CITATION: GLUCHOWSKI v. LISTER, 2014 ONSC 2190
COURT FILE NO.: CV-09-377030
DATE: 20140429

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
RENATA GLUCHOWSKI, GEORGE GLUCHOWSKI	)	*Arthur Yallen*, for the Plaintiffs
	)	
Plaintiffs	)	
	)	
– and –	)	*Heather L. Kawaguchi*, for the Defendant
	)	
PATRICIA LISTER	)	
	)	
Defendant	)	
	)	
	)	
	)	
	)	**HEARD:** April 13, 2014

CHIAPPETTA J.

Overview

[1] This is a motion for summary judgment where the issue is discoverability of a motor vehicle claim. More particularly, the question to be answered is when the Plaintiff knew or ought to have known about the existence of a motor vehicle negligence cause of action that meets the threshold requirements of s. 266(1) of the *Insurance Act*, R.S.O. 1990, c. I.8.

[2] The action arises out of a motor vehicle accident that occurred on December 30, 2005. The Plaintiff, Renata Gluchowski ("Renata"), was operating a motor vehicle which stopped at an intersection when she was rear-ended by a motor vehicle operated by the Defendant, Patricia Lister ("Patricia").

[3] The Statement of Claim was issued on April 22, 2009, over three years after the motor vehicle accident. Patricia brings the within summary judgment motion to dismiss the action on the ground that it is statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24.

[4] The Defendant submits that there is no genuine issue requiring a trial as the Plaintiffs' claim is untimely. The medical opinions before April 22, 2007, are consistent with the Plaintiffs' subjective complaints. It is submitted that the court can say with certainty the Plaintiff knew or ought to have known she had a "threshold" claim before April 22, 2007.

[5] The Plaintiffs resist the motion and submit that the preponderance of evidence demonstrates that Renata's injuries only met the threshold after April 22, 2007. In the alternative, the Plaintiffs submit that the limitations issue cannot be decided on this motion given the substantial and complex medical evidence. Rather, the issue of discoverability is an issue requiring a trial.

[6] For reasons that follow, the Defendant's motion for summary judgment is dismissed.

Test on a Motion for Summary Judgment

[7] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada held, at para. 66, that on a motion for summary judgment under Rule 20.04, a court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record without using the enhanced fact-finding powers under Rules 20.04(2.1) and (2.2). The court further directed that if there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using enhanced fact-finding the powers in Rule 20.04.

[8] I have concluded that there is a genuine issue requiring a trial, namely when did Renata discover the extent of her injuries as a result of the December 2005 motor vehicle accident such that the limitation period started to run. I have also concluded that applying the powers of Rules 20.04(2.1) and (2.2) would not change my findings. I remain of the view that when Renata discovered her claim is a genuine issue requiring a trial.

Analysis

[9] A party must meet the threshold as provided by s. 266(1) of the *Insurance Act* in order to recover damages arising from a motor vehicle accident. Section 266(1) provides as follows:

> In respect of loss or damage arising directly or indirectly from the use or operation, after the 21st day of June, 1990, of an automobile and despite any other Act, none of the owner of an automobile, the occupants of an automobile or any person present at the incident are liable in an action in Ontario for loss or damage from bodily injury arising from such use or operation in Canada, the United States of America or any other jurisdiction designated in the *Statutory Accident Benefits Schedule* involving the automobile unless, as a result of such use or operation, the injured person has died or has sustained,
>
> (a) permanent serious disfigurement; or

(b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.

[10] In *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, the Supreme Court of Canada held that the limitation period does not begin to run until it is reasonably discoverable that the injury meets the threshold of s. 266(1).

[11] When *Peixeiro* was decided there was no statutory deductible. The Ontario Court of Appeal in *Everding v. Skrijel*, 2010 ONCA 437, 100 O.R. (3d) 641, established that before the threshold test is met, objective evidence that a claim would exceed the statutory deductible is also required.

[12] The *Limitations Act, 2002*, codifies the principle of discoverability. Sections 4 and 5 of the *Limitations Act, 2002*, provide as follows:

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

Discovery

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

Presumption

> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

[13] The limitation period is presumed to begin to run from the date of the accident, December 30, 2005. The onus is on Renata to persuade the court that the seriousness and permanency of her injury that is physical in nature was not discoverable within the applicable limitation period, and that she acted with due diligence to discover if there was a cause of action: see *Yelda v. Vu*, 2013 ONSC 4973, at paras. 29-30; *Huang v. Mai*, 2014 ONSC 1156, at para. 36.

[14] Since the Defendant has admitted that Renata acted with the required degree of due diligence, the Plaintiffs need only establish that her "threshold" claim was not discoverable until after April 22, 2007, to prevent the action from being statute-barred

[15] The applicability of the discoverability principle in the context of the threshold requirement in the *Insurance Act* was recently reviewed by Perell J. in *Huang*. Upon considering the Court of Appeal's decision in *Everding*, Perell J. stated as follows, at para. 38:

> [t]he limitation period does not begin to run simply because the plaintiff believes or ought to believe that he or she has a claim. Rather, the limitation period begins when the plaintiff first knew – which I take to be when he or she had an objective appreciation – that a proceeding would be an appropriate means to seek a remedy.

[16] The question for the court, then, is when did Renata objectively know that the injuries she sustained from the motor vehicle accident of December 30, 2005 could be considered permanent and serious. In other words, when between December 30, 2005 and April 22, 2009 was there a sufficient body of objective evidence to put before the court to demonstrate that Renata's injuries met the threshold and deductible as set out in the *Insurance Act*?

[17] In my view, this remains a genuine issue for trial. The interests of justice would not be served by attempting to weigh the objective evidence and draw inferences at this stage in the litigation. The objective evidence is complex and varied. It requires assessment in the context of a trial process. It is far too simplistic an approach to isolate Renata's complaints at this stage and determine such an elastic concept as discoverability in the context of the threshold under the *Insurance Act*. The nature of the objective evidence on the record before me does not lend itself to determining when Renata's injuries ripened to the point of being actionable.

[18] On the one hand, there is objective evidence to support the conclusion that it was only after April 22, 2007 that Renata became aware of her injuries that met the threshold and that she could reasonably expect an award of general damages that would exceed the $30,000 statutory deductible.

[19] Radiographs done on January 16, 2006 on Renata's neck and spine suggested no instability.

[20] In a report, dated March 10, 2006, the insurer denied the February 27, 2006 OCF treatment plan and noted that the January 17, 2006 OCF 18 authored by Dr. Salameh did not identify any objective neurological deficits and stated there was no need for a referral for specialty studies. In addition a January 30, 2006 report found no objective neurological deficits and that Renata was seen to have suffered a Whiplash Associated Disorder, "WAD II" injury.

[21] A report, dated March 30, 2006, by Dr. Jason Nyman found that Renata's injuries were likely a WAD II cervical strain/sprain, thoracolumbar spine strain/sprain, cervicogenic headaches, and a possible right shoulder injury. Dr. Nyman denied Renata institutional treatment and indicated that Renata would benefit from continued home exercises, being encouraged to gradually resume all of her pre-accident normal activities of daily living, and that a formal return-to-work plan be established with her family physician.

[22] An April 20, 2006 report by Atul Kaul determined that Renata would be able to resume and perform all of her household duties over the next four weeks.

[23] On May 6, 2006, July 21, 2006, November 6, 2006, and February 6, 2007, Dr. Gwardjan, Renata's family doctor, completed Attending Physician's Statements of Continuing Disability forms diagnosing Renata with a WAD II injury, which were for applications for short-term disability payments. None of these statements ever said that Renata's injuries were permanent.

[24] A May 22, 2006 report by Dr. Lance Majl, MD, noted that Renata advised she had been receiving physiotherapy and that she had been gradually improving, but the treatments stopped as they were no longer covered by the insurance company. Dr. Majl also noted that there was a 10% improvement in Renata's headaches and back pain since the accident.

[25] A June 13, 2006 report by Dr. Igor Sapozhnikov suggested a work specific rehabilitation program to get Renata to a position where she could gradually return to work on modified hours.

[26] A July 6, 2006 report by Dr. A.B. Death refused the June 29, 2006 OCF-22 form requesting a psychological referral.

[27] Renata's application for long-term disability benefits from RBC Life Insurance Company was denied on September 13, 2006.

[28] From January 2007 to April 2007, Dr. Joseph Park, MD, treated Renata with a series of five injections into her neck, back, and shoulders in an attempt to alleviate her symptoms.

[29] A February 1, 2007 report by Dr. Stephen Balsky stated that "there is no evidence in the documentation provided to suggest that Ms. Gluchowski is suffering from anything more substantial than simple soft tissue injuries".

[30] In a report, dated March 6, 2007, the February 19, 2007 OCF-22 request for a Driver Road Evaluation due to Renata's psychological discomfort in operating a motor vehicle was refused.

[31] In the October 22, 2007 application to the Canada Pension Plan, Dr. Gwardjan noted that Renata's prognosis for recovery from her pain was poor.

[32] A July 11, 2008 report by Dr. Joseph Kwok noted that Renata's injuries were still persisting and that she should undergo a psychological evaluation and be assessed by a chronic pain specialist. Dr. Kwok also found that it is more probable than not that Renata's impairments would remain into the future indefinitely. The report also sought an MRI on Renata's shoulder to rule out a rotor cuff injury.

[33] A July 14, 2008 report by Dr. Garry Moddel concluded that a further neurological examination was not reasonable or necessary.

[34] An August 8, 2008 report by Dr. Levy denied the request that Renata receive a chronic pain assessment and instead, recommended that Renata see a pain specialist to determine if a chronic pain assessment was necessary.

[35] A November 5, 2008 report by Dr. Vlade Gagovski suggested a psychological evaluation and that the "prognosis at this time is guarded" and that it is "exceedingly difficult to give a prognosis for an individual with a chronic pain impairment". Dr. Gagovski felt that Renata had "not yet reached maximal medical improvement and given her motivation to return to her pre-accident level of functioning, she will likely get better".

[36] A November 5, 2008 psychological evaluation by Maria Slutski and Dr. Leon Steiner found that Renata's depression was in the moderate range (class 3).

[37] A November 6, 2008 MRI on Renata's shoulder found evidence of an "acromoicolavicular joint with some capsular distention as well as prominent inferior acromial enthesophyte" and "mild subaoromial/subdeltoid bursitia".

[38] A January 14, 2009 report by Dr. Peter Bernstein assessed the January 2, 2009 OCF-22 form prepared by Dr. Steiner and noted that Dr. Steiner found that "Ms. Gluchowski 'is physically and psychologically unable to return to the pre-accident employment'". Dr. Bernstein also commented that "[a]ssuming that the insurer is required to determine if Ms. Gluchowski is completely disabled from any occupation for which she is reasonable suited by education, training or experience as a result of the accident, a psychological assessment may be considered reasonable and necessary".

[39] A Psycho-Vocational Assessment was undertaken and a report prepared by Dr. Steiner on February 6, 2009. In his report Dr. Steiner found that Renata's symptoms met the criteria for a chronic somatoform pain disorder, an adjustment disorder, and mixed anxiety and depressed mood.

[40] A March 11, 2009 report by Dr. John Heitzner, which responded to the November 5, 2008 OCF-18 treatment form, determined that the treatment for Botox injections and a multi-disciplinary chronic pain management program was not reasonable or necessary. It was Dr. Heitzner's belief that the treatment would not lead to significant improvement in Renata's range of motion.

[41] On March 20, 2009 a rebuttal report to Dr. Heitzner's March 11, 2009 report was prepared by Dr. Gagovski. Dr. Gagovski confirmed his November 5, 2008 findings of chronic pain and noted that the literature shows a multi-disciplinary treatment approach is a cost-effective means of treating chronic pain.

[42] An April 9, 2009 report by Dr. Gillin-Garling concluded that Renata's symptoms were "consistent with a diagnosis of a Chronic Pain Disorder associated with both Psychological Factors and a General Medical Condition as well as mild to moderate Adjustment Disorder with Mixed Anxiety and Depressed Mood". In addition, Dr. Gillin-Garling concluded as follows, at p. 14:

> Test results also suggest non-disabling levels of anxiety and depression. Ms. Gluchowski is likely worried, tense, nervous, and probably has difficulty "getting started" on an activity. Individuals with similar profiles may function at reduced efficiency for long periods of time, but are quite unlikely to be experiencing debilitating levels of emotional distress.
>
> More generally, test results suggest that Ms. Gluchowski is a passive individual … is extremely emotionally over-controlled and keeps her feelings 'bottled up' most of the time. Ms. Gluchowski most likely makes excessive use of denial as a major psychological coping mechanism and probably would tolerate a great deal of unhappiness before becoming motivated to change.

[43] On the other hand, however, there is objective evidence, which taken together, supports the conclusion that the latest date that Renata ought to have discovered her impairments were serious and permanent was in 2006 or early 2007.

[44] The clinical notes and records of Dr. Gwardjan mention "chronic pain" in 2006. Throughout 2006, on numerous occasions Renata complained to Dr. Gwardjan of pain to her upper back, lower back, neck, and right shoulder, along with headaches, difficulty sleeping and depression.

[45] On or around May 22, 2006, Renata underwent an independent neurological assessment by Dr. Majl, who opined that five months after the accident, Renata continued to suffer from physical, cognitive, and psychological impairments that were "likely to continue". He also concluded that it was unlikely Renata would be able to resume her pre-accident level of function.

[46] On or around June 22, 2006, Dr. Giammarco diagnosed Renata with cervicogenic headaches.

[47] On or around December 2006, Renata visited Dr. Park, who recommended that Renata receive lumbar caudal/epidural steroid injections and associated nerve blocks. As noted above, Renata received injections to her neck, shoulders, and back on five occasions from January to April 2007. Renata stopped seeing Dr. Park because she did not find this treatment helpful.

[48] On or around January 10, 2007, Renata visited Dr. Philippa Tattersall, a psychiatrist, and stated she had been experiencing depression symptoms every day since March 2006. Dr. Tattersall noted vegetative signs such as decreased interest in all activities, decreased appetite, decreased energy, and decreased concentration due to decreasing hope that the pain experienced by her would improve. Dr. Tattersall diagnosed Renata with pain disorder, chronic, with associated neck pain, back pain and headaches, and prescribed Effexor to her.

[49] The prescription history of Renata shows that prior to March 30, 2007 Renata had been taking a number of medications including Venlafaxine, Tylenol 3, Imovane, Gabapentin, Lenoltec, Oxycontin, Citalopram, Elavil and Pennsaid, among others. These medications are used for the treatment of pain, neuralgia, depression/anxiety, and sleep disruption.

[50] On January 2, 2006, Renata returned to work in her position as a Quality Inspector with Metrican Stamping full-time and on full-duties. Around January 16, 2006, Renata reported that she could not resume work due to injuries she suffered from the motor vehicle accident at issue.

[51] For an application for benefits to UnumProvident, Dr. Gwardjan completed an Attending Physician's Statement, dated April 7, 2006, for Renata, which diagnosed her with whiplash injury, headaches, and lumbar strain. Dr. Gwardjan also noted that Renata was not improving with treatment.

[52] Dr. Gwardjan filled out a form, dated May 15, 2006, outlining Renata's restrictions with respect to walking, sitting, standing, and stair climbing. Dr. Gwardjan noted that Renata was still unable to return to work.

[53] Dr. Gwardjan also completed an Attending Physician's Statement of Continuing Disability for Renata's application for benefits to Sun Life Insurance. It diagnosed Renata with WAD II, musculoligamentous thoracolumbar strain, cervicogenic headaches, and right shoulder rotator cuff tendinitis. It also stated that Renata had a poor and slow response to treatment and, due to chronic pain, Renata was unable to do any prolonged sitting, standing, or walking. Dr. Gwardjan's other Statements of Continuing Disability dated July 21, 2006, November 6, 2006, and February 6, 2007, stated that Renata continued to suffer from chronic pain and depression that prevented her return to work.

[54] Considering the totality of the evidence presented on this motion, I cannot say with the required degree of certainty that Renata will fail to rebut the presumption i.e. fail to persuade the court that the seriousness and permanency of her injury was not discovered until after April 22,

2007. Nor can I say with certainty that Renata knew or ought to have known she had a "threshold" claim before April 22, 2007. A triable issue has been raised on this motion.

[55] The Plaintiffs and the Defendant attach the weight and credibility of the medical evidence offered to advance their respective position. Both parties ask the court to discount medical opinions or portions of medical opinions unsupportive of their respective positions pointing out the purpose of the report; the presumptions in the report; the credibility and or stated specialty of the author of the report; whether the report was based on a paper review or personal assessment; and/or the material reviewed to prepare the report.

[56] In my view, this assessment, which is critical to the issue of discoverability, is best left to the trier of fact upon hearing evidence in context, directly from the proposed expert, his or her qualifications, his or her challenges, and his or her respective opinion and explanations in cross-examination. There is good reason why the issue of whether a plaintiff meets the threshold requirement in the *Insurance Act* is considered at the end of a trial with the benefit of *viva voce* evidence from qualified medical experts or medical fact witnesses.

[57] In the circumstances of this case, given the varied medical opinions cited above, and the interpretations of the opinions as advanced by the parties, it would not serve the interests of justice to determine the issue of discoverability and ultimately when the threshold was met in the context of this motion.

[58] The Defendant submits that an adverse inference should be drawn against Renata because no affidavit from Renata herself was provided. I disagree. Resolving the issue on this motion required objective medical evidence. The Defendant examined Renata for over two days in furtherance of this action and has relied on Renata's evidence from discovery in support of their motion. I conclude that no adverse inference will be drawn from the fact that an affidavit of Renata was not put forward in response to this motion.

[59] It is worth noting two final facts. First, the Defendant admits there is no evidence of prejudice to the Defendant in defending the Plaintiffs' claim, notwithstanding it was issued over three years from the accident.

[60] Second, the Defendant pled that Renata fails to meet the threshold at s. 266(1) of the *Insurance Act* and is therefore not permitted to recover damages arising out of the motor vehicle accident of December 30, 2005. This reflects the inherent difficulty in making such a complex assessment, the sensitivities and risks to balance when deciding when to commence a motor vehicle accident claim, and the degree of latitude courts have given to plaintiffs in such circumstances before declaring a limitation period has started to run: see *Ioannidis v. Hawkings* (1998), 39 O.R. (3d) 427 (Gen. Div.), at pp. 433-434.

Disposition

The defendant's motion for summary judgment is dismissed.

I Will Not Remain Seized

[61] In my view, the purpose behind the Supreme Court's direction at paras. 78-79 of *Hryniak* that a motion judge who dismisses a motion for summary judgment to remain seized of the matter, absent compelling reasons to the contrary, is not well served in this case. The issues at trial will be far broader than the narrow issue before me on this motion. I have made no findings here on liability or damages, including whether the statutory threshold was satisfied.

[62] The insight I gained from hearing this summary judgment motion will not save judicial time or facilitate access to justice. I therefore decline to exercise my discretion to remain seized.

Costs

[63] The plaintiffs are seeking costs of this motion fixed at $50,000. The plaintiffs submit that the defendant improperly scheduled the motion originally before a Master. This resulted in a 16 month delay and additional costs for the plaintiffs, as counsel underwent significant preparation for the first motion, all of which were thrown away. I agree that the plaintiffs are entitled to some costs thrown away. The amount claimed for this and for costs of the motion, however, is disproportionate in my view, considering the complexity of the motion and reasonable expectation of the parties. The defendant's costs for this motion, for example, are $15,828.36 and its costs for the entire action are $26,572.85 on a partial indemnity scale and $37,961.22 in full. It is reasonable therefore, in my view, to fix the costs of this motion at $20,000. Costs of $20,000 are therefore payable forthwith to the plaintiffs by the defendant.

CHIAPPETTA J.

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REASONS FOR JUDGMENT

CHIAPPETTA J.

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