SUPREME COURT OF NOVA SCOTIA
Citation: *Bond v. Willson*, 2018 NSSC 287

Date: 20181119
Docket: Hfx No. 464646
Registry: Halifax

Between:

Carlton Bond as the Executor of The Estate of Bernice Bond

Plaintiff

v.

Alexandra Willson, John/Jane Doe, Canso Pharmacy Ltd.

Defendants

Judge:	The Honourable Justice Joshua M. Arnold
Heard:	July 4, 2018, in Halifax, Nova Scotia
Final Written Submissions:	September 12, 2018 by the Plaintiff September 19, 2018 by the Defendants
Counsel:	Raymond Wagner, Q.C., and Kate Boyle, for the Plaintiff Kyla Russell and Sara-Jo Briand, for the Defendants

By the Court:

Overview

[1] Carlton Bond as the Executor of The Estate of Bernice Bond, the plaintiff, seeks an order disallowing a limitations defence, and a declaration that an alternative limitation period applies. The plaintiff's claim arises out of the death of his mother, allegedly due to a medication prescription error. He commenced this action, as executor, under the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163. The plaintiff says the applicable limitation period runs one year from the date of death, pursuant to s. 10 of the *Fatal Injuries Act*.

[2] Alexandra Willson, John/Jane Doe, and Canso Pharmacy Ltd., the defendants, say the applicable limitation period is the one-year limitation found under s. 76 of the Nova Scotia *Pharmacy Act*, S.N.S. 2011, c. 11, which runs from the date the pharmacy services were rendered.

Background

[3] The history of the proceeding is as follows, based on the affidavits and the pleadings.

[4] The plaintiff's mother, Bernice Bond, had a prescription filled at Canso Pharmacy Ltd., the defendant pharmacy, on May 3, 2016.

[5] Before dispensing the prescription, Alexandra Willson, the defendant pharmacist, found that John/Jane Doe, the unidentified defendant pharmacy assistant, had prepared an incorrect dosage of Methotrexate. The pharmacist assistant packaged the Methotrexate to be taken once daily each week instead of once per week as prescribed. The pharmacist directed the assistant to remove the extra tablets, but did not check the compliance packages before dispensing them. The assistant had again left excessive tablets in the compliance packages.

[6] On May 24, 2016, Ms. Bond was admitted to hospital. She died on June 16, 2016. The medical examiner's report, dated December 12, 2016, describes the cause of death as "acute overdose of medication", namely Methotrexate.

[7] The plaintiff retained counsel in January 2017.

[8] On March 2, 2017, plaintiff's counsel, Raymond Wagner, Q.C., requested Ms. Bond's records from the pharmacy, enclosing an authorization signed by the plaintiff.

[9] On March 13, plaintiff's counsel received correspondence from Mr. Greg Hardy, indicating that he had been retained by the pharmacist, and requesting that correspondence and communication be directed to him.

[10] On April 12, 2017, plaintiff's counsel telephoned the pharmacy, followed by an e-mail on April 13. The email stated:

> To whom it may concern:
>
> I write further to our telephone conversation on April 12, 2017. Please find attached correspondence from Ray Wagner.
>
> Please let me know if there is anything else you may need in order to process the record request.

[11] Attached to the e-mail was a letter from Mr. Wagner dated April 13, 2017, that stated:

> We are the solicitors assisting Bernice Bond with respect to a litigation matter. Accordingly, I ask that you provide me with a copy of Ms. Bond's pharmacy records. I enclose an authorization form signed by Carl Bond, the executor of her estate, which allows you to release this information to us.
>
> If you have any questions or concerns, please contact my assistant Amber at 902 425 7330.
>
> Thank you for your assistance.

[12] There was also an authorization signed by the plaintiff, and a copy of his mother's will attached.

[13] The *Pharmacy Act* limitation period expired on May 3, 2017.

[14] Plaintiff's counsel phoned the pharmacy on May 5, 2017, and was told by a pharmacy assistant that the records would be sent that day. The same day, Mr. Hardy wrote to plaintiff's counsel, directing that the records be requested through him. Plaintiff's counsel made the request, and Mr. Hardy provided the records on May 8.

[15] The statement of claim was filed on June 15, 2017, bringing an action under the *Fatal Injuries Act*.

[16] The statement of defence was filed by Mr. Hardy on behalf of all three defendants on July 18, 2017. The defendants pleaded the limitation periods in both the *Fatal Injuries Act* and the *Pharmacy Act*.

[17] On September 26, 2017, plaintiff's counsel wrote to Mr. Hardy, requesting that the defendants waive the limitation defence. Defence counsel replied for the defendants the same day, refusing to waive the defence.

The limitations defences

[18] The principal question is which statutory limitation period applies: the limitation period found in the *Pharmacy Act*, or its counterpart in the *Fatal Injuries Act*.

[19] The *Pharmacy Act*, S.N.S. 2011, c. 11, includes a limitation period for "negligence or malpractice by reason of professional services requested or rendered" at s. 79, which states:

> Limitation period
>
> 79 No action may be brought against any person registered under this Act for negligence or malpractice by reason of professional services requested or rendered, unless the action is commenced within one year from the date when, in the matter complained of, the professional services were rendered.

[20] The *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, provides:

> Limitation of action
>
> 10 Not more than one action shall lie for and in respect to the same subject-matter of complaint and every such action shall be commenced within twelve months after the death of the deceased person.

[21] Ms. Bond received her prescription from the pharmacy on May 3, 2016. She died on June 16, 2016. The plaintiff filed the statement of claim on June 15, 2017.

[22] The *Pharmacy Act* limitation period expired one year after the date the professional services were rendered, that is, May 3, 2017, about six weeks before the action was commenced.

[23] The *Fatal Injuries Act* limitation period expired on June 16, 2017, the day after the statement of claim was filed.

[24] The plaintiff says the *Fatal Injuries Act* limitation period governs. The defendants say the *Pharmacy Act* limitation period applies and the plaintiff is out of time.

Are the limitation provisions in conflict?

[25] While the cause of action arises under the *Fatal Injuries Act*, the defendants say the *Pharmacy Act* is "equally applicable and relevant" because they are "professionally governed" by it. The two acts are not in conflict, they say, because the *Fatal Injuries Act* applies to any party with a cause of action arising from the wrongful death of a family member, while the *Pharmacy Act* applies to a specific class of defendants. Further, they say the *Pharmacy Act* limitation provision is "clear and unambiguous", and the statement of claim contains "allegations in negligence" against the defendants. As the plaintiff points out, the *Pharmacy Act* language is no more "clear and unambiguous" than the *Fatal Injuries Act* provision. Further, while negligence or malpractice may furnish the underlying substance of the claim, the cause of action is a statutory one under the *Fatal Injuries Act*.

[26] In response to the defendants' assertion that the two limitation periods are not in conflict, the plaintiff points to Bastarache J.'s description of "unavoidable conflict" in *Lévis (City) v. Fraternité des policiers de Lévis Inc*, [2007] 1 S.C.R. 591, 2007 SCC 14, [2007] S.C.J. No. 14:

> 47 The starting point in any analysis of legislative conflict is that legislative coherence is presumed, and an interpretation which results in conflict should be eschewed unless it is unavoidable. The test for determining whether an unavoidable conflict exists is well stated by Professor Côté in his treatise on statutory interpretation:
>
> > According to case law, two statutes are not repugnant simply because they deal with the same subject: application of one must implicitly or explicitly preclude application of the other. (P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350)
>
> Thus, a law which provides for the expulsion of a train passenger who fails to pay the fare is not in conflict with another law that only provides for a fine because the application of one law did not exclude the application of the other... Unavoidable conflicts, on the other hand, occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results. A law, for example, which allows for the extension of a time limit for filing an appeal only before it expires is in direct

> conflict with another law which allows for an extension to be granted after the time limit has expired... [emphasis added]

[27] The limitation periods in the instant case begin to run from two different specific triggering events, one on May 3, 2016, and one on June 16, 2016. They cannot both apply in the circumstances, since they indicate two different dates for expiry of the limitation period. There is no way to apply them together without a direct contradiction.

[28] In *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, [1998] S.C.J. No. 84, several negligence actions were commenced in the Ontario Court (General Division) after two boating accidents resulting in deaths and serious injuries. One of the issues was whether the applicable limitation period for the fatal accident claim was one or two years; there were two potentially applicable limitation provisions under the *Canada Shipping Act*. Subsection 572(1) of the *Canada Shipping Act*, pertaining to actions arising out of collisions between vessels, stated:

> 572. (1) No action is maintainable to enforce any claim or lien against a vessel or its owners in respect of any damage or loss to another vessel, its cargo or freight, or any property on board that vessel, or for damages for loss of life or personal injuries suffered by any person on board that vessel, caused by the fault of the former vessel, whether that vessel is wholly or partly at fault, unless proceedings therein are commenced within two years from the date when the damage or loss or injury was caused.

[29] The second limitation period in issue, s. 649 of the *Canada Shipping Act*, pertained to claims under s. 646. Those two sections provided:

> 646. Where the death of a person has been caused by a wrongful act, neglect or default that, if death had not ensued, would have entitled the person injured to maintain an action in the Admiralty Court and recover damages in respect thereof, the dependants of the deceased may, notwithstanding his death, and although the death was caused under circumstances amounting in law to culpable homicide, maintain an action for damages in the Admiralty Court against the same defendants against whom the deceased would have been entitled to maintain an action in the Admiralty Court in respect of the wrongful act, neglect or default if death had not ensued.
>
> . . .
>
> 649. Not more than one action lies for and in respect of the same subject-matter of complaint, and every action shall be commenced not later than twelve months after the death of a deceased.

[30] The three actions in *Orden Estate* to which the limitations issue related were each commenced more than one year, but less than two years, after the accident. They involved fatal accident claims pursuant to Part XIV of the *Canada Shipping Act*, which included ss. 646 and 649. Each provision could apply to the claims. The defendants argued, among other things, that Part XIV constituted a complete code governing fatal accidents. The Supreme Court of Canada, *per* Iacobucci and Major J.J., rejected this argument, holding that "Part XIV must be read in conjunction with other provisions of the *Canada Shipping Act*, and with other sources of Canadian maritime law … which deal with fatal accident issues" (para. 125). The court held that there was discernable logic behind the two-year limitation period, and that the plain language of s. 572(1) included the plaintiffs' fatal accident claims. The confusion resulted "only from the fact that their claims also [fell] within the clear wording of s. 649" (para. 132). The court went on to discuss the principle of strict construction of limitations statutes:

> 136 This Court has recognized that statutory provisions creating a limitation period must be strictly construed in favour of the plaintiff. The following statement by Estey J., writing for the majority of the Court in *Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275, at p. 280, is instructive:
>
> > [A limitations provision] being a restrictive provision wherein the rights of action of the citizen are necessarily circumscribed by its terms, attracts a strict interpretation and any ambiguity found upon the application of the proper principles of statutory interpretation should be resolved in favour of the person whose right of action is being truncated.
>
> Following this principle of statutory construction, the ambiguity created by the existence of two distinct limitation periods in the *Canada Shipping Act* should be resolved by allowing the plaintiffs in the Lake Joseph actions to rely upon the longer period provided for in s. 572(1). Parliament apparently intended that both limitation periods should co-exist. In the absence of any valid reason to justify applying a shorter limitation period which would have the effect of barring the plaintiffs' claims, the plaintiffs should have the benefit of the more favourable limitation period. [Emphasis added.]

[31] The defendants do not dispute the statement from *Ordon Estate*. They do, however, refer to the majority's remarks on the purposes of limitations periods in *Novak v. Bond*, [1999] 1 S.C.R. 808, [1999] S.C.J. No. 26, where McLachlin J. (as she then was) said:

> 64 In *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, this Court affirmed its earlier identification of the traditional rationales of limitations statutes in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 29-30. Limitations statutes were held, at p. 29, to

rest on "certainty, evidentiary, and diligence rationales". In *M. (K.)*, *supra*, this Court noted at pp. 29-30:

> 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.

It is apparent that these rationales generally reflect the interests of the potential defendant: *Murphy v. Welsh*, [1993] 2 S.C.R. 1069, at pp. 1079-80, per Major J. They rest on the view that a potential defendant should not have to defend a stale claim brought by a plaintiff who has chosen not to assert his or her rights diligently. Indeed, although there have traditionally been doctrines or statutory provisions that recognized the plaintiff's interests, such as the exceptions applicable to persons under a disability or victims of concealed frauds, limitations statutes have generally been oriented towards the interests of the potential defendant.

> 65 Over the last several decades, however, many legislatures have moved to modernize their limitations statutes, most of which were formerly based on diverse collections of centuries-old English statutes... As part of this process, renewed attention has been given to ensuring that the limitations statutes are framed in a manner that addresses more consistently the plaintiff's interests, not just those of the defendant. This trend has also been reflected in the more balanced way that courts have sought to interpret these statutes. Arbitrary limitation dates have been discouraged in favour of a more contextual view of the parties' actual circumstances. To take just one example, it has been well-recognized that it is unfair for the limitation period to begin running until the plaintiff could reasonably have discovered that he or she had a cause of action... Even on this new approach, however, limitation periods are not postponed on the plaintiff's whim. There is a burden on the plaintiff to act reasonably.
>
> 66 Contemporary limitations statutes thus seek to balance conventional rationales oriented towards the protection of the defendant - certainty, evidentiary, and diligence - with the need to treat plaintiffs fairly, having regard to their specific circumstances. As Major J. put it in *Murphy*, *supra*, "[a] limitations scheme must attempt to balance the interests of both sides" (p. 1080). See also *Peixeiro*, *supra*, at para. 39, per Major J.

> 67 The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics. [Emphasis added.]

[32] The defendants argue that "there is no mechanism for a general limitation provision to override the statutory one found in the *Pharmacy Act*, or even the *Fatal Injuries Act*." It is not clear what this statement is meant to establish. Section 6 of the *Limitation of Actions Act*, S.N.S. 2014, c. 35, provides that "[w]here there is a conflict between this Act and any other enactment, the other enactment prevails." As such, a limitation period in another act will prevail over the general limitation period under the *Limitation of Actions Act*.

[33] One of the cases cited by the defendants on this issue, *Izaak Walton Killam Health Centre v Nova Scotia (Human Rights Commission)*, 2014 NSCA 18, confirms that limitation periods beginning and ending at specific times, such as the termination of professional services, cannot be extended by the discoverability principle. The defendants cite this case for the proposition that "it is not for the courts to allow a secondary (or deferential) document, such as an internal policy or general limitations Act to substantively modify specifically prescribed statutory provisions." It is not clear to what this is relevant. The plaintiff does not argue that the two-year period under the *Limitation of Actions Act*, or a contractual provision, should displace the relevant specific limitation period, whether that be under the *Pharmacy Act* or the *Fatal Injuries Act*.

[34] None of this negates the remarks in *Ordon Estate* about deciding between competing limitation periods. Moreover, *Novak* acknowledges the evolution of limitations law away from a primary emphasis on protecting potential defendants towards a more balanced treatment of the interests of plaintiffs and defendants.

[35] In at least two cases courts have addressed conflicts between limitations provisions under fatal accidents legislation similar to s. 10 of the *Fatal Injuries*

Act, and limitation provisions protecting medical professionals similar to s. 79 of the *Pharmacy Act*.

[36] In *Tardif v. Wong*, 2002 ABCA 121, 2002 CarswellAlta 656, the Alberta Court of Appeal considered competing sections of the Alberta *Limitation of Actions Act*. Section 54 imposed a two-year limitation period on an action under the *Fatal Accidents Act*, running from the date of death. Section 55 imposed a one-year period on an action against a physician "for negligence or malpractice", running from the date professional services terminated. The defendants' action was commenced within one year of death, but more than a year after the last medical services were provided. The chambers judge held that the *Fatal Accidents Act* claim was not statute-barred.

[37] On appeal, Wittmann J.A. (as he then was) stated that a "right of action conferred by a statute of general application can only be taken away or limited by clear language showing such an intent on the part of the legislature…" (para. 18). He cited *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, 1998 CarswellOnt 4390, where the court held that "statutory provisions creating a limitation period must be strictly construed in favour of the plaintiff" (para. 21). Wittmann J.A. said:

> 30 Limitation periods, therefore, must be strictly construed in favour of the plaintiff. The approach advocated by the Supreme Court of Canada in *Ordon Estate* was first, to apply the principles of statutory construction, then second, to resolve any ambiguity created by the existence of two distinct limitation periods by allowing the plaintiffs to rely on the longer period. Finally, *Ordon Estate* requires consideration of whether there is any reason not to construe strictly in favour of the respondents. Absent any valid reason to justify applying the shorter limitation period which would have the effect of barring the plaintiff's claims, the plaintiffs should have the benefit of the more favourable limitation period.

[38] In *Tardif*, the competing sections were "of equal force within the statute" (para. 35).

[39] The purpose of s. 55 in *Tardif* – the one-year limitation period governing physicians' negligence and malpractice – was originally to protect physicians, but in its modern form it had "not been regarded as a limitation period which enjoys primacy over other considerations when interpreting its application" (para. 39). The purpose of the *Fatal Accidents Act* was "to give to the dependent family of the deceased a right of action, and, in this sense, creates a new action…" (para. 40). Wittmann J.A. concluded that the only ambiguity was that each of the sections appeared to apply, and said, "[t]he legislature intended a purpose for each of them

and those purposes, if possible, must be achieved by an interpretation that brings about the more workable and practical result" (para. 43).

[40] The appellants in *Tardif* argued that the purpose of the limitation period for medical services was "to extend preferential treatment to members of the medical profession. They claimed if s. 55(a) is subject to ss. 53 and 54, preferential treatment will be rendered largely meaningless and the legislative purpose would be defeated. Further, they argued it would be unfair if a deceased's family has more time to file a lawsuit than a patient..." (para. 47). The court rejected this reasoning. Citing *Novak*, Wittmann J.A. observed that limitation law had moved away from its traditional orientation towards the interests of the defendant. He went on to note that the medical limitation period was not explicitly made paramount over the fatal injuries limitation period, or vice versa. He continued:

> 54 The object and purpose of the *Fatal Accidents Act* … was to create a right of action which was not possible under the common law. The *Limitation of Actions Act* provided the limitation period for those actions was to be two years. Nothing in any of those three acts state such actions are subject to the one-year limitation period in s.55(a) nor is there any policy reason why s.55(a) should pre-dominate.
>
> 55 The exceptional limitation period provided in s.55(a) has not been a complete blanket protection for all actions against the medical profession. Neither the appellants nor the case law provide a policy reason for such a protection. To require that s.55 apply to actions also subject to ss.53 and 54 for the sake of consistency, ignores the other numerous decisions finding exceptions to the application of s.55. The prospect of a different limitation period applicable to patients than applicable to the patient's estate is no more inconsistent than other exceptions which have arisen under s.55. Nor does the failure to apply s.55 defeat the purpose of limitation statutes. The fair treatment of plaintiffs and the certainty, evidentiary and diligence rationales are respected and properly balanced with the two year limitation under ss. 53 or 54 displacing s. 55(a).
>
> 56 If, as it appears, some inconsistency is inevitable, an interpretation which favours the plaintiff is to be preferred as limitations statutes are to be construed strictly in favour of plaintiffs. I find there is no good reason not to construe strictly in favour of the respondents. Accordingly, s.53 and s.54 apply in this case. Section 55(a) has no application.

[41] The opposite result occurred in *Lorencz v. Talukdar*, 2017 SKQB 389, 2017 CarswellSask 692. The Saskatchewan *Fatal Accidents Act* provided that "every action shall be commenced within two years after the death of the deceased person." The *Medical Profession Act* provided that "[n]o person registered under

this Act is liable for damages in any action arising out of the provision of professional services unless that action is commenced within 24 months from the date when, in the matter complained of, the professional services terminated."

[42] Justice Barrington-Foote cited the view of the Saskatchewan Court of Appeal in *B.H. v. Dattani*, 2010 SKCA 1, 343 Sask R 141, that the purpose of the medical limitation period "was to ensure that claims amounting to complaints about how physicians act in their professional roles are brought forward expeditiously after the treatment ends" and that discoverability did not apply (paras. 58-60). As such, the provision "applied to all claims for damages arising out of the provision of professional services, regardless of the identity of the plaintiff" (para. 61). Justice Barrington-Foote found a conflict between the limitations provisions, stating that under the fatal accidents provision, "[t]he defendants would have been liable to Mr. Lorencz on the date of his death, and his dependants would have had two years to commence their action", while the medical provision meant "that the liability imposed by the *FAA* ends two years after the termination of treatment" (para. 62). He continued:

> 63 In my opinion, this conflict is properly resolved on the basis of the second ground discussed in *Platana* and *Willoughby*. Just as *The Highway Traffic Act* limitation considered in *Platana* and *Willoughby* applied to all motor vehicle accidents, s. 6 of the FAA applied to all wrongful death claims. Section 72, on the other hand - like the competing statutes in those cases - limited claims against a specific profession, arising from the provision of professional services that are relevant to the alleged wrongdoing. Section 72 was the limitation provision that was "more precisely relevant" to the claim brought.
>
> 64 I recognize that this conclusion may appear to be inconsistent with *Ordon*, which supports the adoption of the longer of two conflicting limitation provisions. However, *Ordon* - as *Tardif* confirmed and as *Platana* and *Willoughby* demonstrate - did not create an invariable rule to that effect. Indeed, *Ordon* did not turn solely on that presumption, but also on its facts.

[43] In *Platana v. Saskatoon (City)*, 2006 SKCA 10, the plaintiffs were injured in a traffic accident involving a municipal employee. They started an action within a year, as required by both the *Urban Municipality Act* and the *Highway Traffic Act*. However, they did not serve the municipality within the year, as required by the *Urban Municipality Act*. A rule of court allowed an extension of time for service, but the majority held that the *Urban Municipality Act* limitation period prevailed over the court rule. In considering which act should prevail, Jackson J.A. said, for the majority:

> 104 If it were necessary to apply the doctrine of *generalia specialibus non derogant* to this case, I would be inclined to find *The Urban Municipality Act* ... to be specific legislation. This is the conclusion in *Donaldson v. R.* [(1975), 14 OR (2d) 684 (Ont H Ct J)] and I agree with that decision.
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> 105 When a motor vehicle is involved in an accident, there are, theoretically speaking, any number of limitation provisions which could apply. First, there is *The Limitation of Actions Act* and then there is *The Highway Traffic Act* and the legislation of the various levels of subordinate governments like municipalities, hospital boards, [school] boards and the like.
>
> 106 One has no difficulty concluding that *The Highway Traffic Act* is the specific legislation *vis-à-vis The Limitation of Actions Act*. But when one comes to consider a conflict between *The Highway Traffic Act* and the legislation pertaining to the various levels of subordinate governments, one has to be concerned that the legislature has specifically decided to create special limitation periods for these bodies rather than relying on what would be the general legislative scheme for other legal entities in the Province. Given this special status, it is not probable that the legislature intended to defer to Rule 16 when it specifically legislated a different procedure.
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> 107 If one were to conclude otherwise, our decision in *Willoughby (Litigation Guardian of) v. Larsen* would be called into question. In *Willoughby*, the Court had to consider whether there is a similar conflict between *The Education Act* and s. 86(1) of *The Highway Traffic Act*. While the Court of Queen's Bench concluded there was no conflict, it did so by reading *The Education Act* as being the dominant enactment and went on, in what is, essentially, *obiter* to resolve the conflict, if there were one, in favour of *The Education Act* over *The Highway Traffic Act*.
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> 108 The lack of written reasons from this Court in *Willoughby (Litigation Guardian of) v. Larsen* makes it difficult to determine the basis upon which the judgment of the Queen's Bench was supported. This Court, however, sustained the judgment giving effect to an interpretation that granted immunity to a teacher with respect to all actions rather than carving out an exception for motor vehicles.

[44] *Platana* and *Willoughby*, then, applied a variant of the "more precisely relevant" analysis referred to by Barrington-Foote J. in *Lorencz*. In *Lorencz*, Barrington-Foote J. distinguished *Tardif*:

> 65 I also recognize that the court reached the opposite conclusion in relation to similar wrongful death legislation in *Tardif*. However, it is my view that the third stage of the *Tardif* analysis also supports the conclusion that s. 72 governs. That third stage calls for "consideration of whether there is any reason not to construe strictly in favour of the respondents".

> 66 I reach that conclusion based on the language of the Saskatchewan legislation, as interpreted by our Court of Appeal. The limitation period for an action by a patient against a licensed physician ran from the termination of the relevant medical services. Discoverability was irrelevant. To reiterate, this "harsh" result reflected the fact that the purpose of s. 72 was - as Martin J.A. noted - to throw a safeguard around physicians, or as Richards J.A. stated in *Dattani*, "to ensure that claims amounting to complaints about how physicians act in their professional roles are brought forward expeditiously after the treatment ends."
>
> 67 In my view, that purpose carries the day in this context. It is, in the language of *Tardif*, the "valid reason" not to construe strictly in favour of the defendants. FAA claims against physicians, even they are not strictly derivative, are based on the wrong done to the deceased patient by physicians in their professional role. If the purpose of s. 72 is to throw a safeguard around physicians in relation to that role - regardless of discoverability and the fairness it attempts to protect - why would it be interpreted in a fashion that permitted claims by surviving family members? The effect would be fundamentally inconsistent with the policy goal which lies at the heart of s. 72.

[45] The reasoning in *Lorencz*, then, turned on the conclusions: (1) that the medical limitation period was "more precisely relevant" to the claim than the *Fatal Accidents Act* limitation and; (2) that the legislative intention behind the medical limitation period ousted the general rule of strict construction of limitation provisions.

[46] In the instant case, the plaintiff refers to statements in *Hansard* by the Acting Minister of Health indicating that the *Pharmacy Act* was intended to "enhance the accountability of pharmacists and protection of the public" (Hansard, November 13, 2001, p. 6991). This statement did not, in fact, refer to the current *Pharmacy Act*, but to its predecessor, the *Pharmacy Act*, SNS 2001, c 36. However, the 2011 *Act* appears to be essentially an amending act, facilitating "the expansion of the role of pharmacists in the delivery of health care" and providing "legislative authority for pharmacists to administer drugs, including vaccines, and order and interpret certain diagnostic tests to monitor drug therapy" (Hansard, May 7, 2010, p. 2146). It is reasonable to treat the 2001 comments as being relevant to the 2011 Act. The limitations provision remained unchanged, other than a renumbering from 76 to 79.

[47] The plaintiff says the legislative intention to protect physicians distinguishes this case from *Lorencz*, in view of the Supreme Court of Canada's recognition of physicians as a particularly vulnerable profession. The plaintiff submits that the presumption of legislative coherence suggests that if the Legislature had intended

to displace the limitation period in the *Fatal Injuries Act*, it would have used language to that effect, such as a "notwithstanding" provision.

[48] The defendants concede that "the primary purpose of the *Pharmacy Act* is to protect the public…" Nevertheless, they say, the language of s. 79 of the *Pharmacy Act* is clear, and the *Act* is also intended to provide "the legislative framework within which [p]harmacists work."

[49] Is the reasoning in *Lorencz* supportable in light of the decision in *Ordon Estate*? In my view, *Tardif* is more consistent with the approach to limitation periods required by the Supreme Court of Canada. In *Lorencz*, the court relied heavily on an interpretation of the purpose of the Saskatchewan *Medical Profession Act* that emphasized the need to protect physicians. The court acknowledged that this appeared inconsistent with the Supreme Court of Canada's comments about the evolution of limitations law in *Ordon Estate*, but held that the existing law regarding the purpose of the medical legislation was a reason not to apply the general rule. By contrast, there is no clear authority for the claim that the *Pharmacy Act* limitation provision is intended simply or predominately as protection for pharmacists. Statements in *Hansard*, and the modern approach to construction of limitations provisions, both point in the other direction. The reasoning of the Alberta Court of Appeal in *Tardif*, holding that, as a matter of statutory construction, the medical limitation period did not oust the fatal accidents limitation period, is more persuasive than the contrary reasoning by the Saskatchewan Court of Queens Bench in *Lorencz*.

[50] The plaintiff also submits that *Lorencz* is distinguishable on the basis that the *Medical Profession Act* limitation period applied to "any action" against a physician, while the *Pharmacy Act* provision applies only to actions "for negligence or malpractice." The medical limitation period in *Tardif* was similarly restricted to actions "for negligence or malpractice." This tends to strengthen the persuasiveness of *Tardif*.

[51] The defendants seem to argue that there is some significance to the fact that the limitation periods in *Ordon Estate* were both in the same enactment. The instant case involves limitation periods in two different acts. The conflict here, defendants' counsel says, "results from what the cause of action is and which limitation period is triggered by that cause of action." As a result, the defendants say they should be permitted to retain the benefit of the limitations defence, which should (apparently) be determined at a future motion or at trial. They say this

would not affect the plaintiff's right of recovery. This submission is not persuasive. The purpose of the present motion is to determine whether the limitations defence should be disallowed. The parties have provided evidence and argued the issue. There is no reason to delay a decision in this case until some ambiguous future date.

[52] The defendants also submit that the plaintiff's reliance on the more beneficial limitation period in the *Fatal Injuries Act* is "a litigation tactic"; on this topic, the majority said, in *Novak*, that "[p]urely tactical considerations have no place" in the analysis of a provision allowing postponement of the running time of a limitation period (para. 81). The majority went on to say that "delay beyond the prescribed limitation period is only justifiable if the individual plaintiff's interests and circumstances are so pressing that a reasonable person would conclude that, in light of them, the plaintiff could not reasonably bring an action at the time his or her bare legal rights crystallized" (para. 90). The provision at issue in that case bore little resemblance to s. 12 of the *Limitation of Actions Act*. It provided that a limitation period could be postponed "until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that … the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action" (para. 51).

[53] I do not place any weight on the defendants' suggestion that reliance on the *Fatal Injuries Act* is in some way an unacceptable tactic by the plaintiff.

Scope of the *Pharmacy Act* limitation provision

[54] Section 79 of the *Pharmacy Act* refers to an action against "any person registered under this *Act*…" The plaintiff says this provision would only apply to the defendant pharmacist and possibly to the assistant, depending on whether the assistant was registered under the *Act*. As such, according to the plaintiff, the defendant pharmacy would not be subject to the defence.

[55] The *Pharmacy Act* defines "pharmacist", and several related terms, at s. 2:

> (ak) "pharmacist" means a person registered and licensed under this Act as a pharmacist;

(al) "pharmacy" means that part of a place where scheduled drugs are sold by retail, whether by prescription or otherwise, including the dispensary and the professional service area, or another facility authorized by the regulations, and includes a licensed pharmacy, a formerly licensed pharmacy and a pharmacy the licence or accreditation of which is suspended;

(am) "pharmacy technician" means a person registered and licensed under this Act as a pharmacy technician;

(an) "practice of pharmacy" means the services or restricted activities described in this Act provided by a pharmacist or by a registrant under the direction or supervision of a pharmacist pursuant to this Act;

….

(aw) "registered student" means a student in pharmacy who has not graduated and is registered with the College;

(ax) "registrant" means a person registered with the College pursuant to this Act or the former Act, and includes a member of the College pursuant to the former Act, and also includes a licensed pharmacist or person who was a licensed pharmacist, a licensed pharmacy technician or person who was formerly a licensed pharmacy technician, a certified dispenser or person who was formerly a certified dispenser, a registered student or a person who was formerly a registered student, an intern or person who was formerly an intern and any pharmacist, pharmacy technician, certified dispenser, registered student or intern whose registration or licence is suspended…

[56] Section 65 of the *Pharmacy Act* deals with licensing requirements and unauthorized practice:

Licence required

65 (1) Except as expressly provided by this Act or the regulations, a person who does not hold a valid licence pursuant to this Act shall not

(a) practise or attempt to practise pharmacy;

(b) sell the drugs or devices included in a schedule prescribed pursuant to this Act unless the sale is expressly authorized in the appropriate schedule and then only upon the conditions set out in the schedule; or

(c) dispense or compound drugs.

(2) A person who does not hold a valid licence as a pharmacist shall not assume or use the title of "pharmacist", "druggist", "pharmaceutical chemist" or "apothecary" or words of like import, the designation PhC., R.Ph., or R.Pharm. or a similar abbreviation or any other words or abbreviations to imply that the person is a licensed pharmacist pursuant to this Act.

> (3) No person who does not hold a valid licence as a pharmacy technician pursuant to this Act shall assume or use the title of "pharmacy technician", "registered pharmacy technician", "regulated pharmacy technician", "pharmacy technologist", "dispensary technician", "dispensary technologist" or words of like import, the designation R.Ph.T., R.P.T., Pharm. Tech. or a similar abbreviation or any other words or abbreviations to imply that the person is a licensed pharmacy technician pursuant to this Act….

[57] To "dispense" drugs "means the process of completing a prescription including its release to the patient": s. 2(u).

[58] It appears to be undisputed that the defendant Ms. Willson was a registered pharmacist. The defendants argue that this is sufficient "to allow the limitation defence to stand", given that the defence simply says the defendants "plead and rely upon the relevant limitation periods."

[59] Neither counsel refers to the various *Pharmacy Act* registration provisions. Both pharmacists and pharmacy technicians are "registered and licensed" under the Act. The category of "registrant" means "a person registered with the College pursuant to this Act or the former Act", with various examples provided. The Act also requires the Registrar to "keep a register of all pharmacies licensed pursuant to this Act": s. 24(1). The pleadings refer to John/Jane Doe as a "pharmacy assistant", a designation that does not exist in the Act. Given that this individual was involved in preparing prescriptions, he or she would be required to be a license-holder under the Act: s. 65(1)(c). Both pharmacists and pharmacy technicians are licensed under the Act (as well as being registered): see ss. 65(2) and (3).

[60] Clearly the defendant pharmacist falls within s. 79 as a "person registered." Assuming that John/Jane Doe was in fact a pharmacy technician, or some other form of registrant pursuant to s. 2(ax), he or she would be a "person registered."

[61] The *Pharmacy Act* applies to the defendant pharmacy. There is a register of pharmacies. Is a pharmacy a "person"? Canso Pharmacy, Ltd, is a corporation. The *Interpretation Act*, RSNS 1989, c 235, defines "person" to include a corporation: s. 7(1)(s).

[62] The limitation period in the *Fatal Injuries Act* applies in this case. The plaintiffs filed their action within the time period proscribed by the *Fatal Injuries Act*. The limitation defence is disallowed.

Disallowance of the limitations defence

[63] In the alternative, if the *Pharmacy Act* limitation provision applies, the plaintiff submits that the limitations defence should be disallowed.

[64] Section 12 of the *Limitation of Actions Act* allows the court to disallow a limitations defence. The section applies to the general two-year limitation period under the *Limitation of Actions Act*, as well as to a limitation period established by any other enactment (s. 12(1)). Section 12 "applies only to claims brought to recover damages in respect of personal injuries" (s. 12(2)). Subsection (4) allows a person to apply to the court to terminate a right of action for which the limitation period has expired. Subsection 12(3) and (5) set out the court's authority to disallow a limitations defence:

> (3) Where a claim is brought without regard to the limitation period applicable to the claim, and an order has not been made under subsection (4), the court in which the claim is brought, upon application, may disallow a defence based on the limitation period and allow the claim to proceed if it appears to the court to be just having regard to the degree to which
>
> > (a) the limitation period creates a hardship to the claimant or any person whom the claimant represents; and
> >
> > (b) any decision of the court under this Section would create a hardship to the defendant or any person whom the defendant represents, or any other person.
>
> …
>
> (5) In making a determination under subsection (3), the court shall have regard to all the circumstances of the case and, in particular, to
>
> > (a) the length of and the reasons for the delay on the part of the claimant;
> >
> > (b) any information or notice given by the defendant to the claimant respecting the limitation period;
> >
> > (c) the effect of the passage of time on
> >
> > > (i) the ability of the defendant to defend the claim, and
> > >
> > > (ii) the cogency of any evidence adduced or likely to be adduced by the claimant or defendant;
> >
> > (d) the conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts that were or might be relevant to the claim;
> >
> > (e) the duration of any incapacity of the claimant arising after the date on which the claim was discovered;

> (f) the extent to which the claimant acted promptly and reasonably once the claimant knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to a claim;
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> (g) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice the claimant may have received;
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> (h) the strength of the claimant's case; and
>
> (i) any alternative remedy or compensation available to the claimant.

[65] The Court of Appeal discussed the predecessor provision to s. 12, that being s. 3 of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, in *Butler v. Southam Inc.*, 2001 NSCA 121, [2001] N.S.J. No. 332. Cromwell J.A. (as he then was) said, for the court:

> 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 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... 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... 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...
>
> 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. [Emphasis added]

[66] As a preliminary point, the defendants argue that a claim under the *Fatal Injuries Act* is categorically excluded from s. 12, not being a "personal injury" as required by s. 12(2).

Is a Fatal Injuries Act claim one for "in respect of personal injuries"?

[67] The plaintiff submits that a claim under the *Fatal Injuries Act* is a claim for "damages in respect of personal injuries", as required by s. 12(2) of the *Limitation of Actions Act*. Section 3 of the *Fatal Injuries Act* creates a right of action where the "person injured" would have been able to maintain an action. The defendants deny that this terminology has any significance, in view of the differences between statutory fatal injuries claims and common law personal injury claims.

[68] The defendants make various objections to the proposition that a claim under the *Fatal Injuries Act* is a "personal injury" for the purpose of s. 12. Personal injury claims, they say, are based in common law, not statute. The wrongful death action would not exist but for the legislation, as discussed in *MacLean v. MacDonald*, 2002 NSCA 30, where Cromwell J.A. (as he then was), said "the primary purpose of this legislation was to put the survivors of a person wrongfully killed in the financial position they would have been in had the deceased lived and continued to provide support" (para. 27). The defendants further submit that the claimants in fatal injuries actions are "not the same as those who claim for personal injuries", being family members of the deceased rather than living plaintiffs. The defendants also submit that the heads of damages for the two types of claims are different. None of this, in my view, directly addresses whether a fatal injury is a

"personal injury", or, more to the point, whether a *Fatal Injuries Act* claim is "in respect of personal injuries."

[69] The plaintiff points out that the words "in respect of" have been accorded broad meaning. In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, the "[t]he words 'in respect of' are … words of the widest possible scope. They import such meanings as 'in relation to', 'with reference to' or 'in connection with'. The phrase 'in respect of' is probably the widest of any expression intended to convey some connection between two related subject matters" (para. 39). The plaintiff says it would be "counterproductive … to differentiate between the Plaintiff's claim and those of non-lethal negligence. This would create a legal distinction based exclusively on the results of the impugned conduct." The plaintiff adds that there is no indication in s. 12 that the Legislature "intended to create a discretionary power that stops concurrently with the claimant's life. A wrongful death is the ultimate personal injury."

[70] There is no dominant definition of "personal injury." *Black's Law Dictionary*, 10th edn. (St. Paul, MN: Thomson Reuters, 2014), defines "personal injury" in part as "[i]n a negligence action, any harm caused to a person, such as a broken bone, a cut, or a bruise; bodily injury", or as "[a]ny invasion of a personal right, including mental suffering and false imprisonment…" (p. 906). *The Dictionary of Canadian Law*, 3rd edn. (Scarborough, Ont.: Thomson Carswell, 2004), defines the term as, inter alia, "[b]odily or physical injury…" (p. 933). The current edition of the leading textbook on personal injury damages – Cooper-Stephenson and Adjin-Tettey's *Personal Injury Damages in Canada*, 3rd edn. (Toronto: Thomson Reuters, 2018) – does not offer a clear definition, but *does* integrate fatal injury claims into its scope. The authors devote entire chapters to "Basic Fatal Accident Concepts" and "Fatal Accident Actions." They note that the same principles of damage assessment govern in fatal accident cases as in personal injury cases. A fatal accident claim may not be "for" a personal injury, but the linkage is close enough that it should be considered to be "in respect of" a personal injury when that personal injury would be one that could have given rise to tort liability.

[71] It is worth noting that, while arguing that a fatal injury is not a "personal injury", the defendants simultaneously argue that the *Fatal Injuries Act* claim is one for "negligence or malpractice" under the *Pharmacy Act*. If the statutory origin of the fatal injury claim disqualifies it as a "personal injury", it likewise disqualifies it as "negligence or malpractice." The basis for liability in the *Fatal*

Injuries Act is "such wrongful act, neglect or default of another as would, if death had not ensued, have entitled the person injured to maintain an action and recover damages in respect thereto…" (s 3).

[72] In view of the broad meaning of the words "in respect of", I am satisfied that a *Fatal Injuries Act* claim falls within the scope of the disallowance power under the *Limitation of Actions Act.* I will therefore consider whether the *Pharmacy Act* limitation defence should be disallowed.

Considerations under ss. 12(3) and 12(5) of the *Limitations of Actions Act*

[73] As noted above, the plaintiff says the *Pharmacy Act* limitation defence should be disallowed under s. 12 of the *Limitation of Actions Act*.

[74] Subsection 12(3) requires the court to consider the comparative hardships to the parties arising out of a decision under the section. The principle hardship to the plaintiff would be the loss of the cause of action. The hardship to the defence is less clear; there is no plausible argument that the defendants' ability to adduce evidence or conduct the defence has been impacted. In *Butler*, Cromwell J.A. observed that successful limitations defences "may lead to harsh and unjust results by barring actions where, in the particular case, there is little reason to do so" and that "such defences may result in prejudice to the plaintiff which is disproportionate to the importance, in a particular case, of the achievement of the purposes for which the limitation period exists" (para. 137).

[75] The parties have raised arguments on various of the specific considerations set out in s 12(5) of the *Limitation of Actions Act*, which states:

> 12 (5) In making a determination under subsection (3), the court shall have regard to all the circumstances of the case and, in particular, to
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> (a) the length of and the reasons for the delay on the part of the claimant;
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> (b) any information or notice given by the defendant to the claimant respecting the limitation period;
>
> (c) the effect of the passage of time on
>
> (i) the ability of the defendant to defend the claim,
>
> and
>
> (ii) the cogency of any evidence adduced or likely to be adduced by the claimant or defendant;

> (d) the conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts that were or might be relevant to the claim;
>
> (e) the duration of any incapacity of the claimant arising after the date on which the claim was discovered;
>
> (f) the extent to which the claimant acted promptly and reasonably once the claimant knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to a claim;
>
> (g) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice the claimant may have received;
>
> (h) the strength of the claimant's case; and
>
> (i) any alternative remedy or compensation available to the claimant.

(a) Length of and reasons for the delay

[76] The claim was filed within six weeks of the expiry of the *Pharmacy Act* limitation period. The plaintiff says the reason for the delay was the combination of reliance on the *Fatal Injuries Act* limitation period and the delay in obtaining Ms. Bond's pharmacy records. The plaintiff maintains that the records were necessary to ascertain relevant facts.

[77] The defendants knew in early March 2017, two months before the *Pharmacy Act* limitation period expired, that plaintiff's counsel was seeking the records.

[78] Plaintiff's counsel received the pharmacy records on May 8, five days after the limitation period expired.

[79] The defendants submit that there was no need for the plaintiff to wait for the pharmacy record before commencing the proceeding. The plaintiff had the hospital records before the *Pharmacy Act* limitation period expired. The defendants add, without elaborating, that the plaintiff would have been able to amend under the *Civil Procedure Rules*. This is correct, within limits. Rule 83 governs amendments to pleadings: Rule 38.12. A party may amend a notice commencing an action as of right no later than ten days after all parties claimed against have filed notices of defence or demands of notice, "unless the other parties agree or a judge permits otherwise": Rule 83.02(2). A pleading respecting an undefended claim may be

amended at any time with notice to the party claimed against: Rule 83.02(3). A judge may allow an amendment at any time: Rule 83.11(1).

[80] In this case, the delay was very brief, although the suggestion that the plaintiff could not proceed without the pharmacy documents is not convincing.

(b) Information or notice respecting the limitation period

[81] Plaintiff's counsel was in communication with the defendants or their counsel at least six times between March 2 and May 8, 2017. The defendants gave no notice of the impending expiry of the limitation period, and, in fact, corresponded with plaintiff's counsel respecting the pharmacy records after the limitation period had expired.

[82] The defendants say they had no obligation to inform the plaintiff about the pending expiration of a limitation period. Defendants' counsel submits that he would in fact have been in violation of Rule 5.1-1 of the *Code of Professional Conduct* had he done so. He specifically cites Commentary [7], which provides that "[t]he lawyer should never waive or abandon the client's legal rights, such as an available defence under a statute of limitations, without the client's informed consent."

[83] I agree that there is no ground in these circumstances to find a positive duty on the defendant to inform the plaintiff of the limitation period.

(c) Effects of the delay on the ability to defend the claim or the cogency of evidence

[84] As the plaintiff argues, there is no reason to believe that the six-week delay after the *Pharmacy Act* limitation period expired affects the defendants' ability to defend the claim or the cogency of the evidence.

(d) Conduct of the defendant after the claim was discovered

[85] The plaintiff reiterates the arguments made in respect of s 12(5)(a). In short, the plaintiff says the defendants delayed providing the pharmacy records. The defendants are correct that the plaintiff could have commenced the proceeding without receiving the pharmacy records. That said, the defendants and their counsel knew plaintiff's counsel was seeking the records and did not provide them until after the *Pharmacy Act* limitation period had expired.

(h) Strength of the claimant's case

[86] The available evidence supports the plaintiff's view that the case is a strong one: the medical evidence attached to the affidavits would support a finding that the defendants "provided the wrong dosage of Methotrexate, did not confirm the accuracy of the prescription for Ms. Bond, dispensed an incorrect dosage of medication to her, and six weeks later she died of Methotrexate toxicity and overdose", as the plaintiff's brief summarizes.

Analysis

[87] The plaintiff submits that none of the relevant considerations suggest the court should not exercise its discretion to disallow the limitations defence, and that to allow the limitation period to stand would lead to a harsh and unjust result for the plaintiff. Further, the plaintiff says, there would be no prejudice to the defendants from disallowing the defence. While the plaintiff's stated reason for the delay, the failure of the defendants to disclose the pharmacy records before the limitation period expired, is not strong, the delay was brief, and the defendants would not have been taken by surprise. This was not a case of the plaintiff sitting on his rights and allowing the defendants to believe there was no potential for a claim. The six-week delay would have no discernable impact on the defendants' position, either as to defending the claim or advancing cogent evidence.

[88] In my view, this is an appropriate case for the application of the equitable power provided by s. 12 of the *Limitation of Actions Act*. The result of allowing the *Pharmacy Act* limitation period to stand would be to deprive the plaintiff of a strong claim due to a short delay in commencing the proceeding, while there is no persuasive evidence of any prejudice to the defendants from allowing the claim to proceed.

Conclusion

[89] The limitation period proscribed the *Fatal Injuries Act* applies and therefore, the limitation period prescribed in the *Pharmacy Act* is irrelevant.

[90] In the alternative, if the limitation period set out in the *Pharmacy Act* does apply, this is an appropriate case for the application of the equitable power provided by s. 12 of the *Limitation of Actions Act.*

[91] Either way, the limitation defence is disallowed.

Arnold, J.