HRYNIAK’S “CULTURE SHIFT”: ONE YEAR LATER

by: Jillian Evans, Torkin Manes LLP

When the Supreme Court of Canada released its decision in Hryniak v. Mauldin\(^1\) on January 23, 2014, trial counsel immediately began to mourn what was viewed as the inevitable death of the trial. Many commentators bemoaned the floodgates that would open and overwhelm motions judges; others celebrated the quick, cost-effective and simplified access to justice that they were certain would define the post-Hryniak world, but all agreed that summary judgment had been forever changed.\(^2\)

One year later, this paper proposes to explore if and how Hryniak has altered the medical malpractice landscape.

THE EVOLUTION OF RULE 20 AND HOW WE GOT HERE.

Pre-1985

Prior to the 1985 Rules of Civil Procedure\(^3\) amendments, summary judgment was only available to litigants on very limited grounds: a plaintiff with claims based on liquidated debt or damages, where no real defence existed, could seek summary judgment against his or her debtor.

Rule 33 (1) of the Rules of Practice provided:

> At the option of the plaintiff, the writ of summons may be specially endorsed with a statement of his claim where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest and whether the interest be payable by way of damages or otherwise) arising,

(a) upon a simple written promise to pay or upon a written acknowledgement of debt; or

(b) upon a simple contract, express or implied, for goods sold and delivered; or

(c) upon a simple contract, express or implied, where the price or method of calculation of the price has been agreed upon for,

---

\(^1\) Hryniak v Mauldin 2014 SCC 7, 1 SCR 87 [Hryniak].

\(^2\) Many thanks for Marco Falco and James Round of my firm for their helpful insights and analysis on the history of summary judgment.

\(^3\) Rules of Civil Procedure (Rules of Practice) RRO 1990, Reg 194.
(i) work done or services rendered, or
(ii) work done or services rendered and for the supply and installation of materials; or
(d) upon a cheque, promissory note or bill of exchange; or
(e) upon an account settled between the parties in writing; or
(f) upon a bond or contract under seal for payment of a liquidated sum, but not including a claim for liquidated damages; or
(g) upon a judgment; or
(h) upon a statute where the amount sought to be recovered is a fixed sum of money or is in the nature of a debt other than a penalty; or
(i) upon a guarantee in writing where the claim against the principal is in respect of a debt or liquidated demand;

or the writ of summons may be specially endorsed with a statement of his claim:
(j) in an action for recovery of land; or
(k) in an action for recovery of chattels; or
(l) in an action for foreclosure, sale or redemption.

1985 - 2010

In 1985, the revisions to Rule 20 broadened the scope of cases that were amenable to summary judgment – now, this recourse was available to both plaintiffs and defendants, and the motion was to be determined on a written record:

While there was initially some excitement surrounding these extensive changes, it was not long before the Rule’s potential was undermined. One of the earlier key decisions to herald in this era was Pizza Pizza Ltd. v Gillespie⁴. Therein, Justice Henry arguably tried to usher in a new regime of summary judgment and give effect to the broad amendments to the wording of the Rule. He interpreted the Rule as directing the Court to take a “hard look at the merits,” and requiring counsel to “put their best foot forward.” While he acknowledged that real issues of credibility would still need to go to trial, Justice Henry confirmed that “the court may, on a common sense basis, draw

⁴ Pizza Pizza Ltd. v Gillespie [1990] 75 OR (2d) 225, 45 CPC (2d) 168 [Pizza Pizza].
inferences from the evidence"\(^5\) and that “[a]pparent factual conflict in evidence does not end the inquiry.”\(^6\)

Unfortunately, however, the *Pizza Pizza* decision is more often cited as standing for the principle that summary judgment ought only to be granted where “the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial.”\(^7\) Subsequent appellate decisions like *Aguonie v Galion Solid Waste Material*\(^8\) and *Dawson v Rexcraft Storage*\(^9\) went on to further restrict the scope of Rule 20. Despite the potential in the Rule, by the late-1990s, the Court of Appeal had established that “in ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence or find facts…evaluating credibility, weighing evidence and drawing factual conclusions …are all reserved for the trier of fact.”\(^10\)

**The Osborne Report and the 2010 Rule changes**

In June 2006, then Attorney General of Ontario Michael Bryant asked Justice Coulter Osborne to spearhead the Civil Justice Reform Project and deliver recommendations to make the civil justice system more accessible and affordable for Ontarians. Released in November 2007, the Osborne Report\(^11\) made a number of recommendations, including extensive changes to the *Rules of Civil Procedure*.

With respect to summary judgment, the Osborne Report concluded that the Rule had been too narrowly restricted by the jurisprudence and recommended that summary judgment be made more widely available. The amendments proposed to the Rule aimed to codify the principle of proportionality and provided judges with a number of new fact-finding tools, including an express power to weight evidence, evaluate credibility and draw inferences, and the right to order oral evidence.

\(^5\) *Ibid* at para 42.
\(^6\) *Ibid*.
\(^7\) *Ibid* at para 41.
\(^10\) *Ibid* at para 19.
Justice Osborne’s proposed amendments came into effect on January 1, 2010.

*The Cromwell Report.*

Meanwhile, in Ottawa, Chief Justice Beverley McLachlin was herself tackling the issue of access to justice. With Canada “failing in [its] responsibility to provide a justice system that was accessible, responsive and citizen-focused,”12 Her Honour struck the Action Committee on Access to Justice in Civil and Family Matters in 2008, and appointed her colleague Justice Thomas Cromwell to lead the project.

After nationwide consultation and review, Justice Cromwell released a report in October 2013.13 The report came up with six “guiding principles for change,” which were intended to “spell out the elements of an overriding culture of reform.”14

1. Put the public first

2. Collaborate and coordinate

3. Prevent and educate

4. Simplify, make coherent, proportional and sustainable

5. Take action

6. Focus on outcomes

*Hryniak*

All the while, *Mauldin v. Hryniak*15 and *Bruno v. Hryniak*16 were steadily making their way up through the legal system. Motions judge Grace J. originally granted summary judgment against Hryniak in both actions in October 2010, using the new fact-finding

---

15 *Hryniak, supra* note 1.
16 *Bruno Appliance and Furniture, Inc.* v Hryniak 2014 SCC 8, 1 SCR 126.
powers to find that “the forensic machinery of trial is not required…the significant record allows me to evaluate credibility [and] draw inferences from the evidence.”\textsuperscript{17}

Both motions, together with three others, were combined for a single hearing before a five-judge panel of the Ontario Court of Appeal in June 2011, with OTLA being granted \textit{amicus curae} standing.

In their reasons released later that year, the panel famously formulated their “full appreciation test” – cases that required multiple findings of fact, based on conflicting evidence emanating from numerous witnesses and lengthy written records were not suited to summary judgment, and motions judges were required to ask themselves whether “a full appreciation of the evidence and issues that is required to make dispositive findings [could be] achieved”\textsuperscript{18} absent a full trial.

Although the appeal was heard by the Supreme Court in March 2013, it is likely no coincidence that the Court waited until January 2014 to release their decision. While the reasons were written by Justice Karakatsanis, she wrote for a unanimous panel that included Justice Cromwell, and her decision squarely echoes the themes and directives itemized in his Action Committee’s report released just a couple of months prior.

The Supreme Court decisively did away with the Ontario Court of Appeal’s full appreciation test. They commented that focusing on the benefits of a trial discounted the goals of proportionality, timeliness and affordability, and frustrated the intended effect of the amendments to the Rule.\textsuperscript{19}

\begin{quote}
[49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. 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.\textsuperscript{20}
\end{quote}

\textsuperscript{17} Bruno Appliance and Furniture Inc. v Cassels Brock & Blackwell LLP 2010 ONSC 5490, OJ No. 4661 at para 138.
\textsuperscript{18} Combined Air Mechanical Services Inc. v Flesch 2011 ONCA 764, 108 OR (3d) 1 at 50.
\textsuperscript{19} Hryniak, supra note 1 at 56.
\textsuperscript{20} Hryniak, supra note 1 at 49.
Post-Hryniak

Hryniak has been extensively analysed over the past year, as commentators have tracked its application and watched to see if the litigation landscape has actually undergone the anticipated seismic shift. At press time, more than 400 decisions have either cited, followed or relied on Hryniak, and by and large, there appears to be some consensus about key patterns that have emerged.

While only a fraction of these 400 odd summary judgment decisions are medical negligence actions, it would appear that parallel themes are surfacing.

THE JUDICIARY HEARD JUSTICE KARAKATSANIS’ CALL TO ACTION

By and large, the judiciary has embraced both the Supreme Court’s directive to prioritize “proportionality, timeliness and affordability,” and the new tools that they have been handed, and this is no less true in the medical malpractice realm.

In ThyssenKrupp Elevator (Canada) Limited v Amos, the plaintiff employer commenced a non-competition/non-solicitation action against a former employee. In response to the defendant employee’s motion for judgment, the plaintiff argued – not atypically - that the motion was being brought too early, and that the merits of the claim could not be decided without exchange of documentary productions and full examinations for discovery.

Justice Myers berated this traditional approach as “the classic ‘trial model’ response to a motion for summary judgment.”

Over the years, under prevailing case law, counsel frequently responded to summary judgment motions by pointing to just enough facts to suggest that she can put material facts in dispute or that credibility may be in issue and then proceed to discovery, pretrial, and trial in the ordinary course.

---

21 See for example Shantona Chaudhury’s excellent article in The Advocates’ Journal, Winter 2014.
22 ThyssenKrupp Elevator (Canada) Ltd. v Amos 2014 ONSC 3910 16 CCEL (4th) 313.
23 Ibid at para 4.
24 Ibid.
After reviewing the roadmap provided in the Hryniak reasons to assess if – and how – he ought to exercise his discretion, His Honour granted judgment to the moving employee. He dismissed the plaintiff’s insistence that the full mechanics of disclosure and trial were required: “[C]ounsel can no longer just point to a contested issue of fact to then consign the parties to the slowest and most expensive outcome under the “trial model”.25

A few months later, Justice Myers applied this same approach in a medical negligence action. In Baghbanbashi et al. v Hassle Free Clinic et al.26, Justice Myers was tasked with case managing a summary judgment motion brought by the defendant physicians and hospital. In the action, the plaintiff alleged that she was not fully informed of the risk of developing multiple sclerosis after receipt of the Hepatitis-B vaccine, and that she went on to develop MS as a direct result of this treatment.

The defendants posited that the hepatitis B vaccine does not cause MS, and took the position that they could prove on a balance of probabilities on the motion that there was no genuine issue requiring a trial on causation.

The plaintiffs argued “that there were significant issues of credibility that had to be resolved among competing expert witnesses”27 and that a trial would therefore be required. Indeed, they argued, the plaintiff had a “right” to a trial in this medically complex case, as “the only way to secure real justice.”28

Justice Myers had no patience for this position:

[19] I wholly disagree with this old brain thinking. The traditional notion that only a trial can provide civil justice led to a crisis whereby most Canadians could not afford civil trials and hence were being denied access to justice. Moreover, delays were so acute that even when trials were affordable, few litigants obtained speedy justice. Most suffered the distress of delay, financial uncertainty, procedural gamesmanship – all of which contributed to the crisis. The landmark Hryniak decision of the Supreme Court of Canada opens with the words, “Ensuring access to justice is the greatest challenge to the rule of law in Canada today”.

25 Ibid at para 41.
26 Baghbanbashi v Hassle Free Clinic 2014 ONSC 5934, OJ no 4853.
27 Ibid at para 18.
28 Ibid.
[20] There is no right to a trial in civil litigation in Ontario. If the fair and just resolution of the action requires a trial, then a trial will be held. However, it is no more in the plaintiffs’ interests than it is in the defendants’ interests to endure the cost, delay and distress of a full trial if it turns out that the case could have been resolved years earlier and hundreds of thousands of dollars cheaper on a single issue. In Rathwell, supra, Osler J. lamented that the plaintiff’s family had to endure the strain of a 74 day trial and the inordinate expense of submitting to the full measure of the civil litigation process only to be found to fail due to the lack of causal relationship between the vaccine and the condition from which he suffered. How could the plaintiffs or the defendants have been prejudiced if the case had been resolved on that single issue without a 74 day trial?

[21] Under Hryniak, courts and all users of the civil justice system have been required to undergo a culture shift. The goal remains the same – ensuring a fair and just process that permits the judge to find the facts necessary to apply the law so as to resolve civil disputes. But as Karakatsanis J. noted at para. 28, “…that process is illusory unless it is also accessible – proportionate, timely and affordable”.

Complex cases, with conflicting opinions on nuanced medical issues are no longer immune from summary judgment. Like never before, both the moving party and the respondent need to play trump or risk losing. As Justice Corbett warned in Sweda Farms Ltd. v Egg Farmers of Ontario,29 (the most cited summary of the Hryniak ‘roadmap’): “The plaintiff who treats the defence motion for summary judgment as a speed bump on the long highway to trial risks crashing its case in the deep ditch of dismissal.”30

**COURTS CAN - AND WILL– GRANT JUDGMENT TO A NON-MOVING RESPONDENT**

Mere months before Hryniak was released, Justice Perrell had granted judgment to a non-moving respondent in a solicitors negligence action. In King Lofts v Emmons et al,31 the defendant solicitor and his firm brought a motion for summary judgment, seeking to have the plaintiff client’s action dismissed on the grounds of limitation period, standard of care and causation.

Justice Perrell held that the moving defendants failed on all grounds. He then went on, however, to hold that “a by-product of my findings about the four arguments is my

---

30 Ibid at para 201.
31 King Lofts Toronto I Ltd. v Emmons 2014 ONSC 6113, 234 ACWS (3d) 747.
conclusion that Mr. Emmons was professionally negligent and his negligence or his firm’s negligence caused a loss, and, accordingly, King Lofts should be granted a partial summary judgment. The amount of the loss remains to be proven as does the claim against First Canadian Financial.”

He explained how his interpretation of the new wording of Rule 20 permitted him to do so:

[86] Although King Lofts did not bring a cross-motion for a summary judgment, the above analysis reveals that except for the quantification of damages and except for the matter of the outstanding claim against First Canadian Title, there are no genuine issues requiring a trial. Under rule 37.13(2)(a), a judge who hears a motion may, in a proper case, order that the motion be converted into a motion for judgment. Under rule 20.05(1), where summary judgment is refused, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

[87] In the circumstances of the immediate case, relying on rules 37.13(2)(a) and 20.05(1), I believe that I can dismiss the Defendant’s motion for summary judgment and define the calculation of damages as the issue to be tried. Therefore, I grant judgment to King Lofts with a trial to calculate the damages.33

The defendants’ appeal of Justice Perrell’s decision was heard early in 2014.34 The defendant solicitor argued, among other things, “that the motion judge erred in granting judgment in favour of a party who had not given advance notice of a claim for summary judgment.”35

The Court of Appeal looked to Hryniak to unanimously uphold Justice Perrell’s ruling:

The Supreme Court of Canada in Hryniak v. Mauldin has approved a “culture shift” requiring judges to manage the process in line with the principle of proportionality in the application of Rule 20.

This action involves a claim for $106,000 arising out of a multi-million dollar transaction. The principles of proportionality and sensible management of the court process support the motion judge’s ruling.36

32 Ibid at para 41.
33 Ibid at paras 86-87.
34 King Lofts Toronto I Ltd. v Emmons 2014 ONCA 215, 40 RPR (5th) 26.
36 Ibid at paras 14-15.
Much to the surprise (and likely chagrin) of the defence, this brief passage has been seized upon by a number of subsequent judges in personal injury cases, where in addition to denying the defendants’ motions, judgment is granted in favour of the respondent plaintiff, despite the lack of a cross-motion.

In June, buoyed by the Court of Appeal’s comments from earlier in the spring, Justice Perrell presided over another summary judgment motion brought by the defendant landlord in *Landrie v Congregation of the Most Holy Redeemer*. In this slip and fall case, the defendant took the position that the plaintiff commenced her action more than two years after having discovered her claim, and as such was statute-barred.

Justice Perrell, while acknowledging that the plaintiff had not brought a cross-motion for judgment on the issue, nevertheless granted partial summary judgment in favour of Landrie:

> [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*, 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.

His Honour directed that, the issue of limitation period having been decided, “the 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.”

In *Oakley v Guirguis*, the defendant surgeon and hospital brought parallel motions for summary judgment, again on the grounds that the plaintiff commenced her action more than two years after she discovered her cause of action. Affidavit and discovery

---

37 *Landrie v Congregation of the Most Holy Redeemer* 2014 ONSC 4008, OJ no 3132.
38 Ibid at paras 50-51.
39 Ibid at para 5.
40 *Oakley v Guirguis* 2014 ONSC 5007, OJ no 3970 [Oakley]
evidence as to when the plaintiff first began to experience post-operative limitations, when she learned the cause of her injuries and when she first came to understand the potential negligence of the surgeon was filed. The plaintiffs opposed the motion, but brought no cross-motion of their own.

Justice DiTomaso denied the defendants' motions. He went further, though, and instead of simply finding that there was “a genuine issue requiring a trial” on this point, he made a finding that the claim was commenced within the limitation period:

For the reasons delivered, I have found that the Plaintiffs’ action was not brought after the expiration of the applicable limitation period. Rather, the Plaintiffs’ action was brought within time. I find that the motions for summary judgment brought by both Dr. Guirguis and the Hospital fail. The Plaintiffs are not statute-barred from bringing their claim due to the expiration of the relevant limitation period. Accordingly, the motions for summary judgment are hereby dismissed.  

And if there were any doubt as to the legitimacy of these rulings, in December 2014 the Court of Appeal issued a definitive statement on point.

In Kassburg v SunLife, the defendant insurer brought a motion for summary judgment asserting that the plaintiff’s claim for long term disability benefits was statute barred for having been commenced more than 2 years after the date of the initial denial.

The motions judge not only denied the insurer’s motion for judgment, but (again, despite any cross-motion on the part of the plaintiff) granted an order “declaring that the plaintiff’s action was commenced within the applicable limitation period.”

On appeal, the Court of Appeal entirely endorsed Justice Ellies authority to do so:

[50] The appellant asserts that the motion judge, having decided to dismiss its motion for summary judgment, and in the absence of a motion by the respondent, erred in granting a declaration that determined the limitations question on a final basis. The appellant contends that it should have the opportunity of exploring at trial the question of when the respondent discovered the claim.

...

41 Ibid at para 129.
42 Kassburg v Sun Life Assurance Co. of Canada 2014 ONSC 1523, 119 OR (3d) 620.
43 Ibid at para 43
[52] I would not give effect to this ground of appeal. Consistent with the decision of the Supreme Court in Hryniak and the clear wording and purpose of the summary judgment rule, it was open to the motion judge to determine the issue of the limitation defence on a final basis on the record before him in this case. The parties put a comprehensive record before the court, which the appellants considered sufficient for the limitation period issues to be able to be determined. The appellants could have cross-examined on the respondent’s affidavit filed on the motion, but chose not to do so. It is in the interests of justice that the issue was determined on a final basis by the motion judge at this stage. In my view, the motion judge did not err in making the declaration he did as part of his disposition of the summary judgment motion.  

This trend may well cause the defence to think twice about the risks they face in bringing a motion for judgment. While in the past, they might have expected simply to have been given a second kick at the can at trial, the bench is taking the Supreme Court’s directives about streamlining, narrowing the issues and shortening trials to heart.

**JUDGES ARE REMAINING SEIZED OF MATTERS AND MAKING CONCERTED EFFORTS TO MINIMIZE WASTEFUL AND DUPLICATIVE WORK**

The Supreme Court surprised many when, at paragraphs 78 and 79 of *Hryniak*, it interpreted the case and trial management powers in Rule 20.05 as directing motions judges to remain seized of the matter through to trial:

[78] Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue.

[79] While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices in order to facilitate access to justice.  

---

44 Kassburg v Sun Life Assurance Co. of Canada 2014 ONCA 922, OJ no 6222 at paras 50-52.  
45 *Hryniak*, supra note 1 at paras 78-79.
While it is too soon to see if a true trend is developing whereby judges presiding over unsuccessful motions for summary judgment are staying on to ultimately preside over trial, it would seem to be headed in that direction.

In *Legendre v Crittendon Hospital Medical Centre*\(^{46}\), the Plaintiffs had commenced an action with respect to the death of Lucie L’Ecuyer following weight loss surgery at the hands of the defendant physician.

The CMPA brought a motion for summary judgment without any expert opinion in support of the surgical care provided. In response, the plaintiffs served two expert reports critical of the care provided. In dismissing the physician’s motion for judgment, Justice Stinson anticipated that the defendant would thereafter be serving an expert opinion of his own, and declined to exercise his fact-finding powers to find in favour of the plaintiffs “at this stage.”\(^{47}\)

Instead, he seized himself of the action, ordered the parties to come up with a proposal for the remaining steps of the proceeding.

While it has not yet occurred in a medical malpractice action, it is not unreasonable to foresee situations where motion judges utilize Rule 20.05 to ensure that use the often extensive materials prepared for summary judgment motions are not wasted, much like the Court of Appeal commended Justice David Brown for doing in *Harris v Leikin Group*.\(^{48}\) In that shareholder dispute litigation, a summary judgment was brought that generated a voluminous written record and weeks of cross-examinations. In dismissing the summary judgment, the motions judge relied on Rule 20.05 in seizing himself of the action and ordering “that the trial adopt a "hybrid" form in which the evidence filed on the summary judgment motions would be preserved and supplemented with further evidence to be led at trial.”\(^{49}\)

---

\(^{46}\) *Legendre v Crittendon Hospital Medical Center* 2014 ONSC 6556, OJ no 5386.

\(^{47}\) Ibid at para 28.

\(^{48}\) *Harris v Leikin Group Inc.* 2014 onca 479, 120 OR (3d) 508.

\(^{49}\) Ibid at para 26.
The hybrid trial then proceeded, and the motion – now trial – judge dismissed the plaintiffs’ action. The plaintiffs appealed the trial decision to the Court of Appeal, arguing, among other grounds, that Justice Brown had erred in directing a "hybrid" trial.

Justice Sharpe, speaking for the Court, disagreed:

[49] It is my view that both the letter and the spirit of the judge's directions fell squarely within what the Supreme Court of Canada contemplated in Hryniak v. Mauldin, at paras. 76-77.

…

[50] It seems to me that Karakatsanis J. was urging judges to do exactly what the judge did in this case. After considering the voluminous material filed on the summary judgment motions, he concluded the case could fairly and properly be decided on the basis of a trial focussed on the specific issues that required viva voce evidence.50

Again, this speaks strongly to the need for Plaintiffs to put their best foot forward in responding to summary judgment motions, as the new case and trial management powers under Rule 20.05 could be a double edged sword. While it certainly benefits plaintiffs to avoid multiple repetitive and often duplicative examinations under oath, they also risk being bound by the affidavits and reports filed in response to motions.

**SOME THINGS NEVER CHANGE: “DISCOVERABILITY” REMAINS THE TARGET OF CHOICE.**

The vast majority of medical negligence summary judgment motions decided in the last 12 months have been on the issue of discoverability, a long-standing favourite target of the CMPA.

In *Slack v Bednar*51 the plaintiff was injured during a skiing accident on March 18, 2006, and underwent spinal surgery at the hands of the defendant Dr. Bednar on March 27, 2006. During the surgery, Dr. Bednar caused a dural tear and the avulsion of a number of nerve roots in the cauda equine region of the spine. This “surgical accident” was

---

50 *Ibid* at paras 49-50.
51 *Slack v Bednar* 2014 ONSC 3672, 120 OR (3d) 689.
noted in his operative note, and Dr. Bednar personally and directly advised the plaintiff of the incident and of the possible neurological sequelae that might arise therefrom.

Litigation was commenced against the ski resort. It was not, however, until the ski resort served a medical report from neurosurgeon Dr. Michael Ford suggesting that Dr. Bednar’s “surgical accident” was (1) the result of the negligent use of a Leksell rongeur and (2) the cause of Mr. Slack’s ongoing limitations that the Plaintiff commenced litigation against the physician.

The Court found that the plaintiff had not exercised reasonable diligence in exploring a possible cause of action against Dr. Bednar and granted judgment to Dr. Bednar on the basis that Hryniak empowered him to assess the evidence without the need for trial.

In Oakley v Guirguis,52 the plaintiff faced a motion for summary judgment on the basis that she knew that she had developed debilitating lymphedema within weeks of the surgery at issue, and further that the lymphedema was a direct result of the surgery. She did not, however, commenced litigation until after she learned from a treating physician some years later that her lymphedema was the result of the negligent removal of her lymph nodes by Dr. Guirguis. In order to meet all of the requisite elements of s. 5 (1) (a) of the Limitations Act, the Plaintiff needed to know of the surgery: “(a) that is was wrong, (b) why it was wrong, and (c) who was responsible.” Until then, she knew nothing more than that she had experienced an unfortunate outcome after the surgery.

Justice DiTomaso denied the defendant’s motion for judgment, and instead granted judgment in favour of the plaintiff on the issue of discoverability:

In Barry v Pye,53 the plaintiff sued the defendant oral surgeons with respect to mandibular surgery that she underwent in January 2001. While she had been unhappy with the appearance of her jaw immediately following the surgery, and had retained counsel by early 2003 for the purpose of pursuing litigation as against Drs. Pye and Gaik, she did not commence her action until May 2008, within 2 years of the date that she first obtained a medical opinion that the defendants had been negligent.

52 Oakley supra note 40.
Justice Trimble cited extensively from *Hryniak* in determining that there was no issue that required a trial, and then went on to grant judgment to the defendants on the ground that the plaintiff knew – or ought with reasonable diligence to have known – all of “the things necessary to say that her cause of action had accrued.” Namely, by no later than August 2003, she was aware “that she suffered damages, because of the surgery, performed and/or recommended by the Defendants, and that she intended to sue them.”  

All in all, injured patients and their families should be pleased with the trends that have emerged in the year since Justice Karakatsanis changed the summary judgment landscape. While there may now be a larger burden on plaintiffs to mount a fulsome response to such motions by the defence, by and large any changes that meaningfully increase access to justice, that improve the timely, fair and cost-effective resolution of disputes and that minimize the defence’s ability to procedurally and financially exhaust injured plaintiffs should be celebrated.

---

54 *Ibid* at para 62.