NOVA SCOTIA COURT OF APPEAL

Citation: Smith v. Nova Scotia (Attorney General), 2010 NSCA 14

Date: 20100223
Docket: CA 316119
Registry: Halifax

Between:

Leonard Anthony Smith

Appellant

v.

The Attorney General of Nova Scotia, representing Her Majesty the Queen in right of the Province of Nova Scotia; and The Children's Aid Society of Halifax, a body corporate; and the Nova Scotia Home for Colored Children, a body corporate

Respondents

Judges: Saunders, Oland and Hamilton, JJ.A.

Appeal Heard: January 26, 2010, in Halifax, Nova Scotia

Held: Appeal dismissed. Costs awarded in the amount of $1,000, together with disbursements as taxed or agreed, to be paid by Mr. Smith to the Nova Scotia Home for Colored Children

Counsel: Raymond F. Wagner and Michael Dull, for the appellant
John Kulik, Q.C., and Jane O'Neill, for the respondent, Nova Scotia Home for Colored Children
Michael Wood, Q.C., for the respondent, Children's Aid Society of Halifax, not present
Terry Potter, for the respondent, Attorney General of Nova Scotia, not present

Reasons for judgment:

[1] Two separate, unconsolidated appeals were heard together by agreement: (1) the appeal of Robert Lawrence Borden against The Attorney General of Nova Scotia ("AGNS"), The Children's Aid Society of Colchester County ("CAS Colchester") and The Nova Scotia Home for Coloured Children ("Home") and (2) the appeal of Leonard Anthony Smith against the AGNS, the Children's Aid Society of Halifax ("CAS Halifax") and the Home. As the issues raised by each appeal are similar, my reasons are common to both appeals, with only the final paragraph with respect to costs being different.

[2] Mr. Borden (DOB July 14, 1964) initially commenced his action against the Home and the AGNS on March 1, 2001. His action was later amended to include claims against CAS Colchester and CAS Halifax. Mr. Borden alleged, among other things, vicarious liability for assault, negligence and breach of fiduciary duty, all relating to alleged actions that occurred between approximately 1966 and 1984 while he was a ward of the Province and living at the Home and in foster homes.

[3] In a separate action, Mr. Smith (DOB July 23, 1960) sued the Home, the AGNS and the CAS Halifax on May 30, 2002 alleging similar causes of action relating to alleged events from 1965 to 1969 while he was a ward of the Province and living at the Home.

[4] The Home, and CAS Colchester in the case of Mr. Borden, applied in Supreme Court of Nova Scotia Chambers for summary judgment to have the claims of Mr. Borden and Mr. Smith for vicarious liability for assault and negligence dismissed on the basis their claims were brought outside of the applicable limitation periods provided for in the **Limitations of Actions Act**, R.S.N.S. 1989, c. 258. CAS Colchester also sought to have Mr. Borden's claim against it for breach of fiduciary duty dismissed on the basis there was no factual foundation to support such a claim. The applications relating to Mr. Borden and Mr. Smith were both heard at the same time by Justice Walter R.E. Goodfellow. It was agreed that the Home's applications with respect to the alleged breach of fiduciary duty claims would be adjourned. The CAS Colchester application with respect to Mr. Borden's claim for breach of fiduciary duty proceeded and was successful. Mr. Borden did not pursue his appeal of this last aspect of Justice Goodfellow's decision and, accordingly, I make no comment on it.

[5] The evidence before the judge on each application was very similar. It included a transcript of the discovery evidence of the appellant, his sworn affidavit, demands for and answers to demands for particulars, interrogatories and a report prepared by Dr. Charles Hayes, a psychologist. Dr. Hayes' report with respect to Mr. Borden was dated March 4, 2009, and his report relating to Mr. Smith was dated February 27, 2009.

[6] Most of this evidence, including the reports of Dr. Hayes, addressed the issue of when the appellants had discovered or ought to have discovered their causes of action (when they recognized the "causal connection" between the alleged assaults and negligence and the alleged harm they suffered) and when they were reasonably capable of commencing their respective proceedings.

[7] The discovery evidence before the judge with respect to Mr. Borden indicates:

- that there has never been a time when he did not remember the abuse at the Home;

- that he told a woman named Ann about the abuse at the Home soon after he left the Home (1986). He told her about the abuse and that it "overwhelms" him. After speaking with Ann, he was comfortable telling other people about what had happened at the Home. He told "anyone who would listen";

- that as a result of the abuse, he had problems in his relationships with women, problems with authority and problems with violence. He realized that the abuse at the Home caused these problems before he even left the Home when he was 19 years old. He knew he had problems with authority as a result of the abuse when he was involved in an incident at work when he was 20 years old;

- that the year after he left the Home (1986), he spoke about the abuse at the Home with his friend Denise and through these discussions, she helped him understand that he was not to blame and that the way he acted was caused by the abuse.

- that he consulted with a lawyer in 1997 with respect to the abuse at the Home.

[8] Mr. Smith's discovery evidence indicates:

- that he has always had clear memories of the alleged abuse at the Home;
- that he has always realized that what had happened to him at the Home was not normal;
- that when he was in his early 20s, he talked with his wife extensively about the abuse at the Home and the effects that the alleged abuse had had on him;
- that he worked at the Home in 1989 and he testified that at that time, he knew what had happened to him at the Home was wrong;
- that in or around 1989, he started writing a book about his experiences at the Home;
- that when he was interviewed for a job as a counsellor in 1990, he described the physical, sexual and emotional abuse at the Home and told the employer that he felt the pain of the abuse and that he would be able to connect with his clients;
- that he was interviewed by Charles Saunders, author of the book, *Share and Care*, in the late 1980s/early 1990s and he described the alleged abuse to Mr. Saunders.

[9] Their affidavits differed from their discovery evidence to some extent.

[10] In Dr. Hayes' report with respect to Mr. Borden, he opined that Mr. Borden had not fully understood the connection between the alleged events giving rise to his claims and the alleged harm he suffered until sometime close to the date of his report in 2009, eight years after Mr. Borden commenced his action. In his report

with respect to Mr. Smith, he indicated Mr. Smith had not fully understood the connection between the alleged events giving rise to his claims and the alleged harm he suffered until 2002, around the time he commenced his law suit. In addition, in Dr. Hayes' opinion, both appellants suffered from "learned helplessness" and were therefore not capable of bringing an action against the Home or CAS Colchester before the date they commenced their respective actions.

[11] After considering the whole of the evidence before him, the judge accepted the appellants' discovery evidence in reaching his conclusion that both appellants had discovered or ought to have discovered their cause of action shortly after they reached the age of majority, 1983 for Mr. Borden and 1979 for Mr. Smith. He also relied on their discovery evidence in concluding that each of them had the capacity to bring their actions well before the limitation periods expired. He found that neither those parts of the appellants' affidavits which contradicted their discovery evidence, nor Dr. Hayes' opinions, created a genuine issue requiring a trial on the limitation issue. He placed no weight on Dr. Hayes' opinions because he found the facts Dr. Hayes assumed in his reports for the purpose of giving his opinion were contrary to the discovery evidence. Having found there was no genuine issue requiring trial relating to vicarious liability for assault or negligence, the judge granted the applications sought for summary judgment. His decisions are reported as 2009 NSSC 132 and 2009 NSSC 137.

[12] Mr. Borden and Mr. Smith each appealed the judge's decision relating to him to this court.

[13] This court is not to interfere with a judge's decision on a summary judgment application of this kind, where the judge's decision has terminated certain causes of action, unless he or she has made an error of law resulting in an injustice; **Frank v. Purdy Estate**, [1995] N.S.J. No. 243, para. 10; **Milbury v. Nova Scotia (AG)**, [2007] N.S.J. No. 187, paras. 15-16.

[14] In my view, Justice Goodfellow correctly applied proper legal principles in his assessment of the evidence and in concluding that both claims were statute barred because each of Messrs. Borden and Smith were substantially aware of the harm to which they had been subjected, and its likely cause, many years before they filed suit. See for example, **M.(K.) v. M.(H.)**, [1992] 3 S.C.R. 6; and **K.A.S. v. Reddick** (1997), 160 N.S.R. (2d) 5 (N.S.C.A.). Similarly, I see no error or

injustice in the judge's conclusion that Mr. Borden was reasonably capable of commencing a proceeding in 1985/86, and that Mr. Smith was reasonably capable of bringing an action in the 1980s and not later than 1990.

[15] I am also satisfied that the judge did not err in finding that Dr. Hayes' bare opinions did not create a genuine issue for trial. The assumptions on which both opinions were based were shown to be entirely at odds with the sworn evidence given at discovery by Messrs. Borden and Smith themselves. Thus Justice Goodfellow did not err in concluding that Dr Hayes' opinions were shown to be completely unsustainable.

[16] It would seem to stretch credulity for the appellants to seriously suggest they were only now beginning to understand the connection between these alleged events and the harm they say they suffered, when in fact they commenced these actions in 2001/2002. Dr. Hayes' conclusions on discoverability, i.e. that the appellants did not fully understand the connection between the alleged events giving rise to their claim and the harm they suffered until after they commenced their law suits, sets the bar for discoverability too high. This was made clear by the Supreme Court of Canada in **K.L.B. v. British Columbia**, 2003 SCC 51, [2003] 2 S.C.R. 403, paras. 54-57:

> 54 The appellants argue that their tort actions are not statute-barred because their causes of action were not reasonably discoverable "prior to commencement of these actions". They rely on the trial judge's finding that "[n]one of the plaintiffs had a substantial awareness of the harm and its likely cause prior to commencement of these actions" (para. 140). This finding was based upon the evidence of a psychologist, Dr. Ley, who assessed the appellants after they had commenced their actions and concluded that they lacked a "thorough understanding" of the psychological connection between their past abuse and their current state.
>
> 55 This approach to reasonable discoverability is problematic. It rests on evidence that the plaintiffs lacked sufficient awareness of the facts even after they had brought their actions. Since the purpose of the rule of reasonable discoverability is to ensure that plaintiffs have sufficient awareness of the facts to be able to bring an action, the relevant type of awareness cannot be one that it is possible to lack even after one has brought an action. **The "thorough understanding" proposed by Dr. Ley – an understanding not present even after suit was launched – thus sets the bar too high.**

> 56 All of the appellants were aware of the physical abuse they sustained at the time that it occurred. They may not have been aware of the existence of a governmental duty to exercise reasonable care in making and supervising their placements. They may also not have been immediately aware of the harm that the abuse caused to them or of the causal link between the abuse and the harm. Indeed, in *M. (K.) v. M. (H.), supra*, La Forest J., writing for the majority, acknowledged that awareness of the connection between harm suffered and a history of childhood abuse is often elusive. However, in 1986, K. and V. consulted with a lawyer about the possibility of receiving compensation from the government for damage suffered while in foster care. The lawyer told them that he thought they had a cause of action, and suggested they consult a lawyer in Victoria who specialized in such claims. V. did not follow up on this advice, perhaps as a result of a sense of powerlessness and a concern that she was to blame. In 1990, three of the appellants made a complaint to the Ombudsman, who informed the Superintendent that "[a]ll of the complainants are seeking financial compensation for the events which occurred while in the care of the Superintendent". In June of 1991, all of the appellants met with a Ministry representative. With his assistance, they made a formal request for counselling and for a settlement from the government for physical and mental abuse suffered in the Pleasance and Hart homes.
>
> 57 The appellants could not have come away from these meetings with anything less than an awareness that the government may have breached a duty that it owed to them, and that an action against the government would have a reasonable prospect of success. They now contend that they did not have access to some of the information that they needed in order to conclude that an action would have a "reasonable prospect of success" because the Crown failed to provide them with their child-in-care records. However, the only facts that are contemplated by the statute as necessary for determining whether an action has a reasonable prospect of success relate to the existence and the breach of a duty. The meetings between the appellants and various members of the government suggest that the appellants, by June of 1991 at the latest, had acquired sufficient awareness of those facts to start the limitation period running.
>
> (Emphasis added)

[17] I am also satisfied that the judge did not err by inappropriately making findings of fact, findings of credibility or drawing inferences. An issue of credibility or a dispute of fact exists where there is a conflict in the evidence and the trier of fact is required to accept the testimony of one witness over another to make a final determination on the issues raised. Here the only relevant evidence

before the judge was the evidence of the appellants themselves. On that evidence alone he concluded that there was no genuine issue for trial.

[18] The judge was entitled to accept the discovery evidence of the appellants and reject their affidavit evidence to the extent it was contradicted by their discovery evidence. In **Guarantee Co. of North America v. Gordon Capital Corp.**, [1999] 3 S.C.R. 423 at pp. 436-7, the Court noted that "a self-serving affidavit is not sufficient in itself to create a triable issue in the absence of detailed facts and supporting evidence." There were no such detailed facts or supporting evidence in the affidavits of Messrs. Borden and Smith.

[19] Also in **Rogers Cable TV Ltd. v. 373014 Ontario Ltd.**, [1994] O.J. No. 2196 (Gen Div) the court states:

> 6 I am completely satisfied that the plaintiff has established that there is no genuine issue for trial. What the defendant's position amounts to is this -- a genuine issue for trial is raised in every case in which a defendant swears that it does not owe a debt, notwithstnding[sic] overwhelming evidence to the contrary presented by the plaintiff, and in the absence of any additional evidence by the defendant to support its denial. Although in one sense an issue of credibility is raised on the assumption that a trial judge may believe the defendant, in my view in the context of the record in this case this does not constitute a genuine issue for trial with respect to the defence put forward within the meaning of rule 20.04(2)....

[20] Some of the arguments made by Messrs. Borden and Smith in their facta were based on the possible so-called four year extension for limitation purposes that may be granted by a court following an application under s. 3(2) of the **Act**. The appellants made no such application and thus no evidence was presented addressing the factors a court is required to consider under s. 3(4) when considering such an application. This issue was not raised before the judge. While it makes no difference in either case before us, given the long period of time involved in both cases, I agree with the Home that we are not to consider for the first time on appeal the possible four year extension.

[21] The alleged events took place between approximately 17 and 36 years before Mr. Borden and Mr. Smith commenced their actions. Based on the evidence contained in the records before us relating to the appeals of both Mr. Borden and Mr. Smith, I would dismiss both of their appeals. The judge carefully reviewed all

of the evidence placed before him, applied the correct legal principles and the conclusion he reached does not result in an injustice. He did not err in finding that the limitation periods had expired and that there is no genuine issue of material fact necessitating a trial.

[22] I would order costs in the amount of $1,000, together with disbursements as taxed or agreed, be paid by Mr. Smith to the Home.

Hamilton, J.A.

Concurred in:

Saunders, J.A.

Oland, J.A.