

Issue 190 • Fall 2026

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Limitation Periods and Discoverability in Medical Malpractice Actions

This is the seventh article of our series discussing practical and evidentiary issues in medical malpractice. Each article will examine recent medical malpractice case law and focus on the practical and evidentiary issues within them. The goal is to provide some useful insight into the obstacles that occurred in hopes that future cases can adapt and develop new ways to overcome these challenges.

The purpose of limitation statutes is to ensure that lawsuits are brought within a reasonable time. These laws are based on an understanding that an individual should not be subject to the threat of being sued over a particular matter indefinitely, and recognize that evidentiary problems in the form of lost documents or forgetful witnesses are more likely to arise as time goes by.¹

Most provinces and territories (including British Columbia) have two-year limitation periods for claims against doctors and hospitals. However, determining when the two-year period begins to run is an important feature of medical negligence claims, as it is now well established that a limitation period does not begin to run until a plaintiff discovers, or ought to have discovered, the facts underlying the cause of action.² This is to prevent situations where a plaintiff's claim is barred before they became aware of it, which may occur, for instance, if there was a delay between the negligent treatment and its consequences.³

This article focuses on discoverability in medical negligence cases and what factors the courts have found to postpone the running of the limitation period.

Nature and Extent of Plaintiff's Injuries

Discovery is typically triggered once a plaintiff has discovered that they have suffered some injury, regardless of the extent. However, the nature or type of injury may impact discoverability. Specifically, the courts have found that a plaintiff will not have discovered a claim if they have reason to believe the injuries were the result of an agreed-upon treatment plan.

In *Borek v. Dr. Derek Stirling Hopkins*, 2020 BCSC 304, the defendant dentist applied to have the plaintiff's claim dismissed by way of summary trial on the basis that the action was statute barred by the *Limitation Act*, SBC 2012 c 13 [the "*Limitation Act*"].

The plaintiff filed a claim for negligence, breach of contract, and breach of fiduciary duty on May 25, 2016. The defendant alleged that the claim, as pled, was known to the plaintiff by February 2014, and therefore was not brought within the two-year limitation period. The primary question before the court was when Ms. Borek had, or ought to have had, the requisite state of knowledge such that her claim was “discovered” pursuant to ss. 6 and 8 of the *Limitation Act*.

The court noted that s.6 of the *Limitation Act*, which applied to all of the claims being advanced by Ms. Borek, set a two-year limitation period from the date the claim was discovered. The court also referred to s. 8 of the *Limitation Act*, which set out how the date on which a claim is discovered is determined:

8. Except for those special situations referred to in section 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

The court agreed with Dr. Hopkins that under s. 8(a) of the *Limitation Act*, he need only establish that Ms. Borek knew that she had suffered *some* kind of injury, but she did not need to know the extent or type of injury or that it had a tortious cause.⁴ The court found that Ms. Borek knew she was experiencing an extraordinary amount of pain and other symptoms, including an inability to chew as early as January 2014. As this was the primary injury and loss she claimed in the action, the court found that she was aware of this loss more than two years before the claim was filed.

The court also found that, by January or February 2014, Ms. Borek believed that the temporary crowns installed by the defendant were causing her pain and other losses, and it did not matter for the purposes of s. 8(b) whether she believed that the pain was an unavoidable aspect of treatment or whether it was due to some departure from the standard of care.

With respect to s. 8(d) whether the plaintiff knew, or ought to have known, that having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury loss of damage, the court considered the extent of Ms. Borek’s understanding of the reasons for her pain and intentions with respect to completing her treatment with Dr. Hopkins.

In finding that the defendant had not established that the plaintiff had the requisite knowledge to have discovered the claim more than two years before the claim was filed, the court noted the following:

I find that Ms. Borek’s evidence in discovery that she believed there had been something “wrong” about the installation of the temporary crowns that had led to her extraordinary pain does not establish, in the context of the whole of the evidence, that she knew that an error or departure from her treatment plan

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had occurred. That is, she was not aware that the pain she was experiencing was not pain that she had consented to as a result of Dr. Hopkins following a treatment plan she had agreed to, and she continued to believe (or at least hope) that the pain would be addressed or improved by completion of that plan, either in its current form or in a form that Dr. Hopkins would modify for her. Given Dr. Hopkins' reassurances to her that her pain would be resolved by completion of the plan, this was not unreasonable.

I am also of the view that as long as Ms. Borek was reliant upon Dr. Hopkins for her treatment, that it would not have been appropriate or practical for her to contemplate a lawsuit against him.⁵

Ultimately, the court found that the limitation period could not start running until Ms. Borek had terminated her treatment relationship with Dr. Hopkins, and dismissed Dr. Hopkin's application to dismiss the claim.

In *Bendall v. Goulart*, 2017 BCSC 599, the plaintiff brought a claim for injuries related to a radiation overdose during

cancer treatment, which the defendant physicians argued was statute-barred. The defendant physicians had advised the plaintiff that they had mistakenly exposed him to an overdose of radiation, but they also advised that it was not possible to determine whether the symptoms were related to that mistake or the result of his underlying cancer and its agreed-upon treatment. The court found that the limitation period did not begin to run until the plaintiff was aware of an injury distinct from the symptoms of his underlying cancer or the effect of the appropriate radiation dose he had consented to and that he had brought his claims within time:

"The defendant physicians had advised Mr. Bendall of a range of outcomes and side effects from both his underlying disease and the proposed appropriate treatment of the disease. If his professional advisors could not differentiate between those outcomes that were within the range to be expected from either or both of the underlying disease or its planned treatment (without overdose), Mr. Bendall cannot reasonably be expected to have known differently."⁶

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THE COURT FOUND THAT THE EXPERT REPORTS DID NOT SERVE TO MERELY “CONFIRM” MS. CHAMBERLAIN’S VIEWS ON DR. MATANAJ’S NEGLIGENCE, BUT RATHER THAT “THE CLAIM THAT HAS SINCE BEEN BROUGHT RESTS ON AN ENTIRELY NEW FOOTING, INVOLVING DIFFERENT ALLEGATIONS OF NEGLIGENCE LEADING TO DIFFERENT, AND MORE SERIOUS CONSEQUENCES.”

It is important, however, for the plaintiff to establish that the agreed-upon treatment provides a plausible explanation for their injuries.

In *Ounjian v. St. Paul’s Hospital*, 2002 BCSC 104, the plaintiff underwent a myomectomy to remove a benign uterine fibroid. When she awoke from general anesthetic, she had pins and needles sensation and numbness in her right leg. She was subsequently found to have suffered damage to her peroneal nerve, leading to foot drop.

The court found that the plaintiff knew when she awoke that she suffered an injury that may well have been caused by negligence on the part of the doctors and nurses. She knew that something had occurred that should not have occurred. The surgery was in her uterus and nothing was supposed to have been done with respect to her feet or the nerves affecting her feet. Based on when the plaintiff ought to have discovered the claim, the court found that the action was not brought within the required time.

Access to Medical Records

Moore v. Castlegar District Hospital, 25 BCLR (3d) 188, 1996 CanLII 2564 (BC SC), involved a plaintiff who was paralyzed following a severe motor vehicle accident. The question before the court was whether the spinal cord injury was caused by the accident or the plaintiff’s intervening medical care. The defendant physicians also raised a limitation defense based on when the plaintiff ought to have discovered the material facts underlying the action.

While the action was ultimately dismissed on the issue of causation, the court accepted that the limitation period was postponed while the plaintiff was in hospital with no access to his medical records and no way of knowing that there was a reasonable prospect of a successful action:

It was on the evening of December 11, 1989, that the plaintiff had the first inkling of a possible problem with respect to his care, and the practical realities are that the collection of even the most basic facts would take time, a notional medical advisor needs at least those basic facts to provide any opinion and a notional legal adviser requires both the facts and a medical opinion before any advice can be given. On the evidence, it could not be said that an individual acting reasonably and diligently could have accomplished even that much by March 13, 1990.⁷

Availability of Supportive Expert Opinions

Several cases have dealt with the issue of whether the limitation period is similarly postponed until the plaintiff obtains supportive expert opinions. In *Thomas v. Vancouver Coastal Health Authority et al.*, 2006 BCSC 422, the court echoed the comments of the BC Court of Appeal in *Karsanjii Estate v. Roque*, for the proposition that “to hold that time does not start to run... until the prospective plaintiff happens to receive expert advice confirming that the relevant breach of duty is a possible explanation for the problem — let alone a probable or likely explanation — would... unreasonably expose prospective defendants to “stale” claims.”⁸

Recently, in the case of *Chamberlain v. Matanaj*, 2026 BCSC 421, the defendant relied on the conclusions of *Karsanjii* and *Thomas* for the proposition that the running of the limitation period will not be postponed while the plaintiff waits to obtain a confirming expert report, and that the plaintiff therefore did not bring her claim within the limitation period.

The plaintiff, Ms. Chamberlain, had a history of chronic back pain and left leg pain dating back many years. Following two unsuccessful discectomies, she was referred to the defendant, Dr. Matanaj, for a spinal decompression and fusion. Dr. Matanaj performed the surgery on February 1, 2021 after which the plaintiff woke up with severe leg pain. A post-operative CT showed two screws were in contact with a nerve root, so Dr. Matanaj advised that he needed to perform a second operation to reposition those screws, to which the plaintiff consented. The second operation took place the following day. Dr. Matanaj only repositioned one screw.

Ms. Chamberlain was transferred back to her community hospital following the second procedure, but again was experiencing severe pain. She was seen by her family doctor

who ordered another CT scan which revealed that one of the screws was still in contact with the nerve root. She then underwent a third operation in which Dr. Matanaj removed all the hardware previously installed.

As she was recovering from these operations, Ms. Chamberlain was advised by her family doctor that she was “concerned that the nerve is badly damaged” and that her spine had not been properly fused.⁹ In a journal entry from March 2021, Ms. Chamberlain wrote that “Dr. Matanaj removed the hardware and left me like defunked.”¹⁰ She subsequently made a complaint to the College of Physicians and Surgeons, and through the investigative process, the College obtained expert neurosurgical reports that were delivered to Ms. Chamberlain in 2023. The reports expressed the view that Dr. Matanaj failed to meet the requisite standard of care by:

- A. selecting the wrong operative procedure for the first operation;
- B. leaving one of the two malpositioned screws in place in the second operation; and
- C. removing all of the previously installed hardware rather than repositioning the mispositioned screw in the third operation.

With respect to Ms. Chamberlain’s prognosis, the report indicated that she had been left with a major decompression without any instrumental support, and that in all likelihood it would collapse further and potentially shift.

Ms. Chamberlain commenced her action against Dr. Matanaj in September 2023. Dr. Matanaj argued that Ms. Chamberlain had the requisite knowledge to bring the action by March 2021, as evidenced in her journal entry, as she believed that Dr. Matanaj’s treatment did not meet the standard of care and that he had left her spine in a permanently damaged state. Ms. Chamberlain countered that she lacked the requisite knowledge to bring the action until she received the expert reports. She acknowledged she had a belief before she had received the reports that Dr. Matanaj’s treatment had not met the standard of care, but her complaint was initially due to the pain she was experiencing and that the surgeries had left her no further ahead. She submitted that it was only once she received the expert reports that her hopes of recovery were dashed, and the nature of Dr. Matanaj’s negligence and its consequences were revealed.

In finding the Ms. Chamberlain’s case was not statute-barred, the court distinguished it from *Karsanjii* and similar cases in several important respects. First, the plaintiff’s original complaint was that the mistake in the surgery was that Dr. Matanaj inserted the screws in the wrong position, for which she required additional operations. The court noted that although she believed that improper screw positioning indicated negligence, that was not one of the alleged mistakes that now formed the basis of her claim. Likewise, the court found that the consequences that Ms. Chamberlain understood to have flowed from that negligence — namely pain associated with additional operations — were in the past and among the risks that Dr. Matanaj had warned her about, prior to surgery.

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The court found that the expert reports did not serve to merely “confirm” Ms. Chamberlain’s views on Dr. Matanaj’s negligence, but rather that “the claim that has since been brought rests on an entirely new footing, involving different allegations of negligence leading to different, and more serious consequences.”¹¹

Conclusion

As the cases above illustrate, while it is sometimes possible to argue that a plaintiff’s limitation period is postponed due to lack of discoverability, this is fact-dependent and open to a high degree of interpretation from the court. If the limitation period may be about to expire, it is always an option to file the claim but hold off on serving and later amend the claim, if necessary, once expert opinions have been obtained, to avoid the risk of a missed limitation period. ■

1. Report of the Ontario Law Reform Commission, *Report on Limitation of Actions 9, 10* (1969), adopted by the British Columbia Law Reform Commission’s *Report on Limitations, (Project No. 6), 1974, Part II, General*, at page 8, cited in *Vance v. Peglar*, 1996 CanLII 1834 (BC CA)
2. Gerald B. Robertson & Ellen I. Picard, *Legal Liability of Doctors and Hospitals in Canada*, 5th ed. (Toronto: Thomson Reuters, 2017) at 483.
3. *Ibid*
4. *Borek v. Dr. Derek Stirling Hopkins*, 2020 BCSC 304 at para. 25
5. *Ibid*, at paras. 51-52
6. *Bendall v. Goulart*, 2017 BCSC 599 at para. 52
7. *Moore v. Castlegar District Hospital*, 25 BCLR (3d) 188, 1996 CanLII 2564 (BC SC), at para. 49
8. *Thomas v. Vancouver Coastal Health Authority*, 2006 BCSC 422 at para 18, citing *Karsanjii Estate v. Roque*, (1990), 43 B.C.L.R. (2d) 234.
9. *Chamberlain v. Matanaj*, 2026 BCSC 421 at para. 14.
10. *Ibid*, at para. 15
11. *Ibid*, at para. 54

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