

Civil Litigation

Medical malpractice claim restored by Ontario Court of Appeal

By **Michael McKiernan**

(February 8, 2021, 9:58 AM EST) -- A Toronto health lawyer says medical malpractice defendants should be wary of using Rule 21 motions on limitations issues after Ontario's Court of Appeal restored a late-filed claim by the family of a patient against the hospital where he died.

The appellants in *Beaudoin Estate v. Campbellford Memorial Hospital* 2021 ONCA 57 originally saw a motion judge dismiss their claim under r. 21.01(1)(a) — which allows for the disposal of an action based on a question of law after the pleadings stage — because they missed the hard two-year deadline imposed by the province's *Trustee Act* for bringing an action on behalf of a deceased person.

However, the unanimous appeal panel, led by Justice Mahmud Jamal, found the motion judge engaged in an impermissible fact-finding analysis to reject the family's attempt to rely on the doctrine of fraudulent concealment to toll the limitation period.

"Based on a long line of authorities, they should have a chance to support this allegation with evidence," reads Justice Jamal's Jan. 29 ruling, concurred in by Justices Benjamin Zarnett and James MacPherson.

"Because the facts pleaded in the July 2018 claim must be assumed to be true and are not patently ridiculous or manifestly incapable of proof, it is not plain and obvious that the negligence claims are statute-barred. I would therefore allow the claims pleaded in the July 2018 claim to proceed," he added.



Valerie Wise, Wise Health Law

Valerie Wise, the principal at Toronto's Wise Health Law, says the decision is in line with a developing trend at the province's top court.

"The Court of Appeal has made it pretty clear that they are uncomfortable to some extent with limitation defences succeeding under Rule 21, and they continue to make that more and more challenging," she said. "They seem to want those decisions to be made on a more fulsome record, and if there's any doubt, it's likely to go in favour of the plaintiff."

According to the Appeal Court ruling, the case dates back to the January 2015 death of Garry Beaudoin, one week after his initial attendance at the emergency room of Campbellford Memorial Hospital.

Beaudoin's wife, daughter and grandchildren submitted a request for his medical records in the weeks after his death, but did not launch a claim for damages under the *Family Law Act* against the hospital and three of the doctors who treated him until April 2017, more than two years later.

The defendants denied negligence and moved for dismissal of the action under Rule 21, alleging it was statute barred under the *Trustee Act's* harsh two-year limitation period, which is not subject to discoverability principles.

That prompted Beaudoin's family to amend their pleading to allege fraudulent concealment, one of the common law doctrines that can be used to toll the *Trustee Act's* limitation period. The estate claimed that CT scans taken before Beaudoin's death — but withheld from them — revealed an issue that prevented them from knowing they had a cause of action against the respondents until the scans were disclosed in May 2017, even though they had already issued their claim by that date.

When the Rule 21 motion came before the Ontario Superior Court, Justice William Chalmers struck out the claims, concluding in *Beaudoin Estate v. Campbellford Memorial Hospital* 2019 ONSC 3025 that the fraudulent concealment claim could not succeed because there was no causal connection between the allegedly withheld scans and the appellants' failure to sue on time.

"The [appellants] were aware of the cause of action even in the absence of the allegedly concealed material," Justice Chalmers added.

But on appeal, Justice Jamal found the motion judge erred in deciding the issue of fraudulent concealment as a question of law, rather than fact.

"The factual dispute concerns causation: whether there is a causal connection between the allegedly concealed CT imaging and the appellants' failure to sue within the limitation period. The appellants assert such a causal connection; the respondents deny it," Justice Jamal wrote. "Such a factual issue should generally not be determined on a motion to determine a question of law under r. 21.01(1)(a)."

While the defendant doctors argued the motion judge was entitled to find no causation on the basis that the appellants pleaded facts that were patently ridiculous or manifestly incapable of proof, Justice Jamal disagreed, commenting that "pleaded facts that are merely difficult to prove are not incapable of proof."

"Undoubtedly, that the appellants issued the April 2017 claim before receiving the CT imaging will be among the facts considered by the court deciding the fraudulent concealment issue. The allegation that the appellants would have sued before the limitation period expired had the CT

imaging been disclosed when it was requested may be hard to prove or it may be easy to prove, but it is provable, depending on the evidence,” Justice Jamal wrote.



Iain MacKinnon

Iain MacKinnon, who acted for the successful appellants, said his clients were “relieved” by the Appeal Court ruling and looked forward to pushing the action forward.

“We were very happy to see the result, because it lets them have their day in court, at least for another day,” says MacKinnon, a partner at Linden & Associates in Toronto. “I think it was the right result; judges shouldn’t be determining factual disputes on Rule 21 motions and that was the mistake the Court of Appeal corrected.”

However, Wise — who acts exclusively for health-care professionals — expects the plaintiffs’ victory to be short-lived.

“The defendants have lost this battle, but my sense is that they may win the war,” she said.

Indeed, Wise expressed surprise and a little concern at the suggestion that a plaintiff could possibly prove they lacked knowledge of a cause of action, even after filing a claim.

“That worries me in terms of introducing some confusion in discoverability cases,” she explained. “I thought that was a clear case of something being pleaded that was unprovable, but the Court of Appeal disagreed.”

Counsel for the respondents declined to comment on the case.

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