WHAT DID THE PLAINTIFF KNOW AND WHEN OUGHT HE OR SHE TO HAVE KNOWN IT?

by Jennifer DeThomasis[1]

During the Watergate investigation, U.S. Senator Harold Baker is famous for having asked aloud, "what did the President know and when did he know it?" When faced with a potentially expired limitation period, plaintiff's counsel need ask themselves a similar question, "what did the plaintiff know and when *ought he or she to have known it?*"

The discoverability principle has been codified in the *Limitations Act*.[2] It provides that a cause of action does not arise until the material facts on which it is based have been discovered or ought to have been discovered by the exercise of reasonable diligence. The *Act* contains a rebuttable presumption that a claim is discovered on the day the act or omission took place.[3] A party who wishes to rebut this presumption bears the onus of establishing when he or she knew or ought to have known of his or her right to seek damages.

The purpose of the discoverability principle is to avoid the potential injustice of precluding a party from commencing a claim prior to that party being able to discover the claim.[4] This purpose and potential injustice to plaintiffs must however be weighed against the protection limitation statutes afford potential defendants from being sued in perpetuity.[5] The Ontario Court of Appeal in *Zapfe v. Barnes*[6] discussed these competing interests:

> In balancing the defendant's legitimate interest in respecting limitation periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration. The diligence rationale would not be undermined by the application of the discoverability principle as it still requires reasonable diligence by the plaintiff.[7]
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> ...the discoverability principle rests by definition on the requirement of due diligence by the plaintiff...That requirement dictates the test to be applied in determining the start of a limitation period under the discoverability principle: when can it be said that the plaintiff knew, or by reasonable diligence could have discovered, the material facts on which to base a cause of action against the proposed defendant?[8]

As a result of the competing interests, the courts will examine the diligence of the party seeking to apply the discoverability principle. When, by the exercise of reasonable diligence, ought the party to have discovered his or her right to seek damages? This requires a factual analysis that must be determined on a case-by-case basis.

As a result, on motions to add a party based on the discoverability principle, "it will be rare that the applicability of the discoverability principle based on due diligence will be determined...".[9] Rather, motions judges are required to examine the evidentiary record and determine if there is an issue of fact or credibility to be determined. If there is such an issue, the defendant should be added with leave to plead the limitation defence.[10]

Master Dash detailed the test to be applied on such motions in *Wakelin v. Gourley*. The decision was upheld on appeal.

> ...as long as the plaintiff puts in evidence as to steps taken to ascertain the identity of the tortfeasors and gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence then that will be the end of the enquiry and the defendants will normally be added with leave to plead a limitations defence. This is not a high threshold. If the plaintiff fails to prove any reasonable explanation that could on a generous reading

> amount to due diligence the motion will be denied...if there is any doubt whether the steps taken by the plaintiff could not amount to due diligence then this is an issue that must be resolved on a full evidentiary record at trial or on summary judgment. The strength of the plaintiff's case on due diligence and the opinion of the master or judge hearing the motion whether the plaintiff will succeed at trial on the limitations issue is of little or no concern on the motion to add the defendants. The only concern is whether a reasonable explanation as to due diligence has been provided such as to raise a triable issue.[11]

Similarly with respect to summary judgment motions, the Ontario Court of Appeal in *Alexis v. Darnley* held that issues of discoverability will rarely be resolved. "Because discoverability is a factual analysis, it will often be inappropriate to dispose of the issue of discoverability on a motion for summary judgment. The court has thus held that such motions should not be granted unless the material facts are not in dispute."[12]

Further, the case law is clear that our courts are to extend a degree of latitude to a party relying on the discoverability principle. This latitude was discussed by Master Pope in *Conflitti v. Dhaliwal*:

> [t]he case law is clear that when a party is seeking to apply the discoverability rule, the court should afford a degree of latitude to that party before declaring that the limitation period has begun to run...
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> The authorities are also clear that it is not appropriate for a motions judge or master to resolve a limitation issue where the application of the discoverability rule is central to its resolution for the following reasons. It is a question of fact when the cause of action arose and thus when the limitation period commenced... These facts constitute genuine issues for trial and, as such, it is not appropriate for a motions judge or master to assume the role of a trial judge by resolving them.[13]

In order for a plaintiff to be successful when raising issues of discoverability on a motion, there typically must be a factual or credibility issue in dispute that need be referred to the trial judge. For example, in *Everding v. Skrijel*,[14] the plaintiff was injured as a result of a motor vehicle collision. She experienced significant improvement of her symptoms prior to the two-year mark (albeit with some ongoing pain) and obtained employment post-collision. Approximately four years post-collision, her family doctor diagnosed her with permanent chronic pain and approximately six years post-collision, she had an MRI result that provided some objective proof of permanent injury. The plaintiff commenced her claim approximately seven years post-collision and argued on the motion that her claim was not discoverable until such time as she received the MRI results and had sufficient basis to believe her claim would meet the statutory threshold.

The motion judge dismissed the plaintiff's claim on the basis that the discoverability that the plaintiff's claim meets the threshold was not a genuine issue for trial. On appeal, the motion judge's decision was overturned. The Court of Appeal held that the decision was not warranted on the record and that the discoverability issue was a genuine issue for trial.

Similarly in *Battistella v. Rossi*,[15] the defendant's motion for summary

judgment on the basis that the claim was outside the two-year limitation period was dismissed. G. Mulligan J. held that:

> [t]he issue on this motion is the commencement date of the limitation period given the applicability of the discoverability rule. Although she could have brought an action earlier it is clear that she did not have evidence that would assist her in satisfying the threshold requirement until she received the MRI. Her right to sue was limited by the threshold provisions of the *Insurance Act* and it would be unfair to require her to start an action at a time when she could not expect to meet the threshold requirements...I am satisfied that there is a genuine issue for trial on the issue of discoverability. This issue ought to be left to the trial judge.[16]

However, plaintiffs need be careful. Although latitude is to be given to the party raising the discoverability issue, it will not always save them. The issue of discoverability and reasonable diligence requires a factual analysis. If, based on the evidentiary record, the facts do not support a potential delay of the commencement of the limitation period, plaintiffs need brace themselves for an unfavourable decision.

In *Conflitti v. Dhaliwal,* for example Master Pope, despite highlighting the latitude to be given, went on to resolve the limitation issue and found in favour of the defendant. The Master held that, based on the evidentiary record, the plaintiffs did not have a reasonable chance of persuading a trial judge on the balance of probabilities that the party who sought to be added exercised reasonable or due diligence in ascertaining her right to seek damages before the expiry of the limitation period. This decision was based on the absence of a factual record to support extending the commencement of the two year limitation period to add a *Family Law Act* plaintiff several years after the collision.

Master Pope released a similar decision in *Diotte v. Hillan.*[17] In this case, the plaintiffs' solicitors did not investigate the ownership status of the vehicle driven by the defendant when the original claim was issued. The plaintiffs sought to add the owner of the vehicle as a defendant more than two years after the collision. Master Pope held that the plaintiffs and their solicitors "failed to exercise reasonable diligence to ascertain the identity of [the party proposed to be added]." The Master went on to hold that "they cannot now rely on the doctrine of discoverability to deprive the [party] of her statutorily prescribed limitations protection."[18]

The plaintiff was also unsuccessful in *Fekrta v. Siavikis,*[19] a 2009 Ontario Court of Appeal decision. The defendant in this case brought a summary judgment motion on the basis that the plaintiff's claim was out of time. The judgment of Himel J., dismissing the plaintiff's action, was upheld on appeal. It appears that the plaintiff's loss resulted from there being little dispute as to the facts pertaining to the issue of discoverability. The court specifically held that:

> [i]n the face of undisputed evidence that the respondents were identified in the accident report, that a paralegal acting on behalf of the appellant put the respondents on notice of a potential claim on June 17, 2004, and that the appellant commenced an action against Mr. Siaviki on June 15, 2005 alleging permanent and serious injuries, there is no genuine issue for trial concerning whether the appellant had all the information necessary to discover her claim against the respondents by June 15, 2005 at the latest. Further there is no genuine issue for trial concerning whether the limitation period expired prior to the master's order.[20]

The tide may, however, be turning. A very recent case on point is *Velasco v. North York Chevrolet Oldsmobile Ltd.*[21] It involves a defence motion for summary judgment on the basis that the claim was commenced outside the two-year limitation period. A statement of claim was initially issued against various parties including the drivers of the vehicles in question in 2006, approximately eight months post-collision. Plaintiff's counsel failed to conduct a license plate search when the claim was issued and as a result, North York Chevrolet Oldsmobile Ltd., the owner of the vehicle driven by one of the defendants, was not named as a defendant.

The facts in the *Velasco* case are similar to those of the above-noted case of *Diotte v. Hillan,* which was decided in favour of the defendants by Master Pope. Of interest in the *Velasco* case is the fact that plaintiff's counsel obtained *within two years of the date of the collision* an Integra Investigation Services report that identified North York Chevrolet, as having a registered lien against the defendant driver in question and a Crown Brief with respect to the criminal charges that contained a license plate search clearly showing North York Chevrolet as the owner of the vehicle in question. While it was undisputed that plaintiff's counsel's law clerk reviewed these documents, the clerk did not take notice of the ownership issue. It was not until plaintiff's counsel reviewed the Crown Brief in preparation for discovery approximately 18 months after the two year mark that the ownership issue was discovered.

On the motion, McEwan J. held that plaintiff's counsel exercised reasonable diligence until such time as the Crown Brief was received as the police report incorrectly identified and one of the insurers incorrectly admitted ownership of the vehicle in question. However, McEwen J. held that plaintiff's counsel should not have closed their minds to the ownership issue and should have promptly reviewed the Crown Brief upon receipt. McEwen J. concluded as one might expect given the undisputed facts that plaintiff's counsel did not exercise reasonable diligence, there were no factual matters in dispute and no credibility issues were raised and that as a result, there existed no genuine issue for trial. The plaintiff's claims were dismissed.

This case however becomes more interesting on appeal. The Ontario Court of Appeal appears to have hung its hat on the incorrect identification and admission of the owner of the vehicle and overturned the decision of McEwan J. The Court held that the issue for the motion judge was whether plaintiffs' counsel "ought to have known" the identity of the owners of the vehicle more than two years before the claim was commenced. In their view, plaintiff's counsel acted with reasonable diligence in relying on the incorrect information and admission until they actually reviewed the Crown brief.

> ...having regard to the combination of information [plaintiff's] counsel had indicating ...the owner of the ...vehicle, it was unreasonable for the motion judge to conclude that [plaintiff's] counsel should have treated the ownership issue as a live issue upon receiving the Crown brief. That combination of information led the motion judge to conclude that [plaintiff's] counsel acted with reasonable diligence in continuing to rely on that information until contrary information actually came to their attention. In our opinion, [plaintiff's] counsel acted with reasonable diligence in continuing to rely on that information until contrary information actually came to their attention.[22]

The case law is clear that latitude is to be given to a party seeking to employ the discoverability principle and that it is typically inappropriate to resolve such an issue on a motion. Where there exists a factual or credibility issue, the matter should be referred to the trial judge. However, even where the facts appear undisputed, there may, based on the decision in *Velasco v. North York Chevrolet Oldsmobile Ltd.,* still be hope. The Court of Appeal ruling in this case demonstrates that parties seeking to employ the discoverability principle are not held to a standard of perfection. Even where the facts appear to be clear cut, the courts may give plaintiffs grace and allow their claims to survive another day.

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NOTES

[1] With assistance from Alexis Mantello.

[2] S.O. 2002, c. 24, Sched. B., s. 5. (the "Act").

[3] *Ibid.,* s. 5(2).

[4] *Piexeiro v. Haberman,* [1997] SCJ No. 31, 1997 CarswellOnt 2928, (Available on WL Canada), (SCC).

[5] *Conflitti v. Dhaliwal,*[2010] ONSC 3218, 2010 CarswellOnt 8518 (Available on WL Canada), (Master).

[6] [2003] 230 D.L.R. (4th) 347, 2003 CarswellOnt 2724,(Available on WL Canada) (ONCA).

[7] *ibid.* at para. 21.

[8] *ibid.* at para. 24.

[9] *Wakelin v. Gourley,* [2005] 76 O.R. (3d) 272, 2005 CarswellOnt 2808 (Available on WL Canada), (Master) at para. 9.

[10] *Cilurzo v. Kando,* 2010 ONSC 5535, 2010 CarswellOnt 7560 (Available on WL Canada) (Master).

[11] *Supra* note 8 at para. 15.

[12] *Alexis v. Darnley,* 2009 ONCA 847, 2009 CarswellOnt 7518 (Available on WL Canada), at para. 12.

[13] *Supra* note 4 at para. 17,18.

[14] 2010 ONCA 437, 2010, CarswellOnt 3975 (Available on WL Canada).

[15] 2010 ONSC 5336, 2010 CarswellOnt 7219 (Available on WL Canada).

[16] *ibid.* at para. 32.

[17] 2010 ONSC 1480, 2010, CarswellOnt 8468 (Available on WL Canada), (Master).

[18] *Ibid.* at para 23.

[19] 2009 ONCA 537, 2009, CarswellOnt 3702 (Available on WL Canada).

[20] *ibid.* at para. 6.

[21] 2011 ONCA 522, 2011 CarswellOnt 6844 (C.A.), rev`d 2011 ONSC 85, 2011 CarswellOnt 280 (S.C.J.).

[22] *Ibid.* at para. 9.