

### limitation periods where “discoverability” at issue can now be determined at summary judgment

#### introduction

The recent decision by the Court of Appeal in *Liu v. Silver*<sup>1</sup> signals a change in how courts will handle limitation defences at summary judgment motions. Defendants relying on the defence of an expired limitation period may now have an easier time avoiding the expense of a trial. Courts will not blindly allow plaintiffs to argue “discoverability” as a tactical strategy to avoid summary judgment. The Court of Appeal’s ruling demonstrates how, under the new *Rules of Civil Procedure*<sup>2</sup> which took effect earlier this year, motion court judges now have broader powers to evaluate evidence at summary judgment hearings. These broader powers can, in certain circumstances, put motion court judges in a position to determine when plaintiffs ought to have discovered their claims and to dismiss such claims where they are found to have been brought outside the applicable limitation period.

#### facts and “discoverability”

In *Liu*, the plaintiff underwent what was supposed to be minor out-patient surgery. Without the plaintiff’s consent, the procedure turned out to be much more intrusive and, among other things, involved an eighteen-day hospital stay. Two years and four months later, the plaintiff brought an action against the doctor of surgery for injuries allegedly sustained during the procedure. The defendant doctor brought a motion for summary judgment to have the action dismissed, arguing that the plaintiff’s action was outside the applicable two-year limitation period prescribed by the *Limitations Act, 2002*.<sup>3</sup>

Under the Act, claims like the plaintiff’s are required to be commenced within two years from the date they were or, with reasonable diligence, ought to have been discovered. There is a presumption that plaintiffs come to know all material facts necessary to commence their actions on the day the subject incident occurs, unless they can prove the contrary. If plaintiffs

<sup>1</sup> 2010 ONSC 2218, aff’d at 2010 ONCA 731 (“*Liu*”).

<sup>2</sup> R.R.O. 1990, Reg. 194.

<sup>3</sup> S.O. 2002, c. 24, Sch. B (the “Act”).

demonstrate that their claims were not discoverable until a later time, the commencement of the limitation period is postponed until that date.

In this case, the plaintiff argued that she did not have the requisite knowledge of material facts to assert a claim against the defendant doctor until she obtained an independent expert medical report explaining her injuries. As such, the plaintiff argued that her cause of action was not actually “discovered” until after the report was prepared and therefore within the two-year limitation period.

In assessing whether the plaintiff’s claim was outside the applicable two-year limitation period, the motion court judge was required to evaluate the facts surrounding when the plaintiff ought to have discovered her injuries.

### summary judgment and the limitation period defence

Motions for summary judgment brought by defendants require the motion court judge to determine if there is a genuine issue requiring a trial. Plaintiffs responding to such motions must adduce evidence of material facts in dispute that require a trial to resolve. If defendants can demonstrate that there are no issues of fact in dispute requiring a trial for resolution, the defendants will, all things being equal, succeed in obtaining summary judgment.

Significantly, the Ontario Court of Appeal had previously ruled in *Aguonie v. Galion Solid Waste Management Inc.*<sup>4</sup> that discoverability was not an appropriate issue to resolve on a motion for summary judgment. The Court of Appeal found that the determination of when a cause of action arose necessarily depended on findings of fact, properly determined at trial. *Aguonie* was decided prior to the enactment of the new *Rules*.

Based on the greater powers afforded to motion court judges to evaluate evidence on motions for summary judgment under the new *Rules*, the motion court judge in *Liu* dismissed the plaintiff’s action as outside the two-year limitation period. The motion court judge found that the plaintiff’s injuries were discoverable as of the date of her discharge from the hospital. The plaintiff had the requisite knowledge to commence an action at that time and failed to do so.

In departing from *Aguonie*, the motion court judge explicitly identified the new *Rules* that permit motion court judges to weigh evidence, evaluate credibility, and draw inferences from the evidence adduced. In light of this broader authority, the motion court judge reconsidered the previous approach to discoverability issues on motions for summary judgment. The Court of Appeal upheld the motion court judge’s decision.

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<sup>4</sup> (1998), 38 O.R. (3d) 161 (“*Aguonie*”).

## conclusion

Although a medical malpractice claim, there is little reason to doubt that *Liu* will apply to litigation generally where claims are alleged to have been brought outside the applicable limitation period. With motion court judges now empowered to engage in a wider examination of the underlying evidence, plaintiffs would do well to ensure that their claims are brought on a timely basis. Conversely, defendants now have a better chance of knocking out late claims early on motions for summary judgment.

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