

Discoverability to be Pleaded by Way of Reply

A Commentary on *Collins v Cortez*

On Oct. 7, 2014, in [Collins v. Cortez, 2014 ONCA 685](#) the Ontario Court of Appeal heard an appeal from a motion dismissing the plaintiff's claim based on expiry of the limitation period.

The defendant brought a motion in motions court to have the plaintiff's claim dismissed on the basis of the expiry of the limitation period. The plaintiff, in response, filed an affidavit stating she could not have reasonably discovered that her injuries met the threshold until some time after the accident.

The defendant argued that the plaintiff was precluded from taking that position as she had not pleaded discoverability in her statement of claim and as the limitation period had now expired she could no longer amend. The motions court judge agreed, citing the failure to plead discoverability was a fatal mistake and dismissed the action.

The court of appeal held that, although it was in fact necessary to plead a discoverability argument, a plaintiff need not anticipate a limitation period defence when drafting her statement of claim. If a plaintiff does not plead discoverability in the statement of claim, the plaintiff may plead it by way of a Reply.

The Court of Appeal allowed the appeal, set aside the dismissal of the action and granted the plaintiff 10 days to deliver a Reply.

I believe this is the first time the Court of Appeal has addressed this particular issue.

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