

NOVA SCOTIA COURT OF APPEAL
Citation: *Willson v. Bond Estate*, 2019 NSCA 24

Date: 20190402
Docket: CA 482949
Registry: Halifax

Between:

Alexandra Willson, John/Jane Doe, and Canso Pharmacy Ltd.
Appellants
v.
Carlton Bond as the Executor of the Estate of Bernice Bond
Respondent

Judge: The Honourable Justice Peter M. S. Bryson

Appeal Heard: March 26, 2019, in Halifax, Nova Scotia

Subject: Limitations. Professional liability. *Fatal Injuries Act*.
Pharmacy Act.

Summary: Bernice Bond died on June 16, 2016 after filling a prescription at the appellant pharmacy on May 3, 2016. Ms. Bond's executor commenced a *Fatal Injuries Act* action against the appellant on June 15, 2017, alleging an incorrect dosage of medication. The appellants pleaded that the action was out of time under the *Pharmacy Act* which required that actions be commenced within one year of the provision of professional services. On the executor's motion, the judge set aside the limitation defence because the action was commenced within one year of death as permitted by the *Fatal Injuries Act*. Alternatively, the judge would have extended the limitation period under s. 12 of the *Limitation of Actions Act*. The appellants on appeal argued that the judge misinterpreted the *Pharmacy Act* and the *Fatal Injuries Act*.

Issues: Was the applicable limitation period one year from provision of professional services as described in the *Pharmacy Act*?

Result: Appeal dismissed. The one year period under the *Fatal Injuries Act* applied. The *Act* permitted a statutory action unknown to the common law. But the deceased must have had a viable cause of action at the time of death. Since the one year limitation period under the *Pharmacy Act* had not expired when Ms. Bond died, her executor could bring the action within one year of Ms. Bond's death under the *Fatal Injuries Act*.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 6 pages.

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Respondent

Judges: Farrar, Bryson and Van den Eynden, JJ.A.

Appeal Heard: March 26, 2019, in Halifax, Nova Scotia

Held: Leave granted, appeal dismissed with costs, per reasons for judgment of Bryson, J.A.; Farrar and Van den Eynden, JJ.A. concurring

Counsel: Gregory Hardy and Kyla Russell, for the appellants
Kate Boyle, Lyndsay Jardine and Nick Hooper (articled clerk), for the respondent

Reasons for judgment:

[1] At the conclusion of argument, leave to appeal was granted and the appeal was dismissed with reasons to follow. These are they.

Introduction

[2] Bernice Bond died on June 16, 2016 allegedly as a result of an overdose of Methotrexate. On May 3, 2016, Ms. Bond had filled a prescription for Methotrexate at Canso Pharmacy Ltd. The prescription was dispensed by pharmacist Alexandra Willson, aided by an unknown assistant. Ms. Bond's Executor asserts that she received an incorrect dosage of Methotrexate.

[3] The Executor started an action for provision of negligent professional services. A claim against a pharmacist must be brought within one year from the date when the services were rendered (*Pharmacy Act*, S.N.S. 2011, c. 11). In this case, action was not commenced until June 15, 2017. The parties agreed that the *Pharmacy Act* limitation period expired on May 3, 2017. So the action was out of time under that *Act*.

[4] The Executor brought a motion to disallow the limitation defence. The Honourable Justice Joshua Arnold granted the motion because the *Fatal Injuries Act*, R.S.N.S. 1989, c. 163, permitted commencement of an action within 12 months of Ms. Bond's death. Alternatively, the judge would have extended the limitation period in accordance with s. 12 of the *Limitation of Actions Act*, S.N.S. 2014, c. 35 (*Bond v. Willson*, 2018 NSSC 287). The appellants now seek leave to appeal and ask this Court to reinstate their limitation defence.

[5] The appellants say the judge erred by:

- (a) Failing to balance the interests of the parties when determining whether the appellants could rely on a limitation defence;
- (b) Failing to give proper effect and weight to the *Pharmacy Act*;
- (c) Failing to properly interpret the limitation periods in the *Pharmacy Act* and the *Fatal Injuries Act* by finding them contrary to one another;
- (d) Mischaracterizing a fatal injury as a personal injury;
- (e) Improperly interpreting the *Limitation of Actions Act*; and

- (f) Commenting on the merits when considering whether to extend the limitation period under s. 12 of the *Limitation of Actions Act*.

[6] The parties agree that the low threshold for leave of arguable issues has been met. Leave to appeal should be granted.

[7] The authorities and analysis proposed to the motions judge and argued in the parties' factums did not properly address the relation of common law and statutory principles. These will be addressed first and then the grounds of appeal will be briefly considered.

The correct limitation period

[8] At common law a cause of action in tort died with the deceased (*MacLean v. MacDonald*, 2002 NSCA 30 at ¶31). The *Fatal Injuries Act* displaced the common law rule by authorizing a representative action broadly in favour of family members, provided the deceased could have brought suit had he survived (*Pym v. Great Northern Railway* (1863) 4 B.&S. 396 at 406, 122 E.R. 508, aff'd in *Gentile v. British Columbia Electric Railway Co.*, [1914] A.C. 1034 at ¶9, 18 D.L.R. 264 (P.C.)).

[9] But a condition precedent to a claim under the *Fatal Injuries Act* is that the deceased had a maintainable cause of action at the time of his death (*Williams v. Mersey Docks and Harbour Board*, [1905] 1 K.B. 804 at p. 808; *Gentile* at ¶13; *British Columbia Electric Railway v. Turner* (1914), 49 S.C.R. 470 at ¶1; *Von Cramm Estate v. Riverside Hospital of Ottawa*, 56 O.R. (2d) 700 (C.A.) at ¶7; *Cable Estate v. Ferguson*, 2009 ABCA 333).

[10] In a limited sense, the *Fatal Injuries Act* creates a new cause of action which the common law did not recognize. But that cause of action is derivative of the rights of the deceased at the time of his death because it depends on the deceased having a viable cause of action. In the context of limitations, this means that any *Fatal Injuries Act* claim is dependent on the existence of the deceased's claim. If his claim was statute-barred at death, there could be no statutory cause of action under the *Fatal Injuries Act*. For example, in *Von Cramm*, the time for Ms. Von Cramm to sue under the *Ontario Public Hospitals Act* had expired at the time of her death. The family's *Fatal Accidents Act* claim was dismissed:

[10] It is to be observed that s. 60(1) makes reference to "where a person is injured or killed". In the case at bar ***it is the injury which occurred in 1980 which gives rise to the cause of action not the death of Maria Von Cramm. The cause***

of action of Maria Von Cramm was statute barred two years after she was discharged from the hospital in November, 1980. This must be contrasted with the *Fatal Accidents Act* wherein it is the death itself which gives rise to the beneficiaries' cause of action. In fact the beneficiaries did not have a cause of action until the death occurred.

[11] The action brought on behalf of Maria Von Cramm's son and daughter is a derivative one which could be brought either in the case of her injuries or her death. *The derivative action is based upon and founded upon the injury which the late Maria Von Cramm suffered. The son and daughter cannot have a cause of action which is distinct from and separate from the cause of action of their mother.*

[Emphasis added]

[11] Ms. Bond received her apparently fatal prescription on May 3, 2016. She died on June 16, 2016. The one-year period under the *Pharmacy Act* had not yet expired. She still had a viable cause of action. As a result of Ms. Bond's death, her estate was then entitled to bring an action within a year from that time. The action was commenced on June 15, 2017, within the one-year period from her death provided for in the *Fatal Injuries Act*. So it was not statute-barred.

[12] There is no conflict between the limitation periods described in the *Fatal Injuries Act* and the *Pharmacy Act* because they relate to different limitation periods arising from the altered circumstance of the potential plaintiff's death.

[13] Respectfully, the grounds of appeal do not address the relevant legal principles. Turning briefly to those grounds:

Failure to balance the interests of plaintiff and defendant?

[14] The appellants wrongly conclude that the Supreme Court's comments in *Novak v. Bond*, [1999] 1 S.C.R. 808, somehow create a balancing test when a limitation defence arises.

[15] Care must be taken to read the cases in context. Many limitation issues arise in different settings. The appellants rely upon these comments in *Novak*:

[67] The result of this legislative and interpretive evolution is that most limitations statutes may now be said to possess four characteristics. They are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed

through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time. *To the extent they are reflected in the particular words and structure of the statute in question, the best interpretation of a limitations statute seeks to give effect to each of these characteristics.*

[Emphasis added]

[16] From this the appellants infer that the trial judge was supposed to conduct a balancing of the four interests described by the Supreme Court. This is incorrect. *Novak* does not impose a balancing test that trial judges must follow. It comments on the interests which legislatures consider when they draft limitation legislation. Courts should keep these interests in mind when interpreting legislation—not conduct a free-standing balancing inquiry that precludes that interpretation. In *Novak*, the Court was interpreting a requirement respecting the plaintiff’s potential knowledge of his cause of action. It has no relevance to the limitation periods in this case, which run from discrete events irrespective of a potential plaintiff’s knowledge of a cause of action.

[17] The appellants then say the judge failed to take into account their expectations that they had a “legitimate limitation defence to the respondent’s claim”. The Court does not consider the parties’ expectations when interpreting legislation. The question here is whether the legislation authorizes the bringing of the claim or not. The appellants’ expectations have nothing to do with it.

[18] Next the appellants refer to *Izaak Walton Killam Health Centre v. Nova Scotia (Human Rights Commission)*, 2014 NSCA 18, arguing that specific limitation periods cannot be extended.

[19] The inapplicability of common law discoverability principles referred to in *IWK* has nothing to do with the interpretation of the defined limitation periods in this case.

[20] Finally the appellants suggest that “strict construction” of the legislation should favour them. It is true that limitation periods may be strictly construed in favour of plaintiffs “whose right of action is being truncated” (*Berardinelli v. Ontario Housing Corp.*, [1979] 1 S.C.R. 275 at ¶10). This principle obviously aids potential plaintiffs—not defendants; but the appellants misconstrue this as limiting their rights by preventing them from “fully defending a claim”.

Did the judge err in interpreting the Pharmacy Act?

[21] Here the appellants invoke the objects described in the *Pharmacy Act* respecting professional accountability and say that the judge failed to take these into account and that this invalidates his analysis.

[22] The appellants cite *Lorencz v. Talukdar*, 2017 SKQB 389, to argue that a limitation period in legislation regulating a profession should supersede any such period in fatal injuries legislation. They say the motions judge should have followed *Lorencz*. *Lorencz* dealt with transitional provisions under a new *Limitations Act*. It is not clear that it stands for the proposition claimed by the appellants. But if it does, it is wrong in law for the reasons already given (§8-11 above).

Did the judge err by finding that the Pharmacy Act and the Fatal Injuries Act were contrary to one another?

[23] The appellants fail to refer to any judicial finding that supports this criticism. But much of the appellants' arguments assumes it, by arguing that primacy should be given to the *Pharmacy Act* limitation period because that *Act* is more specific and recent. As already explained, there is no conflict (§11 and 12 above).

Did the judge err by mischaracterizing a fatal injury as a personal injury?

[24] If this is a distinction, it does not matter. It is true that the damages available to a claimant under the *Fatal Injuries Act* may be more constrained than those of a living plaintiff claiming damages for professional negligence. But the cause of action derives from the deceased's claim. It is only the nature of the damages that changes. That is what Justice Cromwell said in *MacLean v. MacDonald*, on which the appellants rely.

Did the judge err in his interpretation of the Limitation of Actions Act?

[25] Here the appellants challenge the judge's exercise of discretion to extend the limitation period under s. 12 of the *Limitation of Actions Act*. Correct construction of the limitation periods (§7-11 above) precludes any need to consider this ground of appeal.

Did the judge err in weighing the available evidence and commenting on the merits of the ultimate issue?

[26] This complaint appears to relate to the judge's consideration of whether to extend the limitation period under s. 12 of the *Limitation of Actions Act*. The

appellants say he should not have weighed the evidence. Assuming it was necessary to do so, this is precisely what should be done when exercising discretion to extend time. Since this case does not turn on that *Act*, further comment on this ground of appeal is unnecessary.

Conclusion

[27] I would grant leave but dismiss the appeal. The respondent shall have costs of \$2,000.00 inclusive of disbursements.

Bryson, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.