CITATION: Tookenay v. O'Mahony Estate, 2024 ONSC 709
COURT FILE NO.: CV-21-00000063-0000
DATE: 20240201

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **Vincent Tookenay and Rosemary Tookenay**, Plaintiffs

AND:

The Estate of Dr. Michael O'Mahony by his Estate Trustees, Janet O'Mahony and MD Private Trust Company, Nurse Jane Doe, Nurse Sue McCabe, Nurse Kristen Pelletier, Nurse Matthew Tobin, Erie St. Clair Local Health Integration Network, and Erie St Clair LHIN Home And Community Care Nursing Clinic, Defendants

BEFORE: Howard J.

COUNSEL: *C. Michael J. Kealy* and *Faith Reid*, Agents for the Lawyers for the Plaintiffs[1]

Sam Rogers and *Adam Dobkin*, for the Defendant The Estate of Dr. Michael O'Mahony

Martina Sagermann, for the Defendants Nurse Kristen Pelletier and Nurse Matthew Tobin[2]

No one else appearing.

HEARD: August 23, 2023.

ENDORSEMENT

Overview

[1] In this medical malpractice action, the plaintiff Dr. Vincent Tookenay alleges that his right leg had to be amputated below the knee as a result of the negligence of, *inter alia*, the late defendant Dr. Michael O'Mahony.

[2] The statement of claim in the action was issued in April 2021.

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[1] As made clear by the moving parties' materials and Mr. Kealey's submissions, Mr. Kealey's firm was not retained as lawyers of record for the plaintiffs in this action. Rather, they were retained by the insurer of the lawyers for the plaintiffs, the Lawyers' Professional Indemnity Company (LawPRO), to act as agents for the plaintiffs' lawyers on this motion.

[2] Ms. Sagermann's clients took no part in the motion; counsel advised that she was in attendance to observe only.

[3] Subrule 14.08(1) the *Rules of Civil Procedure*[3] provides that:

> Where an action is commenced by a statement of claim, the statement of claim *shall* be served within six months after it is issued. [Emphasis added.]

[4] However, the statement of claim here was not served until August 2022 (at the earliest) due to what is called a "miscommunication" within the office of the plaintiffs' lawyers.

[5] Accordingly, the plaintiffs bring this motion, which was heard by special appointment, for an order extending the time to serve the statement of claim to August 2022, which is ten months beyond the six-month deadline required by subrule 14.08(1), and for an order validating the irregular service effected in August 2022.

[6] Sadly, the defendant Dr. Michael O'Mahony passed away on May 2, 2023, more than three months before the motion was argued.

[7] The defendant Estate submits that the motion should not be granted because extending the time for service would, in the circumstances of this case, cause significant and uncompensable prejudice to the defendant Estate. The defendant Estate submits that the two most witnesses for its defence are no longer available, in that, after the time for service elapsed, Dr. Michael O'Mahony suffered a significant mental decline as a result of his advancing Parkinson's Disease, which resulted in complete loss of capacity, and Ms. Melissa Georgiou, a nurse practitioner within Dr. O'Mahony's clinic, died of cancer.

[8] The plaintiffs question whether the defendant Estate has actually been prejudiced and, in any event, submit that the defendant Estate should bear the responsibility for not having taken appropriate steps to preserve the evidence of at least Dr. O'Mahony. The plaintiffs submit that any prejudice to the defendant Estate was self-created and should not be allowed to deprive the plaintiffs of their opportunity to advance their case.

Factual Background

[9] With few exceptions, there is no real dispute between the parties as to the underlying factual background giving rise to the instant motion, as summarized in paras. 7-27 of the plaintiffs' factum and paras. 5-20 of the defendant Estate's factum.

[10] Dr. O'Mahony was a family doctor, practising in a clinic in Sarnia with a nurse practitioner, Ms. Georgiou, for some years. The plaintiff Dr. Tookenay was a patient of Dr. O'Mahony's for many years.

[11] On January 4, 2019, Dr. Tookenay sustained a puncture-type wound to the medial side of his right big toe. At the time, he had diabetes and peripheral vascular disease. On the evidence before the court, it appears that the first time Dr. Tookenay came to Dr. O'Mahony's clinic for the care at issue in the action was February 27, 2019 (although it

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[3] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

appears he was not seen on that occasion by Dr. O'Mahony but, rather, by nurse practitioner Ms. Georgiou).

[12] It appears that between February 27, 2019, and April 25, 2019, Dr. Tookenay attended at the clinic on four (perhaps five) occasions. It appears he was not seen by Dr. O'Mahony on all attendances. It appears that on the last attendance, on April 25, 2019, Dr. O'Mahony performed an examination, prescribed antibiotics, and arranged for urgent surgical referrals for Dr. Tookenay to a cardiovascular surgeon and a vascular surgeon.

[13] On May 3, 2019, further to the referral by Dr. O'Mahony, Dr. Tookenay saw a vascular surgeon at London Health Sciences Centre for infected necrotic gangrene of his right first and second toes and, on the following day, May 4, 2019, he underwent a transmetatarsal amputation (TMA) of his right first and second toes.

[14] On June 10, 2019, Dr. Tookenay underwent an operation to amputate his right leg below the knee.

[15] On January 23, 2020, the plaintiffs retained Mr. Daniel Michaelson of the Neinstein LLP law firm to investigate a potential medical malpractice claim. Thereafter, the plaintiffs' law firm conducted certain investigations and collected medical records from various practitioners (including Dr. O'Mahony) and health-care providers.

[16] On April 28, 2021, the plaintiffs' lawyers caused a statement of claim to be issued in respect of Dr. Tookenay's injuries. (The lawyers had the statement of claim issued in the name of the plaintiffs because, apparently, they had not decided whether they would act as counsel of record for the plaintiffs, as they had not yet obtained an opinion from a vascular surgeon.)

[17] On October 28, 2021, the six-month deadline contemplated by subrule 14.08(1) to serve the statement of claim expired. The six-month period expired without the defendant having been served and without the plaintiffs' lawyers having moved to extend the time for service.

[18] The circumstances surrounding the "miscommunication" within the office of the plaintiffs' lawyers that led to the statement of claim not being served in time were described by Mr. Michaelson in his affidavit sworn March 9, 2023, as follows:

> On or about April 28, 2021, I met with my law clerk … and instructed her to have the statement of claim served within six months of April 28th. …
>
> On or about April 28, 2021, I had the six month deadline to have the statement of claim served on the defendants diarized, with reminders, in our Filevine case management system. The deadline and reminders were set to arise in my calendar, [my legal assistant's] calendar, and [my law clerk's] calendar, although it was the responsibility of [my law clerk] to ensure that the statement of claim was served within six months of issuance pursuant to my express instructions.

On September 13, 2021, a Filevine reminder was generated which stated that the deadline to serve the statement of claim was coming up in 30 days. …

On October 3, 2021, I received a Filevine reminder was generated which stated that the deadline to serve the statement of claim was coming up in 10 days. …

As of October 2021, I was preparing for an upcoming medical malpractice trial, which ultimately proceeded between November 8 and December 2, 2021. As such, in early October 2021, I conducted a full review on my files, including this file, with the staff working on my files. At this meeting, I verbally instructed [my law clerk] to serve the statement of claim by the six month deadline.

In mid-October 2021, [my law clerk] advised me that she was going to leave our law firm, although she continued working for us until mid-December 2021.

On January 31, 2022, I was copied on an email of same date from my assistant … to staff working on my files. [My legal assistant] had reviewed [my law clerk's] outstanding Tasks in her Outlook program and prepared a file status summary. With respect to this file, the following tasks, from [my law clerk's] Outlook, were identified:

> Tookenay – serve SOC (and appoint lawyer) by October 28 – ask DM; pending expert opinion
>
> – Follow up with Dr. Lindsay report

At the time, I did not read the Tasks entries as referenced above to mean that the statement of claim had not been served, or that [my law clerk] thought that the statement of claim was not to be served pending receipt of Dr. Lindsay's opinion, as this would have deviated from our standard practice with respect to serving statements of claim. I took the Tasks entries to mean that the statement of claim had been served by October 28, 2021 as per the first entry, and that [my law clerk] was following up for Dr. Lindsay's report as per the second entry. This is consistent with my recollection of the first half of 2022, which is that we were waiting for Dr. Lindsay to complete his review of the materials so that he could provide a preliminary opinion.

On July 25, 2022, the law clerk who replaced [my aforesaid law clerk] on my team, …, informed me that she was reviewing the file and noticed a reminder to schedule the examinations for discoveries, but that the statement of claim had not been served. This is the first indication that I had received that the statement of claim had not been served by the six month deadline of October 28, 2021, or at all.

> It is around this time that I realized that [my aforesaid law clerk] must have misunderstood my instruction about serving the statement of claim, or did not do it despite my instruction.[4]

[19] As such, as of July 25, 2022, the lawyers for the plaintiffs realized that the statement of claim had not been served.

[20] Meanwhile, more than four months earlier, in early March 2022, nurse practitioner Ms. Georgiou was required to stop working at Dr. O'Mahony's clinic because her breast cancer, which had previously been in remission, had returned. Sadly, Ms. Georgiou passed away shortly thereafter, on April 6, 2022.

[21] Despite the fact that the lawyers for the plaintiffs had realized as of July 25, 2022, that the statement of claim had not been served on Dr. O'Mahony, it appears no steps were taken to have the statement of claim served on Dr. O'Mahony until one month later. That is, on August 25, 2022, a process server left a copy of the statement of claim in a sealed envelope for Dr. O'Mahony at his clinic in Sarnia.

[22] To be clear, Dr. O'Mahony was not served personally on August 25, 2022.[5]

[23] That said, in due course, the statement of claim came to the attention of Dr. O'Mahony's son, Dr. John O'Mahony (and one of his father's substitute decision-makers), who then arranged for legal counsel to be retained. By letter dated September 12, 2022, defence counsel wrote to Dr. Tookenay to advise that they had been retained to assist Dr. O'Mahony, and they urged Dr. Tookenay to retain legal counsel, advising that a motion to extend time for service may well be necessary.

[24] The evidence indicates that the statement of claim was personally served on Dr. O'Mahony on January 16, 2023.

[25] As I have said, on May 2, 2023, Dr. O'Mahony passed away. It is common ground that, prior to his passing, the evidence of Dr. O'Mahony in respect of these issues was not obtained or preserved. That said, the reasons therefor are very much in dispute.

Law

[26] Again, there is no real dispute between the parties as to the governing legal principles that apply to the issues in the instant motion, as summarized in paras. 33-35 of the plaintiffs' factum and paras. 29-33 of the defendant Estate's factum.

[27] The key issue here is the question of prejudice.

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[4] *Motion Record dated April 5, 2023*, Tab 2, Affidavit of Daniel Michaelson sworn March 9, 2023, at paras. 38-47.

[5] Subrule 16.01(1) of the *Rules of Civil Procedure* requires that an originating process be served by personal service or alternative to personal service. Neither was properly effected in this case on August 25, 2022.

[28] Both counsel acknowledge that the leading decision on extending the time for service of a statement of claim is the Ontario Court of Appeal's decision in *Chiarelli v. Wiens*.[6] While the court undoubtedly has the authority and discretion, under subrule 3.02(1) of the *Rules of Civil Procedure*, to extend the time for service of the statement of claim, as the Court of Appeal said in *Chiarelli*, "the court should not extend the time for service if to do so would prejudice the defendant."[7]

[29] In deciding whether to grant an extension under subrule 14.08(2), "a court must consider whether the extension would advance the just resolution of the dispute without prejudice or unfairness to either party."[8] The court "should be concerned mainly with the rights of litigants, not with the conduct of counsel."[9]

[30] Moreover, consistent with the direction of the Court of Appeal, it is the plaintiffs here who bear "the onus to show that the defendant would not be prejudiced by an extension."[10] If the plaintiff fails to establish that there will no prejudice on the part of the defendant, then the motion to extend should be dismissed.[11]

[31] As the factum of the plaintiffs notes, the principles emanating from *Chiarelli* were summarized by Perell J. in *Rowland v. Wright*, as follows:

> In *Chiarelli*[,] … the Court of Appeal articulated the following principles for determining whether to grant an extension of time for the delivery of the statement of claim: (1) although the onus is on the plaintiff to show that the defendant will not be prejudiced by an extension of time, the plaintiff cannot be expected to speculate and the defendant has at least an evidentiary obligation to provide some details of prejudice; (2) the defendant cannot create prejudice by his or her failure to do something that could reasonably have been done; (3) the prejudice that will defeat an extension of time for service must be caused by the delay; (4) an extension of the time for service should not be denied simply because the delay is longer than the applicable limitation period; and (5) each case should be decided on its facts, focusing on whether the defendant is prejudiced by the delay.[12]

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6 *Chiarelli v. Wiens* (2000), 46 O.R. (3d) 780, 43 C.P.C. (4th) 19 (C.A.) [*Chiarelli*].

7 *Ibid.*, at para. 10.

8 *Ibid.*, at para. 12. *McGroarty v. Ontex Resources Ltd.*, 2012 ONCA 241, [2012] O.J. No. 1692, 290 O.A.C. 181, at para. 8.

9 *Chiarelli*, at paras. 9 and 12.

10 *Ibid*. See also *Boodoo v. Merrick*, 2020 ONCA 52, at paras. 7-8; *Labelle v. Canada (Border Services Agency)*, 2016 ONCA 187, 346 O.A.C. 155, at para. 16; *Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, 87 O.R. (3d) 660, 286 D.L.R. (4th) 487, 47 C.P.C. (6th) 233, at para. 28; *Noori v. Grewal*, 2011 ONSC 5213, [2011] O.J. No. 4190 (S.C.J.), at para. 24; and *Howell v. Jatheeskumar*, 2016 ONSC 1381, 130 O.R. (3d) 388 (S.C.J.), at para. 42.

11 *Pagliuso v. Primerica Financial Services Ltd.*, 2019 ONSC 460 (S.C.J.), at para. 25, affirmed, 2019 ONCA 778. And see *Gupta v. Chacko*, 2020 ONSC 1457 (S.C.J.), at para. 40.

12 *Rowland v. Wright Medical Technology Canada Ltd.*, 2015 ONSC 3280, [2015] O.J. No. 2643, at para. 19, citing *Chiarelli*, at paras. 14-16; and *Nash Estate v. Schell Estate*, 2013 ONSC 4813 (Div. Ct.).

[32] The factors to be considered in determining whether an extension of time to serve a statement of claim should be granted have been expressed in similar ways in different cases, including:

a. the length of the delay,

b. the evidence filed that explains the delay,

c. whether the evidence regarding the explained delay is sufficient,

d. whether or not the plaintiff moved promptly for an extension of time after the period expired,

e. whether or not the delay in serving the claim resulted from the direction, participation, or involvement of the plaintiff personally in the service of the claim,

f. the extent to which the defendant, themselves, bears some or all of the responsibility for this delay,

g. whether or not it was reasonable for a defendant to infer from all the circumstances that the plaintiff had abandoned his claim,

h. whether the applicable limitation period for the action has already expired,

i. whether the defendant had notice before the expiry of the limitation period that the plaintiff was asserting a claim against the defendant, and

j. whether the defendant would suffer prejudice if the motion is granted.[13]

Analysis

[33] I have considered the overall equities of the case. I agree with counsel for the parties that both parties, in their own ways, present as sympathetic litigants.

[34] The statement of claim ought to have been served no later than, and the six-month period under subrule 14.08(1) expired on, October 28, 2021.

[35] The evidence indicates that Dr. O'Mahony was not properly served by personal service until January 16, 2023.

[13] *Pagliuso v. Primerica Financial Services Ltd.*, 2019 ONSC 460 (S.C.J.), at paras. 15-16, affirmed 2019 ONCA 778, citing *Beckwith v. Salmon*, 2014 ONSC 3528 (S.C.J., Master), at para. 6, and *Tarsitano v. Drutz*, 2013 ONSC 5605 (S.C.J.), at para. 22.

[36] As such, the delay in service here was more than one year and two months after the statement of claim ought to have been served in compliance with the *Rules of Civil Procedure*.

[37] Even if one considers that some attempt at service was made as of August 25, 2022, assuming the court validates such service, that so-called service was still effected some ten months after the deadline.

[38] I note the explanation offered by the lawyer for the plaintiffs for the original delay in the autumn of 2021. The evidence indicates that the plaintiffs' lawyer received reminders, through his firm's internal computer-based tickler system, on September 13, 2021, and again on October 3, 2021, about the need to serve the statement of claim. There is no real evidence before the court as to the lawyer's response to those reminders. There is no evidence as to any follow-up action that was or was not taken by the lawyer as a result of those reminders. That is to say, there is no evidence that the lawyer for the plaintiffs took any action at all as a result of the computer-generated reminders of September 13, 2021, and October 3, 2021.

[39] Moreover, to be clear, there is no evidence of any "miscommunication" about the reminders received on September 13, 2021, and October 3, 2021.

[40] The evidence of "miscommunication" does not come until January 31, 2022, when the lawyer receives and reviews an email from his legal assistant, and he then comes to a particular interpretation about what was meant by the Tasks entries of his former law clerk in her Outlook program. His interpretation of those Task entries was in error. He thought they indicated that the statement of claim had in fact been served. As we all now know, it had not.

[41] That being said, whatever its relative merits, I need not address or determine here the lawyer's proffered explanation of the "miscommunication" or, I would say, more correctly, his "misinterpretation." I suspect that issue may well be the subject inquiry of a separate proceeding.

[42] Rather, I would focus on the second delay that occurred here.

[43] Because, to my mind, that second delay is far more telling for present purposes.

[44] The evidence is uncontroverted that, as referenced above, as of July 25, 2022, the lawyers for the plaintiffs realized that the statement of claim had not been served.

[45] And upon the plaintiffs' lawyers learning on July 25, 2022, that the statement of claim had not in fact been served in October 2021, as they had mistakenly thought in January 2022, what was their reaction? What actions were taken?

[46] So just to pause, the lawyers for the plaintiffs had received reminders on September 13, 2021, and October 3, 2021, indicating that the statement of claim had not been served. On their own evidence concerning the "miscommunication" that is said to have occurred on

January 31, 2022, they would have known that the statement of claim was supposed to have been served on October 28, 2021. And so, while they may have believed, as of January 31, 2022, that the statement of claim had been served as of October 28, 2021, they would have known, for sure, as of July 25, 2022, that the statement of claim had not in fact been served by October 28, 2021. They would have known that, as they say, their previous express instructions had not been followed or had been ignored.

[47] As such, one would think that – and I maintain this is a reasonable inference – the lawyers for the plaintiffs, upon learning on July 25, 2022, that the statement of claim had not in fact been served, contrary to their previous instructions, would have reacted to the realization that the statement of claim had not been served with a measure of surprise, perhaps consternation, and, no doubt, some degree of professional alarm. Again, I think that is a reasonable inference, given their professed belief that the statement of claim had been served some ten months ago.

[48] And so, upon learning on July 25, 2022, that the statement of claim had not, in fact, been served back in October 2021, contrary to their express instructions, how did the lawyers for the plaintiffs react?

[49] Well, apparently, they let the statement of claim sit there for about another month.

[50] That is, there is an affidavit of service from Mary Theresa Bird sworn September 8, 2022, stating that, on August 25, 2022, at 2:15 p.m., she left a copy of the statement of claim in a sealed envelope addressed to Dr. O'Mahony at his place of business, i.e., the clinic, at 481 London Road, Sarnia, Ontario.

[51] But there is no evidence that explains what happened after the lawyers' realization on July 25, 2022, that the statement of claim had not in fact been properly served and the attempt at alternative service on August 25, 2022. There is no explanation for that further one-month delay.

[52] Again, just casting oneself back into the shoes of the plaintiffs' lawyers as of July 25, 2022, at which point, in my view, it is reasonable to infer that the lawyers would have reacted with a measure of surprise, perhaps consternation, and, no doubt, some degree of professional alarm to the realization that the statement of claim had not been served ten months earlier, one would have thought that, realizing they were significantly off side, they would have issued instructions that the statement of claim be served immediately. Immediately. Not next month. Not in a couple of weeks. Immediately. And if not today or tomorrow, then within a matter of days.

[53] But, on the uncontested evidence before me, that did not happen.

[54] On the uncontested evidence before me, there was no attempt at any service until one month after the lawyers for the plaintiffs knew, on July 25, 2022, that the statement of claim had not in fact been served, as required, in October 2021.

[55] On the evidence before me, there is absolutely no explanation at all for that further one-month delay.

[56] In my view, the absence of any explanation (at all) for why there was no attempt of service of the statement of claim until August 25, 2022, when the lawyers for the plaintiffs realized as of July 25, 2022, that the statement of claim had not in fact been served, is fatal in the circumstances of the instant case.

[57] I would dismiss the plaintiff's motion on that basis alone.

[58] However, I have, of course, considered the fundamental question of prejudice.

[59] I agree with the argument of the defendant Estate that a presumption of prejudice arises here by operation of the relevant deadlines under the *Rules of Civil Procedure* because the statement of claim was served late and well past the outermost plausible limitation date. Even where an originating process is issued within the limitation period, if it is served both late and outside the limitation date, then a presumption of prejudice attaches.[14]

[60] The plaintiffs do not argue otherwise in their factum. Indeed, in their reply factum, the plaintiffs submit that:

> The plaintiffs will agree, for the purposes of the presumed prejudice argument and analysis on this motion only, that the limitation period with respect to the claim against Dr. O'Mahony expired on the earliest possible date, in late August 2021, which is 2½ years after the first treatment date with Dr. O'Mahony in late February 2019. This position is provided without prejudice to the plaintiffs addressing any limitation period issues, and the discoverability of potential defendants, as the action continues.

[61] That said, I would not have this matter determined on the basis of a presumption of prejudice. Because, in my view, the defendant Estate has suffered actual prejudice caused by the failure of the plaintiffs to serve their statement of claim in a timely manner.

[62] To be clear, while I appreciate that *Chiarelli* directed that "prejudice that will defeat an extension of time for service must be caused by the delay,"[15] in my view, the defendant Estate has suffered actual prejudice, beyond the presumed prejudice arising out of the apparent expiration of the limitation period, that was caused by the plaintiffs' delay in serving the statement of claim.

[63] In this case, the actual prejudice suffered by the defendant Estate as a direct result of the failure of the plaintiffs to serve their statement of claim in a timely manner arises in respect of two, now unavailable witnesses.

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[14] See, for example, *Frohlick v. Pinkerton Canada Ltd.*, 2008 ONCA 3,88 O.R. (3d) 401, 289 D.L.R. (4th) 639, at paras. 17-18; and *Malatesta v. 2088675 Ontario Inc.*, 2014 ONSC 1793 (S.C.J.), at para. 17.

[15] *Chiarelli*, at para 16.

[64] First, because the plaintiffs failed to effect timely service of the statement of claim in October 2021, the defendant Estate has been actually prejudiced because as of October 2021, nurse practitioner Melissa Georgiou was available to give evidence in respect of the allegations against her and the defendant Dr. O'Mahony. However, sadly, Ms. Georgiou passed away on April 6, 2022. In the absence of the statement of claim having been served in a timely manner by October 2021, or any notice having been provided by the lawyers for the plaintiffs prior to the spring of 2022, the evidence of nurse practitioner Georgiou was lost as of her passing in April 2022.

[65] The plaintiffs argue that the evidence of nurse practitioner Ms. Georgiou is not particularly relevant and, in any event, is available because her clinical notes are available. Respectfully, I disagree. On the contrary, I wholly agree with the defendant Estate's submissions on point, which I adopt as my own reasons, as follows:

> … Nurse Practitioner Georgiou's evidence on these points is gone. The Plaintiffs will be able to describe their version of events, and their interpretation of those events and the paper record. The defence witnesses will not, but that crucial defence evidence could have been preserved, if service happened on time.
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> Contrary to the moving factum, Nurse Practitioner Georgiou was a key witness and the loss of her evidence is significant. Though the moving factum describes her care as "clearly and legibly recorded", but Plaintiff Counsel failed to even identify her by name in the Statement of Claim, impleading her as "Nurse Jane Doe", evidently because Plaintiff Counsel could not decipher her handwritten chart. And contrary to the moving factum's assertion that Nurse Practitioner Georgiou's March 27, 2019 care was irrelevant to the foot wound, that visit occurred in the middle of the key sequence of events. The note records that the visit was occurring in the context of peripheral vascular disease and diabetes, and seems to say, "has angiogram next week", "still seeing CCAC for foot wound", "↑ difficulty walking over the last yr & more significantly the last week using 2 canes". Because Nurse Practitioner Georgiou's evidence is gone, the significance of this note to the medical care at issue is not at all clear.
>
> In any event, not everything that occurs in a patient interaction is charted, and jurisprudence has developed to reflect this. The evidence of a doctor's usual or invariable practice is admissible and must be given "significant weight" because medical charting is not, nor should it be, an exhaustive and unabbreviated log of every detail that transpired at a patient interaction. The same legal principles apply to nurses. The evidence of both witnesses' invariable practice is gone solely due to the delay in service.

[66] Secondly, for somewhat similar reasons, the failure of the plaintiffs to have served their statement of claim in a timely manner has resulted in the evidence of Dr. O'Mahony being unavailable to the defendant Estate.

[67] The evidence indicates that Dr. O'Mahony retired from the practice of medicine on January 1, 2022, and, sadly, he passed away on May 2, 2023.

[68] The plaintiffs argue that the evidence of Dr. O'Mahony was available, but the defendant Estate failed to take reasonable steps to preserve that evidence. The plaintiffs submit that, to the extent the defendant Estate may sustain any prejudice by reason of the extension of time to serve the statement of claim, the Estate should bear the responsibility for failing to preserve the doctor's evidence. They maintain that the plaintiffs should not lose their opportunity to advance their claim in these circumstances. The tension should be resolved in favour of the plaintiffs.

[69] Again, respectfully, I disagree. The submissions of the plaintiffs are not supported – indeed, are contradicted – by the evidence before the court.

[70] The uncontroverted evidence is that the late Dr. O'Mahony had longstanding Parkinson's Disease, having been first diagnosed in 2011. Dr. O'Mahony's son, Dr. John O'Mahony, also a practising family physician (and, for a time in this proceeding, his father's litigation guardian) delivered an affidavit in response to the plaintiffs' motion, sworn April 11, 2023, which described his father's deteriorating condition.[16] That evidence of Dr. John O'Mahony is unchallenged.

[71] The evidence of the son, Dr. John O'Mahony, was that:

a. Parkinson's Disease has no cure, gets worse over time, and often, as in the case of the late Dr. O'Mahony, eventually causes irreversible cognitive impairment.[17]

b. Despite having had Parkinson's for many years, the late Dr. O'Mahony's symptoms were basically limited to motor issues until late 2022, when they drastically worsened.[18]

c. Until late 2022, Dr. O'Mahony had capacity to testify and instruct counsel. He was still practising medicine until December 31, 2021, and though his motor issues gradually worsened, his cognition was intact.[19]

d. For example, on October 13, 2021, Dr. O'Mahony, his wife, and his son (Dr. John O'Mahony) attended a neurology consult for Parkinson's Disease. At that point, Dr. O'Mahony's cognition was still intact.[20]

e. By April 19, 2022, Dr. O'Mahony's issues were worsening to the point where his son was exploring percutaneous endoscopic gastrostomy ("PEG") to help his father receive medication continuously by stomach tube.[21]

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[16] *Responding Motion Record of the Defendant/Respondent Party, Dr. Michael O'Mahony by his Litigation Guardian John O'Mahony dated April 13, 2023*, Tab 1, Affidavit of John O'Mahony sworn April 11, 2023.
[17] *Ibid.*, at para. 24.
[18] *Ibid.*, at para. 25.
[19] *Ibid.*, at para. 28.
[20] *Ibid.*, at para. 30.
[21] *Ibid.*, at para. 35.

f. In the first week of August 2022, Dr. O'Mahony was admitted to hospital and had the PEG tube surgery laparoscopically in stages over August 1 to 3, 2022. By the date of insertion, his son needed to provide consent for his father, as one of his substitute decision-makers.[22]

g. Dr. O'Mahony was discharged from hospital on August 4, 2022. As noted in the discharge note, he had an episode of acute confusion, secondary to being alone in hospital.[23]

h. By the time of his discharge from hospital, Dr. O'Mahony had baseline cognitive impairment, although his acute episodes of confusion and delirium were not the norm and were associated with hospital stays. With Dr. O'Mahony's Parkinson's advancing, Home and Community Care Support Services were contacted.[24]

i. By August 23, 2022, Dr. O'Mahony's cognition was deteriorating. At a follow-up neurology consult accompanied by his wife, she noted that her husband was now suffering from poor memory and increased confusion, particularly with medication. He was also becoming easily agitated, with a degree of anxiety. Although the PEG surgery was a success and his continuous medication was effective, in the context of advancing disease, he still had worsening motor issues. The neurologist recommended a mental assessment at the next appointment, as he was unable to conduct one in the midst of that visit's tests and treatments.[25]

j. Dr. O'Mahony's decline accelerated. By September 21, 2022, he was almost nonverbal. Unfortunately, the PEG tube's continuous medication did not succeed in sustaining periods of more normal awareness and communication. He was not eating or drinking well, and he was sleeping and falling more. He required toileting assistance. A palliative care consult was arranged.[26]

k. Dr. O'Mahony received a palliative consultation a week later, on September 27, 2022. By that time, he had declined further. The consulting specialist noted that despite having Parkinson's Disease for some ten years, he managed quite well until recently, even working until a year prior. However, starting about six weeks prior, he entered precipitous decline. Until six weeks ago, he had been more engaged, watching his favourite soccer team on TV, listening to music, dancing with his wife, etc. But since then, he began freezing more and had become apathetic. Although more alert and coherent in the mornings, he became drowsy and nonverbal over time. The specialist spoke to Dr. O'Mahony and his wife about resuscitation code status. The specialist could not determine if Dr. O'Mahony could understand his questions. He found Dr. O'Mahony "almost non communicative" at that time. He

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[22] *Ibid.*, at para. 37.
[23] *Ibid.*, at para. 38.
[24] *Ibid.*, at para. 39.
[25] *Ibid.*, at para. 40.
[26] *Ibid.*, at para. 41.

was vague, and it was difficult to know whether he was able to follow the conversation. When asked a question, he might answer very slowly with muffled few words that were barely intelligible. The specialist discussed end-of-life planning with Dr. O'Mahony's spouse, noting that Dr. O'Mahony's cognitive ability was already "rather tenuous" and would likely decline in the near future.[27]

l. Dr. O'Mahony had become entirely nonverbal and bedridden before the end of September 2022 and remained so until his death on May 2, 2023.[28]

[72] As referenced above, a copy of the statement of claim was left in a sealed envelope at the late Dr. O'Mahony's clinic on August 25, 2022. Not surprisingly, we do not have direct evidence as to the state of Dr. O'Mahony's cognition on the precise date of August 25, 2022. That said, we do have evidence as to his status two days previous, when it was reported that as of August 23, 2022, Dr. O'Mahony's cognition was deteriorating, and he had poor memory, increased confusion, agitation, and anxiety. His condition was such that his neurologist recommended a mental assessment.

[73] Of course, it is not suggested by the plaintiffs that Dr. O'Mahony's evidence should have been secured on August 25, 2022, i.e., the date that some attempt at service was made. That would be wholly unrealistic. But that begs the question: by what date do the plaintiffs say that the lawyers for the defendant Estate ought to have secured the evidence of the late Dr. O'Mahony?

[74] The evidence of the son, Dr. John O'Mahony, is that the statement of claim came to his attention in late August 2022, "shortly after a copy was left at the address of my father's former medical clinic."[29]

[75] We also know that, by letter dated September 12, 2022, counsel for the late Dr. O'Mahony wrote directly to Dr. Tookenay (because his lawyers had not officially gone on record at that point) to indicate that they had been retained to assist Dr. O'Mahony.

[76] And so, from that chronology, what we know is that an envelope containing the statement of claim was left at Dr. O'Mahony's clinic on August 25, 2022; that the claim came to the attention of his son, Dr. John O'Mahony shortly after August 25, 2022; and that 18 days later, the lawyers for Dr. O'Mahony were writing to the plaintiff Dr. Tookenay, on September 12, 2022.

[77] To my mind, that is very prompt action on behalf of the lawyers for the defendant Estate. It is manifestly clear that there was no delay on their part. On the contrary, in my view, and I find, they moved swiftly and with a sense of urgency.

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[27] *Ibid.*, at para. 42.
[28] *Ibid.*, at paras. 24-44.
[29] *Ibid.*, at para. 5.

[78] We also know that – a mere nine days after the defendant lawyers wrote their retainer letter of September 12, 2022 – their client was reported to be "mostly nonverbal" (as of September 21, 2022), and just two weeks later, as of September 27, 2022, very sadly, there was a palliative care consult in place.

[79] There is no doubt that, as the affidavit of Dr. John O'Mahony attests, there was a very quick and precipitous cognitive decline in his father in August 2022.

[80] In my view, against the background of the medical evidence I have reviewed above, it is wholly unrealistic to think that the lawyers for the defendant Estate could have acted any sooner to secure the evidence of Dr. O'Mahony. In less than 30 days after there was some attempt of service by the plaintiffs of their statement of claim, Dr. O'Mahony was already nonverbal. And 33 days later, there was a palliative care consult.

[81] The lawyers for the defendant Estate very candidly advised that, in fact, they took no steps to preserve the evidence of the late Dr. O'Mahony because by the time they were retained, it was not possible to secure his evidence given his mental decline and incapacity. I accept that evidence. As I have said, the lawyers for the defendant Estate acted swiftly. A little over two weeks after the plaintiffs' irregular service of their statement of claim, the lawyers for Dr. O'Mahony were retained and are writing to the plaintiff, and just nine days after that, their client is mostly nonverbal. In my view, the lawyers for the defendant Estate acted promptly and reasonably.

[82] Put differently, in these circumstances, the plaintiffs have failed to demonstrate that the lawyers for the defendant Estate acted unreasonably. Again, in law, the onus to show that the defendant would not be prejudiced by an extension of time to serve the statement of claim rests with the plaintiffs.

[83] As such, I find there is no merit in the plaintiffs' argument that the lawyers for the defendant Estate are to be faulted for not securing the evidence of the late Dr. O'Mahony and that the Estate should bear the responsibility for failing to preserve the doctor's evidence.

[84] Moreover, stepping back, in my view, it does not lie in the mouth of the lawyers for the plaintiffs to come to court and complain that the lawyers for the defendant Estate did not jump into action within a matter of days to secure Dr. O'Mahony's evidence after the statement of claim came to the defendant's attention, when they themselves waited an entire month before they took steps to make some attempt at service of their statement of claim (on August 25, 2022), after they realized – on July 25, 2022 – that their statement of claim had not in fact been served back in October 2021.

[85] In sum, in my view, as a result of the plaintiffs' late service of their statement of claim, which has not been adequately explained, the defendant Estate has incurred actual

prejudice that is both significant and uncompensable. In these circumstance, the plaintiffs' motion must be dismissed.[30]

Costs

[86] To the credit of counsel for the parties, they were able to come to an agreement on the appropriate costs disposition on this special appointment motion. Counsel are agreed that there should be no order as to costs.

Conclusion

[87] For all of these reasons, the motion of the plaintiffs is dismissed.

[88] There shall be no order as to costs on the motion.

Original signed by "Justice J. Paul R. Howard"
J. Paul R. Howard
Justice

Date: February 01, 2024

[30] In oral argument before me, and as reflected in the Reply Factum of the Plaintiffs dated August 18, 2023, at paras. 6-15, the plaintiffs took considerable exception to the defendant Estate's reliance on two emails sent by the lawyer for the plaintiffs dated September 29, 2022, and November 17, 2022. In short, the plaintiffs assert that the two emails are protected by settlement privilege and should not have been referenced in the factum of the defendant Estate. Without deciding whether the two emails are subject to settlement privilege and/or are properly before the court, I confirm that I have determined the issues on this motion without any regard, whatsoever, for the contents of the impugned email correspondence.