

NOVA SCOTIA COURT OF APPEAL

Chipman, Hart and Bateman, JJ.A.

Cite as: Marwieh v. Brown, 1995 NSCA 176

BETWEEN:

GEORGE MARWIEH)	Cathy L. Dalziel
)	for the appellant
- and -)	
)	Harvey L. Morrison
)	for the respondents
KENNETH T. BROWN and)	Appeal Heard:
PATRICIA K. BROWN)	October 16, 1995
)	
respondents)	Judgment Delivered:
)	October 16, 1995
)	
)	
)	

Revised Decision: The text of the decision has been corrected according to the erratum which has been appended to this decision.

THE COURT: Appeal dismissed with costs to the respondents in the amount of \$750.00 plus disbursements per oral reasons for judgment of Bateman, J.A.; Chipman and Hart, JJ.A. concurring.

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

BATEMAN, J.A.:

This is an appeal from a decision of a Chambers judge. The appellant sought an order striking out the respondents' Statement of Claim and dismissing the action. The respondents resisted the motion on the basis that the matter was **res judicata**.

The proceeding arose out of a motor vehicle collision which occurred in the Province of Alberta. The plaintiffs, who were residents of Nova Scotia, vacationing in Alberta, were injured in an accident with the defendant's vehicle.

The plaintiffs commenced legal proceedings, in Nova Scotia, outside the two year period prescribed by the Nova Scotia **Limitation of Actions Act** and the Alberta **Limitation of Actions Act**. The defendant alleged in the defence that the action was statute barred by virtue of the provisions of both **Acts**.

The plaintiffs succeeded on an application to a Chambers judge to disallow the defence of limitation, under s.3(2) of the Nova Scotia **Limitation of Actions Act**. The Chambers judge held that the Alberta Act was not applicable. The defendant appealed that decision to the Court of Appeal and was unsuccessful. The court held that the Alberta limitation period was procedural and not substantive and, thus, the Nova Scotia **Act** applied which permitted the Chambers judge to make the decision that he did. (decision reported at (1994), 125 N.S.R. (2d) 389)

Subsequent to that decision of the Court of Appeal, the Supreme Court of Canada held in **Tolofson v. Jensen**, [1994] 3 S.C.R. 1022, that limitation periods are substantive, not procedural. The appellant, therefore, brought the motion to strike before the Chambers judge on the basis of the new statement of the law.

The Chambers judge held that the matter was **res judicata**, having been conclusively determined by the Court of Appeal in the first application, which decision

was not appealed.

The appellant agrees that the Chambers judge correctly found that this was "cause of action" estoppel, rather than "issue estoppel". The appellant submits, however, that the Chambers judge erred in not finding "special circumstances" which would relieve the appellant from the operation of cause of action estoppel.

The appellant relies upon the House of Lords' decision in **Arnold et al v. National Westminster Bank PLC**, [1991] 3 All E.R. 43 (H.L.), as authority for the proposition that an exception to cause of action estoppel is recognized in cases with special circumstances.

The **Arnold** case concerned the application of issue estoppel. In that case the learned Law Lords referred to a possible exception for special circumstances, and in the case of cause of action estoppel, where the earlier decision did not decide vital points because they were not raised. Such is not the case here.

The very issue before the Chambers judge, the operation of the limitation period, had been conclusively determined and in the same action. The Chambers judge made no error in finding that, in these circumstances, there was no authority to relieve the appellant from the absolute bar imposed by cause of action estoppel.

Page 1 - first paragraph - last sentence should read - "The respondents resisted the motion ..."