SUPREME COURT OF NOVA SCOTIA

Citation: *DeWolfe v. Canadian Corps of Commissionaires*, 2015 NSSC 229

Date: 20150717
Docket: *Halifax*, No. 425045
Registry: Halifax

Between:

Nikki Lynn DeWolfe

Plaintiff

v.

Nova Scotia Division of the Canadian Corps of Commissionaires and Halifax Regional Municipality

Defendants

Judge:	The Honourable Justice Peter Rosinski
Heard:	July 13, 2015, in Halifax, Nova Scotia
Oral Decision:	July 17, 2015
Written Decision:	July 30, 2015 [edited for grammar, punctuation and readability]
Counsel:	Richard A. Bureau, for the Plaintiff Joshua A. Martin, for the Defendant Commissionaires [Watching Brief only] Guy Harfouche, for the Defendant Halifax Regional Municipality

By the Court:

The Background Chronology

[1] This is a decision in relation to motions by HRM and Nikki DeWolfe in *DeWolfe v. Canadian Corps of Commissionaires and Halifax Regional Municipality*, Hfx No 425045.

[2] Between 6:00 and 8:00 am on January 27th, 2011, Ms. DeWolfe was walking on the sidewalk abutting premises at 1472 Hollis Street in Halifax Regional Municipality, which property appears to have been owned by the Commissionaires Corps. While walking thereon or on a driveway apron permitting access across the sidewalk to 1472 Hollis Street she had noticed ice was present, and was walking carefully. She slipped and fell to the ground "in the driveway area" sustaining significant physical injuries. She called 911, waited for an ambulance and was assisted 15 minutes later by a passerby who then successfully sought out a Commissionaire. Several other persons including EHS and Commissionaires were also eventually present.

[3] Ms. DeWolfe contacted the law firm of Whitehead & Associates in July 2011 "to discuss my options". Based on her conversation with Mr. Whitehead she believed that she had years to wait before she had to commence any action in order

to claim damages as a result of her slip and fall. She said she did not even become aware of the one year limitation period which is in issue here *vis-à-vis* HRM until November 2013 (para. 47 of her Affidavit).

[4] If she slipped and fell on the property of HRM, the limitation period as stated in s.376 of the *Halifax Regional Municipality Charter* S.N.S. 2008 c. 39 is 12 months after the date of the slip and fall. Any action filed against HRM thereafter could be defended, and is in this case, by HRM on the basis of the limitation period had been missed.

[5] By November 2011, her counsel had given notice of her potential claim to the Canadian Corps of Commissionaires.

[6] By January 2012, she had decided to instruct Whitehead & Associates to pursue her claim.

[7] In July 2012, HRM began the replacement of the sidewalk slab specifically relevant here and it was removed and replaced.

[8] On February 4, 2013, HRM first became aware of the potential claim by Ms. DeWolfe after a telephone call from Mr. Whitehead to Joel Plater, Senior Claims Examiner for Risk and Insurance Services for HRM. A subsequent email from Mr.

Whitehead had also included a Google photograph of the area where Ms. DeWolfe fell. Mr. Plater opened the claim file on February 13, 2013.

[9] HRM takes the position that as a result of it not being earlier aware, it did not have an opportunity to investigate the claim, though I note here that Commissionaires personnel were on the scene and aware at the time of the fall on January 27, 2011, and Whitehead & Associates formally notified the Commissionaires on November 1, 2011 in writing of Ms. DeWolfe's claim.

[10] The Commissionaires are not taking a position herein; they maintained a watching brief only.

[11] HRM argues that the delay between the limitation period expiry date (roughly January 27, 2012) and when it became aware of the potential claim against it (February 4, 2013) has caused prejudice to it and the evidence that was available has become unavailable as follows:

> (i) No records or documents from former HRM employees who were involved in the snow and ice control operations during the relevant time have been found (para. 32 of Plater's affidavit) but I will note that it is not suggested expressly in the evidence that there were such records, and if there were such records that they went missing or were destroyed, and if there were, when they went missing or were destroyed.
>
> (ii) Sometime in July 2012, the sidewalk and driveway in question were completely replaced, compromising the accurate reproduction of the area where Ms. DeWolfe slipped and fell. On this, I note there is no actual "before" and "after" evidence to compare.

[12] On November 18, 2013, Ms. DeWolfe's counsel confirmed she would be filing a claim against HRM and on March 5, 2014, a Statement of Claim was filed as against the Commissionaires Corps and HRM.

[13] On March 28, 2014, HRM filed a Statement of Defence denying liability, relying on the limitation period in s. 376 of the *Halifax Charter*.

[14] On June 17, 2014, an amended Statement of Claim was filed by Ms. DeWolfe.

[15] On October 31, 2014, Mr. Bureau took over as counsel of record from Mr. Whitehead.

The Motions Herein

[16] On December 31, 2014, Ms. DeWolfe filed a Notice of Motion seeking "an order disallowing the time limitation defence for her claim against the Defendant HRM" and on February 18, 2015, HRM filed a Notice of Motion seeking "an order dismissing the Plaintiff's claim against the Defendant HRM" and seeking summary judgment as against Ms. DeWolfe.

[17] The motions were to be heard together by me on April 15, 2015, but adjourned to July 13, 2015, and put over to today for a decision.

Analysis

[18] I will consider Ms. DeWolfe's motion seeking a disallowance of the time limitation defence. If it fails, I will move on to consider HRM's summary judgement on evidence motion.

[19] Section 3 of the *Limitation of Actions Act*, RSNS 1989, c.258, permits a disallowance of the invocation of a time limitation, which counsel agree is applicable to the twelve month limitation period here. I refer therefore to s.3 and the various subsections:

> **Disallowance or invocation of time limitation**
>
> 3 (1) In this Section,
>
> (a) "action" means an action of a type mentioned in subsection (1) of Section 2;
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> (b) "notice" means a notice which is required before the commencement of an action;
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> (c) "time limitation" means a limitation for either commencing an action or giving a notice pursuant to
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> (i) the provisions of Section 2,
>
> (ii) the provisions of any enactment other than this Act,
>
> (iii) the provisions of an agreement or contract.
>
> (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.

(3) Where a time limitation has expired, a party who wishes to invoke the time limitation, on giving at least thirty days notice to any person who may have a cause of action, may apply to the court for an order terminating the right of the person to whom such notice was given from commencing the action and the court may issue such order or may authorize the commencement of an action only if it is commenced on or before a day determined by the court.

(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

(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;

(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;

(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;

(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.

> (5) The provisions of this Section shall have effect in relation to causes of action arising
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> (a) before the twenty-sixth day of June, 1982, if the time limitation has not expired before that date;
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> (b) on or after the twenty-sixth day of June, 1982.
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> (6) A court shall not exercise the jurisdiction conferred by this Section where the action is commenced or notice given more than four years after the time limitation therefor expired.
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> (7) This Section does not apply to an action where
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> (a) the time limitation is ten years or more; or
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> (b) the time limitation is contained in the Mechanics' Lien Act. R.S., c. 258, s. 3.

[20] I note Ms. DeWolfe's motion is specifically based on s.3(2). She argues that the relief sought is appropriate because it is "equitable" based on the factors the court should consider in that section.

[21] The court can disallow a defendant from relying on the limitation period for up to four years, accordingly to s.3(6). The law regarding a court's exercise of its discretion under the section was described by Cromwell JA (as he then was) in *Butler v. Southam Inc., 2001 NSCA 121*, paras. 137 thru to 143:

> [137] Limitation and notice provisions are blunt instruments. They defeat a plaintiff's claim no matter how meritorious the case, no matter how diligent the plaintiff and no matter how little the defendant in fact has been prejudiced. Section 3 of the **Limitation of Actions Act** provides for a measure of judicial discretion to be used on equitable grounds to prevent unduly harsh results from the strict application of limitation and notice provisions. Underlying this grant of discretion is recognition by the Legislature that limitation and notice provisions may lead to harsh and unjust results by barring actions where, in the particular

case, there is little reason to do so. In other words, the Legislature's decision to permit the court to disallow limitation defences recognizes that such defences may result in prejudice to the plaintiff which is disproportionate to the importance, in a particular case, of the achievement of the purposes for which the limitation period exists.

[138] **The crucial assessment under s. 3 is the one required by ss. 3(2):** the determination of what is equitable having regard to the degree which the decision will prejudice the plaintiff and the defendant. **It may be convenient to speak of this as a comparison of the relative degrees of prejudice** (see, for example**, MacCulloch v. McInnes Cooper and Robertson**, **supra** at § 48 - 55). However, as Goodfellow, J. pointed out in **Smith v. Clayton**, (1994), 133 N.S.R. (2d) 157; N.S.J. No. 328 (Q.L.)(S.C.) at § 42 - 44, **the decision about what is equitable cannot be based solely on the relative degrees of prejudice. This is because, in one sense, the prejudice to either party is total whichever decision the Court makes.** If the limitation period is disallowed, the defendant is totally prejudiced in the sense that he or she is deprived of a complete defence to the action: see, Hallett, J. (now J.A.) in **Anderson v. Co-operative Fire and Casualty Co.** (1983), 58 N.S.R. (2d) 163 at § 18; aff'd (1983), 62 N.S.R. (2d) 378 (S.C.A.D.). Conversely, if the limitation defence is not disallowed, the prejudice to the plaintiff is absolute in the sense that the cause of action is lost: see **Anderson** per Hallett, J. at § 16; Smith at § 42 - 44.

[139] **In considering what is equitable, a fundamental consideration is whether the harsh result to the plaintiff of the loss of a cause of action is disproportionate to the purposes served by giving effect to the limitation provision in issue in the particular case.** For example, if the primary purpose served by the relevant limitation period is finality, furtherance of this objective at the cost of the loss of the plaintiff's cause of action may often be regarded as disproportionate, particularly where the delay in relation to the limitation period is short. This is implied by the fact that the Legislature has addressed the issue of finality by restricting the length of time by which a limitation period may be extended: see ss. 3(6) and 3(7) and by providing a mechanism for a potential defendant to apply to terminate a right of action: see ss. 3(3). The situation may well be different when other purposes of the limitation period are in issue in the particular case. For example, there may be concerns that the plaintiff's delay has prejudiced the defendants in their defence. The limitation period's objective of preserving the cogency of evidence must be carefully considered both generally, and in relation to the specific prejudice to the defendants in the particular case.

[140] Where, as here, the limitation provision in issue has purposes in addition to those of finality and preservation of the cogency of evidence, the extent to which these other purposes are defeated by the disallowance of the limitation period

should be considered as an aspect of assessing the relative degrees of prejudice to the plaintiff and the defendant.

[141] **The prejudice to the plaintiff flowing from the loss of the cause of action cannot generally be controlling on its own; if it were, disallowance of the limitation defence would be virtually automatic because such prejudice is absolute**: see **Smith** at § 44. The specific matters to be considered which are set out by the Legislature in ss. 3(4)(a) - (g) make it clear that **the diligence of the plaintiff, broadly defined, in pursuing his or her rights is an important factor in exercising the discretion to disallow a limitation defence.** For example, s. 3(4)(a) refers to the length and the reasons for the plaintiff's delay, s. 3(4)(e) to any disability of the plaintiff after the date of the accrual of the cause of action; s. 3(4)(f) to the extent to which the plaintiff acted promptly and reasonably once he or she knew the defendants' acts might be capable of giving rise to an action and s. 3(4)(g) to the steps taken by the plaintiff to obtain expert advice and the nature of that advice. All of these factors, in my view, relate to aspects of the plaintiff's diligence in pursuing the claim. Such diligence is, therefore, an important aspect of the assessment of the prejudice to the plaintiff resulting from the limitation defence.

[142] This concern with the plaintiff's diligence reflects both an underlying purpose of limitation periods and a widely accepted principle of fairness. The idea that plaintiffs should act with diligence underlies statutory limitation periods generally: see, for example, J.S. Williams, Limitation of Actions in Canada (2d, 1980) at 5. Moreover, concern with the plaintiff's diligence is consistent with s. 3(2)'s focus on what is equitable. **It will generally be less equitable for a limitation defence to defeat the claim of a diligent plaintiff than of one who has sat on his or her rights.** This reflects the old equitable maxim that delay resulting from lack of diligence defeats equity: *vigilantibus, non dormientibus, jura subveniunt*: see Sir Robert Megarry and P.V. Baker, *Snell's Principles of Equity* (27th, 1973) at 33.

[143] **In assessing the prejudice to the defendant it is important to focus on prejudice attributable to delay <u>after</u> the expiry of the limitation period**. This is made clear, for example, in s. 3(4)(c) which requires consideration of the impact of delay on the cogency of evidence compared to what it would have been had the action been started within the time limit. The cases have consistently recognized this: see, for example, **Bollivar v. Hirtle's Estate** (1990), 97 N.S.R. (2d) 247 (S.C.A.D.) at § 11**; Fern v. Christie's Estate** (1986), 76 N.S.R. (2d) 271 (T.D.) at p. 275; **Vickery v. Murphy and Yarmouth Regional Hospital** (1986), 73 N.S.R. (2d) 429 (S.C.) at § 23.

[my emphasis added]

[22] As Cromwell J.A. iterated therein:

> It may be convenient to speak of this as a comparison of the relative degrees of prejudice … however….the decision about what is equitable cannot be based solely on the relative degrees of prejudice.

[23] The plaintiff's counsel cites the loss of opportunity to litigate the matter on its merits as a potential prejudice to Ms. DeWolfe. This is said to be vastly disproportionate prejudice to which that would be suffered by HRM if the court disallowed the limitation period defence.

[24] I also note the following comments of Cromwell JA in *Butler*, *supra*:

> … the Legislature's decision to permit the court to disallow limitation defences recognizes that such defences may result in prejudice to the plaintiff which is disproportionate to the importance, in a particular case, of the achievement of the purposes for which the limitation period exists.
>
> …
>
> In considering what is equitable, a fundamental consideration is whether the harsh result to the plaintiff of the loss of a cause of action is disproportionate to the purposes served by giving effect to the limitation provision in issue in the particular case.

[25] Some of the purposes of limitation periods are: to promote certainty in the law where the limitation period arises; to promote finality of litigation; to ensure the preservation and the cogency of evidence, and to encourage diligence in having matters proceed expeditiously.

[26] I should note as well that in such cases sometimes there may be a suggestion of solicitor negligence, as in fact there has been here. The defendant here suggested that the prejudice to the plaintiff would be less significant than otherwise if her motion to have the limitation period extended is unsuccessful, because Ms. DeWolfe may have recourse against her former legal counsel for professional negligence, but I note that in a similar situation Justice Farrar of our Court of Appeal commented in *Smith v. Lord, 2013 NSCA 34, at para. 52:*

> With respect to the potential alternative remedy against his former counsel, whatever action Mr. Lord may have against his former counsel and its potential success is mere speculation. In my view, it was appropriate for the motions judge to give it little weight in his deliberations.

[27] Although he did go on in para. 53 to add that he did not wish his comments to "be taken as a constraint upon a motions judge's discretion in addressing any other matter which may come before the court below".

[28] There are other specific references to solicitor negligence as a factor in such cases: *Morris v. Royal Bank of Canada*, 2007 NSSC 73, paras. 66 – 70; *Hiscock v. Pasher*, 2008 NSCA 101, at paras. 22, 23 and 27; *Economical Insurance Group v. Master Forestry Ltd.*, 2012 NSSC 353, at paras. 36-40; *Smith v. Lord*, *supra*, paras. 50-53; *Palmer Estate v. MacInnis*, 2013 NSSC 391, at paras. 40, 67 and 68.

[29] HRM emphasizes that the assessment of the prejudice to the defendant should be focussed on the prejudice attributable to the delay after the expiration of the limitation period. The concern is whether the plaintiff's delay has prejudiced the defendants in their ability to defend the claim. Both counsel refer to and rely on the reasoning of Goodfellow J. in *Smith v. Clayton*, [1994] NSJ No. 328, 133 NSR (2d) 157.

[30] Insofar as the summary judgement on evidence motion is concerned, in such cases the applicable law has been authoritatively stated by our Court of Appeal in *Burton Canada Company v. Coady*, 2013 NSCA 95.

[31] Generally speaking if a plaintiff is unsuccessful in its motion for an order disallowing a limitation period under s.3(2) of the *Limitation of Actions 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 *Lays v. Chisholm*, 1997 NSJ No. 190)" per Hamilton JA in *HRM v. Nicholson*, 2009 NSCA 109.

[32] In the case at bar however, HRM has made a motion for summary judgment on evidence, and it has presented the case as rising or falling in that respect upon the outcome of the Plaintiff's motion.

[33] I turn next to the non-exhaustive list of factors in s.3(4) of the *Limitations Actions Act.*

(a) The length of and the reasons for the delay on the part of the plaintiff;

[34] The relevant delay by the plaintiff in filing her Statement of Claim spans from January 27, 2012 until March 5, 2014. Relevant under the rubric "reasons for delay" are: that Ms. DeWolfe's counsel believed that, and advised her that, she had years within which to file a claim. While HRM could not be found to be statutorily liable as an "occupier" under the *Occupiers' Liability Act,* S.N.S 1996, c. 27, s.12(2), HRM could still be sued in negligence; however, 376 of the *Halifax Charter* provides an applicable 12 month limitation period. In relation to the property owners that are abutting Halifax Regional property see: *Bowden v. Withrow's Pharmacy Halifax (1999) Ltd.*, 2008 NSSC 252 per Justice Beveridge (as he then was).

(b) any information or notice given by the defendant to the plaintiff respecting the time limitation;

[35] The Defendant, HRM, was not aware of the potential claim until February 4, 2013. It made the Plaintiff aware of the limitation period diligently. Thereafter, the Plaintiff formally notified HRM on November 18, 2013 that Ms. DeWolfe would be filing a claim against HRM.

(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.

[36] The relevant time period is between the end of the limitation period on January 26, 2012 and February 4, 2013, when HRM was made aware of the potential claim against it. During that time, namely, July 2012, the sidewalk and driveway apron in question were replaced. It cannot be said to what degree the new sidewalk and apron differed from the one present on January 27, 2011. The features thereof would be relevant not only potentially to the liability of HRM, but also to its claim against the Commissionaires since it alleged that the flow of water escaping their property contributed to the slip and fall of Ms. DeWolfe.

[37] In Mr. Smith's affidavit he does suggest the purpose of the replacement of the sidewalk was to effect "concrete street and sidewalk maintenance or repair" (para. 7) and a work order was initiated on or about March 21, 2012. HRM was unaware until February 4, 2013 of the potential claim and therefore would not have marshalled its resources beforehand to gather potential evidence from its employees, agents or other witnesses or preserve documentary evidence such as cleaning efforts made in relation to the street and sidewalk area on January 26-27, 2011. Moreover, beyond general denial of liability, HRM is also entitled to show that it had a reasonable policy of snow and ice control operations which is available at common law and s.377 of the *Halifax Charter*, which could provide a

defence, if the implementation thereof was also reasonable. HRM also has a statutory right of indemnification under s.380 of the *Halifax Charter* potentially as against the Commissionaires in this case if their "act or omission caused the street or sidewalk to be unsafe or caused the nuisance or encumbrance" (see s.40 of S-300 by-law HRM and *Shane v. 3104854 Nova Scotia Ltd.*, 2013 NSCA 84).

[38] I conclude that the cogency of evidence that would otherwise likely have been adduced by the Defendant is at most only modestly lessened by the passage of time or delay flowing from Ms. DeWolfe's failure to fail her Statement of Claim by January 27, 2012.

[39] I say this because HRM relies on three specifics claims of delay prejudice, if I can call it that:

(i) The replacement of the sidewalk. However, I note the surrounding topography remained the same. This suggests that to a large measure the replaced sidewalk must be similar in nature and quality to the sidewalk that was present on January 27, 2011;

(ii) HRM refers to "as unsuccessful" the efforts to locate records of the specific condition of the sidewalk on January 27, 2011 regarding ice for example, and any measures taken by salting or cleaning (para. 32 of Mr. Plater's affidavit).

However, in the evidence I note there is no assertion that such records ever existed, or if they did exist, that the delay is the reason why they are lost and now cannot be reconstituted or located.

(iii) HRM argues that the memories of persons involved in HRM municipal activities on January 27, 2011 are less reliable now since HRM was only notified February 4, 2013. I note that there is no evidence that the memories of any persons involved would have been significantly better at the time of the expiration of the 12 month limitation period on January 26, 2012.

(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 and for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant.

[40] From the evidence available to me I conclude the Defendant was diligent in responding to requests reasonably made by the Plaintiff.

(e) The duration of any disability of the Plaintiff arising after the date of the accrual of the cause of action.

[41] "Disability" is dealt with in sections 4 and 5 of the *Act*. Here, the Plaintiff was injured, but only briefly in hospital. She was on crutches thereafter until the end of March 2011. I conclude this factor had no discernible impact on the

Plaintiff's delay in filing her statement of claim or giving notice to the Defendants herein.

(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.

[42] The Plaintiff, including her counsel, appears to have been unaware of the 12 month limitation period until so advised (that being her counsel) on February 4, 2013. Thus the Plaintiff was not diligent between January 27, 2012 and February 4, 2013. I do bear in mind here that the Plaintiff's primary target and claim was initially the Canadian Corps of Commissionaires, with incidental thought apparently given to the potential liability of HRM.

(g) The steps, if any, taken by the Plaintiff to obtain medical, legal or other expert advice and the nature of any such advice she may have received.

[43] Ms. DeWolfe herself was diligent in obtaining legal advice. She first contacted Whitehead & Associates in July 2011. On or about November 1, 2011 Mr. Whitehead sent a letter on her behalf to Col. Brownlow of the Commissionaires "to inform him of the incident". There is no evidence that the Commissionaires informed HRM of the claim, and their position that Ms. DeWolfe's fall took place solely on HRM property.

[44] HRM in its brief stated at pg.11:

> On the basis of the aforementioned case law, HRM submits that the question becomes whether its defence of the plaintiff's claim on the merits has been irreparably prejudiced by the plaintiff's delay. Such a question involves a consideration of the cogency of the evidence mandated by s.3(4) of the *Limitation of Actions Act*. HRM respectfully submits that the plaintiff's proper recourse is against her former solicitor for missing the applicable limitation period. HRM submits it would be inequitable to deny HRM a substantial defence when it has been prejudiced by the delay as detailed below and page 13 of its brief.

[45] HRM also argued that Ms. DeWolfe still has the ability to pursue the Canadian Corps of Commissionaires for creating the hazard that caused her fall and these alternative potential sources of success diminish any inequity that might arise from allowing HRM to rely on the limitation period.

Conclusion

[46] In conclusion, although I have considered all the appropriate factors, the critical question in this case is during the period of delay from January 27, 2012 to February 4, 2013, did it effect such a degradation to HRM's defence to the plaintiff's claim on the merits, that it has been irreparably prejudiced? I also keep in mind HRM's counter-claim against the Commissionaires. The sidewalk and driveway apron in question were replaced in July 2012. While exhibits "A", "E" and "G", including the content otherwise of Robert Smith's affidavit of February 12, 2015 provide some details of the replacement process and outcome, there is no available precise information of the pre-existing slabs of concrete and driveway apron contours and measurements. Given the nature of the work done which had

to conform to the otherwise not replaced sidewalk slabs and roadway, I do conclude it is more likely than not that the differences occasioned by the replaced sidewalk slabs and driveway apron, were not material in comparison to the pre-existing sidewalk and driveway apron.

[47] On the evidence before me, HRM has not lost the benefit of its snow and ice clearing policy. However, whether the policy was implemented as written on January 26 – 27, 2011 was not shown to have been affected by the delay here. As to the conditions existing at the time of Ms. DeWolfe's slip and fall, her discovery and the production disclosure process will shed light on her allegation in this respect. Staff from the Commissionaires Corps assisted her within approximately 15 minutes of her fall. The Commissionaires Corps were aware of the potential claim by November 1, 2011 at the latest, and did have an opportunity to investigate before the sidewalk slabs and driveway apron were replaced. Paramedics arrived thereafter. I infer that all, or at least some of, these persons can be identified from documentation.

[48] I conclude that Ms. DeWolfe's successful recourse against the Commissionaires and Mr. Whitehead, her former counsel, is sufficiently speculative,and not a persuasive basis for denying her the ability to rely on a limitation period extension. Bearing in mind that the onus is on Ms. DeWolfe to

establish negligence on the part of an alleged tortfeasor, and while I recognize HRM has the onus to establish its cross-claim against the Commissionaire Corps, I conclude that it is more likely than not, in spite of HRM's evidence that it has been unsuccessful in locating persons with memories thereof or documents or other files materials from HRM employees involved in snow and ice operations at the relevant times, that the cogency of that evidence, adduced or likely to be adduced in its defence and cross-claim, has not been so materially prejudiced from what it would have been had the action been brought or notice given within the time limitation, that the plaintiff should be deprived of the opportunity to present her claim on its merits.

Summary

[49] In summary, I conclude that, bearing in mind it is a short limitation period and Justice Cromwell's comments in *Butler* regarding that, in the circumstances of this case as presented to me on this motion, it is equitable to allow the action to proceed, and disallow a defence by HRM based on the time limitation. Consequently I grant the Plaintiff's motion and dismiss the Defendant's motion. Counsel have indicated neither would be seeking costs on the motion so I need not address that issue.

Rosinski, J.