Date of Release: March 22, 1993

VANCOUVER REGISTRY
NO: C883254

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	)	
	)	
ROGER PERRON	)	
	)	
PLAINTIFF	)	REASONS FOR JUDGMENT OF THE
	)	
AND:	)	HONOURABLE MR. JUSTICE COOPER
	)	
R.J.R. MACDONALD INC.	)	
	)	
DEFENDANT	)	

R.V. Stanton, Esq.	counsel for the Plaintiff
J.M. Giles, Q.C. and J.H. Angus, Esq.	counsel for the Defendant
Dates and Place of Hearing:	February 8, 9 and 10, 1993 at Vancouver, B.C.

This is the initial trial on the threshold issue of whether the plaintiff's action is statute-barred by time limitation. That issue includes a determination of whether the appropriate law to be applied is that of the Northwest Territories or of British Columbia.

THE FACTS

The plaintiff's evidence, which is not denied, is that he was born in Geraldton, Ontario in 1952. He began smoking "Export" cigarettes, the defendant's product at age 12 or 13. He arrived in Vancouver, B.C. in 1969 where he lived a panhandling style of life and spent some time in prison. In 1972 he moved to Winnipeg where

he remained until 1975. He then went to Yellowknife in the Northwest Territories where he lived from 1976 until 1983. He moved to Vancouver in 1983 and has resided there since. (See: Discovery - March 25, 1991 Q. 781 - 791).

While residing in Yellowknife, the plaintiff was employed in the construction industry as a truck driver and in various other jobs. He entered into a common law relationship and fathered a son through that relationship.

In October, 1980 the plaintiff's right leg was removed in a hospital in Edmonton. An autopsy of the limb led to a diagnosis of the plaintiff's condition as Buerger's Disease (Thromboangiitis Obliterans). The plaintiff was informed of the diagnosis and warned that he must quit smoking. He returned to his job in Yellowknife, and despite the warnings, continued to smoke cigarettes. His drinking problems worsened and his common law wife left him during this period.

In October, 1982 the plaintiff had the left second toe on his left foot amputated in the Yellowknife hospital, again due to the effects of Buerger's Disease, and the left leg amputated in University of Alberta Hospital in Edmonton in January, 1983 due to the continuing effects of that disease.

Following the amputation of his second leg the plaintiff moved

to Vancouver with his son. He continued to smoke the defendant's cigarettes for several months but in October, 1983 he ceased smoking entirely. His physical health has greatly improved since then.

After the loss of his second leg, the plaintiff was unable to walk or operate machines. He undertook no retraining. He paid no heed to the warnings from his medical doctors to not smoke as he didn't believe smoking could cause much harm. He was then referred to an acupuncturist and became involved in a co-op housing project which helped to turn his life around.

The plaintiff has received a number of social assistance benefits from sources within the Northwest Territories including medical benefits, legal aid, vocational rehabilitation, and short and long term disability benefits.

In November, 1983 the plaintiff consulted a lawyer regarding a claim for long term disability benefits from a former employer in the Northwest Territories. This claim was settled in May, 1984 by a lump sum payment of $20,000.00 and monthly payments of $1,400.00.

In the Spring or Summer of 1987 the plaintiff consulted a lawyer with respect to pursuing an action against the defendant. In the course of these interviews his lawyer told him that tobacco companies knew or ought to have known that smoking was a

contributing factor in the development of thromboangiitis obliterans and they owed him a duty to warn him. The plaintiff said that no action was started until 1988 because no cases had been won against tobacco companies until then and he didn't know he could sue them. Following a jury verdict in Cippolone v. The Ligget Group in the United States in June, 1988, his lawyer advised that he had a reasonable prospect of success. The plaintiff then launched this action in negligence for breach of an alleged duty to warn the plaintiff.

The defendant is a Canadian registered company that trades inter-provincially. It has maintained offices both within B.C. and the Northwest Territories and has been resident for the purpose of doing business within both jurisdictions from 1980 onward. A letter from the defendant's solicitor dated February 2, 1993 addressed to the plaintiff's solicitor indicated that both parties admitted that the defendant was resident for the purpose of doing business in both jurisdictions. No other position appears to have been taken by the plaintiff by correspondence or at trial and I therefore take it that that fact is admitted.

The plaintiff says he was unable to stop smoking even after the loss of his second leg in January, 1983 as he was so heavily addicted to smoking and despite the urging of his doctor. It is his opinion that doctors instruct patients to stop smoking as a general precaution for many conditions but the relationship between

thromboangiitis obliterans was never explained to him and he did not learn of it until his own research revealed it in the Fall of 1983. The numerous references in the medical records as to the concern of the doctors over the plaintiff's smoking and the consequent future exacerbation of his condition, in conjunction with the warnings of his doctor, leads to a conclusion on a balance of probabilities that the plaintiff was so informed of the relationship but elected to disregard it, and I so find.

THE ISSUES

To resolve the threshold issue I propose to address the following questions:

A. Where did the plaintiff's cause of action occur?

B. What is the proper law of the tort, that of the forum or that of the foreign jurisdiction?

C. If the proper law of the tort is that of the Northwest Territories, is the Limitation of Actions Ordinance, R.O.N.W.T. 1974 Cc. L-6 (now the Limitation of Actions Act, R.S.N.W.T. 1988 c. L-8) procedural or substantive in nature?

D. What is the appropriate limitation period for this action under the applicable law?

E. When does the limitation period begin to run on the cause of action under the applicable law? That is, does the statutory postponement provided by S. 6(3)(a) of the Limitation Act R.S.B.C. 1979 c. 236 or the common law 'discoverability test' apply?

A. Place where the cause of action occurred.

The plaintiff's position is that the defendant breached its duty to the plaintiff to warn him of the addictive products which it produced and marketed nationally. The plaintiff says that the breach was a continuing one that arose whenever the plaintiff purchased and consumed the defendant's product even following the amputation of his limbs. The plaintiff therefore says that the defendant's breach of duty continued so long as the plaintiff purchased its product and this continued in British Columbia until October, 1983 and therefore British Columbia law is the correct choice of law.

The defendant argues that if there was a tort it occurred within the Northwest Territories where the plaintiff made his home from 1976 to 1983, where he was told for the first time that he had Buerger's disease and suffered the loss of limbs which gave rise to this action.

In Moran v. Pyle National (Canada) Ltd. (1973), 43 D.L.R. (3d) 293 the Supreme Court of Canada addressed the issue of the situs of a tort where an allegedly negligent defendant was involved in the manufacture and inter-provincial distribution of a product. The plaintiff was injured in Saskatchewan while using the defendant's product which was manufactured in Ontario. At P. 250-1 Dickson, J. in applying a "real and substantial connection" test said:

> "Applying this test to a case of careless manufacture, the following rule can be

> formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise jurisdiction over that foreign defendant."

In my view the words "failure to warn" may be substituted for the words "careless manufacture" and in such case the same rule may be applied in the case at bar in determining the situs of the tort.

While Moran does not consider the question of the applicable law, it does address the jurisdictional issue. Applying the substantial connection test here leads to the necessary finding in my view that the alleged tort occurred in the Northwest Territories. The plaintiff was resident in, used the defendant's product, and suffered his injuries there. While the plaintiff argues that this is not a case of a single event but rather one of an ongoing series of breaches, the facts establish that the plaintiff's use of the defendant's product both before, during, and after the injuries leading to the launching of the cause of action occurred within the Northwest Territories. Support for the proposition that the cause of action for failure to warn may arise in the place where the defective product is purchased is found in Distillers Co. (Biochemicals) Ltd. v. Thompson [1971] A.C. 458 (P.C.). In that case an English company failed to warn the

plaintiff's mother of the dangers of taking their drug containing thalidomide. She purchased the drug in New South Wales. The Judicial Committee ruled that the plaintiff's cause of action arose within the jurisdiction.

In the case at bar, the only connection with B.C. involves the plaintiff's residence in the province but this occurred some time prior to and following his injuries. The significant improvement in the plaintiff's health following his move to British Columbia supports the proposition that this province is not the situs of the tort.

While there may be some merit to the plaintiff's argument that his cause of action continued into British Columbia until he finally ceased smoking in October, 1983, it would be difficult to calculate or even show any actual injury from each individual breach or a combination of such breaches after he entered the province. The substance of the plaintiff's claim is that the defendant's accumulated breaches over the years led to his injuries and loss. On the evidence, the vast majority of those alleged breaches and the resulting injury occurred within the Northwest Territories and not within British Columbia.

In Hansen v. D'Appolonia No. 221068, Nelson Registry (August 24, 1992) where a plaintiff claimed damages for negligently prescribing valium over a great number of years and for failing to

warn her of the dangers of the drug, Selbie, J. held that the cause of action occurred when the addiction arose and when the plaintiff had knowledge of the resultant damage to her person. He rejected the notion that a new cause of action arose with each prescription which he held flew in the face of Section 6 of the Limitation Act.

For the foregoing reasons therefore I find that the situs of the plaintiff's action here is the Northwest Territories and it did not arise in British Columbia.

B. Proper Law of the Tort

The next question is what is the proper law to apply to the plaintiff's cause of action? It is not disputed that the plaintiff's action was properly launched in British Columbia but it is the application of the proper law to the alleged tort that must be resolved. However, even if the law of the foreign jurisdiction is deemed to be the proper law of the tort, the forum will only apply foreign "substantive" law and never "procedural" law. Therefore, if the Northwest Territories' Limitation of Action Ordinance is merely procedural, then under conflict of law rules the B.C. Limitation Act would apply.

In Tolofson v. Jensen (1992) 65 B.C.L.R. (2d) 114 the British Columbia Court of Appeal dealt with what a plaintiff must meet in order to bring suit on a tort committed in a foreign jurisdiction as I have found to be the case here. The court referred to the

rule laid down in Phillips v. Eyre [1970] L.R. 6 Q.B.1 (Ex.Ch.) at p. 28:

> "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England, . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

In Machado v. Fontes [1987] 2 Q.B. 231 the English Court of Appeal held that the second condition in the Phillips' rule could be interpreted to include acts that are "not innocent" under the foreign law.

The reasoning in Machado was adopted by the Supreme Court of Canada in McLean v. Pettigrew [1945] 2 D.L.R. 65 where an action was commenced in Quebec as a result of a motor vehicle accident that occurred in Ontario. Both plaintiff and defendant resided in Quebec. Although no civil action could be commenced in Ontario the defendant was found to be quasi-criminally liable there. The Supreme Court of Canada held that if the action was "punishable" in Ontario, the second branch of the Phillips rule was met and the law of the forum would be the proper law of the tort.

The House of Lords in Chaplin v. Boys [1969] 2 All E.R. 1085 rejected the second test in Phillips and Machado and Lord Wilberforce then said at p. 1102:

> "I would, therefore, restate the basic rule of English law with regard to foreign torts as

> requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists between the actual parties under the law of the foreign country where the act was done."

The Supreme Court of Canada has not considered the issue since McLean but the Ontario Court of Appeal has distinguished McLean on its facts in Grimes v. Cloutier (1989) 69 O.R. (2d) 641 as a case in which neither of the parties lived in the foreign jurisdiction where the accident occurred and which exempted the defendant from liability. In Grimes the traffic accident occurred in Quebec and the defendant resided in Quebec. The plaintiff resided in Ontario and the action was commenced there. The defendant was criminally liable in Quebec and the action was barred there as the plaintiff had received compensation there. The Court of Appeal held that the law of Quebec and not the law of the forum was the proper law of the tort and that to apply the forum law would allow the plaintiff double recovery. It was a further finding that to allow the use of Ontario law would defeat the reasonable expectations of the parties that Quebec law would apply to a Quebec accident caused by a Quebec resident.

Grimes was followed in Prefontaine v. Frizzle (1990), 71 O.R. (2d) 385 where again the accident occurred in Quebec, the plaintiffs were mostly resident in Quebec, and the tort was committed by an Ontario resident. Griffiths, J.A. held that the law of Ontario could not be said to have the "most significant

relationship" with the parties.

Both Grimes and Prefontaine suggest that where either of the parties are resident outside the forum, in Ontario at least, the law of the place of occurrence will be applied over that of the law of the forum.

In Tolofson v. Jensen (supra) the British Columbia Court of Appeal was unable to find sufficient grounds to distinguish it from the decision of the Supreme Court of Canada in McLean. In Tolofson both the plaintiff and one of the defendants lived within British Columbia and Cumming, J.A. held that the application of British Columbia law in the suit would not seem inappropriate although the motor vehicle accident occurred in Saskatchewan and one of the defendants resided there. The court suggested that the application of the law of the forum most closely accorded with the reasonable expectations of the parties but he did not rule out the approach suggested in Grimes.

In attempting to apply the principles derived from the foregoing it is to be noted that the factual situation here is unlike any of these above cases. The plaintiff is presently resident in the forum but was resident in the foreign jurisdiction at the time the cause of action arose. The situs of the tort has been found to be in the foreign jurisdiction. Further, the defendant resides in both the forum and the place where the tort

occurred. It follows that all of the necessary factors were present in the Northwest Territories at the time of the commission of the tort. On the basis of "reasonable expectations" it seems fair to say that the presence of all of the connections in the foreign jurisdiction should lead to the application of the substantive law of the Northwest Territories.

It would appear that McLean would lead to a finding that British Columbia law would apply here only where the plaintiff and defendant were both within British Columbia where the tort occurred in the Northwest Territories. At the time the cause of action arose that was not the case.

It accordingly is my view that the substantive law of the Northwest Territories applies to the case at bar.

C. Is the Limitation Action Ordinance Procedural or Substantive?

The Tolofson case makes it clear that the court of the forum will only apply foreign substantive laws. Thus, if the Limitation of Action Ordinance was substantive in nature and it is found that the action which was begun in June, 1988 was time barred under that Ordinance, then this action must be barred in the forum.

The relevant section of the Ordinance reads:

> S. 3(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

J.G. Castel, in Canadian Conflict of Laws (2nd ed) (1986), at p. 136 says:

> A statute of limitation which operates to bar the plaintiff's remedy is in general procedural, whereas a statute of limitation which operates not only to bar his remedy but also to extinguish his right is substantive.

The Manitoba Court of Queen's Bench adopted this approach in Linklater v. Langan Estate (1986) 47 Man. R. (2d) 311. The Limitation Act in British Columbia can on this reasoning be designated as substantive as S. 9 thereof provides for extinguishment of rights and title following the expiration of the limitation period fixed by the Act. No such provision is to be found in the Ordinance.

Accordingly, in my view the Limitation of Action Ordinance may be characterized as procedural only and not therefore applicable in British Columbia, subject however to S. 13 of the Limitation Act which permits a British Columbia court to apply the foreign procedural limitation law if a more just result is provided.

The traditional approach to the characterization of limitation statutes has been criticized, particularly in Clark v. Naqvi (1989), 63 D.L.R. (4th) 361 (N.B.C.A.) where the majority of the court considered the danger of "forum shopping" where a court refuses to enforce foreign limitation statutes. In Block Bros. Realty Ltd. v. Mollard et al (1981) 27 B.C.L.R. 17 (C.A.) Craig, J.A. suggested that legislation should only be characterized as

procedural if the question is beyond any doubt.

The defendant urges that there is no ground for departing from the more recent approach to characterizing the limitation law of the lex causae as substantive. It says that to do so would cause it to suffer actual prejudice.

It seems to me the proper approach would be to adopt the traditional test set out in Castel's Canadian Conflict of Laws (supra) and to classify foreign statutes that do not expressly extinguish rights as being procedural in nature. Section 13 of the Limitation Act may then be resorted to enable the British Columbia court to apply the foreign limitation law "if a more just result is produced."

In the present case, on a consideration of the application of s. 13, the defendant claims it will suffer actual prejudice in pursuing its defence due to the delay in the commencement of the proceedings. It claims this is so as well because some medical personnel are either deceased or cannot be located and some documents are not now available. The plaintiff, on the other hand, may suffer the dismissal of his action if the more restrictive limits of the Northwest Territories limitation laws are applied. Forum shopping is not an issue since the plaintiff is and has been a resident of British Columbia throughout the running of the applicable limitation period. There is, therefore, a legitimate

explanation for the choice of British Columbia as the forum besides its more flexible limitation statute.

No principles have been cited to me as to the application of s. 13 but balancing the prejudice to the parties, it appears that the actual prejudice to the defendant is relatively minor compared to that to the plaintiff. Should the plaintiff be successful in establishing that his action is not barred by time limitation in British Columbia, his action should proceed to hearing on the merits.

D. What is the applicable limitation period?

The plaintiff's position is that the appropriate limitation period under the Limitation Act is 6 years in this case, rather than 2 years. He relies on Zurbrugg v. Bowie (1992), 68 B.C.L.R. (2d) 322 (C.A.) for this proposition. The Limitation Act provides:

> 3. (1) After the expiration of 2 years after the date on which the right to do so arose a person shall not bring an action
>
> > (a) for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;
>
> (4) Any other action not specifically provided for in this Act or any other Act shall not be brought after the expiration of 6 years after the date on which the right to do so arose.

The sole question to be determined is whether the cause of action here falls within s. 3(1)(a) where the limitation period

would be 2 years after the date on which the cause of action arose (subject to any postponement under s. 6). If it does not fall within that subsection, then the time limitation would be 6 years within s. 3(4) (subject again to any postponement under s. 6).

In Zurbrugg the court was dealing with damage sustained by the plaintiff for dental work which he had done between September 1981 and the Spring of 1983 when the defendant dentist fabricated and installed bridges and crowns on a number of the plaintiff's teeth. Latent defects in the bridge and crown work did not become apparent until the Spring of 1986, beyond the 2 year limitation period from the date of completion of the work. The trial court judge held that any damage suffered by the plaintiff was not caused by an identified external event but appeared to have been occasioned by defects in the property itself. In those circumstances, the court followed the authority of W.C.B. v. Genstar (1986) 24 B.C.L.R. (2d) 175 and held that the limitation period was 6 years under s. 3(4) rather than 2 years under s. 3(1)(a) of the Limitation Act. That decision was upheld in the Court of Appeal.

In the case at bar, the plaintiff says that if negligent dental surgery and the provision of faulty dental products and services were found not to be an identified external event then surely the provision and marketing of an addictive product is not an external event.

The facts in the case at bar are however distinguishable from Zurbrugg. The plaintiff is not alleging a latent defect in the product causing his injury. It is not suggested that the cigarettes were not manufactured properly. The identifiable external event was the defendant's failure to warn the plaintiff of harmful effects of its product. Any delay in the manifestation of the injuries which resulted from that failure may be addressed under the postponement provision of s. 6 of the Act. While the plaintiff's cause of action may be founded on the creation of an addiction, it also must include the corresponding duty to warn. That being the case, there clearly was an identifiable external event, that being the defendant's failure to warn.

It should be pointed out that the defendant also produced the expert opinion of Katherine R. Peterson, Q.C. to the effect that under the Limitation of Action Ordinance, the applicable limitation period for this action is under s. 3(1)(d) and thus, under Northwest Territories law, the limitation period is 2 years.

The plaintiff sought to argue this opinion evidence on the basis that Ms. Peterson had an incorrect view of the cause of action or, alternatively, that she failed to consider the approach in Zurbrugg.

Under the conflict of laws rule in Dicey and Morris The Conflict Laws (8th ed) at p. 1115 the authors say:

> If the evidence of the expert witness as to the effect of the sources quoted by him is uncontradicted, the court is, in general bound to accept it.

The plaintiff did not seek to have the expert witness before the court for cross-examination and indeed in pre-trial correspondence (January 20, 1993) wrote asking that certain questions be put to the expert. He asked the defendant to bear in mind that "the expert is not the property of any party to a lawsuit, but rather is a servant of the court with an obligation to give the court the benefit of his/her special knowledge, regardless of the impact of that knowledge upon the case of either party." The questions were then put by the defendant to the expert. The expert answered and the plaintiff elected not to cross-examine. In these circumstances I must find the plaintiff bound by the expert's opinion.

E. When does the limitation period commence to run?

Since the action here was launched in June, 1988, the postponement provisions of the Limitation Act must have come into play failing which the action will be barred by s. 3(1)(a).

The relevant postponement provisions are:

> 6. (3) The running of time with respect to the limitation periods fixed by this Act for

an action

(a) for personal injury;
(b) for damage to property;
(c) for professional negligence;
(d) based on fraud or deceit;
(e) in which material facts relating to the cause of action have been wilfully concealed;
(f) for relief from the consequences of a mistake;
(g) brought under the Family Compensation Act; or
(h) for breach of trust not within subsection (1)

is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts, would regard those facts as showing that

(i) an action on the cause of action would, apart form the effect of the expiration of a limitation period, have a reasonable prospect of success; and
(j) the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

(4) for the purpose of subsection (3),

(a) "appropriate advice:, in relation to facts, means the advice of competent person, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require;
(b) "facts include
(i) the existence of a duty owed to the plaintiff by the defendant; and
(ii) that a breach of a duty caused injury, damage or loss to

the plaintiff;

This section of the Act was recently considered by the Court of Appeal in Levitt v. Carr (1992), 66 B.C.L.R. (2d) 58 and the earlier decision in Karsanjii Estate v. Roque (1990), 43 B.C.L.R. (2d) 234 (C.A.).

What may be deduced from those decisions is that s. 6 operates to postpone the commencement of the time limitation until the relevant facts are known to the plaintiff, that is, those facts which are actually known to him and those which would become known to him if he took such steps as would have been reasonable for him to do in his circumstances. Secondly, armed with those facts, and having taken the appropriate advice a reasonable man would have sought, the reasonable man owes a duty to himself to decide whether an action would have a reasonable chance of success and whether he should bring such an action.

The Court of Appeal in Levitt rejected simple ignorance of the existence of a cause of action as sufficient to postpone the running of time. At p. 72 the court said:

> "We think it is clear that those who drafted the British Columbia statute rejected simple ignorance of the existence of a cause of action as sufficient to postpone the running of time."

The court went on to adopt the concept of "notional advice by notional advisors" in assisting the reasonable man to decide on the

reasonable prospects of commencing and succeeding in such an action.

In the absence of any actual advice, the courts must attempt to assess what advice a notional advisor would have given the plaintiff if asked.

Finally, the courts are required to consider the personal circumstances of the plaintiff, as provided by s. 6(3)(j), in assessing whether he ought to be able to bring an action. In Karsanjii McEachern, C.J.B.C. said at p. 239 that personal, economic or embarrassing reasons were not sufficient to postpone the commencement of the limitation period. Although he was unable to say precisely what the section meant, it was his view that any plaintiff ought, bearing in mind he has two years to bring an action after the means of knowledge test is satisfied, to bring the action if he has the legal capacity to do so. Taylor and Locke, JJ.A. both held, however, that the plaintiff's ongoing doctor-patient relationship could operate to postpone the limitation period.

The question here then is whether prior to June 20, 1986 the plaintiff, acting as a reasonable man, with his actual and imputed knowledge, including notional advice, had sufficient facts available to him such that he should have known that he had a cause of action with reasonable prospect of success and he ought to have

been able to bring such an action?

I will briefly review the evidence. The plaintiff's first amputation took place in October, 1980. He was then diagnosed as having Buerger's disease several months after the surgery. He was told of his condition and that he should stop smoking. The evidence is not clear that he was told of the connection between smoking and this disease. He says that because of his ongoing medication and his alcohol problems the advice went unhindered. However, the need to cease smoking was communicated to the plaintiff on a number of occasions between 1980 and 1983. The amputation of his second leg occurred in January, 1983. After reading medical journals in the Vancouver General Hospital and seeking assistance from an acupuncturist, the plaintiff finally quit smoking in October, 1983. He consulted a lawyer in May, 1984 to assist him in settling benefit claims from a former employer's insurer. In 1987 the plaintiff commenced to have concerns about providing warnings on cigarette packages to others. He sought legal advice about this. He appears to have been advised that the defendant was in breach of its duty to warn. The plaintiff explained that he did not commence his law suit until 1988 when he was informed of a successful law suit in the United States, previous tort actions against tobacco companies having been unsuccessful.

It is clear that even if the connection between smoking and

Buerger's disease was not communicated to the plaintiff before October, 1983, he did understand that the connection existed at that time. The plaintiff knew in late 1983 of the fact of his injuries and that they were caused by smoking.

The plaintiff submits that until 1987 he was unaware of a duty owed to him by the defendant. The reasoning in Levitt indicates that the plaintiff may not rely on the mere fact of his ignorance of the law to support a claim for postponement. Nor can he rely on actual legal advice received four years after his cause of action arose to support that claim. The Levitt case requires the court to determine what notional advice the plaintiff would have received had he consulted a lawyer prior to June, 1986.

While the plaintiff submits that the absence of similar successful litigants prior to 1988 is support for the postponement, it is clear that the duty of a manufacturer to warn consumers of potentially dangerous aspects of its product has long been settled. See: Heaven v. Pender (1883), 11 Q.B.D. 503, O'Fallon v. Inecto Rapid (Canada) Ltd. [1964] 1 O.R. 88 (Ont.H.C.); Lambert v. Lastoplex Ltd. [1972] S.C.R. 569.

The burden of proving that the running of time has been postponed lies upon the plaintiff who claims the benefit of it as provided by s. 6(5). The plaintiff's knowledge of his injuries, his failure to make reasonable enquiries between 1983 and 1987, and

the standard of the reasonable man's duty of care owed to himself, weighs negatively against the plaintiff. There is no evidence that the plaintiff received advice to delay taking action. It seems unlikely that a reasonable man, given the plaintiff's injuries and his knowledge of their cause, would not have made legal inquiries prior to 1987.

In these circumstances, I find that the plaintiff has failed to meet the burden upon him of proving that the running of time has been postponed. I therefore find that the action is barred pursuant to s. 3(1)(a) of the Limitation Act.

The opinion evidence of Katherine Peterson, Q.C. suggests that the common law may provide for the postponement of the running of the limitation period in the Northwest Territories even though the Northwest Territories statute does not contain a postponement provision such as s. 6 of the Limitation Act. In the City of Kamloops v. Nielsen (1984), 10 D.L.R. 641 the Supreme Court of Canada suggested that the limitation period will start to run from the time the plaintiff discovers his injury or ought reasonably to have discovered it. This "discoverability" test was upheld by the Supreme Court of Canada in Central Trust Co. v. Rafuse et al (1986), 34 B.L.R. 187.

In this case I have found that the plaintiff discovered his injuries and their probable cause by at least October, 1983. The

discoverability test would therefore not provide any postponement. Accordingly, it is clear in my opinion that the plaintiff's action was also barred under the law of the Northwest Territories at the date of the commencement of the action in June, 1988.

COSTS

Because of the complexity of the issues on this trial and the uncertainty of the outcome and further, because the defendant has not earlier sought a ruling on the limitation issue, I conclude that each party should bear his or its own costs.

Dated the 16th day of March, 1993. "Cooper, J."