Degree of Detail Required in Pleading Negligence
A Commentary on *Khan v Lee*

On Dec. 11, 2014, in *Khan v. Lee*, 2014 ONCA 889, the Ontario Court of Appeal resolved conflicting lower court decisions as to the degree to detail required in pleading negligence in medical malpractice cases.

Previously, in *Basdeo (Litigation Guardian of) v. University Health Network*, [2002] O.T.C. 54 (S.C.), [2002] O.J. No. 263 (S.C.J.), leave to appeal to Div. Ct. refused, [2002] O.J. No. 3046, the motions court judge struck a boiler-plate statement of claim for lack of particularity, holding (at para. 17),

> "Surely the defendants are entitled to have some indication of how they failed to exercise reasonable skill and care, what diagnostic steps were not taken, what tests were not administered, what medications should have been prescribed but were not, and so on".

However, in another earlier motions court decision, *Chenier v. Hôpital Général de Hawkesbury*, [2006] O.J. No. 1679 (S.C.), the court refused to strike similar pleadings holding,

> "At this early stage in the litigation process, it would be placing an unduly onerous burden on the Plaintiffs to describe in detail what transpired or did not transpire at all of these points in time. The Defendants are in the position of knowing with great particularity what was done or not done by way of treatment and intervention. The Plaintiffs will only be able to further particularize their allegations once any records that have been disclosed to them by the Defendants are further supplemented with responses given on discovery. The Plaintiffs cannot be expected to have retained their own medical experts to assist in particularizing their allegations regarding a breach of a standard of care by the Defendant Physicians before those experts would have access to all available information as to what actually happened at the time of Sacha's birth."

The motions court judge in the *Khan* case, herein, chose to follow *Basdeo*, and struck the claim.

The Court of Appeal stated that *Basdeo* and *Chenier* were irreconcilable and chose to follow *Chenier,* and allowed the appeal.

The Court of Appeal stated:

> "[16] As acknowledged by the respondent in oral argument, the effect of the motion judge's order is to require a plaintiff in a case like this one to obtain an expert opinion before pleading, in the absence of full information about the case. While getting an early opinion might be useful and prudent, it should not be

> required as a condition of starting an action. Many plaintiffs will not have the expertise required to plead with precision the exact tests a defendant should have ordered.
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> [17] Furthermore, a limitation period will begin to run when a plaintiff has 'sufficient facts upon which she could allege negligence', and, in some cases, before the plaintiff has expert opinion evidence or knows the precise cause of the injury: *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 36.
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> [18] In *Lawless*, at para. 36, the court approvingly cited the following passage from *McSween v. Louis* (2000), 132 O.R. 304 (C.A.), at para. 51: "the production and discovery process and obtaining expert reports after acquiring knowledge through that process, are litigation procedures commonly used by a plaintiff to learn the details of how the injury was caused, or even about the existence of other possible causes and other potential defendants."
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> [19] Rule 1.04(1) provides that "[t]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." To strike a statement of claim in the circumstances of this case would significantly impede rather than facilitate access to justice, an important value emphasized in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87."

While this decision was in the context of a medical malpractice case, it would seem that the same reasoning would apply to cases of other professional negligence.