the action on its merits. If not, the plaintiff loses the opportunity to have the matter heard on its merits": para. 33.

[43] Finally, in *Lord v. Smith*, 2013 NSCA 34, Justice Farrar responded at para. 52 to the argument, often raised by a defendant in this context, that a plaintiff whose claim is found to have expired always has recourse against his counsel:

> With respect to the potential alternative remedy against his former counsel, whatever action Mr. Lord may have against his former counsel and its potential success is mere speculation. In my view, it was appropriate for the motions judge to give it little weight in his deliberations.

(See also: *Oliver v. Elite Insurance Co*., 2014 NSSC 413, at para. 193.)

[44] In my view, having regard to the authorities, it is appropriate for the Court to exercise its discretion under s. 3(2) to disallow the limitations defence. Since the informed consent action against him was filed, Dr. Lincoln has known that his treatment of Dr. Dyack has been under legal scrutiny. There has been no affidavit filed stating that evidence has been lost or that Dr. Lincoln's ability to fully defend himself has been otherwise compromised. While I appreciate that counsel for Dr. Dyack could have acted more diligently to determine whether other claims were available against Dr. Lincoln, this does not end the matter. Indeed, it is my determination that when the degrees of respective prejudice are weighed, Dr. Dyack will suffer far greater prejudice if Dr. Lincoln is permitted to rely on the limitation period than Dr. Lincoln will suffer if the limitations defence is disallowed. It is true that if Dr. Lincoln is permitted to rely on the limitations defence, Dr. Dyack will still be able to proceed with the informed consent claim. However, if Dr. Lincoln can establish that he did obtain informed consent, Dr. Dyack will have no opportunity to have the Court determine whether his iatrogenic fracture was simply the manifestation of a material risk of the surgery or the result of Dr. Lincoln's negligence. With the limitations defence disallowed, Dr. Lincoln is still able to fully defend every aspect of his treatment of Dr. Dyack.

[45] Having concluded that the transition provisions do not apply, I need not address the Plaintiff's alternative argument concerning the discoverability of the proposed claims.

Issue 4 – If the transition provisions apply and the limitation period has expired, can the Court still add the claims to the existing proceeding?

[46] Even if my interpretation of the transition provisions above is in error, I would still allow the amendments for the reasons that follow. If the transition provisions apply, the new claims cannot be brought after the earlier of two years from the effective date of the new *Act* and the day on which the former limitation expired or would have expired. Pursuant to s. 2(1)(d) of the former *Limitation of Actions Act*, medical negligence or malpractice claims must be brought "within

two years after the date in the matter complained of such professional services … terminated." Dr. Dyack argues that Dr. Lincoln's professional services did not terminate until April 12, 2013, when Dr. Lincoln performed a final surgery to remove the hardware from his shoulder. Dr. Lincoln says that since no complaint has been raised about the April 2013 procedure, his professional services terminated for the purposes of s. 2(d) on August 26, 2012. This argument is purely academic, however, since the new claims are clearly out of time under either approach.

[47] Section 22 of the new *Act* governs the addition of expired claims to an existing proceeding where the amendment would not add a new defendant or change the capacity in which a defendant is sued. Section 22(a) provides:

> Notwithstanding the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is **related to the conduct, transaction or events described in the original pleadings** and if the added claim
>
> (a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;
>
> [*Emphasis added*]

[48] Counsel for Dr. Lincoln argues that the stipulation in s. 22 that the added claim must be "related to the conduct, transaction or events described in the original pleadings" amounts to the same requirement as under Rule 83.11(3) that the material facts supporting the new cause of action must already have been pleaded. No authorities were cited for this proposition.

[49] Although there are no Nova Scotia decisions considering s. 22, the provision was based on similar sections contained in the Alberta and New Brunswick statutes.[6] Courts in Alberta and New Brunswick have considered their respective sections on several occasions.

[50] In *Greentree v. Martin*, 2004 ABQB 365, the plaintiffs were injured when their vehicle was struck by a vehicle operated by Slater, an employee of the defendants. Within the limitation period, the plaintiffs brought an action alleging

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[6]Nova Scotia, Nova Scotia Department of Justice (Halifax: Nova Scotia Department of Justice, April 2011) at pgs. 34-35.

that the defendants were vicariously liable for Slater's negligence. After the limitation period expired, the plaintiffs applied to amend their pleadings to add a claim that the defendants were negligent in hiring Slater. At para. 12, Justice Clackson described the "real issue" as "whether the amendment can be said to be 'related to the conduct, transaction or events described in the original proceeding'". He concluded at para. 13:

> The Plaintiffs bear the onus of establishing that relationship. In this case, it seems to me that the original pleading clearly put the Martins on notice that all aspects of their relationship with Slater both as employee and consensual operator of their vehicle would be under scrutiny. I have no doubt that upon learning of the accident and again upon service of the Statement of Claim, the Martins revisited the circumstances which led to Slater's hiring. I have little doubt that any of the factual underpinnings for the new allegation come as a surprise to the Martins. I think that while the cause of action established by the amendment is different from the cause of action in the original pleading, the Act does not speak of causes of action but rather events and occurrences. In my view, that is a much broader perspective. As such I think it is reasonable that the events or transactions encompassing the employment of Slater in the consensual operation of the Martins' vehicle are related to the event or transaction that encompassed Slater's hiring. That is sufficient to meet the requirements of Section 6 and as such the proposed amendment is not statute barred.

[51] In *Calgary Mack Sales Ltd. v. Shah*, 2005 ABCA 304, the Alberta Court of Appeal held that the phrase "related to" has a very broad meaning: para. 14. Subsequent lower court decisions have held that it "does not appear to be a particularly high threshold": *Stolk v. 382779*, 2005 ABQB 440, at para. 36*; Litemor Distributors (Edmonton) Ltd. v. Midwest Furnishings & Supplies Ltd.*, 2005 ABQB 520, at para. 11; *Dow Chemical Canada Inc. v. Nova Chemicals Corp*, 2010 ABQB 524, at para. 69; *Owners Condominium Plan No. 0125764 v. Amber Equities Inc.*, 2015 ABQB 235, at para. 192.

[52] In *DeSoto Resources Ltd. v. EnCana Corp*., 2010 ABCA 110, the Alberta Court of Appeal explained, at paras. 8-10, that the court must consider the total context to determine whether the relationship requirement is met:

> Whether a new pleading arises from the same "conduct, transaction or events" must be based on an assessment of the whole factual and legal context. No firm line can be drawn between an unrelated new claim, and what has previously been pleaded. Too general a definition would give the plaintiff an unlimited ability to add statute barred claims: *C.H.S. v. Alberta (Director of Child Welfare)*, 2006

> ABQB 528, 403 A.R. 103, 34 C.P.C. (6th) 378 at para. 32, aff'd 2006 ABCA 355, 401 A.R. 215.
>
> …
>
> **Section 6 allows the addition of new claims because the defendant will not be prejudiced or surprised since they arise out of the same conduct, transactions and events.** Therefore, one test of whether a new claim is involved is to examine the extent to which a new set of conduct, transactions and events would have to be proven at the trial. The documents and other evidence that would be needed to prove the appellant's new allegations would differ significantly from those required to prove the originally pleaded facts.
>
> [*Emphasis added*]

[53] In *Champagne v. Sidorsky*, 2015 ABQB 305, Justice Jones emphasized, at para. 171, that there must be more than a cursory connection between the claims:

> Claims for which facts will have to be proven by new documents and new witnesses are only weakly connected to the original claims and should be closely scrutinized. Where only a cursory, superficial connection exists … the amendments should not be allowed.

[54] In *513320 Alberta Inc. (c.o.b. Interface Financial Group)*, 2015 ABQB 826, Justice Goss wrote that an amendment should not be allowed "where a plaintiff is seeking to substitute one claim for another, essentially re-defining the questions in issue between the parties, by advancing a new set of facts as the basis for their claim, and by abandoning the set of facts alleged as the basis for the original claim in the Statement of Claim": para. 38.

[55] The claims Dr. Dyack seeks to add clearly meet the criteria under s. 22(a). The claims are related to the same conduct, transaction or events – the surgeries – and do not change the capacity in which Dr. Dyack sues Dr. Lincoln or Dr. Lincoln is sued. Accordingly, even if I had found that the transition provisions under the new *Act* applied, I would have allowed the new claims to be added under s. 22(a).

Conclusion

[56] The amendments proposed by the Plaintiff raise new causes of action. Since a proceeding has already been commenced against the Defendant for acts or omissions relating to his treatment of the Plaintiff, I find that the transition provisions of the new *Limitation of Actions Act* do not apply. As a result, the former *Act* applies to the claim, including s. 3(2), which gives the court to discretion to disallow a limitations defence. I find that this is an appropriate case in

which to exercise that discretion and I allow the amendment. Even if I had found that the transition provisions applied, however, I would have allowed the amendments in any event under s. 22(a) of the new *Act*.

[57] In the result, I have signed the Order prepared by Mr. Wagner incorporating the Amended Statement of Claim. Given the novel nature of this motion, I decline to award costs.

Chipman, J.