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As Director of Legal Research at Torkin Manes, Marco provides legal opinions and analyses on a range of topics in the civil litigation and corporate/commercial context. He has drafted legal memoranda, facta and materials for all levels of court, with a particular emphasis on appellate cases.

Discoverability in a Medical Malpractice Action

THE ONTARIO SUPERIOR COURT HAS RECENTLY HELD THAT THE PLAINTIFF'S KNOWLEDGE OF AN UNFORTUNATE MEDICAL OUTCOME MAY NOT BE SUFFICIENT TO START THE LIMITATIONS CLOCK IN A MEDICAL MALPRACTICE ACTION. RATHER, THE TWO-YEAR LIMITATION PERIOD ON AN ACTION MAY NOT BEGIN TO RUN UNTIL THE PLAINTIFF UNDERSTANDS ALL OF THE MATERIAL FACTS CONCERNING THE DEFENDANT MEDICAL PRACTITIONER'S NEGLIGENCE AS THE CAUSE OF THE PLAINTIFF'S HARM.

In *Oakley v. Guirguis*, 2014 ONSC 5007, per Justice DiTomaso, the plaintiff commenced an action against a general surgeon and the hospital following the removal of an abscess in under her right armpit in December, 2007. During the surgery, the physician also performed a lymph node dissection of a number of plaintiff's lymph nodes. Following the surgery, the plaintiff developed a disabling complication caused by the removal of her lymph nodes, namely lymphedema.

In November, 2008, the plaintiff met with the surgeon regarding the development of drainage at the surgical site and continuing lymphedema symptoms. At the time, the plaintiff states that the defendant surgeon said "Sorry what I did to your arm". He did not, however, explain what he meant by the statement. On February 25, 2010, the plaintiff met with another specialist and was told that the defendant should not have removed her non-cancerous lymph nodes and that the plaintiff should seek legal counsel. Thereafter, the plaintiff immediately sought legal counsel and commenced her action against the defendants on September 7, 2011.

Counsel for the defendants physician and hospital brought a motion for summary judgment to dismiss the action as statute-barred, i.e. having been commenced more than two years after the plaintiff discovered the cause of action as set

out in the *Limitations Act, 2002*, S.O. 2002, c.24, Sched. B (the "L*imitations Act*").

The defendants submitted that the plaintiff knew all of the material facts of her case no later than November 11, 2008, her last consultation with the defendant surgeon. Since the plaintiff did not commence her action until September 7, 2011, the defendants argued that the action was out of time because it was started more than two years after November 11, 2008.

Counsel for the plaintiff, Jillian Evans of Torkin Manes LLP, argued that the action ought not to be dismissed. According to the plaintiff, she did not know that the defendant surgeon might be culpable until February 25, 2010, when she received the unsolicited medical opinion from the specialist that her non-cancerous lymph nodes "should not have been touched". According to the plaintiff, it was only then that the plaintiff knew all the material facts to commence an action against the defendant surgeon.

The Ontario Superior Court dismissed the defendants' motion for summary judgment, holding that the plaintiff's action was not brought after the expiration of the two-year limitation period.

Section 5(1)(a) of the *Limitations Act* provides as follows:

> **5(1)** A claim is discovered on the earlier of,
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> **(a)** the day on which the person with the claim first knew,
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> **(i)** that the injury, loss or damage had occurred,
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> **(ii)** that the injury, loss or damage was caused by or contributed to by an act or omission,
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> **(iii)** that the act or omission was that of the person against whom the claim is made, and
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> **(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,
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> **(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).

According to the Court, the limitation period does not begin to run until the plaintiff is actually aware of all of those matters listed in section 5(1)(a) or until a reasonable person ought to have known of all those matters.

In the instant case, the Court held that the plaintiff did not have all the material facts as of November 11, 2008 to ground a claim in negligence against the defendant surgeon. The plaintiff did not know that there was a culpable act performed by the defendant prior to February 25, 2010. More was required than the plaintiff's awareness that "she had sustained a less than perfect outcome as a result of the surgery". In particular, the Court held:

> A critical element of the cause of action against [the defendant surgeon] is whether he should have performed a lymph node dissection. It is clear that [the plaintiff] knew shortly after the surgery that she had an unfortunate outcome although nothing more…the evidence clearly establishes that [the plaintiff] did not know:
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> **a.** that it was wrong for her lymph nodes to have been removed;
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> **b.** that non-cancerous lymph nodes should not be removed; and
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> **c.** [the defendant] was responsible for her lymphedema by wrongly removing her lymph nodes.

The central element of the plaintiff's cause of action against the defendant was that he wrongly performed a lymph node dissection on non-cancerous lymph nodes. The Court observed that the "evidence is uncontroverted that the meeting with [the specialist] was the first time that [the plaintiff] learned this fact, until which time she had no reason to suspect that her condition was due to [the defendant surgeon's] error.

Accordingly, Justice Di Tomaso dismissed the defendants' motion for summary judgment. His Honour further went on to make a finding that the statement of claim, which was issued on September 7, 2011, was brought within the applicable limitation period.