

SUPREME COURT OF NOVA SCOTIA

Citation: *MacDonald v. Jamieson*, 2019 NSSC 345

Date: 20191119

Docket: *PtH.* No. 488793

Registry: Port Hawkesbury

Between:

Kirklin MacDonald

Applicant

v.

Brittany Jamieson and Samantha Robinson

Respondents

Decision on Application in Chambers

Judge: The Honourable Justice Robin Gogan

Heard: July 12, 2019, in Port Hawkesbury, Nova Scotia

Counsel: Brianne Rudderham, for the Applicant
Brittany Jamieson, Respondent, self represented
Samantha Robinson, Respondent, self represented

By the Court:

INTRODUCTION

[1] This is a decision on an application in chambers. Kirklin MacDonald seeks an Order pursuant to s. 12(4) of the *Limitations of Actions Act*, S.N.S. 2014, c 35 (as amended). He asks to terminate the right of Brittany Jamieson and Samantha Robinson to bring an action as a result of a motor vehicle accident that occurred on March 10, 2017.

[2] The application was filed on June 3, 2019. It was served on both Jamieson and Robinson. Robinson filed a Notice of Contest asking that the application be dismissed. She appeared at the hearing. She did not provide any evidence. Jamieson did not respond to the application.

[3] What follows is a decision on the application.

BACKGROUND

[4] This proceeding arises from a single vehicle accident that occurred on March 10, 2017 near Auld's Cove, Antigonish County, Nova Scotia.

[5] At the time of the accident, MacDonald was driving a 2003 Honda Civic. Jamieson was a front seat passenger and Robinson was a backseat passenger. There was a third passenger in the backseat of the vehicle. His name is Matthew Higgins. It is alleged that MacDonald lost control of the vehicle and it rolled a number of times before coming to rest in a ditch adjacent to the roadway.

[6] MacDonald's insurer was notified of a potential claim by Higgins on March 27, 2017. A claim file was opened on June 1, 2017.

[7] All of the passengers reported injuries following the accident. Higgins was seriously injured. He suffered a C5 motor and C7 sensory tetraplegia which has resulted in him depending on a wheelchair for his mobility.

[8] Neither Jamieson nor Robinson have disclosed any medical records to MacDonald's insurer. Jamieson provided a statement to the insurer on June 27, 2017 disclosing various injuries sustained in the accident. Robinson has never provided a statement to the insurer. She did provide a statement to the RCMP on March 10, 2017 confirming that she sustained injuries in the accident and was hospitalized for a period of time.

[9] Higgins filed a Notice of Action and Statement of Claim against MacDonald on November 10, 2017 (PtH No. 470355).

[10] Neither Jamieson nor Robinson have filed a claim against MacDonald. It has now been thirty-two months since the motor vehicle accident. Both were nineteen years of age at the time of the accident. Neither expressed an intention to pursue a claim prior to this application.

[11] On October 20, 2017, MacDonald was charged with three counts of impaired driving causing bodily harm contrary to s. 255(2.1) of the *Criminal Code of Canada*. Both Jamieson and Robinson were subpoenaed to attend a hearing in that matter on June 19, 2018.

[12] MacDonald's "Section A" third party insurance policy is carried by Echelon Insurance. The policy limit is \$1,000,000.00. Higgins' claim could exceed policy limits. Echelon is not prepared to discuss the resolution of Higgins' claim until there is certainty around the potential claims of Jamieson and Robinson. The application is brought for this reason.

ISSUE

[13] Should the court exercise its discretion and grant the termination order under s. 12(4) of the *Limitations of Action Act*?

POSITION OF THE PARTIES

[14] MacDonald takes the position that it is appropriate to terminate any future claims that could be commenced by Jamieson and Robinson.

[15] Matthew Higgins filed a submission in the support of the application.

[16] Jamieson did not respond to the application.

[17] Samantha Robinson says that she intends to file a claim but has not done so. She did not provide any evidence. The grounds relied upon in her notice of contest say she has injuries, thought she could not proceed until related criminal proceedings concluded, and intends to seek legal advice on her potential claim.

ANALYSIS

[18] This is an application to terminate the ability to bring any further claims against MacDonald. It is not contested that the limitation period for any related claims expired on March 10, 2019. Neither Jamieson nor Robinson filed a claim before the expiration date.

The Limitation Provisions for Personal Injury Claims

[19] The authority for this application is found in s. 12 of the *Limitations of Actions Act*, S.N.S. 2014 , c. 35, as amended (the “*Act*”) which provides:

Disallowance or invocation of limitation period

12(1) In this Section, “limitation period” means the limitation period established by

- (a) clause 8(1)(a); or
- (b) any enactment other than this Act.

(2) This Section applies only to claims brought to recover damages in respect of personal injuries.

(3) Where a claim is brought without regard to the limitation period applicable to the claim, and an order has not been made under subsection (4), the court in which the claim is brought, upon application, may disallow a defence based on the limitation period and allow the claim to proceed if it appears to the court to be just having regard to the degree to which

- (a) the limitation period creates a hardship to the claimant or any person whom the claimant represents; and
- (b) any decision of the court under this Section would create a hardship to the defendant or any person whom the defendant represents, or any other person.

(4) Where a limitation period has expired, a person who wishes to invoke the limitation period, upon giving at least 30 days notice to any person who may have a claim, may apply to the court for an order terminating the right of the person to whom such notice was given from commencing the claim and the court may issue such order or may authorize the commencement of the claim only if it is commenced on or before a day determined by the court.

(5) In making a determination under subsection (3), 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 claimant;
- (b) any information or notice given by the defendant to the claimant respecting the limitation period;
- (c) the effect of the passage of time on
 - (i) the ability of the defendant to defend the claim, and

- (ii) the cogency of any evidence adduced or likely to be adduced by the claimant or the defendant;
 - (d) the conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts that were or might be relevant to the claim;
 - (e) the duration of any incapacity of the claimant arising after the date on which the claim was discovered;
 - (f) the extent to which the claimant acted promptly and reasonably once the claimant 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 a claim;
 - (g) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice the claimant may have received;
 - (h) the strength of the claimant's case; and
 - (i) any alternative remedy or compensation available to the claimant.
- (6) A court may not exercise the jurisdiction conferred by the Section if the claim is brought more than two years after the expiry of the limitation period applicable to that claim.
- (7) This Section does not apply to a claim for which the limitation period is 10 years or more.

[20] The current limitations regime came into force on September 1, 2015. It was the product of consultation and heralded as a modern and uniform approach consistent with other Canadian jurisdictions. The hallmark of the new approach was a consolidation and shortening of limitation periods. The changes from the

earlier regime signalled a stricter approach to limitations with some increased focus on timeliness, certainly, and finality.

[21] Section 12 of existing *Act* applies specifically to personal injury claims. The limitation periods are determined by s. 12(1). Section 12(1)(a) incorporates s. 8(1)(a) which requires claims to be brought within two years of discovery. After the expiration of that period, a person who seeks to rely upon a limitation period may apply for a termination order on thirty days notice. If a termination order has not been granted, a claimant may bring a claim and apply to disallow any limitation period defence. The considerations on such an application are found in ss. 12(3) and (5).

[22] Once a limitation period in s. 8(1)(a) has been expired for more than two years, there is no need for a termination order. At that point, the court no longer has jurisdiction to disallow the limitation period defence. Section 12(6) essentially creates an absolute limitation. Prior to the absolute limitation, a court may exercise its discretion in several ways: (1) a claim may proceed by disallowing a limitation period defence (s. 12(3)); (2) a claim may proceed by a deadline (s.12(4)); or a claim may be terminated (s. 12(4)). After the absolute limitation date, no form of discretionary relief is available (s.12(6)).

Interpretive Guidance

[23] To date, there has been no judicial consideration of s. 12(4). There has been consideration of s. 12 of the *Act*, and several cases on the interpretation of ss. 12(3) and (5). In *MacPhee v. Christensen*, 2019 NSSC 79, Scaravelli, J. noted that s.12(4) of the *Act* was “permissive” as well as “clear and unambiguous”. But he declined to comment further as there was no application before him seeking termination.

[24] In *Barry v. Halifax (Regional Municipality)*, 2018 NSCA 70, Bourgeois, J.A. considered s. 12 of the *Act* and cautioned claimants seeking relief to put their best foot forward at paras. 77 -78:

[77] Before undertaking a consideration of the various factors, a preliminary observation is in order. Although s. 12(3) requires a court to consider the degree of hardship to both claimant and defendant, it should not be forgotten that this exercise is triggered due to a claimant having missed a limitation period created by virtue of the *Act* or other enactment. As such, the burden rests on the claimant to establish that any defence arising from the lapsing of that period ought to be disallowed.

[78] It is incumbent on a claimant to adduce evidence which addresses the factors contained in s. 12(5), in order to inform the assessment. Although s. 12(5) mandates a judge to “have regard to all the circumstances of the case”, those who fail to provide an evidentiary foundation do so at their peril. Similarly, in response, a defendant (or proposed defendant) is well-advised to provide sufficient foundation to permit a comprehensive consideration of the factors in s. 12(5) in order to better inform the hardship assessment. ...

[25] Although Justice Bourgeois was not dealing with s. 12(4) of the *Act*, I find her comments relevant to the present application.

[26] In *M.(K.) v. M.(H.)*, 1992 SCC 31 at paras. 22-24, the Supreme Court of Canada identified three rationales that underlie limitations legislation. They have been described as the certainty, evidentiary and diligence rationales:

[22] Statutes of limitations have long been said to be statutes of repose. ... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. ...

[23] The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim. ...

[24] Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion. ...

[27] Interpretive direction is also found in the reasons of Bryson, J.A. in *Willson v. Bond Estate*, 2019 NSCA 24. In that case, the court of appeal was called upon to review a decision disallowing a limitation defence under s. 12. In response to a submission that the interests of the parties be balanced, Justice Bryson imposed interpretive guardrails;

[15] Care must be taken to read 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 limitation 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 in original]

[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 its 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.

[28] In the absence of any decisions on point, I am left with an exercise in statutory interpretation. The modern principle of statutory interpretation requires that the words of an Act be read in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, object of the Act, and the intention of Parliament.

[29] All of this in mind, it seems that the statutory scheme encapsulated in s. 12 was intended to balance the interests of parties to personal injury litigation. On one hand, claimants were given a two year period within which to bring a claim (or longer if s. 12(1)(b) applied or if subject to discovery) and an ability to set aside a limitation defence in certain equitable circumstances. On the other hand, defendants were given more certainty and finality in a shortened time frame.

[30] In the overall scheme, s. 12(4) finds its place as means to encourage claims to proceed in diligently and provides certainty if they do not. Section 12(4) is permissive and requires notice. But it contains no specific criteria to guide the exercise of discretion. I note that the discretion is limited by the choices available – either termination or deadline. Presumably, if the application wakes a sleeping dog, the dog must be ready to bite, with an explanation justifying a deadline, rather than termination.

Disposition of the Application

[31] Returning to the present case, I have only the evidence of the applicant and the court record for consideration. The relevant facts are not complicated. The only claim brought from the accident in question is the Higgins claim. It is serious and the parties wish to attend to it. This rationale should be positively sanctioned.

The limitation period has now passed for any other claims. But the absolute limitation period has not. This leaves the possibility that Jamieson and Robinson could bring a claim and seek relief under s. 12(3). In the face of that possibility, the applicant seeks finality and certainty. This is relief available to them under s. 12(4).

[32] To invoke relief under s. 12(4), the applicant has must first establish that the limitation period has expired and must provide thirty days notice. I find the notice requirement has been met. In the absence of evidence from either potential claimant, there is no basis to argue discovery or contest the expiry of limitation period. I find that it expired on March 10, 2019. The preconditions being met, I am left with only two choices: (1) termination; or (2) deadline.

[33] In deciding which form of relief to grant, I consider all of the circumstances raised in evidence. Jamieson and Robinson suffered some degree injury in the accident. Neither disclosed medical records or gave notice of intention to advance claims to the insurer. Both were nineteen at the time of the accident. Jamieson did not respond to this application and has made no effort to move a claim forward. I find it appropriate to terminate Jamieson's potential claim in the circumstances.

[34] Robinson attended the hearing and formally contested it, but offered no evidence. Within the thirty-day notice period, Robinson took no concrete steps to advance a claim. At the hearing, there was no informed explanation for delay in advancing a claim and there was no promise to act within a certain future timeframe. She made assumptions about process in the absence of legal advice. In my view, with reference to the purpose of this section, I find that finality must prevail. I find it appropriate in the circumstances to terminate Robinson's potential claim.

[35] Accordingly, there shall be termination order granted extinguishing any ability for either Jamieson or Robinson to advance an action as a result of the motor vehicle accident on March 10, 2017.

Gogan, J.