Date: 19970530 Docket: CA 135551

NOVA SCOTIA COURT OF APPEAL
Cite as: K.A. S. v. J.S.R., 1997 NSCA 110

Clarke, C.J.N.S.; Roscoe and Bateman, JJ.A.

BETWEEN:		
K. A. S.	Appellant	Jamie MacGillivray for the Appellant
- and -		
J. S. R.	Respondent	Ronald Pizzo for the Respondent
		Appeal Heard: May 30, 1997
		Judgment Delivered: May 30, 1997

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: The appeal is allowed without costs as per oral reasons for judgment of Roscoe, J.A.; Clarke, C.J.N.S. and Bateman, J.A., concurring.

The reasons for judgment of the Court were delivered orally by:

ROSCOE, J.A.:

[1] This is an appeal from a decision made by Justice Douglas MacLellan in Supreme Court Chambers dismissing the action commenced by the appellant after finding that the "action was barred by the **Limitations of Actions Act**", R.S.N.S. 1989, c. 258, as amended, (the **Act**).

[2] In his Statement of Claim, dated June 14, 1996, the appellant claimed damages for injuries, including mental distress which he suffered as a result of a sexual assault on him by the respondent, which took place on July 8, 1988. The respondent claimed, in his Defence that the action was barred by s. 2(1)(a) of the **Act** which states that an action for assault shall be commenced within one year after the cause of action arose.

[3] The appellant applied pursuant to s. 3(2) of the **Act** to disallow the defence based on the limitation period. That section states:

> 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
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> (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] The factors to be considered by the court on such an application are set out in s. 3(4). Section 3(6) restricts the time during which the court can exercise the jurisdiction to extend the limitation period to a period of four years after the limitation period expired. The other section of the **Act** relevant to this matter is s. 2(5) which is:

> In any action for assault, menace, battery or wounding based on sexual abuse of a person,
>
> (a) for the purpose of subsection (1), the cause of action does not arise until the person becomes aware of the injury or harm resulting from the sexual abuse and discovers the causal relationship between the injury or harm and the sexual abuse; and
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> (b) notwithstanding subsection (1), the limitation period referred to in clause (a) of subsection (1) does not begin to run while that person is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse.

[5] On the hearing of the application, the appellant filed two affidavits and counsel for the respondent filed an affidavit which contained excerpts from the appellant's medical files. There was no agreed statement of facts. However, it was not disputed that the appellant received medical attention and counselling in 1988 and after the respondent was convicted of sexual assault in 1989, the appellant made an application for and received compensation from the Criminal Injuries Compensation Board.

[6] The appellant argued before the Chambers judge that although he was "aware of some of the problems associated with the fact that he had been assaulted", he did not have "a substantial awareness of the harm" until 1995. The appellant relied on **M.(K.) v. M.(H.)**, [1992] 3 S.C.R 6, a case in which the Supreme Court of Canada dealt with the issue of discoverability in relation to cases involving sexual abuse. Justice La Forest formulated the substantial awareness test in the following terms: (at page 35)

> In my view the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the

> limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes . . .

[7] The appellant also refers to **C.(P.) v. C.(R.)** (1994), 114 D.L.R. (4th) 151 where Justice Corbett of the Ontario Court (General Division) interpreted the **M.(K.)** test as requiring both an appreciation of the "extent" of the problems and the connection between the assault and the injuries.

[8] The Chambers judge while agreeing that the **M.(K.)** test was applicable, found that there was no question that the appellant ". . . was very aware of the problems he was experiencing in 1988 ... and he was aware that these problems were related to the abuse by the defendant." Furthermore, he held that the appellant was "substantially aware" in 1989 of the effect the assault had upon him. The Chambers judge then determined that the effect of that finding was that the action was barred by the limitation period and therefore the action should be dismissed.

[9] On appeal, it is submitted that the Chambers judge erred in his interpretation and application of **M.(K.) v. M.(H.), supra**, or alternatively, that the determination of the appropriate limitation period is a matter for trial and should not have been determined in Chambers.

[10] With respect to the first ground of appeal, it is apparent that the Chambers judge applied the correct principles of law in concluding that the appellant was substantially aware of the effects of the assault in 1989. The s. 2(1)(a) limitation period therefore expired in 1990. He was accordingly precluded by the operation of s. 3(6) of the **Act** from extending the limitation period beyond a further four years. We are unable to conclude that

he committed any palpable or overriding error in the fact finding process.

[11] However, the application brought before the Chambers judge was an application by the plaintiff to disallow the defence. The options available to the Chambers judge were to allow the application with the result that the limitation defence would be struck or to dismiss the application, with the result that the validity of the defence would then be determined at the trial. In **Layes v. Chisholm and Stewart**, C.A. No. 135212, dated April 30, 1997, a recent decision of this Court, a similar issue arose. Justice Hallett, in that matter, concluded as follows:

> ...Justice Anderson not only dismissed the application made pursuant to s. 3(2) of the **Act**, but also dismissed the appellant's action.
>
> There was no application before Justice Anderson pursuant to **Civil Procedure Rule** 14.25 to strike the appellant's statement of claim nor was there before him an application pursuant to **Rule 25** to determine whether the appellant's action was barred by the Statute. Such an application should only be made where the parties agree to submit a question of law to the court based upon an agreed statement of facts (**Binder v. Royal Bank of Canada et al.** (1996), 150 N.S.R. (2d) 234 (C.A.)).

[12] In conclusion, the Chambers judge did not err in determining on the evidence when the appellant had a substantial awareness of the harm caused by the sexual assault. The appeal from the decision dismissing the application to disallow the defence is dismissed. However, the Chambers judge should not have dismissed the appellant's action and to that extent the appeal is allowed, without costs.

Roscoe, J.A.

Concurred in:

Clarke, C.J.N.S.

Bateman, J.A.