[Chairman: Mr. Schumacher] [8:35 a.m.]

MR. CHAIRMAN: Ladies and gentlemen, I see a quorum. As the time in all phases of our activities seems to be pressing in a little bit, perhaps we could come to order.

You've all received copies of the agenda. We'll spend the first hour considering Bills we've completed our evidence-gathering process on that our respective caucuses have had a chance to consider. Hopefully that can be done in the first hour, and then we will resume hearing arguments with respect to Bill Pr. 10, which we were unable to complete last time. If that would be in order, I'll receive a motion for the agenda.

MR. WRIGHT: Yes. So moved.

MR. CHAIRMAN: All those in favour of accepting the agenda? Opposed? Carried.

Now I'll entertain a motion to move in camera.

MR. BRASSARD: I so move, Mr. Chairman.

MR. CHAIRMAN: Any discussion? All those in favour? Opposed? Carried.

[The committee met in camera from 8:36 a.m. to 9:30 a.m.]

MR. CHAIRMAN: Members of the committee, order, please, for a moment. Mr. Brassard has moved that I report to the Assembly the decisions we took with respect to the Bills we considered this morning in camera. All those in favour?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Opposed? Carried.

Well, members of the committee, I see a quorum. We're back with Bill Pr. 10, Brandon Paul Lumley Limitation Act. I believe that when we adjourned two weeks ago, Mr. Major was about to ask Drs. Hunt and Bladek some questions.

MR. MAJOR: Yes, thank you, Mr. Chairman. May I proceed?

MR. CHAIRMAN: Yes, you may, Mr. Major.

MR. MAJOR: Drs. Hunt and Bladek, I'll address both of you, and you can respond in order if you would. When did you first know that Brandon Lumley had cerebral palsy? Please feel free to refer to your notes, which you've provided us.

MR. CHAIRMAN: Dr. Hunt.

DR. HUNT: I would say that I found out that Brandon Lumley had cerebral palsy when I was served with a statement of claim from your office, Mr. Major.

MR. MAJOR: And you did examine Brandon on December 30, 1986?

DR. HUNT: December 30, 1986, yes.

MR. MAJOR: And on that occasion was it your opinion that Brandon was a normal child?

DR. HUNT: On that occasion the mother indicated that the child had been seen in Ontario with an ear infection and asked me to check his ear. I checked the ears, and as my comments say: the drums are now OK; slight wax in the right ear canal. In other words, the ear infection that may have been present in Ontario in my opinion had cleared up and didn't require any further antibiotic.

MR. MAJOR: And when you observed Brandon in December 1986, was it your opinion that this was a normal baby a little over a year old?

DR. HUNT: I've specifically responded to the question about the ear infection. The only other comment – because I hadn't seen the child for some time, I asked the mother how the child was doing. She said, "Fine." I didn't examine the child generally except to look at his ears, as the mother requested.

MR. MAJOR: And from what you did observe, was it your opinion that the child was normal?

DR. HUNT: I can't comment because I was specifically . . .

MR. MAJOR: You can't comment or you won't comment, Dr. Hunt?

MR. LOWE: Mr. Major, that's improper. Mr. Chairman, I object. If Mr. Major intends to impute motives . . .

MR. MAJOR: I'll withdraw the question.

MRS. MIROSH: Mr. Chairman, excuse me. This isn't a courtroom.

MR. CHAIRMAN: Mrs. Mirosh, I'll also remind you of that later, and I'll remind everybody in the room that this is not a courtroom. We will try to . . .

MR. MAJOR: Yes, we're just after the facts.

Dr. Bladek, when did you first know that Brandon had cerebral palsy?

DR. BLADEK: I first heard that term used regarding Brandon when I was served with the statement of claim.

MR. MAJOR: Are you not familiar with the term "cerebral palsy"?

DR. BLADEK: Yes.

MR. MAJOR: And did you have any apprehension that Brandon might have cerebral palsy over the period following his birth up to April 21, '87, when you last examined him?

DR. BLADEK: From my recollection of seeing Brandon that term, cerebral palsy, did not cross my mind.

MR. MAJOR: Would you refer to your notes, Dr. Bladek?

DR. BLADEK: Yes.

MR. MAJOR: February 18, '86: that was a five-month check?

DR. BLADEK: Yes.

MR. MAJOR: Would you read the notes that you made on February 18, please.

DR. BLADEK: Yes. February 18, 1986. First of all, I have two charts: I have the mother's chart and Brandon's chart. On Mrs. Lumley's chart I had written down:

> Worried about son. Dr. Govender thinks he's slow, has low tone & wants referral to neurologist.

On Brandon's chart I have indicated:

> 5 month ck. 16 lbs.
> On phenobarb 3.5 BID
> Formula + food – gets excited [about the food]
> Smiles
> Sits with support
> Rolled back to front x 2
> Minimal head lag
> Eyes don't focus too well
> Can see light – reaches for it
> Imp – Birth injury
> ? developmental delay
> Talk: reassured parents are doing a good job
> Proceed with referral to neurologist.

MR. MAJOR: Now, this note: impression, birth injury. Would you tell me what that means? Would you expand on your note?

DR. BLADEK: All righty. Further, I'd like to add, too, that on this chart – I just read to you from February of '86, and the entry prior to that was October 25, '85. On Brandon's chart I have documented that the mom had told me when she talked to me about Brandon's delivery that the cord was wrapped around the neck, that forceps were used, that there was an intracranial hemorrhage, that he was home since two weeks of age, and that he was on phenobarbital.

MR. MAJOR: Are you reading from the mother's chart?

DR. BLADEK: That October 25, 1985, entry was in Mrs. Lumley's chart.

MR. MAJOR: Yes. I'm just looking at Brandon's chart. On Brandon's chart on February 18, '86, you have the note: impression, birth injury. Was that your impression, Dr. Bladek?

DR. BLADEK: Now, that . . .

MR. MAJOR: I'm sorry; was that your impression?

MR. LOWE: Mr. Major, perhaps you could just let the witness answer the question. There's no doubt she heard it, and she was formulating her answer. If you want to badger somebody, do it in a courtroom.

MR. MAJOR: I'm sure the witness is grateful for your intervention. Are you having any problem with me, Dr. Bladek?

DR. BLADEK: No.

MR. MAJOR: Thank you. Would you answer the question?

DR. BLADEK: Sorry; could you repeat it again, please?

MR. MAJOR: Yes.

MR. CHAIRMAN: The question was whether it was your impression, Dr. Bladek, or somebody else's impression.

DR. BLADEK: All right. Now, again, I don't recall specifically. However, in my chart documenting from February 18 of '86 I do have recorded the words: birth injury, query developmental delay. If I had written that down, then that was something that was discussed and brought up. I believe that was documented in the context of what the mom had told me, what I had in the chart already back from October of '85.

MR. MAJOR: Is it your oath today that you discussed with Mrs. Lumley that the child had a birth injury, on February 18, '86? Because you sat here and you heard Mrs. Lumley testify that she was never told by yourself of this matter. This is very important, Dr. Bladek.

DR. BLADEK: I don't recall specifically that discussion. However, it's recorded in my chart, and it's my practice that if it's recorded in my chart, it's been discussed.

MR. MAJOR: And you heard Mrs. Lumley say that it was not discussed.

DR. BLADEK: Yes, I heard that.

MR. MAJOR: As I understand, you're not contradicting Mrs. Lumley; you're simply stating what your general practice is.

DR. BLADEK: I'm answering your question.

MRS. MIROSH: Mr. Chairman, can I just have clarification?

MR. MAJOR: And you say that you don't have a specific recollection of the discussion but this was your general practice.

DR. BLADEK: I don't recall my discussion of February 18, '86.

MR. MAJOR: Dr. Bladek, I'd like to read to you a description of cerebral palsy which comes from *You and Your Health*, volume 1, a definition by leading specialists copyrighted in 1985. It says:

> Cerebral Palsy (Little's Disease)
>
> In cerebral palsy there has been damage to the brain of a fetus or infant some time during the period of the brain's development. Because the site of this damage varies from case to case, so do the specific symptoms. In the usual case there is an impairment of the control of the muscles (more commonly in the legs) coupled with spasticity (stiffness) and with awkward, jerky movements. There may be compulsive, impaired speech and a degree of mental deficiency, but in many cases mentality remains normal. Some patients are unjustly assumed to be mentally deficient because of their awkwardness and difficult speech. The condition is long-term, nonfatal, and incurable.

Do you agree with that summary?

DR. BLADEK: That is a lay magazine's discussion of cerebral palsy.

MR. MAJOR: Do you agree with the description of it, doctor?

DR. BLADEK: Well, I think it describes it in very general terms.

MR. MAJOR:

> In some cases, the damage to the brain is caused by the high concentration of bilirubin in the blood associated with hemolytic disease of the newborn . . . A period of reduced supply of oxygen as a complication of premature birth may be the damaging agent to the brain. Trauma to the brain in a case of difficult labor may be the causative factor. Infection of the brain tissues as in encephalitis may cause cerebral palsy.

Do you agree with those statements, doctor?

DR. BLADEK: Those are considered some of the causes of cerebral palsy as known to laypeople.

MR. MAJOR:

> In some cases the condition of cerebral palsy is not recognized until the infant is about six months old and then because of his inability to sit up, crawl, or stand.

Would you agree with that, doctor?

DR. BLADEK: I have a little trouble with that, cerebral palsy not being recognized. I think it's difficult to put the words "cerebral palsy" on a baby at six months.

MR. MAJOR: And if the cerebral palsy were somewhat minor, it might not be recognized until he was indeed 12 months or older.

DR. BLADEK: Or older.

MR. MAJOR: Is that fair?

DR. BLADEK: Yes.

MR. MAJOR: Now, with respect to your notes on February 18, you've made a note that Brandon smiles, sits with support, rolled back to front times two, minimal head lag, eyes don't focus too well. Were those things that you observed or that the mother told you?

DR. BLADEK: Those were my observations.

MR. MAJOR: And did you discuss with the mother what the child ought to be doing at five months of age?

DR. BLADEK: Again, I don't recall.

MR. MAJOR: You saw the child periodically in July and in August of 1986?

DR. BLADEK: That's correct.

MR. MAJOR: Could you read me the notes from August 21, 1986?

DR. BLADEK: August 21, 1986: seeing Dr. Hindle (ophthalmologist) at Alberta children's hospital; wanting to see Dr. Skov regarding strabismus, which is like crossed eyes.

MR. MAJOR: Is Dr. Skov another ophthalmologist?

DR. BLADEK: That's correct.

"G & D" – growth and development – "pulls self up to standing."

MR. MAJOR: Now, did you observe that, doctor?

DR. BLADEK: Yes.

MR. MAJOR: On August 21, when Brandon was pulling himself up to standing, would you characterize him as suffering from cerebral palsy?

DR. BLADEK: Again, I don't recall specifically that visit of August of '86. However, if I had felt that a patient of mine had cerebral palsy, I would have documented it. It's not documented in this chart.

MR. MAJOR: So on August 21 it's fair to say that you didn't feel that Brandon had cerebral palsy.

DR. BLADEK: That's correct.

Can I read to you one paragraph about cerebral palsy from a textbook that I used when I was in medical school? I have a copy here of page 1855 from *Harrison's Principles of Internal Medicine*, seventh edition. There's one paragraph describing cerebral palsy. The title is: Abnormalities of Motor Function (Cerebral Palsy).

> In this category of neurologic defect a major disturbance of motor function, usually nonprogressive, has been present since infancy or childhood. The popular term for these conditions is *cerebral palsy*. The name is not altogether appropriate, nor is such a crude classification of nervous disorders particularly useful from the viewpoint of the physician, because it results in a collocation of diseases of widely differing etiologic and anatomic types. The hereditary and acquired, the intrauterine, natal, and postnatal diseases lose their identity. Nevertheless, the term has been adopted as a slogan for fund-raising societies and for a major rehabilitation movement throughout the United States, and it will not soon disappear from medical terminology.

MR. MAJOR: Yes, thank you, doctor.

In any event, on August 21 you had not formed the opinion that Brandon was suffering from cerebral palsy or motor disorders?

DR. BLADEK: You said: cerebral palsy or motor disorders. I did not feel that he had cerebral palsy at that time. However, from my previous chartings I had felt that there was a motor problem, because I indicated developmental delay.

MR. MAJOR: Now, Dr. Hunt, would you tell us why you used forceps in this delivery?

MR. LOWE: Mr. Chairman, at one point I think we agreed that we were not going to examine the question of liability, and it strikes me that's where we're headed now.

MR. CHAIRMAN: I agree with you, Mr. Lowe.

MR. MAJOR: Dr. Hunt, when you examined Brandon on his six-week checkup, did you tell Mrs. Lumley that Brandon was fine now?

DR. HUNT: According to Mrs. Lumley that's what I said, and if she said so, that's probably what I said. My notes of that day indicate that there was a mild dermatitis, no treatment required. But at the six-week checkup, normally if you do a check-up, you listen to the heart and lungs and just examine the child

generally.

MR. MAJOR: And again on December 30, 1986, you specifically looked at the ears, and you would have examined the child generally?

DR. HUNT: No, I didn't, Mr. Major. The mother came in and asked me to check the ears. The child had been on antibiotics, and I wanted to see what the ears were like at that particular point. I examined the child from the ear point of view, not a general examination on that date.

MR. MAJOR: And from what you observed, there was no need for you to examine the child further? Or, in any event, you did not examine the child further? Is that fair?

DR. HUNT: I did not examine the child further.

MR. MAJOR: Yes.

Thank you, Mr. Chairman. Those are my questions.

MR. CHAIRMAN: Mr. Lowe.

MR. LOWE: I just want to clarify one thing about the label cerebral palsy that was finally applied to Brandon's injuries in August of '87 and the distinction between somebody putting a label on it and whether the injuries were known before that date. I guess my question is to Dr. Hunt. Is cerebral palsy a diagnosis that you make by taking a blood test or any other kind of test, or is it a name which is applied to a variety of symptoms?

DR. HUNT: It's a name that's applied to a variety of symptoms. There is no blood test or skull X ray or anything like that that's going to give you a diagnosis. I mean, basically, there are a variety of symptoms. A child may have some spasticity of the limbs. A child may have some decreased tone and may be floppy. The child may have what we call athetosis, which are involuntary unco-ordinated movements.

MR. LOWE: But the injuries are there before somebody puts the label on them. Is that what you're saying?

DR. HUNT: I'm saying that's the case if the etiological factor is a birth injury and the injuries are there, sure.

MR. LOWE: Mr. Chairman. Thank you. That's all.

MR. CHAIRMAN: Mr. Fradsham.

MR. FRADSHAM: Thank you, Mr. Chairman. I'm sorry that we've lost some members because I want to point out very strenuously, if I can, the difference between the position that the hospital finds itself in -- and I act on behalf of the Calgary General hospital -- and the position that the two physicians find themselves in. If I might tackle this problem perhaps somewhat differently than it has been tackled to date, I don't propose to cross-examine anyone. I just want to make a very simple point, and that is that the Lumleys come before this committee today and two weeks ago saying that the present state of the Limitation of Actions Act will deprive them of the ability to go ahead and prosecute their action against the defendants: the hospital and the physicians. I want to show you, if I might, that indeed that is not the case insofar as it relates at least to my client, the Calgary General hospital.

If we remember that the Lumleys come here basically saying -- and we've heard much discussion about it in the past two meetings -- that the year within which the Limitation of Actions Act gives them to commence an action ticked by and they didn't know that something was wrong with their child. Accordingly, at the end of the year when they found out something was wrong and they wished to commence an action, they were cut off. Simply put, they had run out of time before they even knew the time was running. That's the essence of their position. We're dealing here with a child who is not normal, and that causes all of us distress. That tugs at the heartstrings of all of us. But let us remember that the basic contention of the parents before you today is that they ran out of time before they even knew that the game was on. They say that simply because they didn't discover it within time.

I direct your attention to the section of the Act which governs my client, the Calgary General hospital, and you will note that it is very different in its wording from the section that governs the two physicians. It's common sense to say that before you can find out whether a limitation period has expired, you have to know, one, the length of the period and, two, from which time you should start to measure that period of time. Well, the Act is pretty clear. It says that you have a year. When you talk about physicians, you measure the year from the date when the services of the physician terminated, and hence you've had a lot of debate before you about whether or not there was discoverability within that time period. But when you look at the section of the Limitation of Actions Act as it now stands that relates to the Calgary General hospital, it says that that action must be commenced within one year after the cause of action arose. You will recall that in the first presentation of Mr. Major, even he was prepared to admit that that particular section causes less difficulty to the Lumleys than perhaps does the section relating to the physicians, and the reason is quite simple. The reason is that the Supreme Court of Canada has said that the cause of action arises, for the purpose of measuring a limitation date, when either the facts that support the cause of action were known or ought to have been known. And isn't that exactly what we've heard all this debate about? Haven't we heard some considerable questioning and cross-examination on the very question of when the parents knew or ought to have known that their child had suffered an injury? Because the concern was whether or not they could have found out within that year. But when you look at my client, the test is: the year only starts to run when they knew or when they ought to have known. The very thing that's before this committee will be before the court when it decides whether or not the limitation date has run in respect of the Calgary General hospital.

The Lumleys need no assistance when it comes to the legislation vis-à-vis the hospital. They sit here -- and I don't have to advocate one way or the other -- and they say to you, "We didn't know, and we couldn't have known." Mr. Lowe ably puts the position: "They knew, or they should have known." And I sit here and say that it doesn't matter vis-à-vis my client, because that's an issue that the Legislature has already said will be decided by the trial judge at the time of the trial. The last thing, if I understand the position taken by the hon. members here, is that you don't want to be in the position of having to decide the lawsuit. All you want to do is to decide whether or not the present Limitation of Actions Act ought to be changed because there are special circumstances that have prevented the Lumleys from going ahead and prosecuting their action.

When it comes to the hospital, those circumstances don't exist. If the Lumleys are right that indeed they could not have known, then the law is that the limitation date against the hospital didn't start to run until they knew or could have known. If the Lumleys are wrong – that they knew or should have known more than a year before they commenced their action – then, simply put, the trial judge will find that they're out of time. But that's a function that this Legislature has already said will be determined by the trial judge at the appropriate time. The Lumleys need no further assistance. They say vis-à-vis the physicians that they couldn't have known; I say vis-à-vis the hospital that that's a matter that can be decided. If they are entitled to a remedy, it's in the present legislation; if they are not entitled to a remedy, then the legislation says they shouldn't have one.

My point is that we shouldn't get mesmerized by the mere fact that the hospital is involved in a lawsuit with the physicians. Mr. Major said last time, when he was making his presentation to you, and I quote from page 65 of *Hansard*:

> Now, there is a parallel request to extend the period with respect to the hospitals, and with respect to the hospitals the limitation period is not as severe because it provides that an action may be commenced within one year after the cause of action arose. That's been interpreted to mean within one year after discovery.

So, if I might interject, I don't have to worry about discovery here, because that's something the trial judge will take care of.

> However, we would ask that a judge be given the power, which he hasn't got unless it's given to him under this special Bill, to extend the limitation periods concerning both actions in order that the preliminary question of limitation may be dealt with by the judge with respect to both parties and the action may proceed on the merits as to whether or not there was indeed negligence. And the two of them are intricately wound up together.

Well, let us remember what he's basically saying to you, then, vis-à-vis the hospital. He's saying: "Well, not only is it not good enough that the discoverability rule will apply. I just don't even want to go through the trouble of having to show when my clients knew or ought to have known that there was an injury to their child. I would like that taken away from the hospital right now." So basically what he says is, "Vis-à-vis the physicians I would like the discoverability rule to apply as it does to the hospitals, but by the way, when we come to the hospitals, let's just take it away altogether." And in my respectful submission to you, hon. members, that's not fair. There is no more protection needed for the Lumleys than is currently in that legislation.

Now, the word last time that was used, and that Mr. Lowe jumped upon, was "technicality." Now, I know that Mr. Lowe and I as lawyers can probably stand here for days on end and try to convince you that a limitation defence is not a technicality. Mr. Lowe is quite correct in his interpretation of the law to you. It's not a technicality; it's a substantive defence, and I dare say how substantive it is would be brought home better to you if, indeed, you wanted to rely upon it some day.

But when it comes to a medical malpractice case involving a child, there is a knee-jerk reaction to say that if we don't determine this on the merits, then anything that prevents that must be a technical defence. I simply say that that isn't a concern that you have when it comes to the hospital. There's nothing that the Lumleys are losing under that present Limitation of Actions Act. All they want is something more, something that they ought not to have, under this special Bill. If, indeed, this committee decides that they wish to grant the Bill, then I would specifically say that it is not necessary, as Mr. Major has contended, to drag the hospital along. The very test that he wants vis-à-vis the doctors is already present in the legislation for the hospital. I think that your Parliamentary Counsel will tell you that judges get very, very itchy when they see legislation passed which tinkers with concepts they thought they understood, because they will then be in a position of trying to figure out why it is you did it. And if there was no good reason to do it, they are left in a very difficult position.

So my respectful submission on behalf of the Calgary General hospital is that the protection the Lumleys want is in the Act right now. To do any more is to take away even the requirement that the Lumleys show whether or not they knew or ought to have known. If, indeed, the facts are found as they tell you that they are today, then they will not have a limitation problem with the hospital. We will lose that defence. If they are wrong and if indeed they knew or ought to have known, then the limitation defence will most likely succeed, and that is how it ought to be. But that's for a judge to determine, a judge who is better equipped, I might respectfully submit, than any of us here to make those determinations. Because, indeed, he will hear all the evidence, and he'll hear it in a forum which is designed to have that evidence heard.

So, Mr. Chairman, my respectful submission is that the Bill in any event ought not to proceed against the Calgary General.

MR. CHAIRMAN: Thank you, Mr. Fradsham.

Mr. Wright.

MR. WRIGHT: I take it you agree, then, that the rule the Supreme Court of Canada laid down that the time runs from where discovery was made or ought reasonably to have been made, does not apply to the limitation as expressed against the doctors.

MR. FRADSHAM: I think that's probably true. Luckily I've only had to address my mind to the question relating to my client, the hospital. But it certainly applies to my client, the hospital.

MR. WRIGHT: Because the wording there is the cause of action rather than cessation of services.

MR. FRADSHAM: Exactly, sir. Exactly. And the cause of action vis-à-vis the limitation only arises when you knew or ought to have known.

MR. WRIGHT: Because damage is part of the gist of the action.

MR. FRADSHAM: Exactly, sir.

MR. YOUNIE: I presume we can question anything we've heard this morning, not just the most recent presentations.

MR. CHAIRMAN: Yes. I think the procedure we'll follow now: we'll open this up for questions by the committee, and then we will end with the final submissions by Mr. Lowe and Mr. Major. I don't know if Mr. Fradsham wants to make . . .

MR. WRIGHT: I do have a couple more to sum up.

MR. CHAIRMAN: Oh, certainly. As I say, we'll open it to the committee now, and then we'll go back to the final summing up.

MR. WRIGHT: To Dr. Bladek. Your notes made mention of a birth injury or a possible birth injury, and from that you infer that you must have discussed the matter with the patient or Mrs. Lumley. Am I right in supposing that's what you said?

DR. BLADEK: Because that is my practice. If it's written down, then we've gone over it.

MR. WRIGHT: Yes. But might it have been the case that you didn't use those very words to her, that you discussed the possibility of something having gone wrong or discussed, at any rate, this business of the cord being wrapped around the infant's neck and the forceps delivery and so on without using the term "birth injury"?

DR. BLADEK: I can't recall back to February of '86 what words I used. However, back in October of '85 the mom had told me, because that was the first I'd heard of the cord wrapped around the neck with forceps and the intracranial hemorrhage and the baby being on phenobarbital.

MR. WRIGHT: Yes. So it may have been your conclusion from the discussion you had had that there was a possible injury at birth, without using those terms for the mother?

DR. BLADEK: That's possible.

MR. WRIGHT: Thank you.

MR. CHAIRMAN: Mr. Younie?

MR. YOUNIE: Okay. Mine is a very similar point, but I do want to get it clarified for myself. You've used the phrase several times, "I don't recall the specific conversation." Now, I would agree that in the process of a busy day a doctor would not recall a specific conversation with a specific patient after a long period of time, and that's precisely why notes are kept. But I would contend on the other hand that a mother would have it very indelibly etched on her mind if a doctor said this could have been caused by a birth injury during the process of delivering the baby.

It would seem to me that as the mother very specifically said she does not recall that phrase being used and does not recall being told in that meeting that it might have been a birth injury that was causing these symptoms, what I'm asking is: is it possible, although your custom was otherwise, that what you wrote down was something that occurred to you in the process of the meeting but something you did not, in specific enough terms for the mother to recall it in that sense, say to her that this might have been caused by a birth injury?

DR. BLADEK: Again I don't recall back to 1986, although if I feel there's a specific concern of any matter, it's my practice to discuss it. I don't recall what exact words I used.

MR. YOUNIE: But they were obviously words that did not convey to the mother, by her assertion, that the symptoms her son was suffering were related to a birth injury.

DR. BLADEK: Well, that's what we've heard today.

MR. YOUNIE: Which means that although that is your general practice, it is just that, a general practice and not something that is necessarily 100 percent in every case.

DR. BLADEK: Well, that's my job. That's what I do, and that's how I work. At least that's how I'm responding. I just don't recall exactly back to February 18 of 1986.

MR. CHAIRMAN: Ms Mjolsness?

MS MJOLSNESS: Yes. I'd just like to ask, I guess, Dr. Hunt: when a baby is born with a forceps delivery and then subsequently a couple of days later has an intracranial hemorrhage, is it not routine practice that under those circumstances that child would be kept under very close observation throughout the development to make sure that no permanent damage has been done?

DR. HUNT: I would think that. Just to refresh your memory, after the delivery I . . . As a matter of fact, for routine after forceps deliveries I've made it a point of usually having a child looked after by a pediatrician, and the sequence of events here is that I immediately transferred the care of the child to the pediatrician. This is after the delivery on September 4 at 7 p.m. The decision was made by the pediatrician the next morning at 11:15 to send the child for further assessment at the Foothills, where they have more neonatologists and more equipment. So the child was in the intensive care unit right from the beginning, from the delivery room to the intensive care unit, and it was under close observation by the nursing staff in the intensive care unit.

MS MJOLSNESS: Thank you. So when you saw the child again, it was July and August of '86?

DR. HUNT: Sorry. I saw the child in October of '85 and December of '86.

MS MJOLSNESS: So you had no reason to believe at that time that there was any reason to be alerted to any problems?

DR. HUNT: Well, remember the circumstances: the child was under the care of a pediatrician at the General, a very competent pediatrician. The child was then transferred to the care of a neonatologist at the Foothills, again a very competent physician. I did not receive a report from the Foothills as to their findings. I've received it since there's been a statement of claim brought against us, but I basically did not know what had happened to the child.

MR. CHAIRMAN: Mrs. Hewes.

MRS. HEWES: Yes, Mr. Chairman. I just want to go back over one thing that continues to trouble me. Dr. Bladek, did you consider that Brandon was your patient throughout this?

DR. BLADEK: Mrs. Lumley was my patient. Because of the birth injury, because of what happened at birth, I did not feel that I was ever the primary care physician for Brandon. I felt that the mom came in to talk to me about Brandon, but Brandon was under the care of Dr. Govender.

MRS. HEWES: Mr. Chairman, Dr. Bladek, on page 4 of the submission section (e) it says: "Dr. Mary Bladek who recommended further neurological investigations." Did you make that

referral?

DR. BLADEK: We talked about that last time.

MRS. HEWES: That's right.

DR. BLADEK: That referral was made by Dr. Govender, and Mrs. Lumley said to me February 18, '86, "Dr. Govender thinks he's slow, wants a referral to a neurologist." I said, "Do proceed with referral to a neurologist." So that appointment had been made or suggested already.

MRS. HEWES: Right. But essentially, then, we've got Brandon's mother as your patient. Although you saw Brandon and made notes about him on a number of different occasions, you somehow didn't... He wasn't your patient or wasn't your patient in the sense that you followed Dr. Govender's care of him.?

DR. BLADEK: I was not the primary care physician, the main person looking after the child. I was not the primary care physician.

MRS. HEWES: And reports on Dr. Govender's assessment and analysis were not shared with you.

DR. BLADEK: Unfortunately not.

MRS. HEWES: Would it not be normal practice for you to pursue that under the circumstances?

DR. BLADEK: Again, since I've got this statement of claim, I have all kinds of information. I saw the baby in October '85 and at that time was informed that he was on phenobarbital. I had not prescribed the phenobarbital, and at that time I knew the patient was seeing a pediatrician. Then at five months I saw the baby again. Five months is not that far along in a baby's life, and at that time it is usually not unreasonable for us not to have received something yet from the specialist. Sometimes we do, but sometimes we don't. So at that time I had assumed that I would be getting something. But what has happened is that Dr. Govender did not know that Brandon was seeing me at all. He did not...

MRS. HEWES: As far as you recall, Mr. Chairman, Dr. Bladek, there was nothing in your observations, even though you record "birth injury" in February '86, that made you pursue either with the mother or with the primary care specialist what, if anything, you should be working on vis-à-vis this family?

DR. BLADEK: What I usually do is that if I'm seeing a baby who is seeing a specialist, I usually expect to get a report, and usually I do.

MRS. HEWES: That would be normal procedure.

DR. BLADEK: Right, to expect it to come. Because usually the specialists do know who the family doctor is, and that is usually because patients tell them or it's known through communication prior.

MRS. HEWES: Mr. Chairman, then, just finally. Dr. Govender did not get in touch with you or send any reports, and you did not pursue the matter with Dr. Govender or any other specialist, Dr. Hindle or any of the others that were used?

DR. BLADEK: I received a report from Dr. Skov when I referred the patient to the ophthalmologist. She basically had indicated to carry on with Dr. Hindle's suggestion, because that was for a second opinion. Other than that I received no other information on this baby, and again at five months of age I had expected that I would have received them in time.

MRS. HEWES: Dr. Skov – I hadn't recalled that from last time. Dr. Scov's report to you didn't indicate any particular abnormalities that you should follow up.

DR. BLADEK: That was an opthalmologist. In her letter she basically said that, yes, he has this cross-eye problem and they should proceed with surgery. A cross-eye problem is a very common problem in babies.

MRS. HEWES: But it was not related to anything else in her letter?

DR. BLADEK: Would you like me to read the letter?

MRS. HEWES: Please.

DR. BLADEK: It's a very short letter. The letter's from Dr. Scov, November 6, 1986 to Dr. Bladek.

Dear Dr. Bladek,

Re: Brandon Lumley
([Born] Sept. 4, 1985)

Thank you for referring Brandon, whom I had the pleasure of seeing on October 28, 1986.

Brandon has had an esotropia since birth,

the cross eye, the lazy eye,

and has had patching therapy in preparation for surgery.

On examination, his vision is good and equal in each eye. He has an esotropia of 20 prism diopters at near which does not reduce with +3.00 lenses.

I feel he has an infantile esotropia and recommended that they proceed with the surgery with Dr. Hindle. Mrs. Lumley felt better and will see Dr. Hindle in the near future.

Thank you.

Sincerely,

C.M.B. Scov, M.D.

I would like to add one thing, that seeing a baby at five months of age who is doing all these things... You know, many of the things he did were quite appropriate for his age. The concern was that his eyes didn't focus too well, plus what Dr. Govender had said to the patient was very important, that he had recommended a referral to a neurologist because he felt that the baby was slow and had low tone. So those were important points to me to agree that the patient should see the neurologist. At that time, again, as asked before, I would not have thought of cerebral palsy. That was not in my mind.

MRS. HEWES: Thanks, Mr. Chairman, Dr. Bladek.

MR. CHAIRMAN: Dr. West.

DR. WEST: Yes. I would like to get back to Allan here on the hospital issue because it seems to me that we're judging whether to extend the statute of limitations. That's exactly why we're here. I'm not here to judge the facts, although I feel very sensitive to them. I'm here to see if fairness and equity can be ad-

dressed under the present system.

If you were to take it today on behalf of the hospital -- leave the doctors out -- you would base your case and your defence on proving that they knew. You would try to establish that the doctors had told them earlier that there was something wrong, and therefore you would be in conflict with the defence the doctors would use later in there. You would try to prove, as the hospital, that they knew earlier so that under the present Act they couldn't proceed against the hospital.

MR. FRADSHAM: With respect, sir, the first thing that I would do is show that the hospital wasn't negligent at all. But the second thing I would do is take the tack, indeed, that the limitation defence applies in favour of the hospital simply because the parents knew or ought to have known. That's the debate that you hear here. I simply say that the legislation as it currently stands puts that debate before the trial judge, who is the better person to make that decision. Now whether that puts me in conflict with the physicians, I'm not sure that I see the drift of that conflict myself. And I'm not sure it's germane.

DR. WEST: Well, you would be proving, then, that the Lumleys knew. I'm not prejudging evidence, but the evidence is that they're coming to us because they didn't know. Therefore, you would immediately take a position that would take away fairness and equity to them with the doctors, in having a judgment one way or the other. All they want to do is have a judgment. But your position is to work on technicalities. You wouldn't worry about that judgment on Brandon's part; you'd just worry about a technicality.

MR. FRADSHAM: As I say, I don't agree it's a technicality. All I simply say is that... Sometimes in the questions I fear that members think that there are no defences available apart from this limitation defence. You must remember that all defendants have strenuously defended this on the basis that there's no merit in the claim. But the position of the hospital on the limitation argument simply will be that the Lumleys knew or they ought to have known within the year, and they could have commenced their action. They contend that that isn't the case.

I'm going to let Mr. Lowe speak on behalf of the physicians as to whether my position will bring them into conflict with the hospital or not. But no, I'm not attempting to take away the merits of their case. What I'm attempting to do is to say to this committee that whether they knew or ought to have known is not an appropriate thing vis-à-vis the hospital for this committee to decide, because the Legislature has already said that it's something to be decided by the trial judge.

DR. WEST: I appreciate that, but the point I'm bringing up is the direct conflict of the two types of suits. On the other hand, the doctors really have indicated medically and everything else that you couldn't have known before a year, and they didn't relate that.

MR. LOWE: Dr. West, if I could interject. The doctors haven't said that at all. In fact, the evidence that I'll summarize for you from *Hansard* last time will indicate that the fact of the injuries, all of the injuries, was known before the year was up and that all that remained was for somebody to put a label on it. Now, time doesn't run from the date when somebody puts a label on it; time runs from when the injuries are known.

MR. MAJOR: Mr. Chairman, I wonder...

MR. CHAIRMAN: I think everybody on this side of the table is going to have a chance to sum up. Really, what's happening now -- I think that's your job to try to make it clear what's in the questioner's mind so that you can respond to that later.

Dr. West, do you...

DR. WEST: No, I'll leave it there. You know, I'm trying to get back on the limitation issue. You know, sometimes we get to the case and want to review it.

MR. CHAIRMAN: As I understood Mr. Fradsham's position, really, there doesn't need to be any change in the limitation period as far as the hospitals are concerned; what already exists for the hospitals is what the Lumleys are asking with regard to the doctors.

MR. FRADSHAM: That's correct, Mr. Chairman.

DR. WEST: That's why I say it was in conflict. On the one you don't need it and the other you do, if you want to proceed.

MR. CHAIRMAN: Mr. Younie.

MR. YOUNIE: Yes. I'm going to make sure I understand, then, if whatever reasoning is correct, exactly what our reason for hearing this Bill is. As I understand it, our reason for hearing the Bill is in fact to decide whether or not the Lumleys did know or ought to have known about the condition sufficiently to sue within the time limit or whether they could not reasonably have been expected to know, and therefore the time limitation should be waived. Is that correct?

MR. CHAIRMAN: Well, my understanding, Mr. Younie, is that our Limitation of Actions Act as far as the doctors are concerned limits the right of action to one year after the last service, and in the case of Dr. Hunt that was the date of the delivery. What the Lumleys are asking for, really, is for us to move to the position that Ontario has adopted, and that is to have the limitation period start running when they knew or ought to have known there was an injury.

MR. YOUNIE: Okay. So in other words, we're deciding what...

MR. CHAIRMAN: That is to put the doctors in the same position as they are in Ontario or as the Calgary General hospital is in.

MR. YOUNIE: Well, if counsel could...

MR. M. CLEGG: Mr. Chairman, may I add something which I hope will clarify it? The point has been made that the question being put to us with respect to the hospital is quite different from the question being put to us with respect to the doctors. It's the position of the hospital's counsel that the question should not be put to us at all with respect to the hospital. He is saying that the Limitation of Actions Act provides that the court shall determine whether or not the cause of action had arisen more than a year before the action was commenced, and that is on the basis, from the Supreme Court of Canada, as to whether or not the plaintiffs knew or ought to have known. The position

of the hospital's counsel is that there is no need for this Bill to come before us because there's no special exception to be granted here. Because the matter at issue, the question which will determine whether or not that limitation period is still there -- and it may still be there; it may not -- is a matter which the legislation specifically says the trial judge shall determine. In the law he is given guidelines for determining it.

With respect to the doctors it's entirely different. At this point in time, specifically at least with respect to Dr. Hunt, there seems to be no argument that his services terminated very shortly after the birth and that more than 12 months did in fact expire before the action was commenced. On that basis, the law as it stands specifically states that they may not bring an action. What we have to look at is whether there are special, exceptional circumstances that might not have been considered when the law was drafted which would give Brandon Lumley a right to action because of the special circumstances. One of those circumstances might be whether or not the parents knew or ought to have known, but it's not necessarily the only circumstance. The two things are quite different. The question of the point at which Dr. Bladek's services terminated has not been yet addressed.

MR. YOUNIE: Okay. I just wanted to clarify that legal point first. Now, it seems to me that at least in terms of the legal action against the doctors and whether or not we should extend the limitation period, the prime consideration is whether or not the limitation period ran out before the parents could reasonably have known that they had just cause for legal action.

Now, a point that's been brought up twice, once last week -- and I've got it in quotation marks, so I hope it's an exact phrase from Dr. Hunt -- that there was "a breakdown in communication" and therefore communication from the pediatrician that you would normally have expected to receive did not come, and you did not receive it until after, in fact, the legal action against you was commenced. Then you've confirmed the point again this morning, Dr. Bladek, that although you would normally have expected to receive those kinds of summaries of the pediatric care given by the pediatrician within some reasonable amount of months, it was information you didn't get until after the legal action was commenced.

Now, the reason I mention that is it seems to me that if a breakdown in communication from the pediatrician the baby was referred to, to the doctor who made the referral could happen, then, as Mrs. Lumley is asserting, an equal breakdown in communications that would have allowed them to have the required knowledge to bring a lawsuit also existed there, and that there was a lot of information that in an ideal world you might have had that you did not have within the one-year limitation time, although you eventually got it within the second year. I just wanted to ask Mrs. Lumley if, in her point of view, that's a fair assessment.

MRS. LUMLEY: That's exactly right.

MR. YOUNIE: Now, I've also heard the phrase used -- and it seemed to me that this was at least one motive in action -- that "Mrs. Lumley felt better." And it seems to me that oftentimes information that may have been quite distressing to her was not given to her in the most timely way for that very reason, to not make her feel that either she was being an inadequate mother or that the situation was hopeless or that the baby had a permanent condition, and that, legitimately, Mrs. Lumley had every reason to believe that these were conditions that would go away, that were somewhat temporary in nature and not of as much concern as they obviously should have been. Is that a fair assessment?

MRS. LUMLEY: Yes, it is.

MR. CHAIRMAN: Any further questions or comments? Mr. Wright.

MR. WRIGHT: To Mr. Major. The Bill does not propose to extend the Limitation of Actions Act in such a way as to depend on the date at which your clients discovered or ought to have discovered the birth injury.

MR. MAJOR: Yes, sir. That is correct. I've considered that following our last meeting. I specifically looked at the other statutes in the other provinces again, and I note that the statutes of Manitoba have an extension of time in certain cases and that this is the law in Manitoba as it currently exists. I have reproduced it. Perhaps it would be appropriate, Mr. Chairman . . .

MR. WRIGHT: That isn't in your submission that you've given us already?

MR. MAJOR: No, sir. This is in response to the questions and the thrust of the questions that this body has focused on.

In Manitoba the Act reads that:

> Notwithstanding any provision of this Act or of any other Act of the Legislature . . .

And this is on the bottom half of that page.

> . . . limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between
>
> (a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and
>
> (b) the date on which the application was made to the court for leave.

Now, I've adapted that language to the Brandon Paul Lumley Limitation Act. The preamble would be the same, and the operative section will be:

> 1 Notwithstanding the Limitation of Actions Act, or of any other Act of the Legislature limiting the time for beginning an action the Court of Queen's Bench may on application by way of Notice of Motion grant leave to the applicant to continue the action of . . .

And this is the action set out, which is an exhibit.

> . . . if [the Court] is satisfied on evidence adduced by or on behalf of the applicant that no more than 12 months have elapsed between
>
> (a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based and the date the said action was commenced.
>
> 2 The application permitted by section 1 may not be made after the expiration of 60 days from the coming into force of this Act.

Now, such an Act would be acceptable to the Lumleys. I've noted that the committee have examined the Lumleys under oath and examined the doctors under oath. If they are satisfied that the action should merely proceed on the merits, then if you turn the page over, there's a simple way that you have the power to

do it, and that simply says that "notwithstanding the Limitation of Actions Act," this action "may be continued."

The first draft Bill, Pr. 10, gives the court very broad discretion in . . .

MR. WRIGHT: That's the one I'm looking at.

MR. MAJOR: Yes.

MR. WRIGHT: I'm a bit puzzled. Has there been an amendment, then?

MR. MAJOR: This . . .

MR. WRIGHT: Is a proposed amendment.

MR. MAJOR: A proposed amendment.

MR. WRIGHT: I see.

MR. MAJOR: Either would be acceptable to the Lumleys.

MR. WRIGHT: Mr. Chairman, I notice that . . .

MR. MAJOR: And I might say that would meet Mr. Fradsham's argument that . . . What we're endeavouring to do is get mechanisms so we can go in and, in fairness, deal with the limitation period if the people are not dilatory, if in any way the doctors are prejudiced. And clearly, they have not been prejudiced; they have the same records today that they had a year ago, or within a year of the delivery. They're in no way prejudiced, and if we can on a preliminary application deal with the limitation period both with respect to the doctors and with respect to the hospital, then if a judge grants us leave to continue, we can proceed to the merits. If this body is satisfied that the Lumleys ought to proceed, then they have the power to simply grant a Bill saying so, and we can get on with the . . .

MR. WRIGHT: Yes, Mr. Chairman. Have we formally received a request for an amendment?

MR. M. CLEGG: No.

MR. WRIGHT: I see. Okay. Have you seen a copy of this proposed amendment, Mr. Fradsham?

MR. FRADSHAM: No.

MR. WRIGHT: Having heard it, it really recapitulates the Manitoba exemption, which in turn mirrors the Supreme Court of Canada decision. So it may be that after you've read it, you will agree that the very thing that under existing law governs the position on limitation of the hospital vis-à-vis the Lumleys, is set out in the proposed amendments.

MR. FRADSHAM: Mr. Chairman, that may indeed be the case. And I will take the opportunity to review the piece of legislation that's proposed. It's now been given to me. But I would strongly suggest to this committee that there is something inherently strange about this committee re-enacting in a private Bill the law which already exists in this province, that there is no good purpose to take a private member's Bill and restate that which already exists, particularly when the first paragraph, I gather, of what is now proposed will say, notwithstanding the Limitation of Actions Act, we're going to re-enact it.

MR. WRIGHT: That's very true.

MR. FRADSHAM: In my respectful submission that is not a good use of the time of this committee. It is not a good use of the process which is available to the residents of the province, and it will be at least confusing to whatever member of the Court of Queen's Bench has the misfortune to have to decide the matter. If the law is indeed sufficiently broad now to protect the Lumleys, it ought to be left alone and applied. If this committee wishes to change the law in respect of a separate section of the Limitation of Actions Act as it relates to physicians, that's a matter which the committee can determine. To drag the hospital along in an unnecessary amendment, in my respectful submission, is inappropriate.

MR. WRIGHT: Mr. Lowe, do you agree that the Supreme Court of Canada interpretation of the tort law on limitation does not apply to the limitation that's set out vis-à-vis doctors?

MR. LOWE: Yes.

MR. CHAIRMAN: Any other questions or comments? Dr. West.

DR. WEST: Does it clarify anything if the hospital were dropped?

MR. CHAIRMAN: Well, Mr. Fradsham says the hospital . . .

DR. WEST: I mean, I submit that it does come back to the conflict that I have. If we pass this, then what you say is absolutely right if the hospital is included. If the hospital isn't included under this joint action, then, of course, this doesn't have any bearing on what you're saying.

MR. FRADSHAM: Mr. Chairman, if the hospital is not included in the Bill as it's proposed to this committee, then I must admit I lose a lot of interest. So it eliminates any conflict in my mind to that point that . . . And that's why it's important and why I made the point last time that it's important for this committee to distinguish the positions of the physicians and the hospital. Because in the wisdom of the Legislature there are two separate sections in the present Act governing limitations for those two types of individuals.

MR. CHAIRMAN: Mr. Clegg, did you want to say something?

MR. M. CLEGG: I have some further questions of the witnesses, Mr. Chairman.

MR. CHAIRMAN: Mr. Clegg then.

MR. M. CLEGG: Mr. Chairman, I wanted to ask some further questions dealing on the professional relationships between the various doctors involved and Mrs. Lumley and Brandon.

I'd first like to ask Dr. Bladek. She used the term "primary care physician," which is a term I'm familiar with. But I'd be grateful if you could tell the committee what it means from your professional point of view. What is your professional opinion of that expression?

DR. BLADEK: Primary care physician means the physician who is in primary charge, the person who is looking after that child.

MR. M. CLEGG: If that person recommends a reference to another specialist, would you consider that the primary care physician remains the primary care physician and would be responsible to get this specialist's opinion back and brief the patient?

DR. BLADEK: Definitely.

MR. M. CLEGG: And did you consider yourself to be the primary care physician to Mrs. Lumley at this stage?

DR. BLADEK: Yes.

MR. M. CLEGG: Did you consider yourself the primary care physician to Brandon Paul Lumley at this stage?

DR. BLADEK: Not to Brandon.

MR. M. CLEGG: I see. So is that the distinction you made when you did not follow up on the nonreceipt of the specialist's report? You were aware that Brandon had been sent to see a specialist. It was the suggestion of Dr. Govender. To put it another way, at that point in time had you professionally concluded that Dr. Govender was the primary care physician for Brandon?

DR. BLADEK: Yes.

MR. M. CLEGG: Thank you.
Could I ask a question of Mrs. Lumley?

MR. CHAIRMAN: Yes.

MR. M. CLEGG: I understand that your first contact with Dr. Govender was when Brandon had been referred for further treatment and observation after he had been born.

MRS. LUMLEY: Right.

MR. M. CLEGG: So essentially you didn't actually pick Dr. Govender and retain him as a pediatrician, but you were told that he was under Dr. Govender's care?

MRS. LUMLEY: That's right. He came into my room and was talking to me.

MR. M. CLEGG: So at that time did he present himself to you as the physician who would then be looking after Brandon?

MRS. LUMLEY: Right.

MR. M. CLEGG: And when he subsequently recommended that Brandon see a neurologist, Dr. Sarnat -- and we understand from the evidence that you advised Dr. Bladek of that, because you were discussing with her your concern about Brandon.

Now, there was an earlier discussion which you had with Dr. Govender. No, this was a . . . Dr. Sarnat arranged for a CAT scan and advised -- I'm just checking my notes. It's not clear from my notes whether Dr. Sarnat advised you or advised Dr. Govender that part of the brain was dead and that half might take over. Was there a discussion with Dr. Sarnat?

MRS. LUMLEY: Dr. Sarnat.

MR. M. CLEGG: Dr. Sarnat. So at that point in time, on a reference from Dr. Govender, you were briefed by Dr. Sarnat?

MRS. LUMLEY: Right.

MR. M. CLEGG: Now, when Dr. Sarnat said that part of the brain appeared to be dead and another part might take over, did he discuss with you any reason for that? Or was he just discussing what he'd observed?

MRS. LUMLEY: Just what he had observed.

MR. M. CLEGG: Now, did you have any discussion with Dr. Govender about that conclusion? Did Dr. Govender talk to you separately about that afterwards?

MRS. LUMLEY: I don't believe -- that's March 11? I don't believe we did discuss it. Because there were several months in there that I didn't see Dr. Govender.

MR. M. CLEGG: Yes. So after having seen Dr. Sarnat, you didn't go back to see Dr. Govender. You just took what you had heard from Dr. Sarnat, and he was essentially saying that there might be some cure to this, that it might cure itself in a way? That's the impression you had?

MRS. LUMLEY: Yes.

MR. M. CLEGG: And just one final question of Dr. Bladek. The specialist reference that you did make to an opthalmologist, whose name I forget for the moment . . .

DR. BLADEK: Dr. Skov. S-k-o-v.

MR. M. CLEGG: Thank you. In that case you were in fact recommending a reference and you did have a report back from that particular physician. So it does seem to me that there was a different approach on your case there. In your case there you were acting to make a reference to a physician and you received the physician's report back, whereas in fact with respect to the neurological examination you then left it in the hands of Dr. Govender.

DR. BLADEK: I made that appointment for Dr. Skov, and I did receive that report.

MR. M. CLEGG: But was that on the recommendation of Dr. Govender or based on your own observations of the crossed eyes?

DR. BLADEK: Oh, the patient requested the referral to Dr. Skov.

MR. M. CLEGG: I see.

MRS. LUMLEY: That was mine. I wanted a second opinion.

MR. M. CLEGG: Oh, I see. Now, when the diagnosis of infantile esotropia came back, was there any discussion between

you and Dr. Skov as to the cause of that? A letter which you have read to the committee merely makes the diagnosis and the correction but doesn't bear on the cause. Did the cause appear to you not to be relevant, or could it have many different causes?

DR. BLADEK: Well, there can be many causes. I wouldn't know what the cause would be in this case or in other cases.

MR. M. CLEGG: I see. So it didn't trigger in your mind -- and maybe still does not -- that it might be connected with the condition which is now categorized in a broad sense as cerebral palsy?

DR. BLADEK: So you're asking me -- again, please?

MR. M. CLEGG: Yes. Whether at that time it added to your concern that there was something which might have caused some of Brandon's symptoms which would have arisen at birth?

DR. BLADEK: That's correct.

MR. WRIGHT: Mr. Chairman, can I ask whether there's an agreement amongst the lawyers as to which limitation period governs an action against a nurse, whether it's the doctor's one or the hospital's one or the general tort injury one?

MR. CHAIRMAN: Yes, you may ask that.

MR. WRIGHT: Well, how about an answer?

MR. LOWE: There's no agreement on the answer.

MR. WRIGHT: I see. What's your position, Mr. Fradsham?

MR. FRADSHAM: Oh, I think that nurses are governed by the general tort liability section. If they were to be sued individually, I think the cause of action would be governed by the general tort section of the Limitation of Actions Act.

MR. WRIGHT: Yes. Even if they were sued as an employee but joined individually.

MR. FRADSHAM: If they were an individual, named defendant, then I think the Limitation of Actions Act that applies in general tort actions would apply to them.

MR. WRIGHT: Well, that makes sense to me. What's the contrary position, Mr. Lowe?

MR. LOWE: Mr. Wright, I'm not prepared to argue the law on that point with you this morning. I didn't know it was going to come up, and I'm not prepared to argue it.

MR. WRIGHT: Well, it's just that they've proposed to join "Jane Doe, a Nurse", in this amendment at any rate.

MR. LOWE: "Jane Doe, a Nurse" is not my client and will not be, and I simply haven't addressed my mind to it. I'm just telling you that. As far as I'm aware there's no agreement on the point.

MR. WRIGHT: Yeah. In any event, were you aware that Jane Doe was proposed to be joined?

MR. LOWE: Yeah, I've read the pleadings.

MR. WRIGHT: I'm sorry; I haven't. Jane Doe is in there, is she?

MR. LOWE: Yes.

MR. WRIGHT: And so in any event, you wouldn't recognize that.

MR. LOWE: This is an ongoing action, Mr. Wright. It's not as though the acton hasn't begun yet.

MR. WRIGHT: Yes, I know that. I wasn't here last time, I'm afraid, and I'm catching up to it. All right. Fine.

MR. FRADSHAM: Mr. Chairman, if I might, because I think the hon. member highlights an interesting point. The position of the hospital simply is that we will deal with the law as it presently stands. Good, bad, or indifferent to the position of the hospital, we will deal with it as it stands, and the Lumleys need no more protection than is already in the law.

MR. WRIGHT: Yes, I understand that, Mr. Fradsham, but we're being asked to meddle with the law.

MR. FRADSHAM: Oh, and your choice of words is to be commended. I think that's exactly what you're being asked to do, to tinker and to meddle.

MR. WRIGHT: Well, sometimes it's as well we are entitled to meddle with the law if the law is bad. But I just want to find what the law is, if possible, or what the opinion of the lawyers here is regarding Jane Doe. Mr. Major?

MR. MAJOR: I haven't completely researched the matter. I would take the position that the nurse would fall under the general limitation period, which would be two years, and the action was commenced within the two-year period. But I have some apprehension in that position.

MR. CHAIRMAN: If there are no further questions or comments, I'll ask Mr. Lowe for his summing up.

MR. LOWE: Mr. Chairman, I think this committee's counsel quite properly said that what the committee is being asked to do is consider whether there are special circumstances which would warrant the removal of an accrued defence from the two doctors, and that only one of the special circumstances would be whether, on the test which now applies under the Ontario law, this action would have been in time. Now, we've focused principally on that question so far in this hearing. My suggestion to you is that the evidence is that even on that test, this action is out of time, and I'll summarize that argument in a minute.

You also asked another question, or somebody asked: what about the timing and Dr. Bladek? In the statement of claim the only allegation against Dr. Bladek is that it was negligent of her to have referred the patient to Dr. Hunt. That's all. Anybody who refers a patient to Dr. Hunt is negligent. Dr. Bladek did; therefore, Dr. Bladek was negligent. That's the only allegation against Dr. Bladek. Obviously, that referral took place before

September 4. Obviously, any time limit begins running even before September 4 against Dr. Bladek if that's the substance of the allegation.

Now, as we consider this one question that seems to have preoccupied us most, which is, even under the Ontario test would these plaintiffs be in time?, you'll recall that I invited you when I was here last time to consider not when the Lumleys heard the words "cerebral palsy," not when they had an opinion that they ought to see a lawyer, or not when a lawyer told them that he thought this was a lawsuit worth running. I said to you that even under the Ontario legislation the test is when they knew or ought to have known the facts upon which their case is based. My summation to you will, I think, show you that the facts were known before the end of August of '86. The facts are the injury, the intervention and the injury. Whether someone eventually calls that collection of injuries which had been noticed certainly since the neurological assessment was done in March of '86 cerebral palsy or not doesn't change the fact of the injury and the fact that the injury was recognized.

Now, we know that in October of '85 it was Mrs. Lumley who recited what can only be described as a birth injury to Dr. Bladek. She recited that the cord was wrapped around the baby's neck, that there was intracranial bleeding, that there had been a forceps delivery, that the child was on phenobarbital, and she's told us that she understood the phenobarbital was to prevent seizures. She described a birth injury.

We've heard Dr. Bladek's evidence that in February of 1986 Mrs. Lumley came, worried because a specialist had told her that the child needed to be assessed by a neurologist, and that Mrs. Lumley was concerned about that recommendation, and we know that Dr. Bladek has written in her notes, impression birth injury. We've heard her say that her practice is that if she writes it down, she discusses it. She's also told you under oath quite truthfully that she simply doesn't recall the words used. Whether the words "birth injury" were used or not by Dr. Bladek, can you think that a description such as the one given by Mrs. Lumley to Dr. Bladek in October is a description of anything other than an injury suffered at birth? It certainly isn't a description of a normal delivery. In any event, Dr. Bladek recommends to Mrs. Lumley that she do as the specialist has suggested, that she have the neurological assessment. A neurological assessment is then performed in March by Dr. Sarnat.

You heard Mrs. Lumley the last time use the phrase: the doctors said that "these things happen." Mr. Clegg pursued that when we were here last. The reference is at page 89 of *Hansard*. I'd like to read it to you, because we find out what she understood by "these things happen." The Chairman says:

> Could I just ask: after the Sarnat assessment in March of '86 did you ever query anybody as to the results of that?

Answer:

> Yeah. I think we asked him then, too, didn't we?

And Mr. Lumley says:

> We had a meeting.

So in March of 1986 there was a meeting following Dr. Sarnat's neurological assessment. Both parents were present. Mrs. Lumley says:

> The only answer we ever got from Dr. Sarnat, Dr. Cochrane, all the big specialists: "These things happen."

The Chairman says:

> That was the extent of your discussion . . .

Mrs Lumley says:

> That's all they'd say.

The Chairman continues:

> . . . with regard to that assessment of March of '86 and following that?

And she says:

> Yeah. Oh; pardon me. He did say that he was getting better from our last visit.

Then Mr. Clegg asks this supplementary:

> When he said, "These things happen," did you understand that to refer to an injury at birth or a developmental problem?

Mrs. Lumley says in answer:

> To the birth injury.

Mr. Clegg says:

> So he was saying to you essentially that there was an injury at birth, but these things happen.

Mrs. Lumley says:

> Yes.

Mr. Clegg says, speaking of the March 1986 report:

> And that was after the assessment which we received with this report.

Mrs. Lumley says:

> Right.

So we know that by March of 1986, after a specialist's assessment, there was a meeting with the parents. The specialist said that there had been a birth injury and that birth injuries happen and presumably discussed what the child's condition was. Well, are we to believe that the child went into therapy because he was normal? We know that his condition as set out in that report of Dr. Sarnat shows slow development and that he began therapy immediately afterwards. Dr. Sarnat had said to the plaintiffs, "He suffered a birth injury, but these things happen." He then goes into therapy the next month, and on the next page we have a question about that, on page 90. Mrs. Mirosh is asking: well, Mrs. Lumley, why did you think your child went into therapy? We have this:

> Mrs. Lumley, I just wondered what stimulated you, or created this Alberta children's hospital assessment program. Why did you take your child there at seven months?

Mrs. Lumley says:

> Because Dr. Govender told us he had low muscle tone. I asked what caused that . . .

And now we have Dr. Govender speaking – not Dr. Sarnat; Dr. Govender.

> . . . and he said: "Well, it could be the phenobarbital because that's a muscle relaxant. Some kids are born with low muscle tone with not having any injury." And then he said, "Or it could have been the damage he received at birth."

So before Brandon goes into the therapy session following his assessment by Dr. Sarnat, there's a discussion with Dr. Govender, and Dr. Govender recites possible causes for the deficits which are sending the child to therapy. He's not going to therapy because he's normal; he's going to therapy because he has deficits. Dr. Govender recites the possible causes. And what are they? He says it could be the phenobarbital, some kids are born with low muscle tone, or it could have been the damage he received at birth.

So we've had Dr. Sarnat connect the birth injury to the child's condition, we've had Dr. Govender connect the child's condition to the birth injury, and this all by March of 1986. Now, those are the facts. Nobody's given them an opinion yet that they ought to sue a doctor, but those are the facts. Now we add one more. In August of 1986 Dr. Sarnat reviews with Brandon's parents the results of the CT scan, and he tells them that there's a portion of Brandon's brain which is nonfunctional. They used the word "dead"; that's what they understood. He holds out some hope that perhaps other parts of the brain will

take over those functions. They have that fact, and still a year hasn't passed, in August of '86. Now, what other facts will the plaintiffs rely upon in claiming damages in a lawsuit? There are none. Mr. Wright knows that; he's a lawyer. There are no other facts upon which this lawsuit is based.

All that happened after August of 1986 is that Dr. Hindle, the ophthalmologist, used the words "cerebral palsy." Now, cerebral palsy, we've heard, is not a diagnosis that you make with a blood test or by taking bone marrow or in any other way. Cerebral palsy is a blanket description. It's like calling what you and I get every winter the flu. The flu is a generic description, and cerebral palsy is a generic description. It describes defects that are congenital, it describes defects that occur during birth, it describes defects that occur after birth, and it describes defects that are caused by drugs, by loss of oxygen – however that comes about. It has, as that description from the medical text says, been adopted by the public. The public has seized on the term. It's used in fund raising and a lot of other things. But all it really is is a label.

Now, let me suggest to you that the test, even under the Ontario law, which I say is not the test that should be applied, but even under that test, the question is not "When was the label put on the injuries?" but "When were the injuries known and related to the birth injury?" When were the deficits known, and when were they related to a possible birth injury? That's the test. There can be no other conclusion but that the parents had had suggested to them by two specialists a possible birth injury before March of '86, and there can be no other conclusion but that they knew Brandon was suffering deficits by March of '86. Whether they thought those deficits would correct themselves with time, whether anybody had put the label on it, whether anybody had recommended they see a lawyer, those are not relevant questions. Even under the Ontario amendments, which don't apply in this province, even under that test, the question is: when did they know the facts?

[Mr. Musgreave in the Chair]

When we were here last, I also suggested that we remember that limitation of action is part of every legal system and that you and I benefit from the same protection. It's shorter for a doctor. There are policy reasons for that. They were debated when this law was enacted. They may be debated again if the law is to be changed in the future. You will undoubtedly have your part of that debate. The fact that there is a limitation of liability is not an error of history. It's not an evidence of ill judgment on the part of your predecessors. Every system of law has a Limitation of Actions Act. Alberta and seven other provinces have one of identical wording. You are not some sort of aberration with the law that you presently have.

Now, at page 84 Mr. Younie – he's not here, and that's too bad – asked a question. He quite properly saw that the question was: "did anyone give them reasonable cause to believe there was a relationship" between the birth injury and Brandon's symptoms? I suggest to you that the evidence that we've read from *Hansard* this morning indicates that the answer to that is yes, they had reasonable cause to make the connection between the events of the birth, which were clearly known to Mrs. Lumley, and the deficits that were sending Brandon to therapy by as early as March. Certainly two specialists had made that connection for them in private interviews.

[Mr. Schumacher in the Chair]

In my submission, it would be wrong on the evidence that you have now to amend the law retroactively and remove the defence which is a substantive accrued right to freedom from action, to use the words of the Supreme Court of Canada. It would be to discriminate against two physicians, to treat them differently from all others in the province and, in my submission, to treat them unequally before the law.

Thank you, Mr. Chairman.

MR. CHAIRMAN: Thank you.

Mr. Wright.

MR. WRIGHT: Mr. Lowe, you do agree that this particular limitation is formulated in such a way as to be out of step with what is now considered to be the way one in general approaches tort injury limitations?

MR. LOWE: No, Mr. Wright, I don't agree with that at all. That's an argument of law that you and I could have some day, but I don't agree with that. I think there were and still are sound policy reasons for treating physicians differently.

MR. WRIGHT: I'm not quarreling with that. There may be, but it's out of step with the general way, namely . . .

MR. LOWE: It's not out of step, in a general way, for treating physicians, Mr. Wright.

MR. WRIGHT: I'm not talking about physicians; I'm talking about in general in tort injury law, where knowledge or reasonable knowledge . . .

MR. CHAIRMAN: I think he's saying that there's a special case for physicians.

MR. LOWE: There's no doubt about that. All you have to do is read the Limitation of Actions Act and you can see that your protection is two years, as mine is, and that a physician's is one year. We know that.

MR. MAJOR: From discovery and from termination of services. It extends the limitation period in the case of lawyers, in the case of everybody else, but not in the case of doctors according to Mr. Wright's submission.

MR. WRIGHT: Yes. I'm just saying that the Supreme Court gloss doesn't apply to your limitations. That's all I'm saying. But it seems to apply to all the others, because they use the words "cause of action."

MR. LOWE: From the point where the cause of action arose and the interpretation of the point when it arose, as you've pointed out.

MR. WRIGHT: The other question, Mr. Chairman, if I may, is – and this is addressed to all the lawyers who are here on behalf of the petitioners or the respondents to the petition – namely, the wording of the existing section. It says, "Except as provided" – well, I'll leave out the words that don't apply – a physician may be sued

> for negligence or malpractice by reason of professional services requested or rendered within one year from the date when the professional services terminated in respect of the matter

that is the subject of the complaint, and not afterwards.

Are there cases that say, or is it simply sufficient, the evidence from the wording there, that "the professional services" applies only to the professional services being rendered by the defendant and not just the professional services in respect of the matter that is the subject of the complaint?

MR. LOWE: It's the professional services which are the subject of the complaint.

MR. WRIGHT: So that if other doctors treat the patient for the very same condition, that extends the limitation period?

MR. LOWE: Mr. Wright, the astonishment in your voice is astonishing to me. This is not new law to you. You've practised 20 years longer than I have. You and I have had cases together.

MR. MAJOR: Well, my understanding is exactly as you state, and Chief Justice McLaurin, in a famous Alberta case where a physician left scissors or forceps in an abdomen and the same physician later removed them – in that case it was held that the services were continuing, but the Chief Justice made it very clear that under the legislation, if another doctor had removed them, he could not have sued the first doctor.

MR. WRIGHT: Well, that's my point. Is there a difference of opinion between the two of you on that?

MR. LOWE: No. There's a Supreme Court of Canada case from Ontario in which a sponge was left in a patient and discovered 10 years later.

MR. WRIGHT: Yes.

MR. LOW: And the Supreme Court of Canada said that the limitation period had expired.

MR. WRIGHT: Yes.

MR. LOWE: And the point at which time begins running is the point at which the services were rendered by the physician against whom it is being alleged that he was negligent. Certainly if the allegation . . .

MR. WRIGHT: Well then, you and I agree on what appears to be the view of this section, that "the" refers back to the . . .

MR. LOWE: The one who is being complained of.

MR. WRIGHT: By the doctor.

MR. LOWE: Well, no others are being complained of, Mr. Wright.

MR. WRIGHT: Well, I'm not talking about this particular case. I'm just talking about . . .

MR. LOWE: Well, in every case no others are complained of. If you're complaining that physician X was negligent on day Y and physicians A, B, and C treated on days one, two, and three later, the only allegation you're making relates to physician X on day Y, and that's when time runs. The fact that others did other things later doesn't extend the time.

MR. WRIGHT: Yes, but there is an interpretation of the Act, consistent with justice, in fact, that might extend it; i.e., that it's reasonable not to require the person injured to sue until it's been checked out by others.

MR. LOWE: I'm sorry; I'm not following that at all.

MR. WRIGHT: All right. Well, take this case: a baby injured at birth.

MR. LOWE: Yes.

MR. WRIGHT: It goes through a succession of doctors who try and cope with the problem, and at the end of the day it's found they can't cope with it in a satisfactory way or it's diagnosed that there is a problem that can't be remedied. But the original doctor stopped his services more than a year before. It is reasonable to say, well, perhaps we shouldn't require the alleged victim to sue within the year before it's all been checked out and that really, professional services refers to a professional service in respect of the matter of the subject of the complaint by whatever doctor.

MR. LOWE: Mr. Wright, the corollary of that is that if you were injured in a motor vehicle accident, you wouldn't have to sue until you found out, after having been treated by a succession of specialists, whether you were going to recover or not, which is ludicrous.

MR. WRIGHT: No, no, no. We're just talking about physicians, Mr. Lowe, really. And I won't extend the discussion; it's a legal discussion. I'm just asking whether there are decisions that say something other than what Mr. Major has said and what you have said. You know of none that might extend the time by treating "the professional services" as referring to professional services in respect of the particular complaint, irrespective of the doctor who rendered them?

MR. LOWE: The professional services in that Act are those which are alleged to have been below standard.

MR. WRIGHT: That's what you say. All right.

MR. CHAIRMAN: Mr. Fradsham, do you have anything further to present to the committee before I call on Mr. Major?

MR. FRADSHAM: No, Mr. Chairman. I think the position of the hospital is quite clear. The petitioners come to this committee saying there are special circumstances that require the enactment of a special Bill. The special circumstance raised is the concern about whether the injury could have been discovered within the one year. I simply say that that's already been taken account of in the present legislation, and absolutely nothing more is necessary to be done by this House in respect of my client, the hospital.

MR. CHAIRMAN: Thank you.

Mr. Major.

MR. MAJOR: I'll be very brief, Mr. Chairman. I must say that I'm very grateful for the time the committee has spent and the

thoroughness in which they have dug into this problem.

It's clear to everyone here that Mrs. Lumley did not know that Brandon would be crippled for life until August of 1987, when the child was almost two. We've all heard Dr. Bladek this morning say that on August 21, 1986, when she examined him -- and this is within days of the one-year limitation period -- she did not consider Brandon to have cerebral palsy. Now, if a professional doctor examines a child and tells us that some of his actions were in accordance with his age, how would anyone expect a new mother -- and I've led you through the baby book that Mrs. Lumley kept for her first child, and you see what she knew. She knew what the doctors told her. She never connected the problems that Brandon had, and she knew he had problems, but she never connected them with the injury at birth until she was told or she was asked if Brandon had cerebral palsy. She asked Dr. Govender, and Dr. Govender said, "I was wondering when you would ask me that."

Now, this body has the power, and with it the obligation, to relieve from injustice. And there's a grave injustice to a little boy who faces life crippled. Now, if there has been negligence -- and we've heard that there are defences, that there was no negligence -- then this child ought to have redress through the courts. The Bill that you have before you would give this child that redress, and that is my submission.

I might say that if any of you haven't got a copy of my submission, I do have an extra copy. Mr. Wright, you weren't here last time, when they were handed out.

MR. BRASSARD: If you wanted to leave one with us, I'm sure that the Chairman would distribute them.

MR. MAJOR: I would quickly add, Mr. Chairman, that I'd be happy to address specific questions if there are any.

MR. CHAIRMAN: If there are no further questions, on behalf of the committee I want to thank Mr. Major, Mr. Lowe, and Mr. Fradsham, and the other participants, of course, for their assistance. As is our normal course, we will be taking this under advisement and reviewing the matter, and we'll be reporting as soon as we can as to what our conclusions are. Thank you very much.

Now, I'll entertain a motion to adjourn.

MR. BRASSARD: I so move.

MR. CHAIRMAN: All in favour?

HON. MEMBERS: Agreed.

MR. CHAIRMAN: Opposed? Carried.

Just as a matter of interest to the members of the committee, we'll be dealing with Bills Pr. 16 and 18 next Wednesday, and Mr. Musgreave will be in the Chair.

[The committee adjourned at 11:18 a.m.]