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NEGLIGENCE AND LIMITATION PERIODS: WHEN DOES THE CLOCK START?

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In [Wiebe v Johnson & Johnson Inc., 2026 ONCA 597](#), the Ontario Court of Appeal dismissed three appeals arising from the respondents' successful motions for summary judgment where the claims were dismissed as statute-barred under the *Limitations Act, 2002*.¹ The Court held that the claims were discoverable more than two years before the claims were issued. The respondents manufactured polypropylene mesh products that were implanted in each of the appellants during their respective hernia repair surgeries. Each of the appellants brought their claims more than three years after their final surgeries and removal of the mesh. The Superior Court had granted the respondents' motions for summary judgment in July 2025 (see [2025 ONSC 3958](#)).

Motions Below

The appellants' main argument at the motions below was that their claims were not discoverable until they consulted legal counsel and first learned the identity of the manufacturer, Johnson & Johnson, and that the mesh used in their respective surgeries was included in a list of devices that their legal counsel believed to be defective.²

The motion judge dismissed the motions and found that within months of their respective final revision surgeries and mesh removals, each appellant knew or ought to have known all material facts necessary to commence a claim. The Court found that the appellants knew that they may have suffered a post-surgical injury associated with the mesh and that the mesh required removal, and that upon review of available medical records, the mesh manufacturer could be identified.³ The motion judge held that the claims were thus discoverable more than two years before issuance of the claims and statute-barred.⁴

¹ *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. ("*Limitations Act*")

² [Para. 14](#)

³ [Para. 15](#)

⁴ [Para. 16](#)

The Appeal

The only issue on appeal was whether the motion judge erred in finding the limitation period expired before the claims had been issued.⁵ In its analysis, the Court provided a helpful overview of the law applicable to a determination of when claims are discoverable for the purposes of the *Limitations Act, 2002*.

Determining when the requirements of s. 5(1) of the Act are met and a cause of action arises is a fact-driven inquiry.⁶ Citing *Lawless v. Anderson*,⁷ the Court held: “The question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant. If the plaintiff does, then the claim has been ‘discovered’, and the limitation begins to run[.]”⁸

Due diligence forms part of a court’s analysis in respect of when a reasonable person first ought to have known they had a claim.⁹ The Court of Appeal found that the motion judge correctly held that through due diligence, each of the appellants could have discovered all the facts required to commence a claim during a short turnaround period after their respective mesh removals. Following the removal and revision surgeries, each appellant found that the problems they had been experiencing resolved. The Court held that each of them knew or ought to have known that they had suffered an “injury, loss or damages” that may have been caused or contributed to by the mesh, that the manufacturer of the mesh might be responsible for “its failure to perform as required”, and that a proceeding would be an appropriate means to seek a remedy.¹⁰ The Court noted that a plaintiff is not required to be certain that a defendant will be liable but “need only have in her possession sufficient facts upon which she could allege negligence.”¹¹

While the appellants may not have known the identity of the mesh manufacturer when they had their surgeries, the Court found that they could easily have discovered the manufacturer’s name by looking at their hospital records.¹² Even allowing a few months post-surgery for hospital records to be obtained, all three claims were commenced outside the applicable two-year limitation period. The Court found no error in the motion judge’s finding that the appellants knew or ought to have known all material facts underlying their claim more than two years before their statements of claim were issued.¹³

The Court expressly rejected the submission that being advised by a lawyer that a claim is appropriate is a “material fact” that a plaintiff must know before the limitation period

⁵ [Para. 17](#)

⁶ [Para. 21](#)

⁷ 2011 ONCA 102

⁸ [Para. 22](#)

⁹ [Para. 22](#)

¹⁰ [Para. 24](#)

¹¹ [Para. 25](#)

¹² [Para. 26](#)

¹³ [Para. 27](#)

begins to run. Simply being given that advice, without more, is not sufficient to trigger a limitation period running. As the Court held: “if this were so, virtually all limitation periods would not be triggered until legal advice was sought and obtained. This cannot be the law.”¹⁴

The Court also held that seeing the advertisements or being advised by counsel that they were of the opinion that the mesh was defective were not novel material facts that postponed the limitation period starting to run.¹⁵

The appellants also argued that the motion judge erred by failing to make specific findings of when precisely each element of the s. 5(1) *Limitations Act* test was met. In support, they relied on the Court of Appeal’s decision in *Morrison v. Barzo*, 2028 ONCA 979, where the Court found an error where the motion judge “did not make findings of fact as to when the appellants knew of the matters listed in s. 5(1)(a) of the *Limitations Act*.”¹⁶

The Court held that *Morrison* did not stand for the proposition upon which the appellants relied. The “essence” of the error in *Morrison* was not the lack of a precise date but instead, an absence of any evidence about how the potentially relevant information could reasonably have been obtained before it was in fact discovered.¹⁷ In contrast, in the case before it, the Court found that the motion judge had explained what each appellant knew or ought to have known within months of their surgeries and that the claims were issued well after the two-year limitation period expired.¹⁸

Key Takeaway

Where a plaintiff has or reasonably ought to have discovered sufficient facts on which to base a negligence claim, the limitation period begins to run. The limitation period will not be delayed until a lawyer advises that a claim is appropriate – having that legal advice is not a “material fact” that a plaintiff must know before the limitation period begins to run.

In assessing discoverability in respect of a limitation period defence, a precise date for discoverability of each of the elements of s. 5(1) of the Act may not be required where there is evidence of how the material facts could reasonably have been obtained before they were in fact discovered.

¹⁴ [Para. 35](#)

¹⁵ [Para. 36](#)

¹⁶ [Para. 41](#), citing *Morrison v. Barzo*, 2018 ONCA 979 (“*Morrison*”) at [para. 3](#)

¹⁷ [Para. 42](#), citing *Morrison* at [para. 62](#)

¹⁸ [Para. 43](#)