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Summer Newsletter

## PERSONAL INJURY

### Limitation Periods:

Every personal injury action in Ontario must be commenced within the applicable limitation period prescribed by the *Limitations Act, 2002* which came into force on January 1, 2003 or within the period prescribed by any other Act referenced in the Schedule to the *Limitations Act, 2002*. Generally, an injured party has until two years after a claim is discovered to commence an action for damages for personal injury.

The common law has always recognized that a limitation period does not begin to run until the plaintiff knew or ought to have known through the exercise of reasonable diligence that she had a cause of action or right to bring a claim against another. This is referred to as the discoverability rule or principle. Put another way, the limitation period in any case does not begin to run until the facts upon which the claim against another is based are reasonably discoverable. In many cases, the discovery of the claim coincides with the happening of the incident attributed to be the cause of the plaintiff's injuries. However in some cases, for example, in cases involving injuries to an infant, the claim will not be discoverable until a later time, quite possibly years after



the incident occurred. In these cases, the limitation period will only begin to run once the full extent of the injuries are known.

In the recent Court of Appeal decision of *Safai et al. v. Bruce N. Huntley Contracting Limited*, 2010 ONCA 545 (CanLii), the issue before the court was whether the plaintiff's claim against the owner of property on which the plaintiff injured herself and the maintenance contractor was statute barred. The court considered the provisions of the former limitations act that provided for a six year limitation period in cases of negligence.

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## Limitation Period continued...

In that case, the plaintiff fell on a patch of ice in a parking lot on February 17, 2000 and suffered a broken ankle. A claim was commenced against the property owner on February 23, 2006, six days after the expiry of the applicable limitation period. A separate claim was commenced against the maintenance contractor on September 27, 2006.

The defendants in both claims moved for summary judgment on the basis the claims were statute barred. The motion was resisted by the plaintiff on the basis that both claims were brought within time if the limitation period began to run from the date on which the plaintiff was able to ascertain the name of the owner of the property and maintenance contractor.

The plaintiff met with legal counsel on March 13, 2000 and a title search of the property was conducted in May 2000 revealing the name of the owner of the property. The name of the maintenance contractor came to the attention of counsel in October 2000 after he received a letter from the property owner's insurers.

The motions judge found for the defendants and dismissed the claims.

The Court of Appeal (Moldaver, Goudge and Armstrong) held that the plaintiff knew she injured her ankle on February 17, 2000 and that she likely knew she had a claim for her injuries against the owner of the property. The court found that she was in a position to ascertain the name of the property owner as of the date of the accident. The court concluded it would not be reasonable to give effect to the plain-



tiff's submissions that the running of the limitation period was postponed until such time as the plaintiff could ascertain the name of the property owner. Essentially, this was a situation where the plaintiff could, through the exercise of reasonable diligence, have obtained this information coincident with the happening of the event giving rise to the injury.

The court however disagreed with the motion judge when it came to the maintenance contractor. It was noted in the record before the motion judge that the plaintiff did not know the owner of the property had contracted out winter maintenance to a third party. The court found that there was no simple method by which the existence of the third party contract could be ascertained and concluded that there was a genuine issue for trial as to whether the running of the limitation period respecting the maintenance contractor should be postponed. This was a matter for the trial judge to determine.

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## Limitation Period continued...

The Court of Appeal's decision in this regard is difficult to understand. The parking lot in which the plaintiff fell was attached to a commercial building. The plaintiff had attended the building to meet with her husband's accountant. Surely a reasonable person in the plaintiff's circumstances would have considered the possibility that maintenance of the parking lot had been contracted out to a third party and then made appropriate inquiries to determine whether this was the case.

In cases involving a slip and fall on commercial premises plaintiff's counsel will typically write the property owner soon after accepting the retainer to ascertain the existence of any possible third party defendants. This was apparently done in *Safai* but the problem was it took counsel six years to get the claim going. This should and may have resulted in a claim against the Lawyer's Professional Indemnity Company, now known as LawPro.

One wonders whether this decision may have the effect of watering down the reasonable diligence requirement underlying the application of the discoverability rule or whether this case may simply be viewed as a unique decision and product of its own time. It is quite possible the Court of Appeal's decision would have been different had the new *Limitations Act* applied or had it been decided in motions court under the amendments to the summary judgment rule that came into effect on January 1, 2010.

Under the new *Limitations Act* a person is presumed to have knowledge of the existence of a claim and the particulars of the



claim on the date of the incident, unless the contrary is proved. The plaintiff in *Safai* would have had to have shown that she was unaware of the maintenance provider and then convinced the court this information was not reasonably discoverable.

Further, under the new summary judgment rule a motions judge may weigh the affidavit evidence led at the hearing, assess the credibility of the parties and the evidence led by the parties and draw any reasonable inference from the evidence that is available. It is submitted that had the motion been decided under the new rule the motion judge's finding that there was no evidence of any unknown or unknowable potential party would likely have been upheld on appeal.

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This publication is intended to discuss personal injury matters of interest. Comments provided reflect the views of the author and are not intended as legal advice. Persons who wish to be informed of the specific implications of any of the matters discussed or decisions referenced herein should consult with a lawyer.

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