Branche v. MacArthur et al.

56 O.R. (2d) 71

Also reported at 30 D.L.R. (4th) 301

[1986] O.J. No. 789

ONTARIO
HIGH COURT OF JUSTICE
DIVISIONAL COURT

WHITE J.

11TH JULY 1986*

*Released August 21, 1986.

Limitations -- Professions -- Physician -- Plaintiff commencing action naming two doctors -- Motion to add third doctor involved in surgery made more than one year after date of surgery -- Plaintiff's solicitor first aware of proposed defendant's involvement on examination for discovery of other doctors -- Hospital records indicating other doctor's involvement -- Evidence insufficient to constitute notice to plaintiff of proposed defendant's involvement -- Amendment allowed -- Health Disciplines Act, R.S.O. 1980, c. 196.

Limitations -- Hospitals -- Cessation of treatment -- Plaintiff continuing to receive treatment following discharge -- Treatment related to effects of surgery rather than original condition -- Issue of expiry of limitation period properly left to trial judge -- Public Hospitals Act, R.S.O. 1980, c. 410, s. 28.

The plaintiffs sued two doctors, alleging negligence with regard to a facial operation. Prior to the operation, the plaintiff was led to believe that the two doctors named as defendants would be the ones to perform the operation. In fact a third doctor, who the plaintiff now proposed to add as a defendant, was also involved in the surgery. The plaintiff continued to receive treatment from the hospital following her discharge, but the treatment was related to the effects of the surgery rather than to the original condition. The plaintiff consulted a lawyer following the incident and a writ was issued naming the two doctors as defendants. While it could be inferred from the hospital charts that

the third doctor had also been involved, it was only at the examination for discovery that the plaintiff and her lawyer became aware of his involvement. The plaintiff moved for an order adding the hospital in which the operation was performed and the third doctor as defendants. The master granted the motion to add the hospital but dismissed the motion to add the third doctor. Both the plaintiff and the hospital appealed.

Held, the plaintiff 's appeal should be allowed, and the hospital's appeal should be dismissed. In deciding that the plaintiff's counsel should have concluded from the review of the medical charts that the third doctor was involved in the incident, the master had usurped the function of the trial judge. There was no evidence before the master regarding the standard of care required of a solicitor in such circumstances, and the charts did not indicate unequivocally that the third doctor was involved in the operation. The plaintiff had been told by the two original defendants that they would be the doctors who would be performing the surgery. It was not, therefore, clear that the plaintiff "ought to have known the fact or facts" upon which her claim was based within the meaning of s. 17 of the Health Disciplines Act, R.S.O. 1980, c. 196. The master had properly granted the order with regard to the hospital. The issue of when treatment ceased within the meaning of s. 28 of the Public Hospitals Act, R.S.O. 1980, c. 410, was one upon which there was no previous authority and it was best left for determination to the trial judge.

Cases referred to

Gaudet et al. v. Levy et al. (1984), 47 O.R. (2d) 577, 11 D.L.R. (4th) 721, 46 C.P.C. 62; Basarsky v. Quinlan et al., [1972] S.C.R. 380, 24 D.L.R. (3d) 720, [1972] 1 W.W.R. 303; Kitchen v. Royal Air Force Ass'n et al., [1958] 1 W.L.R. 563; Breaman v. A.R.T.S., Ltd., [1949] 1 K.B. 550; Marleen Investments Ltd. v. McBride et al. (1979), 23 O.R. (2d) 125, 13 C.P.C. 221; Stoicevski v. Casement (1983), 43 O.R. (2d) 436, 43 C.P.C. 178; Dobson et al. v. Wellington Tavern (Windsor) Ltd. et al.; Paolotto et al., Third Parties (1982), 139 D.L.R. (3d) 255n

Statutes referred to

Health Disciplines Act, R.S.O. 1980, c. 196, s. 17

Public Hospitals Act, R.S.O. 1980, c. 410, s. 28

APPEAL by the plaintiff from an order of Master Peppiatt, 6 C.P.C. (2d) 142, dismissing an application to add a defendant; appeal by the defendant hospital from an order of Master Peppiatt adding it as a defendant.

Robert S. Hart, Q.C., and David Lackman, for appellant, plaintiff.
J. J. Colangelo and P. R. Jervis, for respondents, defendants.
Virginia C. Kent-Lemon, for Sisters of St. Joseph.

WHITE J. (orally):-- These are two appeals from the order of Master Peppiatt, dated November 25, 1985, wherein he refused the plaintiff 's application to add as a defendant in the action Dr. McDonald and granted the plaintiff 's application to add as a defendant St. Joseph's Hospital. The first appeal is brought by the plaintiff, the second by the hospital.

The action is brought by a patient who, on June 23, 1982, had a facial operation at a hospital operated by the Sisters of St. Joseph, in Toronto. She had a tumour of the parotid gland and that necessitated a surgical operation into the gland.

Before the operation, she was led to believe by Dr. McKee that she would perform the operation. She signed a written consent that she operate on her. That consent was broad enough in its compass to authorize other doctors on the staff of the hospital to participate in the operation. When she got into the immediate proximity of the operating theatre, Dr. MacArthur communicated with her and advised that he would be a surgeon, participating in the operation. The operation was performed. Dr. McKee and Dr. MacArthur participated in the operation and a Dr. McDonald, who was a staff resident doctor, also participated in the operation.

In so far as the plaintiff was aware the doctors who operated on her were Drs. McKee and MacArthur. Unfortunately, a mishap occurred during the operation which caused damage to the facial nerve. It is not the responsibility of the Court at this stage to make any finding, even of a preliminary nature, as to whether any surgical negligence was involved in that mishap. She was discharged from the hospital on June 26, 1982, and thereafter, up until May 29, 1983, continued to attend the hospital, as an out-patient for treatment of the consequences of her facial nerve having been damaged during the operation.

She consulted counsel, presumably prior to September 15, 1982, in regard to her potential claim, or claims arising from the mishap. The counsel was Mr. Sommers. On September 15, 1982, Mr. Sommers obtained copies of hospital charts from the hospital relating to the operation and thereafter he conferred with a medical-legal consultant. We do not have information as to what the opinion of the consultant was, and it appears that Mr. Sommers when cross-examined on his affidavit, used on the application before the master to add as party defendants to the action, Dr. McDonald and the hospital, claimed privilege for any information the consultant gave him.

The writ was issued on May 25, 1983, against Dr. MacArthur and Dr. McKee as the defendants. Pleadings were exchanged. There was a motion for particulars and the action got to the stage of examinations for discovery on December 14, 1984, and during the interrogation in those examinations of the doctors who had been sued in the action, namely, Drs. MacArthur and McKee, they gave evidence that there had been yet a third surgeon who had taken part in the surgery on the plaintiff, namely, Dr. McDonald. An application was made to add Dr. McDonald and the hospital,

on February 26, 1985, and counsel have stipulated that although Master Peppiatt did not dispose of the application until November 25, 1985, that for the purpose of these proceedings it can be deemed that the motion to add Dr. McDonald and the hospital was made on February 26, 1985.

The application was resisted by counsel for Dr. McDonald and also by counsel for the hospital. Master Peppiatt, in his decision rendered November 25, 1985, refused to add Dr. McDonald as a defendant, but he ordered that the hospital be added as a defendant.

The issue as to whether the plaintiff could, on the application before Master Peppiatt, add Dr. McDonald as a party defendant, depends on whether the limitation provision contained in s. 17 of the Health Disciplines Act, R.S.O. 1980, c. 196, bars her from doing so. That section reads:

> 17. No duly registered member of a College is liable to any action arising out of negligence or malpractice in respect of professional services requested or rendered unless such action is commenced within one year from the date when the person commencing the action knew or ought to have known the fact or facts upon which he alleges negligence or malpractice.

There is no question but that the plaintiff subjectively had no direct knowledge at any time that Dr. McDonald had participated in the surgery. The evidence is clear that she believed that Dr. McKee and Dr. MacArthur had performed the surgery. Presumably, her lawyer would have direct instructions from her that the surgeons who operated on her parotid gland were Drs. McKee and MacArthur. Her lawyer's first direct and unequivocal information, that Dr. McDonald had also taken part in the surgery was imparted when Drs. McKee and MacArthur disclosed that fact in answers given on their examinations for discovery on December 14, 1984. However, on September 15, 1982, Mr. Sommers, the plaintiff 's lawyer, had received hospital charts which did give some clues that perhaps a third doctor, or even indeed a fourth, had taken part in the surgery. The evidence as to these clues appearing in the hospital charts is reviewed by the learned master in his reasons for judgment at p. 15 as follows [6 C.P.C. (2d) 142 at pp. 151-2]:

> It will be remembered that the hospital records were received on the 15th day of September 1982, well within one year from the date of the operation. It is argued by counsel for Dr. McDonald that his involvement is revealed by those records. Firstly it is said that his signature appears at p. 5 of the records. This may be so but looking at the document which was placed before me most of the writing is illegible and certainly I would not have known that the signature reads "G McDonald" if I had not been told so. This is particularly so when one considers that the signature that might be expected to be there would be "C McArthur" and from an objective viewpoint it might as easily be one as the other.
>
> Of p. 19 of the records, there is a sheet of physician's orders, one of which is said to be signed by Dr. McDonald but the signature is equally illegible. Moreover, although

there is no evidence on this point before me, it would seem to me that it does not necessarily follow that the physician who is giving orders concerning post-operative care is necessarily a surgeon who participated [in] the operation.

However, at p. 12 of the records is what appears to be an operative report. The first page of that report shows the surgeons as being Dr. McKee and Dr. MacArthur and assistant surgeons as being Dr. G. McDonald and another doctor whose name has not been fully reproduced on the photocopy but appears to be a Dr. Tatham.

This is followed by an operative note presumably written but not physically signed by Dr. MacArthur. That note after the word staff surgeon has "Dr. C. MacArthur, Jr." There is no name after the word assistant nor after "ANES" which I take it stands for anesthetist.

It is my opinion that the hospital charts are compatible with the possibility that Dr. McDonald, and indeed some fourth doctor, did participate in the surgery. The operative note in the charts is reproduced as follows:

OPERATIVE NOTE

NAME: BRANCHE Ava DATE: 23/6/82

CHART: J203390

STAFF SURGEON: Dr. C. MacArthur, Jr. ANES:

ASSISTANT:

PREOP. DIAGNOSIS: Left superficial parotid mass

POSTOP. DIAGNOSIS: Same

OPERATION: Left superficial parotidectomy and repair of left superior facial nerve branch

PATHOLOGICAL FINDINGS:

PROCEDURE: Under general anesthesia, the patient's face was prepped and draped in the usual manner. parotid incision was then outlined and carried down through the subcutaneous fat to the parotid tissue.

The flaps were then developed superiorly and posteriorly and sewn down with silk.

The external canal cartilage was then cleaned and a pointer found.

For the next hour there was great difficulty in finding the facial nerve itself. There was a tremendous amount of bleeding. When the facial nerve was found eventually, it appeared to be coming out from an abnormally low position. The lower two branches of the facial nerve were found and then the upper branch was found to be dehisced from the main branch. As we had been in the area only once before in cleaning up the gland and rotating it anteriorly, it was very difficult to ascertain when this had occurred.

The branches were all followed out to the periphery and the tumour was removed. Clinically it was a benign mixed tumour.

The upper branch of the facial nerve was then cleaned, re-anastomosed to the main stalk with three 8-0 sutures.

A lateral tarsorrhaphy was then performed.

Postoperatively the patient was returned to the RR in satisfactory condition. There was a weakness of her left upper face area.

C. MacArthur, Jr., M.D., F.R.C.S.

CMAJ:mn 23/6/82 14/7/82

The above operative note indicates that the staff surgeon in the operation was Dr. C. MacArthur Jr.; it purports to have been dictated by Dr. C. MacArthur Jr. He, of course was the doctor who advised the plaintiff that he would be taking part in the operation. The operative note does not disclose that Dr. McDonald, nor any other doctor, participated in the surgery. Preceding the operative note in the hospital charts is a chart, unlabelled, which discloses that the surgeons are Dr. McKee and Dr. MacArthur, and that the assistant surgeons are Dr. McDonald and Dr. (illegible). In the charts also is a hard to decipher note of some kind, which is dated June 23, 1982. It is alleged that this note is signed by Dr. McDonald. I cannot decipher the name McDonald as the signature. The learned master concluded from the portions of the hospital charts, to which I have alluded, as follows [at p. 153 C.P.C.]:

> It is fair to say that the medical records provided by the hospital are far from satisfactory. I have referred to the consent which was altered after signature, to the illegibility of certain of the documents and to the fact that the operative note from Dr. MacArthur fails to disclose that there was an assistant surgeon, although it was always known that Dr. McKee was involved and also fails to disclose that there was an anesthetist although there must have been one. This is not, of course, the fault of Dr. McDonald, and moreover, in my view, the patent defects in the records should have put the plaintiff 's solicitor on notice that some things were not fully revealed and that a further investigation was warranted. This could have been carried out within the one-year limitation period.

(Emphasis mine.)

The learned master in his reasons accepted that direct evidence of Dr. McDonald's participation in the surgery did not come to light until Mr. Sommers elicited that from Drs. McKee and MacArthur on discovery on December 14, 1984. He ruled, however, in the above-quoted passage from the reasons that a scrutiny of those parts of the hospital charts should have put a solicitor on sufficient notice to have conducted a further investigation; that, had he done so, the participation of Dr. McDonald would have been disclosed within one year of the surgery. Accordingly, in his opinion the plaintiff 's solicitor ought to have known of the participation in the surgery of Dr. McDonald, within a year of the surgery, so that he could have been added as a party defendant well within the one-year period mentioned in s. 17.

The issue of fact is, therefore, whether the plaintiff ought to have known "the fact or facts" upon which she alleges negligence or malpractice prior to the making of the application of February 26, 1985; of course "the fact or facts" relevant under s. 17, were those bearing on a third identifiable surgeon having taken part in the surgery of June 23, 1982. Of course, it is not contested that the application was made with efficient promptness once Drs. McKee and MacArthur made their disclosure on discovery on December 14, 1984.

Mr. Sommers was the plaintiff 's agent, and of course under the law of agency his knowledge is imputed to his principal, the plaintiff; he is an agent to know in these circumstances. One has therefore to go to the cross-examination of Mr. Sommers to find out why he did not carry out the course, recommended by Master Peppiatt, of conducting a further investigation following his receipt of the hospital charts in September, 1982, as above stated.

At Tab 10 of the appeal book is found the transcript of the cross-examination of Mr. Sommers, made January 16, 1985 (pp. 104-6):

> 51 Q. Did you consider that to be a progress note or a note relating to the surgery conducted on the 23rd of June, 1982?
>
> A. I didn't consider it to be anything.
>
> 52 Q. Did you know that those words appearing on the second line with writing were names? Did you consider that?
>
> A. Oh, there is no question that McKee and MacDonald are names, I recognize them.
>
> . . . . .
>
> 62 Q. Thank you. Now, if we can refer to the third page after the consent, in the hospital chart, we have a document which I believe is called the operative record?
>
> A. Yes.
>
> 63 Q. And I would ask you if you see the names of doctors appearing under the line "surgeon" on the righthand side?
>
> A. Yes.
>
> 64 Q. And you will agree with me that those names are Dr. McKee/Dr. MacArthur?
>
> A. That's right.

65 Q. And underneath that we have the line "assistant surgeons". Can you read those names?

A. Dr. G. MacDonald and Dr. T. A. -- whatever, it doesn't -- the complete name is not reproduced.

66 Q. And did you consider when you reviewed that that there may have been four physicians participating in the surgery?

A. No.

67 Q. You didn't consider that?

A. No.

68 Q. Did you think of it at all?

A. No.

69 Q. You simply --

A. No, I considered that it's inconceivable that if an individual gives a consent to have a surgery performed by one surgeon that another would have any involvement in cutting the individual.

70 Q. Upon that basis did you decide to sue only Drs. McKee and MacArthur?

A. The doctors I considered were involved, yes.

71 Q. And if I can refer you --

MR. ROTH: And the doctors that our client understood were involved also.

In particular the answer to Q. 69 is the explanation of Mr. Sommers as to why he did not seek to sue Dr. McDonald before he did. I reproduce, for emphasis, the answer to Q. 69, "No, I considered that it's inconceivable that if an individual gives a consent to have a surgery performed by one surgeon that another would have any involvement in cutting the individual."

There was no evidence before the learned master as to the standard of meticulousness required of a solicitor conversant in medical malpractice matters, in detecting from a perusal of hospital charts, potential defendants.

It would seem that notwithstanding that on an unlabelled chart, Dr. McDonald's name is given as an assistant surgeon, and notwithstanding that there is another chart written in his hard to decipher hand, at the end of which appears his undecipherable signature, that the operative note, which I have reproduced above, in extenso, might very well lead a viewer of the three documents to conclude that the sole active operator was Dr. MacArthur. Perhaps a solicitor viewing these charts should have inferred that possibly Dr. McDonald had taken an active role in the operation -- but I am of the opinion that the factual basis on which the learned master found that the plaintiff 's solicitor failed to measure up, in responding to patent defects in the records, is indeed slim. I cannot agree that those patent defects should have put the solicitor on notice that "some things were not fully revealed and that a further investigation was warranted. This could have been carried out within the one-year limitation period."

That, in my opinion, is not the only finding that could be made on the information in the charts. The charts do not indicate unequivocally that Dr. McDonald was a surgeon, who may have participated in the actual cutting of the plaintiff, or have been engaged in the immediate area of the surgery. Based on what Dr. McKee told her and what Dr. MacArthur told her, she would have every reason to believe that they would be the doctors who would be primarily involved in her surgery. Further, there is no indication whatsoever that either Dr. McKee or Dr. MacArthur or any other doctor or any person on the staff of the hospital or otherwise, advised the plaintiff that Dr. McDonald had indeed participated in the surgery, or that he may have been involved, as such, in the mishap which had befallen her.

It is my opinion that the learned master usurped the function of the trial judge in coming to the conclusion that Mr. Sommers, as the plaintiff 's agent, should, from the patent defects in the records have made a further investigation. That finding is available, of course, to the trial judge to make in the light of all of the facts. Perhaps Mr. Sommers made an error in judgment. An error in judgment is not negligence. In view of the instructions that his client gave him, which would be compatible with the proposition that Dr. McKee was to do the surgery and then later on Dr. MacArthur with Dr. McKee's help was to do it, a trial judge may very well find that a reasonable solicitor, in view of

those instructions, notwithstanding the enigmatic clues in the hospital charts of Dr. McDonald's participation, was not at fault in failing to conduct the further investigation mentioned by the learned master. I construe the words "ought to have known the fact or facts" as found in s. 17, as attracting a consideration of the duty of care of a solicitor in an investigation. I discussed this in Gaudet et al. v. Levy et al. (1984), 47 O.R. (2d) 577, 11 D.L.R. (4th) 721, 46 C.P.C. 62. It is my opinion that the learned master erred in finding that through her agent and solicitor, the plaintiff ought to have known "the fact or facts" of the participation of Dr. McDonald in the surgery within the one-year limitation period.

The other ground upon which the plaintiff seeks to upset the learned master's ruling is based upon the doctrine of "special circumstances". Having regard to the view I have of the case, I do not need to rest my decision upon that doctrine. However, I would be prepared to rule that since it was expressly disclosed to the plaintiff, personally, by Drs. McKee and MacArthur that they would operate on her, and since unknown to her a third surgeon, Dr. McDonald, took part in the operation, and as seems to be the case, neither Dr. McKee, Dr. MacArthur nor Dr. McDonald, nor any other person having knowledge, took pains to advise the lady that Dr. McDonald had been actively present at the time when the mishap may have occurred, that failure to disclose that fact is a special circumstance permitting Dr. McDonald to be added, notwithstanding a prima facie expiration of a limitation period: see Basarsky v. Quinlan et al., [1972] S.C.R. 380, 24 D.L.R. (3d) 720, [1972] 1 W.W.R. 303 (S.C.C.). I would find, at least in a prima facie sense, and of course subject to any contrary finding, made on all the evidence by a trial judge, that the unfairness resulting from the plaintiff having been led to believe that she would be operated on by Dr. McKee and Dr. MacArthur, and Dr. McDonald having surreptitiously taken part in that operation, and no one having disclosed to her his activity in the operation, notwithstanding a significant mishap that occurred during the operation, are sufficient to attract application of the doctrine of fraud, as a basis for extending the limitation period. I use the term fraud, as used in equity, that is as requiring no degree of moral turpitude, but as including conduct "which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other": Kitchen v. Royal Air Force Ass'n et al., [1958] 1 W.L.R. 563 at p. 573 (C.A. per Lord Evershed M.R.); see also Breaman v. A.R.T.S., Ltd., [1949] 1 K.B. 550 at p. 567 (C.A. per Somervell L.J.). I am of the opinion that in declining to add Dr. McDonald the learned master erred in law in construing s. 17 of the Health Disciplines Act, as applied to the facts. He should have deferred to the trial judge on the question of whether the plaintiff was barred by the limitation period. His error is not saved by Marleen Investments Ltd. v. McBride et al. (1979), 23 O.R. (2d) 125, 13 C.P.C. 221 (Southey J.): see Stoicevski v. Casement (1983), 43 O.R. (2d) 436, 43 C.P.C. 178 (Ont. C.A.).

The other appeal is the appeal by the hospital against the addition of the hospital as a defendant in the disposition by Master Peppiatt. I reproduce the limitation provision that pertains to hospitals, and that is s. 28, Public Hospitals Act, R.S.O. 1980, c. 410:

> 28. Any action against a hospital or any nurse or person employed therein for

> damages for injury caused by negligence in the admission, care, treatment or discharge of a patient shall be brought within two years after the patient is discharged from or ceases to receive treatment at the hospital and not afterwards.

(Emphasis added.)

As previously indicated, the plaintiff continued to receive treatment as an out-patient at the hospital up until May 29, 1983, and of course the writ was issued within a year of that date. Now it is the position of counsel for the appellant hospital that the word "treatment" in the phrase "ceases to receive treatment at the hospital" in s. 28 of the Public Hospitals Act, means treatment for the condition for which the patient was originally admitted to hospital. Of course the patient was originally admitted to hospital because she had a tumour of the parotid gland and needed an operation on that tumour on June 23, 1982. The appellant hospital's position is that all treatment at the hospital, in respect of the tumour, ceased on June 23, 1982, and that treatment from the date of her discharge June 26, 1982, to May 29, 1983, did not have to do with the tumour, but rather with the treatment for the damage to the facial nerve that had occurred during the operation on the tumour. There are no cases brought to my attention dealing with what the word "treatment" in the phrase "ceases to receive treatment at the hospital" means. The learned master dealt with the application to add the hospital at pp. 19-22 of his reasons [pp. 153-5 C.P.C.]. He states at pp. 21-3 [p. 155 C.P.C.]:

> I think that the only way to give s. 28 the effect which seems to be intended is to construe it as meaning that a person who has been a patient and is discharged but continues to receive treatment without being re-admitted remains a patient for the purposes of that section as long as such treatment continues. It was argued by counsel for the hospital that treatment must mean treatment related to the purpose for which [the patient] was admitted to the hospital but which was administered after discharge. I am inclined to agree with that submission and to say that, to give an example, if a patient receives treatment on his foot before he is discharged and later receives a treatment for his hand, such treatment does not extend the limitation period. However, it is necessary for me to decide this point as I am satisfied that the treatment which the plaintiff received after her discharge was related to the operation which gives rise to her cause of action. As counsel for the hospital said in his submission, the doctor was treating her for the result of the surgery and that means for the purposes of s. 28 that the treatment which she received after her discharge is part of the treatment of which she now complains.
>
> It appears to me that s. 28, although apparently drafted without giving much if any thought to the definition sections which I have quoted, was drafted in the knowledge, of which I can take judicial notice, that it is quite common for a person who has been admitted to a hospital and treated to return to that hospital after discharge and without

> being re-admitted, for procedures which are related to what was done in the hospital and that is part of the same treatment.
>
> I think it would be most unfortunate and unjust if the section were construed in such a manner that when a hospital attempts to resolve a problem which has occurred before a patient's discharge and the patient, rather than taking action against the hospital immediately submits to such further treatment, both parties acting in good faith, such a patient does so at the risk of losing a right of action through expiry of the limitation period.

Exercising his discretion the learned master decided to grant an order adding the Sisters of St. Joseph (whom I have referred to as the hospital) to the action.

It would appear to me that the interpretation which the learned master put on s. 28 is one that the section could reasonably receive. It does not appear to me to be clear that the construction urged by the appellant hospital is the only construction that can be put upon those words. I am not satisfied that the learned master was clearly wrong in the way he construed that provision. I realize that under Stoicevski v. Casement, supra, when dealing with an issue that affects the substantive rights of the parties, the test of Marleen Investments Ltd. v. McBride, supra, does not apply to my reviewing the learned master's decision and reasons. I am of the view that when we have a statutory provision of the importance of the one under discussion, that is, s. 28 of the Public Hospitals Act, when, from what counsel have told me, they have diligently searched the law books and tried to find some case that deals with the construction of that provision and have not had their efforts rewarded by finding anything, it is best that it be left to the trial judge to construe that limitation provision in the light of all the facts that shall come out at trial. In any event, the facts are not, at this stage, sufficiently persuasive that I could say the treatment that the plaintiff received up until May, 1983, was not treatment that fell within the words of the provision that are under review. I make mention of a decision that perhaps gives some support to my disposition of this aspect of the case, namely, Dobson et al. v. Wellington Tavern (Windsor) Ltd. et al.; Paolotto et al., Third Parties (1982), 139 D.L.R. (3d) 255n (Ont. C.A.). The reasons were endorsed on the appeal record, and among other things, Lacourciere J.A. speaking for the Court of Appeal, states in the endorsed reasons:

> For these reasons ... we think the senior master was correct in leaving the determination of the legal and factual issues to the trial court.

I am not satisfied that the learned master erred in law in his treatment of s. 28 of the Public Hospitals Act, and therefore I dismiss the appeal of the hospital.

Of course, it is my intention that Dr. McDonald be deemed to have been added as a party defendant in this action only as of the date of my disposition of the matter which is July 11, 1986; although it follows, if I am right, that Master Peppiatt should have added him on the date he dealt with the application. Furthermore, I want to make it clear that my disposition of both appeals, and in

particular, my discussion of the limitations provisions involving Dr. McDonald and the hospital, is in no way intended to be determinative of the applicability of either of these limitations provisions. I am explicitly deferring to the trial judge, in regard to whether either of the limitation periods apply, so as to bar the claims of the plaintiff, in the light of the facts, as shall be found at trial.

The appeal of the plaintiff is allowed and the order of Master Peppiatt is amended by deleting para. 1 of his order and inserting in lieu thereof the words:

> This court doth order that Dr. Graeme McDonald be added as a party defendant in the action.

The appeal of the hospital is dismissed. The costs of these appeals shall be costs in the cause. The costs of the motion before the master to add Dr. Graeme McDonald and the hospital as party defendants shall be costs in the cause.

Orders accordingly.