NOVA SCOTIA COURT OF APPEAL

Citation: Halifax (Regional Municipality) v. Nicholson, 2009 NSCA 109

Date: 20091029
Docket: CA 308570
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

David J. Nicholson

Respondent

Judges:	Hamilton, Fichaud, Beveridge, JJ.A.
Appeal Heard:	September 11, 2009, in Halifax, Nova Scotia
Held:	Leave to appeal granted. Appeal allowed and summary judgment granted to HRM. Claim against HRM is struck. Trial costs of $750 reversed in favour of the appellant, plus appeal costs to the appellant of $750 including disbursements for this appeal.
Counsel:	E. Roxanne MacLaurin, for the appellant Nicolle A. Snow, for the respondent

Reasons for judgment:

[1] The Halifax Regional Municipality ("HRM") applies for leave to appeal and, if granted, appeals the March 6, 2009 order of Justice Kevin Coady striking HRM's limitation defence to the respondent's, David J. Nicholson, claim for damages arising out of his August 13, 2003 motorcycle accident and dismissing its application for summary judgment. HRM says the judge should have issued an order dismissing Mr. Nicholson's claim against it because it would be inequitable to allow his claim against HRM to proceed, having regard to the prejudice HRM has suffered from Mr. Nicholson's delay in bringing his action.

Facts

[2] Mr. Nicholson was involved in a single motorcycle accident on August 13, 2003 near the entrance to Municipal Enterprises Limited's ("MEL") quarry located at 315 Rocky Lake Drive, Bedford. He commenced an action against MEL on January 5, 2007 alleging its trucks negligently left an abundance of loose gravel and damaged the surface of the public roadway by making "a deep set of impressions" so that it was dangerous for public use. MEL filed its defence on February 8, 2007. MEL is not involved in this appeal as no pre-trial applications were made with respect to its limitation defence.

[3] Mr. Nicholson was discovered by MEL prior to HRM's involvement. On November 29, 2007 Mr. Nicholson served a notice of intended action on HRM. On February 1, 2008 he amended his claim to include a claim against HRM for negligent maintenance of Rocky Lake Drive by failing to take measures to inspect and remedy the "deep depressions" in the road. Mr. Nicholson subsequently served HRM.

[4] HRM filed a defence to the claim and crossclaimed against MEL on February 19, 2008. Among other defences, HRM stated that Mr. Nicholson's action was not commenced within twelve months of his accident as required by s.512(1) of the **Municipal Government Act** ("**MGA**"), S.N.S. 1998, c.18, and was therefore statute barred. MEL filed an amended defence and crossclaimed against HRM on March 12, 2008. HRM filed its defence to MEL's crossclaim on July 18, 2008.

[5] On August 28, 2008, HRM filed an interlocutory application (*inter partes*) seeking an order striking Mr. Nicholson's statement of claim pursuant to **Nova Scotia Civil Procedure Rule (1972)**14.25 or, in the alternative, an order for summary judgment against Mr. Nicholson in accordance with **Rule (1972)** 13.01, both on the basis his action against HRM was statute barred.

[6] Mr. Nicholson filed an interlocutory application (*inter partes*) seeking an order striking HRM's limitation defence pursuant to s.3(2) of the **Limitation of Actions Act** ("**Act**"), R.S.N.S. 1989, c.258 on the basis his action should be allowed to proceed considering the relative prejudice to the parties.

[7] The judge heard the applications together. Only one substantive affidavit was filed by the parties. HRM filed an affidavit of Joel Plater, senior claims examiner of risk and insurance services. Mr. Plater swore that his normal witnesses, do a scene analysis, investigate the property damage, request records regarding reported deficiencies in HRM infrastructure, obtain copies of medical and treatment records and the claimant's accident benefit file, and engage the services of a professional forensic engineer to review the evidence and do an accident reconstruction to determine such things as speed and causation.

[8] He further swore that HRM was at a disadvantage as a result of Mr. Nicholson's delay in suing HRM because it had "been unduly and irreparably prejudiced in the conduct of its investigations." In his opinion this prejudice arose because of the evidence that was now unavailable as a result of Mr. Nicholson's delay:

> (1) the records from the pub where Mr. Nicholson indicates he was prior to the accident had been destroyed,
>
> (2) the people working at that pub now have no recollection of Mr. Nicholson's activities that evening prior to the accident (Mr. Plater indicated this evidence would be relevant in explaining the discrepancy between Mr. Nicholson's statement that he had not consumed any alcohol, drugs or medication prior to the accident and his medical records indicating the presence of alcohol),

(3) the only surviving paramedic who attended at the accident scene now has no recollection of it,

(4) Mr. Nicholson's rebuilding of the motorcycle after the accident precludes its inspection for the purpose of assessing property damage, determining whether any mechanical defects, tire wear, structural features or other conditions contributed to the accident, and arranging for an accident reconstruction, and

(5) the repair and repaving of Rocky Lake Drive commencing November 26, 2005, more than two years after the accident and more than one year after the expiration of the of the limitation period, prevents HRM from assessing the grade, profile and surface of the roadway and any skid marks thereon at the time of the accident.

[9] I do not presume to comment on the "opinions" contained in this affidavit. Its admissibility was not challenged before us.

[10] No substantive affidavit was filed on behalf of Mr. Nicholson despite the onus being on him to establish the basis on which his s.3(2) application should be granted. Instead, on the day prior to the hearing, Mr. Nicholson's counsel sent two letters to the judge. In the first were copies of the following with an indication this was "additional documentation to be relied upon by" Mr. Nicholson:

1. Excepts from his discovery transcript,

2. Portions of a site plan,

3. Copies of photographs included with the site plan,

4. Copies of photographs from Mr. Nicholson's list of documents, and

5. A copy of a discharge summary from the hospital dated August 15, 2003.

[11] In the second were copies of notes and photographs said to be from the files of Mr. L. R. Archibald, an adjuster acting on behalf of MEL, and the following statement:

> As I will be making reference to these documents tomorrow, I wanted the Court to have a copy in advance. I will have the original copies with me tomorrow for viewing, as well as the original copies of the documents submitted earlier today.

[12] No affidavit of Mr. Archibald was filed and he was not called as a witness.

[13] HRM objected to the judge considering these documents on the basis they were filed late and were not properly put into evidence by way of an affidavit. The judge referring only to the lateness argument, admitted them. He appears to have given no consideration to the fact they were not attached to a proper affidavit.

[14] The judge gave an oral decision on January 27, 2009. He denied HRM's applications. He granted Mr. Nicholson's application pursuant to s. 3(2) of the **Act**, struck HRM's limitation defence, and awarded Mr. Nicholson costs in the amount of $750.

[15] HRM appeals the judge's order striking its limitation defence and dismissing its application for summary judgment. HRM has not appealed the judge's decision dismissing its application to strike pursuant to **Rule (1972)** 14.25.

Judge's Decision

[16] The judge found that the one-year limitation period for bringing actions such as Mr. Nicholson's against HRM, as set out in s.512(1) of the **MGA,** applied. He found that Mr. Nicholson had missed this limitation period and rejected Mr. Nicholson's argument that the discoverability rule applied. Those findings are not challenged on appeal.

[17] The judge noted that the **Act** envisages "that there are times and situations where missing the limitation is not fatal, and allows a period up to four years." He referred to the relevant portions of s.3:

> 3(2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which

> (a) the time limitation prejudices the plaintiff or any person whom he represents; and
>
> (b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.
>
> ...
>
> (4) In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to
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> (a) the length of and the reasons for the delay on the part of the plaintiff;
>
> (b) any information or notice given by the defendant to the plaintiff respecting the time limitation;
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> (c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought or notice had been given within the time limitation;
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> (d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
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> (e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
>
> (f) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
>
> (g) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

[18] During the course of the hearing Mr. Nicholson argued that the judge should not deal with balancing the prejudice to the respective parties on the basis there was no pre-trial procedure available to a defendant such as HRM to have the court make such a determination. However, Mr. Nicholson himself brought an

application to the judge under s.3(2) of the **Act** to disallow the limitation defence. It is plain that the judge concluded that such an application rendered moot the objection to him hearing the application pre-trial. No issue has been taken challenging the approach by the judge.

[19] The judge correctly referred to the function of the court on a s.3(2) application as set out in **McCulloch v. McInnes, Cooper & Robertson** (1995), 140 N.S.R. (2d) 220 in which a limitation issue was determined pre trial pursuant to s.3(2) of the **Act**:

> 21 In this case, as in most, an extension of the time limit prejudices both parties. The legislators recognized that fact. That is why the words "...and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which..." there is prejudice to each party, are in s. 3(2) (Emphasis added). In so doing a court must "have regard to all the circumstances of the case and in particular" to the seven factors set out in s. 3(4). The weighing of the degrees of prejudice is an important and required prerequisite to any conclusion which may be reached by a court.
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> 22 In **Anderson v. Co-op Fire & Casualty Co.** (1983), 58 N.S.R. (2d) 163; 123 A.P.R. 163 (T.D.), Hallett, J., as he then was, was confronted with the same issue. After setting out the provisions of the **Limitation of Actions Act**, previously quoted, at p. 167 he commented:
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> > "... The issue before the Court on this application is whether it is equitable to disallow the time limitation defence, having regard to the degree to which (1) the time limitation prejudices the plaintiff or any person whom he represents and (2) any decision to disallow the time limitation pursuant to this amendment would prejudice the defendant or any other person. In determining the issue, the Court must have regard to all the circumstances of the case and, in particular, the seven matters referred to in s. 2A(4) (a) to (g). [Now 3(4) (a) to (g)].
> >
> > "In any case, there is great prejudice to a plaintiff if a time limitation defence succeeds as the plaintiff loses his cause of action. On the other hand, there is great prejudice to the defendant who loses a perfect defence if the order is granted. The Legislature in enacting this amendment must have recognized that there was prejudice to each party when the word 'degree' was used in s. 2A (2). The Court has been directed to consider not simply whether there is prejudice but to weigh the degree of prejudice to the parties. The intention of the Legislature as expressed is to give the Court the authority to disallow a defence based on time limitation

> considering the criteria set forth in ss. 2A (2) and (4). [Now s. 3(2) and (4)].
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> "The degree of prejudice to a plaintiff caused by a valid time limitation defence could not be greater as the cause of action is lost. ...
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> "What the Legislature must have meant when it authorized the Court to disallow the defence if it appeared equitable to do so, having regard to the degree to which any such decision would prejudice the defendant, was whether the defendant was prejudiced in the defence of the action on its merits because of the failure of the plaintiff to have proceeded in time. The Legislature could not have intended that the Court consider the fact that the defendant loses a perfectly good defence in assessing the degree of prejudice to the defendant if the order were granted, as, otherwise, it would be somewhat pointless for the Legislature to have enacted the amendment. There would be virtually no basis upon which to weigh the degree of prejudice to the parties as if the relief is refused, the plaintiff is totally prejudiced in the case and to allow the relief, the defendant is totally prejudiced. In summary on this point, in determining the degree of prejudice that would be suffered by the defendant if a decision were made to disallow the time limitation defence, the Court should not give much weight to the fact that the defendant loses its defence."
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> 23 I agree with those comments. They are of utmost significance to this appeal. It is a given: each party will suffer prejudice depending upon whether the decision is to allow or disallow the time limitation defence. Thus, the necessity to weigh the degree of prejudice suffered by each.

[20] The judge referred to the factors in s.3(4) of the **Act** noting that those set out in (b), (d), (e) and (g) were not relevant in the context of the application before him. With respect to the factors set out in (a), he agreed Mr. Nicholson's delay in bringing his action against HRM was significant. With respect to (c), he agreed that the cogency of HRM's evidence had suffered from the delay but Mr. Nicholson's had not, and with respect to (f), he agreed that Mr. Nicholson had not acted promptly and reasonably once he knew of HRM's potential liability for his accident. With respect to the prejudice he found HRM had suffered because of Mr. Nicholson's delay, the judge stated:

> I accept HRM's submissions ... that they have impairment of their ability to create a scene analysis, accident reconstruction, exploring concerns about alcohol; examination of the motorcycle; examination of the roadway. The critical question is, how significant are these impairments?

[21] The judge later concluded that Mr. Nicholson's s.3(2) application should be granted and HRM's limitation defence struck, reasoning:

> The prejudice to the Plaintiff, if the limitation defence succeeds, is that he loses his cause of action re : HRM.
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> The prejudice to the Defendant HRM if the limitation defence does not succeed is an impairment in their ability to defend.
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> There are a number of factors about this case that figure into this ... analysis of prejudice.
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> One, this accident involves a single motor vehicle, Mr. Nicholson's motorcycle.
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> Two, on the facts as per the pleadings and on this application, MEL vehicles were entering and leaving the quarry on a regular basis. If there were any deep impressions on the road, it is likely that a good deal of the liability for them would attract to MEL.
>
> The first Defendant MEL did some investigations and took interviews which will be available to HRM. It would be different if HRM were owners of both the quarry and the roadway. While the scene may have been altered, it still exists in the same place at least as it did in 2003.
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> Next, while HRM may be deprived of an accident reconstruction, that is not as great a prejudice as if it involved multiple vehicles and operators.
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> Next, concerns about alcohol could be tested by cross-examination. The records and medical personnel who raised this concern are identifiable and available.
>
> And next, given the nature of the accident, I'm not persuaded that an examination of the motorcycle would yield as much as may have been advanced by HRM.
>
> Given all the factors that I've cited and the legislated factors in [Section 3(4)] of the *Limitation of Action Act*, I conclude that the prejudice to the Plaintiff exceeds the prejudice to the Defendant HRM.

Issues

[22] Restated the two issues on appeal are:

1. Did the judge err in admitting the documents sent to him by Mr. Nicholson the day before the hearing?

2. Did the judge err in finding HRM's limitation defence should be struck under s.3(2) of the **Limitation of Actions Act**?

Standard of Review

[23] The standard of review on the first issue is correctness, being a question of law. The standard of review on the second issue is that set out in **Minkoff v. Poole** (1991), 101 N.S.R. (2d) 143 (CA) at p.145:

> **[9]** At the outset, it is proper to remind ourselves that this court will not interfere with a discretionary order, especially an interlocutory one such as this, unless wrong principles of law have been applied or a patent injustice will result. The burden on the appellant is heavy: **Exco Corporation Limited v. Nova Scotia Savings and Loan et al.** (1983), 59 N.S.R. (2d) 331; 125 A.P.R. 331, at 333, and **Nova Scotia (Attorney General) v. Morgentaler** (1990), 96 N.S.R. (2d) 54; 253 A.P.R. 54, at 57.
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> **[10]** Under these headings of wrong principles of law and patent injustice an Appeal Court will override a discretionary order in a number of well-recognized situations. The simplest cases involve an obvious legal error. As well, there are cases where no weight or insufficient weight has been given to relevant circumstances, where all the facts are not brought to the attention of the judge or where the judge has misapprehended the facts. The importance and gravity of the matter and the consequences of the order, as where an interlocutory application results in the final disposition of a case, are always underlying considerations. The list is not exhaustive but it covers the most common instances of appellate court interference in discretionary matters.

First Issue - Did the judge err in admitting the documents sent to him by Mr. Nicholson the day before the hearing?

[24] I am satisfied the judge made a reversible error in admitting the hearsay documents Mr. Nicholson's counsel sent to him the day before the hearing that were not attached to an affidavit. By admitting the documents in this form, he deprived HRM of its opportunity to cross-examine on them which cross examination could have impacted their value, reliability and relevance. This would have been particularly important with respect to Mr. Archibald's notes and photographs, as it would have provided an opportunity to assess how useful his

investigation would be in establishing the condition of the road at the time of the accident.

Second Issue - Did the judge err in finding HRM's limitation defence should be struck under s.3(2) of the **Limitation of Actions Act**?

[25] Under s.3(2) of the **Act** the judge was required to determine whether it was equitable to disallow HRM's limitation defence and allow Mr. Nicholson's action to proceed by weighing the degree of prejudice suffered by each, having regard to all the circumstances of the case and in particular the factors set out in s.3(4).

[26] As set out previously, when the judge considered the s.3(4) factors, he found Mr. Nicholson's delay was significant, had resulted in HRM's evidence for its defence being less cogent, and that Mr. Nicholson had not acted reasonably and promptly in suing HRM once he knew HRM may be liable.

[27] Despite his findings with respect to the s.3(4) factors he was required to consider, the judge concluded that HRM's limitation defence should be struck because (1) MEL would bear "a good deal of the liability" for any deep depressions in the road because its vehicles regularly entered and left the quarry, (2) that there was less prejudice to HRM because some investigations and interviews had been done by MEL, (3) even though the road was repaved it still "existed" in the same place, (4) HRM's prejudice in not being able to obtain an accident reconstruction was not as great in a single vehicle accident as it would have been in a multiple vehicle accident, (5) alcohol concerns could be tested on cross-examination because the records and medical personnel involved were still available, and (6) an examination of the post-accident motorcycle was not as important as HRM had argued.

[28] As to his first reason, that MEL would bear a good deal of any liability, there was no evidence properly before the judge that could support such a finding. No law was canvassed as to potential liability as between MEL and HRM. MEL was not a party to the applications before the judge and hence was not present at the hearing. Even if the judge is correct in his conclusion, I fail to see how this factor would assist in balancing the prejudice in favour of Mr. Nicholson as between he and HRM. According to the judge, Mr. Nicholson already had an outstanding claim against MEL, the tortfeasor having the greater potential liability for the condition of the roadway. If anything, Mr. Nicholson would therefore arguably

suffer less prejudice if he was not able to proceed against HRM due to the existence of the limitation defence.

[29] With respect to the judge's second reason, that HRM would suffer less prejudice because some investigations and interviews had been done by MEL, there was no evidence properly before the judge of the extent, relevance or reliability of any investigations or interviews conducted by MEL. The judge's finding was based on speculation.

[30] The judge's third reason, that the mere existence of the repaved road would somehow reduce HRM's prejudice, indicates he misunderstood the significance of this evidence. The existence of the road is of no relevance to HRM's defence, because the particulars of negligence pled by Mr. Nicholson are that HRM's negligence arose from its failure to properly inspect and remedy the "deep depressions in the roadway". This is the only feature of the road that is relevant to Mr. Nicholson's claim against HRM. The uncontested evidence of Mr. Plater was that the grade, profile, and surface condition of the road where the accident occurred were completely changed after November 2005, fifteen months after the one-year limitation period provided for in s.512(1) of the **MGA** expired.

[31] As to the fourth reason the judge gave, that accident reconstruction is not as important for a single vehicle accident, there was no evidence before the judge from which he could draw such an inference.

[32] In addition, the judge gave no consideration to the fact the onus was on Mr. Nicholson on his application, yet he failed to file an affidavit explaining the reasons for his delay, one of the factors s.3(4)(a) mandates that the judge consider. This information would be within his knowledge.

[33] Taking all of this into consideration, I am satisfied the judge made a reversible error in striking HRM's defence. While he referred to the correct test in **McCulloch**, he failed to apply it properly.

[34] Having found the judge erred by striking HRM's defence, I then have to consider whether summary judgment should be granted to HRM. If a plaintiff such as Mr. Nicholson is unsuccessful in an application under s. 3(2) of the **Act**, it is by no means automatic that the court will necessarily strike the Statement of Claim or otherwise grant judgment in favour of the defendant. See **Layes v. Chisholm**,

[1997] N.S.J. No. 190. Absent an application by the plaintiff, the defence simply is allowed to stand and, like many defences, be determined at trial. In this case, there was an application for summary judgment by HRM. As explained in paragraph 16 above, the chambers judge found that the limitation period applied and that the respondent had missed the limitation period. He also concluded there was no issue about discoverability. No appeal or dispute has been advanced with respect to these conclusions. There is no issue about the plaintiff being under a disability, nor with respect to any of the facts establishing the limitation defence. There is therefore no genuine issue of material fact requiring a trial, and the plaintiff's claim is not one that has a real chance of success. Summary judgment for HRM must follow.

[35] I would grant leave to appeal, allow the appeal, dismiss Mr. Nicholson's application to strike HRM's defence of limitation, and grant summary judgment to HRM. I would order that the costs awarded by the judge be reversed, so that Mr. Nicholson is to pay costs of $750 to HRM for the chambers application. In addition, I would order that Mr. Nicholson pay costs to HRM in the amount of $750 including disbursements for this appeal.

Hamilton, J.A.

Concurring:

Fichaud, J.A.

Beveridge, J.A.