SUPREME COURT OF NOVA SCOTIA
Citation: *MacDonald v. Westhaver*, 2020 NSSC 43

Date: 20200220
Docket: Hfx No. 336117
Registry: Halifax

Between:

James Todd MacDonald

Plaintiff

and

Joseph Westhaver

Defendant

and

Canadian Natural Resources Limited, a body corporate

Defendant/Third Party

and

International SOS Canada Company, a body corporate

Defendant

and

Cascades Engineering and Projects, a Division of Cascades Canada Inc.

Third Party/Fourth Party

Judge: The Honourable Justice Ann E. Smith

Heard: December 19, 2019, in Halifax, Nova Scotia

Counsel: W. Nicholas C. Hooper and Lyndsay C. Jardine on behalf of Raymond F. Wagner, QC, for the Plaintiff
Ashley C. Dickey on behalf of Jocelyn Campbell, QC, for the Defendant Dr. Joseph Westhaver (not participating)
Nancy G. Rubin, QC and Sarah A. Walsh, for the Defendant/Third Party Canadian Natural Resources Limited
Marc L. J. Dunning, for Defendant International SOS
Christopher C. Robinson, QC and Michael P. Blades for the Fourth Party (not participating)

By the Court:

Introduction

[1] This decision considers whether James Todd MacDonald ("Mr. MacDonald" or the "Plaintiff") started his lawsuit against the Defendant Canadian Natural Resources Limited ("CNRL") and the Defendant International SOS Canada Company ("ISOS") too late, i.e., after the expiry of the limitation period which these Defendants say began to run when Mr. MacDonald discovered the claims against them.

[2] CNRL and ISOS bring a motion for summary judgment on evidence pursuant to *Civil Procedure Rule* 13.04 in relation to claims in negligence brought by Mr. MacDonald against them. CNRL and ISOS each says that the claims against them are statute barred by operation of the Alberta *Limitations Act*, RSA 2000, c. L-12 (the Alberta "*Limitations Act*").

[3] This proceeding originated in Sydney, but the parties agreed that the summary judgment motions brought by CNRL and ISOS would be heard in Halifax. A consent order providing for the action to be transferred to Halifax was granted by Gogan J. and issued out of the Supreme Court in Cape Breton on December 11, 2019.

[4] The Defendant, Dr. Westhaver, did not make submissions nor participate in the summary judgment motions as his cross-claims against CNRL and ISOS will be determined according to the outcome of the within motions of those parties to have the Plaintiff's claim against them summarily dismissed. Counsel for Dr. Westhaver was present during the hearing, but did not participate.

[5] The Fourth Party, Cascades Engineering and Projects, a Division of Cascades Canada Inc. ("Cascades") did not provide submissions nor participate in the hearing of the motions, but counsel for Cascades attended the hearing.

Background

[6] The Defendant, Dr. Westhaver, carried out root canal surgery on Mr. MacDonald in Cape Breton, Nova Scotia on September 18, 2008. Shortly thereafter, Mr. MacDonald flew to Alberta to work as a pipefitter at a CNRL oil

sands facility known as the "Horizon Project", near Fort McMurray, Alberta. On September 28 and 29, 2008 Mr. MacDonald attended at a health centre which was owned by CNRL and operated by ISOS (the "health centre"). The employees working in the health centre, including the employees who attended upon Mr. MacDonald on September 28 and 29, 2008, were employees of SRS Industrial Services, a subcontractor of Cascades.

[7] Mr. MacDonald suffered a seizure on September 29, 2008 while at the health centre and was urgently transferred to a hospital in Alberta for medical treatment. He underwent brain surgery and subsequently returned to Nova Scotia for hospitalization and further treatment.

[8] Mr. MacDonald commenced an action in negligence against Dr. Westhaver on September 16, 2010.

[9] Dr. Westhaver commenced the actions against CNRL and ISOS on September 16, 2015 (the "Amended Claim or Claims"). At that time, CNRL and ISOS were added as Defendants to the existing action in negligence against Dr. Westhaver.

The Positions of the Parties in Brief

CNRL and ISOS

[10] CNRL and ISOS each says that Mr. MacDonald's claims against them are statute barred because the applicable limitation period for bringing the actions against them expired before they were added as Defendants. They say that the substantive law of Alberta applies to the Plaintiff's claims in tort against them and that the Alberta *Limitations Act* allows for a two-year period for a tort claim to be brought once the claim is "discovered."

[11] CNRL says that the claim against it was discovered on September 28 or 29, 2008 when Mr. MacDonald was a patient at the health centre, or at the latest on November 26, 2008 when Mr. MacDonald was discharged from hospital in Nova Scotia. CNRL says that therefore the limitation period for claiming against it expired in 2010, some five years before Mr. MacDonald claimed against CNRL as a Defendant.

[12] Further each of CNRL (alternatively) and ISO says that the claim against it was discovered within a reasonable time after March 1, 2011. On that date counsel

for CNRL sent Mr. MacDonald's counsel a copy of his health records arising from his attendance at the health centre on September 28 and 29, 2008. Counsel for ISOS and CNRL say that using March 15, 2011 as the presumed date that counsel for Mr. MacDonald received the health records, and allowing a six-month period for counsel to review and consider the contents of the health records, the claim against CNRL and ISOS began to run on September 15, 2011 and expired on September 15, 2013, two years after the Amended Claim was filed.

[13] CNRL and ISOS also point to section 6 of the Alberta *Limitations Act*. That provision, in particular subsection 6(4), provides that a party may be added to an existing proceeding after the limitation period has expired, but only if certain statutory requirements are met, which counsel say have not been met in the circumstances. Mr. MacDonald's counsel did not brief the Court, nor provide any oral argument on the hearing of the motion with respect to the applicability or not of subsection 6(4) of the Alberta *Limitations Act*.

[14] As noted above, these are summary judgment motions. CNRL and ISOS each says that there are no genuine issues of material fact requiring a trial because Mr. MacDonald's claims are statute barred, having been commenced well after the expiration of the applicable limitation period.

[15] Mr. MacDonald agrees that the applicable limitation period is two years after his claims were discovered, pursuant to the Alberta *Limitations Act*.

[16] Mr. MacDonald says that his claims are not statute barred, having only been discovered on July 30, 2015 when his counsel took discovery evidence of registered nurse Joseph Noseworthy, an employee of SRS Industrial Services, who attended to him at the health centre on September 28 and 29, 2008. Mr. MacDonald's counsel says that Mr. Noseworthy's discovery evidence provided him with sufficient facts to proceed with an action against CNRL and ISOS in September 2015.

[17] Counsel for Mr. MacDonald says that he had no material facts which grounded a claim against CNRL and ISOS prior to discovering Nurse Noseworthy, and commencing claims against those Defendants before he did so, would have been to claim based on mere speculations.

Evidence on the Motions

[18] The Plaintiff filed the Affidavit of Amber Robinson, a paralegal employed by the Plaintiff's law firm.

[19] CNRL filed the Affidavits of Nancy Rubin, Q.C. and Sarah Walsh, each counsel for CNRL.

[20] ISOS filed the Affidavit of William Russell, co-counsel for ISOS.

Undisputed Facts

[21] The following facts are not in dispute:

1. On September 18, 2008, the Defendant Dr. Westhaver, performed root canal surgery on Mr. MacDonald in Cape Breton, Nova Scotia. Soon after the root canal surgery, Mr. MacDonald flew to Alberta to work at a CNRL oil sands facility in Fort McMurray, Alberta.
2. On September 28, 2008, Mr. MacDonald attended the oil sands health centre complaining about something (the record is unclear) related to his cheek and eye area above where the root canal had been performed. He was assessed by Registered Nurse Joseph Noseworthy. Mr. Noseworthy recorded an assessment of "?Sinusitis." Mr. MacDonald was released with a flu pack, advised to take one or two of this medication every four to six hours, advice to rest and increase his fluids and to return to the health centre if his symptoms persisted or worsened.
3. On September 29, 2008 Mr. MacDonald returned to the health centre with ongoing symptoms. His assessment was interrupted when he suffered a seizure. Mr. MacDonald was transported to Northern Lights Health Centre in Alberta. He was discharged on October 1, 2008 and transferred to the University of Alberta Hospital where he underwent brain surgery. Mr. MacDonald was an in-patient at the University of Alberta Hospital until November 13, 2008, when he was transferred back to Nova Scotia for further rehabilitation.
4. On November 26, 2008 Mr. MacDonald was released from the Cape Breton Regional Hospital, with a diagnosis of left subdural empyema.

Procedural History

[22] The following procedural history as it relates to the September 2015 Amended Claim which added CNRL and ISOS as Defendants is relevant:

1. On September 16, 2010, the Plaintiff commenced action against Dr. Westhaver (alone) in Nova Scotia. The statement of claim

alleges, *inter alia*, that Dr. Westhaver negligently performed the root canal surgery on him on September 18, 2008.

2. On January 17, 2011 Dr. Westhaver filed a defence, denying liability and alleging contributory negligence.

3. By letter dated March 1, 2011, CNRL provided the Plaintiff's counsel with a copy of the Plaintiff's medical records relating to his attendance at the health centre. The health records were provided in response to a request of February 17, 2011.

4. On November 7, 2012, Dr. Westhaver commenced a third-party claim against CNRL, claiming contribution and indemnity for allegations of negligent medical treatment at the health centre. The third-party claim alleged that CNRL was the owner/operator of the health centre. The statement of claim against CNRL alleges that the medical treatment rendered by CNRL and CNRL's employees was "careless and negligent and not in accordance with accepted practices."

5. On February 28, 2013 CNRL filed a Notice of Defence to Dr. Westhaver's Third Party Claim. In the statement of defence to the third party claim, CNRL admitted that it was the owner of the health centre, but denied that it was the operator of the health centre CNRL said that the operation of the health centre was contracted to ISOS. CNRL specifically denied that any medical treatment was rendered to Mr. MacDonald by CNRL or its employees.

6. On March 1, 2013, CNRL filed a defence to the third-party claim and commenced a fourth-party claim against ISOS and Cascades, which identified ISOS as the operator of the health centre. The fourth-party claim against ISOS was discontinued on October 9, 2013. As of that date ISOS was no longer a party to the proceeding.

7. On November 27, 2014 Mr. MacDonald was discovered by counsel for Dr. Westhaver and counsel for CNRL. During the discovery examination, Plaintiff's counsel, then Mr. McPhee, indicated to counsel that he intended to amend the pleadings to add CNRL as a defendant. Ms. Rubin, Q.C., counsel for CNRL, questioned Mr. MacDonald during his discovery

examination as to what he said CNRL did or did not do to cause his brain injury.

8. On February 19, 2015, Mr. MacDonald's counsel circulated, by email, a copy of a proposed notice of action and statement of claim which added CNRL and ISOS as defendants. The allegations against ISOS and CNRL are identical. The claim alleges that Mr. MacDonald's injuries were caused or contributed to by the negligence, contributory negligence, concurrent negligence, breach of duty, breach of contract and malpractice of each of CNRL and ISOS. The claim also alleges that CNRL and ISOS are vicariously liable for the negligent acts and breach of contract of "its agents, servants, employees, and staff."

9. On July 23, 2015 a consent order was filed to permit the Plaintiff to amend the pleadings to add CNRL and ISOS as defendants. The recitals to the consent order plead the discovery of new information and state that the amendment to add CNRL and ISOS as Defendants is based on that new information.

10. On July 30, 2015 Nurse Joseph Noseworthy was discovered.

11. On September 16, 2015, the Plaintiff's counsel filed an Amended Statement of Claim adding CNRL and as defendants. The allegations against CNRL and ISOS in the filed Amended Statement of Claim are identical to the draft version of same which Plaintiff's counsel had circulated to counsel on February 19, 2015.

12. In their defences to the Amended Claims, CNRL and ISOS each plead the substantive law of Alberta and a limitations defence.

Issues

[23] The issue is whether summary judgment on evidence should be granted against the Plaintiff. In determining that issue, it is necessary for the Court to determine whether the limitation period in the Alberta *Limitations Act* had expired before the actions against CNRL and ISOS were commenced. In order to come to a conclusion on that issue, the Court must determine when the Plaintiff first knew,

or in the circumstances, ought to have known, that the injury alleged had occurred, that the injury was attributable to the conduct of CNRL or ISOS and that the injury warranted bringing a proceeding.

[24] The issues for determination are therefore as follows:

1. What is the test for summary judgment on evidence?
2. Should summary judgment be granted and Mr. MacDonald's claims against CNRL and ISOS be dismissed, because the applicable limitation period expired before Mr. MacDonald's action was commenced?

[25] Within question 2, the other questions which must be answered are:

(a) What is the source and the length of the limitation period applicable to Mr. MacDonald's claims against CNRL and ISOS?

(b) When were the facts that might give rise to the causes of action discoverable by Mr. MacDonald?

(c) If Mr. MacDonald's added claims against CNRL and ISOS are out of time, can the claims be added under subsection 6(4) of the *Alberta Limitations Act*?

Law and Analysis

Issue 1: What is the test for summary judgment on evidence?

[26] The motions are each for summary judgment on evidence, pursuant to *Nova Scotia Civil Procedure Rule* 13.04, which provides:

> **Summary judgment on evidence in an action**
>
> **13.04** (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.

> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.
>
> (6) A judge who hears a motion for summary judgment on evidence has the discretion to do either of the following:
>
> > (a) determine a question of law, if there is no genuine issue of material fact for trial;
> >
> > (b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[27] There is no discretion under *Rule* 13.04 where a judge is satisfied that there is no genuine issue of material fact, and where the action or defence does not require a determination of a question of law. The *Rule* provides that a judge must then grant summary judgment.

[28] The parties do not dispute the analytical framework to be applied on motions for summary judgment on evidence. The framework was set out in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 (N.S.C.A.), where Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to *Rule* 13.04 (paras. 34 - 42):

> 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
> 2. If the answer to the above is NO, then does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
> 3. If the answers to the above are NO and YES respectively, does the challenged pleading have a real chance of success?

4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?

5. If the motion for summary judgement is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

[29] With respect to the first question, Justice Fichaud said that a "material fact" is one that would affect the result. In an earlier Court of Appeal decision, *Burton Canada Co. v. Coady*, 2013 NSCA 95 (N.S.C.A.), the Court of Appeal defined "material fact" as a fact that is essential to the claim or defence and "genuine issue" as an issue that arises from or is relevant to the allegations associated with the cause of action, or the defences pleaded (para. 87(8)). Both definitions of "material fact" are consistent. The Court of Appeal in *Burton* said that a "real chance of success" is a prospect that is reasonable in the sense that it is an arguable and realistic position that finds support in the record, and not something that is based on hunch, hope or speculation (para. 87(8)).

[30] In *SystemCare Cleaning and Restoration Limited v. Kaehler*, 2019 NSCA 29 (NSCA), Bourgeois J.A. provided further direction as to the identification of material facts:

> [37] …Determining whether there is a genuine issue of material fact must be founded in the pleadings and the evidence presented in the matter under consideration. Case authorities may be helpful for identifying issues of law, but the material facts which will govern the outcome will be determined based on each unique context.

[31] In the context of a defendant's motion for summary judgment based on an expired limitation period, the Nova Scotia Court of Appeal in *Milbury v. Nova Scotia Home for Coloured Children*, 2007 NSCA 52, articulated the test as follows at paras. 20 and 23:

> [20] Did the defendants establish that there are no genuine issues of fact on the question of whether the plaintiff's action is statute barred because the limitation period has expired?
>
> …
>
> [23] When the defendant pleads a limitation period and proves the facts supporting the expiry of the time period, the plaintiff has the burden of proving that the time has not expired as a result, for example, of the discoverability rule [citations omitted].

[32] Based on this review of *Rule* 13.04 and the case law, it is obvious that this Court must determine whether CNRL and ISOS have met the burden of showing, with evidence, that there is no genuine issue of material fact, whether on its own or mixed with questions of law, for trial and that the claim does not require the determination of a question of law. *Rule* 13.04 is clear that this Court must grant summary judgment in the absence of a genuine issue of material fact for trial and when there is an absence of a question of law, either on its own, or mixed with fact, requiring determination.

[33] Mr. MacDonald is also required to put his best foot forward. As Fichaud J.A. stated in *Shannex* (*supra*), "Each party is expected to 'put his best foot forward' with evidence and legal submissions on all these questions, including the 'genuine issue of material fact'…".

[34] In responding to this motion, Mr. MacDonald was required to adduce evidence as to why the limitation period has not expired, i.e., by the discoverability rule and therefore that his claim had a real chance of success.

Issue 2: Should summary judgment be granted, and Mr. MacDonald's claims against CNRL and ISOS be dismissed because the applicable limitation period expired before the actions were commenced?

(a) What is the source and the length of the limitation period applicable to Mr. MacDonald's claims against CNRL and ISOS?

[35] The parties agree that the Alberta *Limitations Act* applies since Mr. MacDonald's claims against CNRL and ISOS are rooted in the alleged negligence of those parties when the Plaintiff attended the oil sands health centre in Alberta on September 28 and 29, 2008. Any tort that occurred, occurred in Alberta, and so the substantive law of that province applies.

[36] The parties also agree that the relevant provision of the Alberta *Limitations Act* is section 3(1) which provides as follows:

> 3(1) Subject to subsections (1.1) and (1.2) and section 3.1 and 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,

> i. that the injury for which the claimant seeks a remedial order had occurred,
>
> ii. that the injury was attributable to conduct of the defendant, and
>
> iii. that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.
>
> [emphasis added]

[37] Accordingly, the Alberta *Limitations Act* provides for a two-year limitation period which runs after the claim is "discovered."

[38] CNRL and ISOS point out that Section 6 of the Alberta *Limitations Act* allows a plaintiff to add a claim to a proceeding after the limitation period has expired if certain requirements are met.

[39] By virtue of these provisions of the Alberta *Limitations Act*, Mr. MacDonald's claims against CNRL and ISOS are statute barred if not brought within two years after they were discovered, and if the requirements of subsection 6(4) are not met.

Issue 2:

(b) When were the facts that might give rise to the causes of action discoverable by Mr. MacDonald?

[40] For the two-year limitation period to begin to run, Mr. MacDonald must have known, or in the circumstances ought to have known, all three elements of s.3(1)(a) – the injury occurred, the injury was attributable to the conduct of CNRL and/or ISOS, and the injury (assuming the Defendants' liability) warranted bringing a proceeding.

[41] In order to determine when the limitation period began to run, I must consider the discoverability principle as codified in section 3(1) of the Alberta *Limitations Act*. Discoverability has both a subjective and objective test and time starts to run as soon as one of those tests is met.

[42] The discoverability principle in the context of the Alberta *Limitations Act* was considered by the Alberta Court of Appeal in *Nasrin v. Bank of Nova Scotia*, 2007 ABCA 10 where O'Leary J.A. held (para. 54) that the words "knew, or in the circumstances ought to have known" were informed by the common law discoverability principle described by the Supreme Court of Canada in *Central Trust Co. v. Rafuse* at 224, [1986] 2 S.C.R. 147, at p. 224 where Justice La Dain stated:

> [A] cause of action arises for purposes of a limitation period when the material facts on which it [the cause of action] is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.
>
> [emphasis of O'Leary J.A.]

[43] O'Leary J.A. in *Nasrin* went on to state that the principle of discoverability does not require perfect knowledge:

> [56] The principle of discoverability does not require perfect knowledge: *De Shazo v. Nations Energy Co.*, 2005 ABCA 241, 367 A.R. 267 at para. 31. Mere suspicion is not sufficient to trigger the running of a limitation period; the plaintiff can be said to have "known" of the claim only when he has some support for his suspicion: *Photinopoulos v. Photinopoulos* (1988), 92 A.R. 122 at para. 26 (C.A.).

[44] More recently, in *Clark Builders and Stantec Consulting Ltd v. GO Community Centre*, 2019 ABQB 706 Renke J. of the Alberta Court of Queen's Bench considered in detail the elements of discoverability pursuant to the Alberta *Limitations Act* as follows:

> ***2. Knew or Ought to Have Known***
>
> [255] The three elements of discoverability in s. 3(1)(a) must be considered in relation to what the claimant "knew, or in the circumstances ought to have known." The subjective test and the objective test are alternatives. Time starts to run as soon as one of them is met: *Gayton v. Lacasse*, 2010 ABCA 123 at para. 61; *Gratton v Shaw*, 2011 ABCA 340 at para 32.
>
> [256] Knowledge of the s.3(1) elements requires more than mere suspicion but less than perfect knowledge: *Kydd v Abolarin*, 2011 ABQB 690 (Alta. Q.B.), Macklin J at paras 36, 29; *Sztucaka v Knebel*, 2012 ABQB 72 (Alta. Q.B.), Mason M at para 11(3); [further cites omitted]. There is no statutory requirement that a claimant have "clear information" respecting an injury: *Canadian Natural Resources Ltd. v Jensen Resources Ltd*, 2013 ABCA 399 at para 41.

> [257] The test for "ought to have known" is that of "reasonable diligence" analyzed in the light of the three s. 3(1)(a) factors [cites omitted]. That is, as stated by Justice Poelman in *McDonnell v. Csaki*, 2014 ABQB 452 (Alta. Q.B.) at para 28,
>
> > [28] What a plaintiff "ought to have known" also incorporates an expectation of reasonable diligence by the plaintiff or his or her counsel [*Central Trust Co v. Rafuse*, [1986] 2 SCR 147, para 77; *Peixeiro v Haberman*, [1997] 3 SCR 549, para 42]. It will not suffice to wait idly for information to come to hand. Some research and inquiry may be expected of a reasonable plaintiff as part of determining what ought to have been known [*Saxton v Credit Union Deposit Guarantee Corporation*, 2004 ABQB 631, paras 29 and 30; [further cites omitted]. The burden is not high to establish at least a triable issue on due diligence, but it is usually expected that the plaintiff put forward some evidence of steps taken to ascertain the identity of tortfeasors and give a reasonable explanation for why information was not obtainable with due diligence earlier…
> >
> > What a claimant knew will inform what the claimant ought to have known in the circumstances.
>
> ***3. Facts, Not Law, Not Assurance of Success***
>
> [258] Discovery relates to the facts, not the applicable law or any assurance of success [cites omitted]. Thus "knowledge" refers to knowledge of the facts supporting a claim, not knowledge that, in law, the facts support a claim [cites omitted].
>
> ***4. Injury***
>
> [259] With respect to s. 3(1)(a)(i), what is required is knowledge of the injury, not knowledge of whether there is a cause of action [cites omitted].
>
> [260] Further with respect to s. 3(1)(a)(i), what is required is knowledge of the injury not knowledge of the cause of the injury.

[45] These cases confirm that the test for "ought to have known" is that of "reasonable diligence", analyzed in light of the three s. 3(1)(a) factors.

Discoverability Findings:

What Does the Evidentiary Record Before the Court Show?

S. 3(1)(a) (i) - *Injury had occurred*

[46] In my view, the section 3(1)(a)(i) "injury" component of Mr. MacDonald's claim arose at the latest, a reasonable time after he was discharged from hospital in Cape Breton in 2008. At that point in time, he knew that on September 29, 2008

he suffered a seizure while at the health centre which necessitated brain surgery, other medical treatment and rehabilitation. As noted above in the Alberta decisions reviewed, the injury or injuries must be distinguished from the causes of the injury or injuries.

[47] This Court notes that the Plaintiff's counsel did not argue, nor provide any evidence, that Mr. MacDonald was incapacitated, resulting in his inability to initiate legal proceedings against CNRL and ISOS within the two-year limitation period. Mr. MacDonald was able to commence action against Dr. Westhaver on September 16, 2010 based merely on the knowledge that he had undergone a dental procedure carried out by Dr. Westhaver and suffered damages as a result of what he alleged was negligence on Dr. Westhaver's part.

[48] In *Careno v. Park*, 2010 ABQB 36 (Alta. Q.B.) the plaintiff underwent surgery in 1997 on her left ear, but continued to have post-operative problems with dizziness and balance difficulty. She made many visits to her physician complaining of these problems over several years. In 2005 she requested a copy of her medical records and discovered the defendant surgeon's chart note dated December 2000 which said, "this lady most likely had postoperative sensorineval [*sic*] hearing loss as a result of Clorohexadine toxicity."

[49] The plaintiff in *Careno* then commenced an action against the surgeon in 2007. The issue before the Master in Chambers was when the plaintiff had sufficient facts to know that her injuries were in whole, or in part, contributable to the actions of the defendants.

[50] Master Laycock held that the limitation period started to run shortly after the plaintiff's operation in 1997, or, at the latest, when she read the surgeon's chart note in 2005.

[51] Master Haycock summarily dismissed the plaintiff's action on the basis of the expired limitation period, stating:

> [30] In this case the Plaintiff knew shortly after surgery of her injury and that the injury warranted brining a proceeding. Once she had enough knowledge to believe that the injury occurred during the operation, she could attribute the injury to the conduct of the parties present during the operation. The identifies of the parties were easily ascertainable. It is not necessary for her to have knowledge of exactly what caused the injury as long as she knew who could be blamed for her injury…

> [31] This case is similar to the Ontario Court of Appeal decision in *McSween* [2000 CarswellOnt 1934 (Ont.C.A.)]where the injury occurred or manifested itself immediately after an operation, the patient knows that the injury must have been caused by some act or failure to act by one or more of the professionals involved in the operation. Once there is a likelihood of negligence of some kind, either in what was done or what was not done but what should have been done, the limitation period begins to run.
>
> [emphasis added]

[52] Knowledge of injury, while necessary, is not sufficient to start the limitation period. The Court must also determine when the claims against CNRL and ISOS were discoverable.

S. 3(1)(a)(ii) – Injury was attributable to the conduct of CNRL or ISOS

[53] The subsection 3(1)(a)(ii) analysis is more complicated than is the issue of knowing of the injury. However, it is not so complicated, based on the evidence before this Court, that it cannot be addressed on these motions.

[54] The discoverability test requires that Mr. MacDonald knew or ought to have known the material facts upon which his claim against CNRL and/or ISOS is based.

[55] Mr. MacDonald's counsel says that Mr. Noseworthy's discovery evidence yielded the following information that could not have been gleaned from the medical records:

> (a) Mr. Noseworthy, the attending Nurse, had only a "little, small course" regarding occupational health and safety;
>
> (b) There were "nine or 10" total medical staff on-site for approximately "four or 5,000" workers";
>
> (c) The only available physician on the worksite was present approximately "four to six" hours per day, only on weekdays, and lived approximately "an hour and a half" away from the Health Centre;
>
> (d) The recorded assessments in the CNRL records never constituted a "technical diagnosis", but rather represented a nurse, who "can query something", making an "educated guess" on a possible diagnosis;

(e) Mr. MacDonald's condition was never formally diagnosed at the Health Centre, and, indeed, he never saw someone who was qualified to diagnose him;

(f) Staff at the Health Centre were "pretty limited as to like any testing, further testing you could do at the clinic itself" and "wouldn't have an x-ray department there or a full lab or things like that";

(g) There were "standing orders" governing the medical response to presenting symptomatology, involving "certain over-the-counter medications to people presenting with certain complaints";

(h) The root canal recorded in the CNRL medical record was not viewed as significant based on interpretation of Mr. MacDonald's vital signs;

(i) Mr. MacDonald was seen by a nurse who considered that "it's not my pace like to make that final diagnosis" and was content for him to "come back when things are, are worsening or persisting";

(j) Mr. Noseworthy did not consider the queried infection serious, despite seeing devasting consequences before, because "the ones that I have seen were really sick people" and '[y]ou could see it when they walked in through the door";

(k) The possibility of a dental infection was dismissed based simply on the fact that Mr. MacDonald "wasn't having any swelling to his face which is, can be attributed to, you know, dental infections and things like that";

(l) Mr. MacDonald was seen by a nurse with no access to a nurse practitioner, as "[w]e usually just discuss the next day, like that morning, you know, what patients were in and just give a brief overview";

(m) Based on CNRL standards, the medical records do not indicate review of Mr. MacDonald's chart by a qualified physician or nurse practitioner;

(n) There was only one physician who could be called to the worksite, and he was not on-site when Mr. MacDonald presented to the Health Centre;

> (o) Mr. Noseworthy never consulted with a nurse practitioner or physician in his care of Mr. MacDonald, and, so, Mr. MacDonald never received qualified medial care at the Health Centre;
>
> (p) An examination of Mr. MacDonald's mouth was performed but not recorded, which should have indicated the possibility of a serious infection;
>
> (q) Mr. Noseworthy never identified a cause of Mr. MacDonald's symptoms, despite acting as a primary caregiver;
>
> (r) Mr. MacDonald was never seen by someone capable of prescribing the antibiotics he needed.

[56] Mr. MacDonald's counsel devoted a considerable portion of his pre-hearing brief to what he called "The Legal Framework for Medical Discoverability." However, this Court finds that several of the statements made by counsel in this part of the brief are overstated and irrelevant to the factual circumstances before this Court. The brief provides, in part:

> Given the knowledge disparity between patients and treatment providers, courts have held that medical discoverability requires something more than knowledge of the bare facts underlying an action.

[57] Mr. MacDonald's counsel cites no legal authority for this proposition. In fact, a review of the cases relied on by the Plaintiff, contradicts what is asserted.

[58] For example, the Plaintiff's counsel refers to the decision of Macklin J. in *Kydd v. Abolarin* 2011 ABQB 690 (Alta. Q.B.) in support of the statement that, "A claimant must hold 'more than a mere suspicion and less than perfect knowledge' for the limitation period to begin running." That is an accurate statement of the law. *Kydd* was a medical malpractice case. At para. 36, Macklin J. states:

> 36 Where the Plaintiff raises the issue of discoverability, the Plaintiff must adduce evidence of steps taken to investigate the claim. The Plaintiff need only to have possession of sufficient facts upon which to allege negligence. Additional information, such as a medical opinion, may support the claim and help assess the risk of proceeding but is not required to discover the claim (*Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75 (Ont. C.A.) at para. 36)… .
>
> …
>
> 39 In summary, it is a question of fact as to when the Plaintiff has acquired sufficient knowledge of the material fact or facts to trigger the running of the

> limitation period. The knowledge required is more than a mere suspicion and less than perfect knowledge. In some cases, the plaintiff will require an expert medical opinion in order to determine whether to commence an action. In other cases, the plaintiff will have knowledge of material facts and the expert medical opinion will only be required as evidence to support the claim. In every case, however, a plaintiff is required to exercise reasonable diligence to acquire the facts necessary to determine whether to commence an action.
>
> [emphasis added]

[59] *Kydd v. Abolarin* does not support the plaintiff's contention that medical discoverability always requires something more than mere knowledge of the facts underlying an action. Discoverability is a question of fact. Experts' reports may be necessary in some cases, but not in others. In this case, the Plaintiff has not produced any expert opinion. The Plaintiff's sole reason advanced for not filing the Amended Claim against CNRL and ISOS was waiting for the discovery evidence of Joseph Noseworthy. Further, the Consent Order attaching the Amended Claim against CNRL and ISOS was filed before Mr. Noseworthy's discovery examination and the Amended Claim was not revised after Mr. Noseworthy's discovery examination. Further, there was no evidence before this Court as to steps taken by the Plaintiff's counsel to investigate the Claim.

[60] The Plaintiff's counsel also states in its pre-hearing brief, "Medical records rarely detail their authors' errors and omissions, and it is well-settled that the substance of medical negligence is 'beyond the ken' of the average person." The case cited in support of that statement is *Ter Nevzen v. Korn*, [1995] 3 SCR 674 (S.C.C.) at para. 68.

[61] However, this Court agrees with counsel for CNRL that a careful reading of para. 68 of *Ter Nevzen* shows that the ratio of this case is that a jury can fix the standard of medical negligence without reliance on expert testimony in appropriate circumstances. The case does not stand for the proposition, as asserted by the Plaintiff's counsel in its brief, that "it is well-settled that the substance of medical negligence is 'beyond the ken' of the average person."

[62] In any event, there has been no expert opinion disclosed by the Plaintiff's counsel which the Plaintiff relies on to trigger the running of the limitation period.

[63] It is clear from a review of the Amended Claim, the material facts on which Mr. MacDonald's claim against CNRL and ISOS are based arise out of the ownership, staffing and the provision of services to Mr. MacDonald at the health

centre on September 28 and 29, 2008. This is not a situation where the identity of either CNRL or ISOS as a potential party was not known. The following evidence establishes this with respect to CNRL:

(a) Mr. MacDonald filled out and signed CNRL's Horizon Project Site Access Registration Form, which specifically stated that the undersigned (Mr. MacDonald) acknowledged that the Form was required by Mr. MacDonald to provide certain personal information to CNRL;

(b) Mr. MacDonald underwent an orientation prior to starting work on the Horizon Project. Slides from the presentation refer to CNRL and that the health centre was open 24 hrs a day, 7 days of week, that it was a "satellite health center", that a "nurse, paramedics and EMT's" were available and there were "two emergency transport vehicles on site."

(c) Mr. MacDonald had previously visited the health centre on September 10, 2008 to deal with an issue relating to the build-up of wax in one of his ears.

(d) When asked on discovery examination on November 27, 2014 by counsel for CNRL the basis of this claim against CNRL, Mr. MacDonald testified:

> "*Well, if they did, if I went on the 28th and they gave me olive oil, which like I said, I say that but, you know, it's possible they didn't, but I'm pretty sure they gave me that, and they said my fluids were down, well, why didn't they give me, like, you know, what do you call it, a saline pack, you know, IV?"*

[64] Of course, Mr. MacDonald also knew that he suffered a seizure at the health centre.

[65] Mr. MacDonald also knew in September 2008 that the health centre did not have MRIs or even x-ray equipment. Yet, he did not claim against CNRL alleging negligence on CNRL's part until September 2015. This is the case even though his then legal counsel stated at his discovery examination on November 27, 2014 that he intended to amend the claim to add CNRL as a defendant. Clearly his then counsel thought that he possessed sufficient material facts to ground a claim against CNRL at that time.

[66] If I am wrong, and Mr. MacDonald's claim against CNRL was not discovered in November, 2008, I find that his claims against each of CNRL and ISOS were discovered within a reasonable time after Plaintiff's counsel's receipt of the health records, i.e. by September 15, 2011.

[67] As noted earlier in this decision, CNRL provided the health records relating to Mr. MacDonald's September 28 and 29, 2008 attendance at the health centre to the Plaintiff's counsel by letter dated March 1, 2008.

[68] A review of these health records is instructive for what information they show, and what information they do not show.

> First Page: A cover letter dated March 1, 2011 with the logos of "Canadian Natural" and Horizon" on the top. The letter is sent to Mr. MacDonald's counsel signed by Mary Ryan R.N., Lead-Medical Administrative Services, Horizon Oil Sands. Ms. Ryan's phone number, cell phone number and fax number is provided.
>
> Second Page: The document is "Health Center Visit Report." The logos of Canadian Natural and Horizon are at the top of the page. The employee's name is James MacDonald. The document is signed by Mr. MacDonald on September 28, 2008 under the following statement, "I hereby authorise International SOS Canada, Inc., to provide a copy of the above information to my Employer and CNRL Horizon Medical department in order to ensure that my injury/incident is managed as a part of the health and safety systems onsite." The document is also signed by "medical staff name" J. Noseworthy with a circle around "RN." There is no circle around the words "Dr" or "EMTP." There is an indication to "Circle as appropriate."
>
> Third Page: The document is entitled "Case Monitoring Notes." There is a logo at the top of the page with the words "International SOS." The document is signed by J. Noseworthy. The assessment is "?sinusitis." The Plan/Management is "flu packs T-TII, q 4 – 6 prn. Rest in camp today, increased fluids, RTC if sx's persist/worsen." There is no indication on this form that Mr. MacDonald was seen by a physician, had a firm diagnosis, was sent for any tests or prescribed any medication, apart from flu packs.
>
> Fourth to Sixth Pages: The fourth page is dated September 29, 2008 and entitled "Case Monitoring Notes." There is a logo at the top of the page

> with the words "International SOS." This document outlines that Mr. Noseworthy attended the health centre on September 28 complaining of headache with a five-day history of chemical taste in his mouth and burning in his nose. The document also has case notes for September 29 starting at 0550 hours when Mr. MacDonald arrived at the clinic until 0714 when he was transferred to an ambulance. The Assessment is "sepsis, electrolyte imbalance and dehydration." The fourth page "case monitoring notes" indicate that "exam interrupted by sudden onset seizure… ." The sixth page appears to be a print out dated September 29, 2008 from an ECG exam with "Abnormal ECG 'Unconfirmed'."
>
> [emphasis added]

[69] The health records set out how Mr. MacDonald was assessed, his presenting symptoms and how he was examined with a diagnosis of "?sinusitis." If the Plaintiff had an issue with his examination or diagnosis (as claimed in paragraph 25(k) of the Amended Claim), this was readily apparent from the health records.

[70] It is also noted that on February 28, 2013, in its Notice of Defence to Dr. Westhaver's Third Party Claim, that CNRL claimed that while it owned the health centre, the operation of the health centre was contracted under a Medical Services Contract between CNRL and ISOS. CNRL denied that any medical treatment was rendered to Mr. MacDonald by CNRL or its employees. On March 1, 2013, CNRL initiated a Fourth Party Claim against ISOS.

[71] These pleadings made it clear what CNRL and ISOS were alleging was their respective roles with respect to the health centre and its operation. This was known to the Plaintiff's counsel in 2013.

[72] Paragraph 25(m) of the Amended Claim refers to a failure to properly treat Mr. MacDonald. Page 2 of the medical records refers to "Plan/Management" and records the advice given to Mr. MacDonald, i.e., "flu packs, rest in camp today, increase fluids" and that he should return to the centre if his symptoms persisted or worsened.

[73] The treatment the Plaintiff received or did not receive was clear on the face of the health record.

[74] Paragraph 25(k) of the Amended Claim alleges a failure to arrange or do further testing with reference to CT scan, MRI and x-ray. However, a review of the medical records shows that there is no reference to any tests being undertaken, including those specific tests.

[75] After receiving these health centre records in March of 2011, Dr. Westhaver filed a Third Party Claim on November 7, 2012 against CNRL, claiming contribution and indemnity for allegations of negligent medical treatment at the health centre. It is instructive to review the allegations made against CNRL by Dr. Westhaver in 2012 because many of the allegations are identical or substantially the same to those made by Mr. MacDonald nearly three years later in his Amended Claim against each of CNR and ISOS:

> (a) CNRL failed to staff the CNRL Health Centre with individuals who were adequately trained, qualified and competent to treat patients. **[identical to s. 25(d) of Amended Claim]**
>
> (b) CNRL failed to ensure that each individual working within the CNRL Health Centre was working within his or her competence. **[identical to s. 25(e) of Amended Claim]**
>
> (c) CNRL failed to provide adequate or any instruction and/or supervision to the individuals employed and working within the CNRL Health Centre. **[identical to s. 25(f) of Amended Claim]**
>
> (d) CNRL failed to provide adequate facilities and equipment necessary for the provision of reasonable patient care. **[identical to s. 25(g) of Amended Claim]**
>
> (e) CNRL failed on September 28 and September 29, 2008 to have adequate medical coverage available to handle Mr. MacDonald's medical problems. **[identical to s. 25(h) of Amended Claim]**
>
> (f) CNRL failed to take reasonable steps to ensure that users of the CNRL Health Centre such as Mr. MacDonald were adequately advised of the limited nature of the services available at the CNRL Health Centre. **[substantively the same as s. 25(i) of Amended Claim]**
>
> (g) CNRL failed to take reasonable steps to ensure that Mr. MacDonald was adequately advised of the CNRL Health Centre's limited ability to provide medical assessment and treatment to him. **[substantively the same as s. 25(j) of Amended Claim]**
>
> (h) CNRL and its agents, employees, servants and staff failed to adequately examine, diagnose and/or screen Mr. MacDonald. **[identical to s. 25(k) of Amended Claim]**

(i) CNRL and its agents, employees, servants and staff failed to utilize all equipment and techniques reasonably available to make a proper diagnosis of Mr. MacDonald. **[identical to s. 25(l) of Amended Claim]**

(j) CNRL and its staff and employees at the CNRL Health Centre failed to provide any or adequate treatment to Mr. MacDonald. **[identical to s. 25(m) of Amended Claim]**

(k) CNRL and its staff at the CNRL Health Centre failed to arrange or request any tests of any nature whatsoever including but not limited to a CT scan, MRI or x-ray of Mr. MacDonald's head/brain. **[identical to s. 25(n) of Amended Claim]**

[76] As noted by this Court's review of the case authorities, the "ought to have known" part of the discoverability test imposes an obligation of reasonable diligence.

[77] The Plaintiff's counsel is expected to undertake research and make inquiries to investigate possible claims.

[78] It is also clear from the Alberta case law reviewed, that discoverability under the *Act* relates to facts, not the applicable law, nor any assurance of success. "Knowledge" is knowledge of the facts which support a claim, not knowledge that in law the facts support a claim (*Clark Builders* (*supra*)) para. 258.

[79] Based on the evidence before the Court, at the latest, within a reasonable time after receipt and review of the health records, with diligence, counsel ought to have discovered that Mr. MacDonald had sufficient material facts to ground a claim against each of CNRL and ISOS. At that time Mr. MacDonald had the objective knowledge that any injury arising out of CNRL's ownership or staffing of the health centre or ISOS' operation of the health centre could be attributable to the conduct of those parties.

[80] While the discovery of Joseph Noseworthy in July 2015 may have provided additional evidence fleshing out those material facts, many and sufficient material facts to ground actions against CNRL and ISOS existed for the Plaintiff's counsel to discover following a careful review of the medical records received in mid-March, 2011.

[81] The logos for "Canadian National" and "International SOS" were on top of several pages of the records. Mr. MacDonald signed an authorization on September 28, 2008 stating,

> I hereby authorise International SOS Canada, Inc., to provide a copy of the above information to my Employer and CNRL Horizon Medical department in order to ensure that my injury/incident is managed as part of the health and safety systems onsite.
>
> [emphasis added]

[82] A prudent lawyer, acting reasonably, and knowing that the Alberta *Limitations Act* provided for a two-year limitation period, would have taken steps to find out CNRL and ISOS's roles with respect to the health centre, its operation and its employees.

[83] Indeed, in 2012, Mr. Dunphy commenced a Third Party Claim against CNRL based on the information in those health records and made many of the claims which Mr. MacDonald's counsel includes verbatim in the Amended Claim.

[84] Although there are particulars of negligence in the Amended Claims against ISOS and CNRL that are "new", i.e., not in the Third Party Claim against CNRL, much of the Amended Claim is a reiteration of the Third Party Claim.

[85] There were many material facts supporting negligence claims against CNRL and ISOS which the Plaintiff's counsel knew or ought to have known by mid-September, 2011. Counsel may not have had perfect knowledge of the claims at that time, but he had considerably more than mere suspicion of claims.

[86] The Plaintiff or his counsel may not have known of all the particulars of his negligence claims against CNRL and ISOS, but he knew or ought to have known that he had causes of action in negligence. The Plaintiff need not know precisely what allegedly went wrong at the health centre before the limitation period commences. See *Carena v. Parks* (*supra*).

S. 3(1)(a)(iii) – Injury, Assessing Liability Warranted Bringing a Proceeding

[87] As noted by Renke J. in *Clark Builders and Santec Consulting v. GO Community Centre* (*supra*), the "warranted" inquiry turns on an objective assessment of the claimant's personal or subjective knowledge and circumstances (para. 390).

[88] The evidence before this Court does not address the reasons for the Plaintiff not commencing the claims against CNRL and ISOS until September 2015. There is no evidence of impecuniosity bearing on commencing litigation or evidence of

any personal circumstances of Mr. MacDonald including alleged incapacity, which precluded initiating an action, at the latest, two years after receipt and review of the medical records. Nor is there evidence of steps taken by the Plaintiff's counsel to investigate possible claims.

[89] This Court finds that Mr. MacDonald ought to have known that his injuries warranted bringing an action against CNRL and ISOS by mid-September, 2011 at the latest. The two-year limitation clock began to run at that time and expired mid-September, 2013.

Conclusions on the Application of the Alberta *Limitations Act*

CNRL

[90] I have found that Mr. MacDonald knew, by the end of November 2008 that he suffered an injury at the health centre and ought to have known that the injury could be attributable to CNRL and that an action against CNRL was warranted. At the latest, I find that Mr. MacDonald ought to have known that his injuries could be attributed to CNRL by September 15, 2011, six months after his counsel's receipt and review of the health records.

ISOS

[91] Mr. MacDonald also ought to have known he had a claim against ISOS by September 15, 2011 for the same reason as he ought to have known he had sufficient material facts to warrant bringing action against CNRL by that date.

[92] I find that there is no merit to the Plaintiff's contention that Joseph Noseworthy's discovery evidence on July 30, 2015 was the first time he had sufficient material facts to ground an action against CNRL and ISOS. It was not speculative, as the Plaintiff's counsel contends, to claim against CNRL and ISOS based on the medical records and whatever other information might have been gleaned from following up with counsel for CNRL about the staffing of the health centre. It is to be remembered that the Consent Order attaching the Amended Claims against ISOS and CNRL was filed with the Court on July 23, 2015, before Mr. Noseworthy's discovery and never amended.

Issue 2:

(c) If Mr. MacDonald's claims against CNRL and ISOS are out of time, can the claims be added under subsection 6(4) of the Alberta *Limitations Act*?

[93] In order for subsection 6(4)(a) to be met, "the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding."

[94] Both CNRL and ISOS argue that the threshold of section 6(4)(a) is not met by the facts before the Court.

The s. 6(4) Analysis

[95] As noted previously in this decision, section 6(4) of the Alberta *Limitations Act* allows a party to add a claim to a proceeding after the limitation period has expired if certain requirements are met. CNRL and ISOS each say that those statutory requirements are not met in the circumstances.

[96] The Plaintiff's counsel did not respond either in written submissions or in oral argument on the motion to CNRL and ISOS' arguments on section 6.

[97] Section 6 provides as follows:

> 6(1) Notwithstanding the expiration of the relevant limitation period, when a claim is added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings, the defendant is not entitled to immunity from liability in respect of the added claim if the requirements of subsection (2), (3) or (4) are satisfied.
>
> (2) When the added claim
>
> …
>
> (b)does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued, the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.
>
> …
>
> (4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,
>
> (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding, and

> (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.
>
> (5) Under this section,
>
> (a) the claimant has the burden of proving
>
> (i) that the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding, and
>
> (ii) that the requirement of subsection (3)(c), if in issue, has been satisfied,
>
> and
>
> (b) the defendant has the burden of proving that the requirement of subsection (3)(b) or 4(b), if in issue, was not satisfied

[98] The first question which must be answered in carrying out the s. 6(4) analysis is whether the added claim is related to the conduct, transaction or events described in the original pleading in the proceeding.

[99] In *Sweetland v. MacInnis*, 2019 ABQB 736, Lema J. provided a review of Alberta case law as to "relatedness" in the context of s. 6(4) of the Alberta *Limitations Act*. He stated:

> [31] Alberta cases provided guidance on "relatedness." In *Stout (Estate of) v. Golinowski (Estate of)* the Alberta of Appeal held [2002 ABCA 49 at paras 104-106]:
>
> > …all three requirements [including "relatedness] are made out. The pleading sought to be brought by the administrator of the estate as the added claim is the same pleading that may have been erroneously brought by the administrator *ad litem* and arises from the conduct, transaction or events described in the original pleading, which is the same conduct or events from which the other, regular claims arise.
>
> [32] In *DeSoto Resources Ltd v. EnCana Corporation* [2010 ABCA 110 at paras 7-10], the Court of Appeal held:
>
> > …To allow the amendments the "added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding." The appellant argues that sine all the pleadings are about the same leases, the amendments should be allowed.
> >
> > Whether a new pleading arises from the same "conduct, transaction or events" must be based on an assessment of the whole factual and legal context. No firm line can be drawn between an unrelated new claim, and

> what has previously been pleaded. Too general a definition would give the plaintiff an unlimited ability to add statute barred claims [authority omitted].
>
> …The proposed amendments are about different misrepresentations to third parties made before the appellant was restructured, and breach of a contract described as the Forbearance Agreement which had not previously been mentioned. The conduct, transactions and events that underlie the production or lack of production from the lands, and the resulting Notices of Termination are different from the conduct, transaction and events that led to the restructuring via the proposal in bankruptcy, and the alleged breach of the Forbearance Agreement with resulting damage. Likewise, the conduct, transaction and events underlying the various misrepresentations and qualitatively different in time and content: one set was before the bankruptcy, and the other set after. The misrepresentations, while all allegedly relating to the validity of the leases, were made to different persons at different times in different contexts.
>
> Section 6 allows the addition of new claims because the defendant will not be prejudiced or surprised since they arise out of the same conduct, transactions and events. Therefore, one test of whether a new claim is involved is to examine the extent to which a new set of conduct, transactions and events would have to be proven at the trial. The documents and other evidence that would be needed to prove the appellant's new allegations would differ significantly from those required to prove the originally pleaded facts.
>
> [emphasis of Lema J.]

[100] In the case before this Court, the original pleading against Dr. Westhaver focuses on Dr. Westhaver's alleged negligence in conducting the root canal surgery on September 18, 2008 in Sydney, Nova Scotia. Breach of contract and negligence are plead. The claim alleges that as a result of the root canal surgery, Mr. MacDonald developed a severe infection that migrated to his brain, requiring extensive hospitalization and treatment. The claim alleges that as a result of the infection and aftermath of the lifesaving surgeries performed, Mr. MacDonald has neuropsychological deficits.

[101] The material facts pleaded in the Amended Claim against CNRL and ISOS relate to Mr. MacDonald's attendance at the CNRL health centre in Alberta on September 28 and 29, 2008. The original Statement of Claim does not refer to CNRL or ISOS at all.

[102] This Court finds that the facts as pleaded in the Amended Statement of Claim are entirely different than those in the original Statement of Claim. The "events" took place in Sydney, Nova Scotia versus Fort McMurray, Alberta on different dates and obviously in different provinces.

[103] The "added claim" is not an elaboration of an existing pleading. There are new material facts plead which form the basis of claims against CNRL and ISOS in relation to the operation of the health centre and the conduct of employees who attended to Mr. MacDonald.

[104] This Court finds that these claims are not sufficiently related and that therefore section 6(4)(a) is not met.

[105] Given the Court's decision with respect to section 6(4)(a) there is no need for the Court to consider whether subsection 6(4)(b) applies. Despite this, the Court will go on to conduct the 6(4)(b) analysis.

[106] In Nova Scotia, whose procedural rules apply, a plaintiff has one year to serve a claim after filing pursuant to *Civil Procedure Rule* 4.04(1).

[107] In terms of CNRL, if November 26, 2008 is the date that Mr. MacDonald discovered his claim, the two-year limitation period would run to November 26, 2010 and the final date of notice under subsection 6(4)(b) would be November 26, 2011. If September 15, 2011 is the date that Mr. MacDonald discovered his claim, the two-year limitation period expired on September 15, 2013 and the final date of notice would be September 15, 2014.

[108] The Court finds that both CNRL and ISOS had no knowledge of the claim against them until February 19, 2015, when the proposed Amended Notice of Action and Statement of Claim was circulated to them by the Plaintiff's counsel. At the earliest, the Plaintiff's then counsel raised the issue of adding CNRL as a Defendant at the Plaintiff's discovery examination on November 27, 2014. While CNRL had notice of Dr. Westhaver's Third Party claim against them in November 2012, being a Third Party to a claim is obviously not the same as being a defendant to a claim. "Knowledge of the added claim" has been held to pertain specifically to the 'added claim' as opposed to knowledge about the claim generally. See *McLaughlin v. Broddy*, 2006 ABQB 914 at paras 28-29.

[109] Accordingly, the claims against CNRL and ISOS cannot be added under subsection 6(4) of the Alberta *Limitations Act*.

Conclusion

[110] In my opinion, there is no genuine issue to be tried respecting whether Mr. MacDonald brought his action against each of CNRL and ISOS within the limitation period. Mr. MacDonald's contention that his claim was brought on time has no merit. His claims against CNRL and ISOS are barred by the Alberta *Limitations Act*.

[111] In the case of ISOS, both the added claims of Mr. MacDonald and Dr. Westhaver are statute barred. That is because Dr. Westhaver's cross-claim against ISOS explicitly adopts and repeats the allegations of the Plaintiff's added claim against ISOS. Since the Plaintiff's claim against ISOS is out of time, so too is Dr. Westhaver's cross-claim.

[112] CNRL and ISOS are entitled to summary judgment and the cost of their motions against Mr. MacDonald.

[113] If the parties cannot agree on costs, they may provide written submissions within thirty (30) calendar days from the date of this decision.

Smith, J.