SUPREME COURT OF NOVA SCOTIA
Citation: *Saulnier v. Benwell*, 2021 NSSC 366

Date: 20210301
Docket: HFX493471
Registry: Halifax

Between:

Kathy Saulnier

Plaintiff

v.

Marc Andrew Benwell

Defendant

DECISION

Judge: The Honourable Justice Darlene A. Jamieson

Heard: March 1, 2021, in Halifax, Nova Scotia

Oral Decision: March 1, 2021, in Halifax, Nova Scotia

Counsel: Liam O'Reilly and Lyndsay Jardine, for the Plaintiff

Michelle Chai and Jennifer Taylor, for the Defendant

By the Court (Orally):

Background

[1] This matter arises from a motor vehicle accident which occurred on July 18, 2017. The Defendant's vehicle, a 2017 Honda Civic, allegedly rear-ended the Plaintiff's vehicle, a 2012 Toyota Yaris owned by Willard Saulnier, the Plaintiff's spouse, at the intersection of Windmill Road and Wright Avenue in Dartmouth, Nova Scotia.

[2] The Plaintiff confirmed on discovery that the parties exchanged insurance information at the scene of the accident. The Personal Insurance Company ("The Personal") insures the Defendant's vehicle. However, having forgotten the drivers name, Ms. Saulnier filed a Notice of Action against an unidentified driver on October 28, 2019, which was amended when The Personal provided the correct name to her counsel. The amendment to name Mr. Benwell as Defendant, is dated January 6, 2020.

[3] A Defence was filed on July 20, 2020, which states:

> (5) The Defendant says that the Plaintiff has failed to bring her legal action within the applicable limitation period set out in the *Limitation of Actions Act*, SNS 2014, c 35.
>
> (6) Furthermore, the Defendant states that on a number of occasions, the Plaintiff was advised of the foregoing limitation period applicable to her claim.

[4] Affidavits disclosing documents were exchanged. The Plaintiff's affidavit disclosing documents was disclosed on May 5, 2020, and a supplemental affidavit disclosing documents on January 8, 2021. The Defendant produced his affidavit disclosing documents on April 23, 2020, a supplemental affidavit disclosing documents on July 17, 2020, and second supplemental affidavit disclosing documents on January 6, 2021.

[5] Discovery of the Plaintiff took place on July 20, 2020. Discovery of the Defendant took place on December 11, 2020.

[6] On September 29, 2020, the Defendant filed a Notice of Motion seeking an order for summary judgment.

[7] On January 13, 2021, the Plaintiff filed a Notice of Motion seeking an order disallowing the Defendant's defence based on the time limitation and to, thereby, allow the action to proceed.

Evidence on the Motions

[8] The affidavit evidence filed in relation to the two motions is as follows:

- The Defendant filed an affidavit of Mr. Andrew Fisher, Claims Advisor with The Personal, sworn January 25, 2021; a response affidavit of Mr. Fisher sworn February 1, 2021; and a supplemental affidavit of Mr. Fisher sworn February 5, 2021.
- The Plaintiff filed the affidavit of Ms. Kathy Saulnier sworn on January 20, 2021; a further affidavit of Ms. Saulnier sworn February 12, 2021; an affidavit of Ms. Andrea Ault-MacLean, paralegal with the law firm of Wagner and Associates, sworn January 19, 2021; a supplemental affidavit of Ms. Ault-MacLean sworn January 22, 2021; and a solicitors affidavit of Mr. Liam O'Reilly sworn February 16, 2021.

[9] At the commencement of the Motions there were preliminary discussions with counsel concerning the Defendant's evidentiary objections, set out in his Response Brief, to portions of the affidavits filed by the Plaintiff. All objections were resolved as between counsel with the exception of the Defendant's objection to the medical records attached to the Plaintiff's affidavit. I will address these medical documents later in this decision.

[10] Mr. Fisher and Ms. Saulnier were both cross-examined.

Preliminary issue

[11] When a summary judgment motion is brought and the Plaintiff argues the limitation defence should be disallowed under the *Limitations of Actions Act*, ("*LAA"*) s. 12(3), must the Plaintiff bring a separate motion pursuant to s. 12 of the *LAA*?

[12] The Plaintiff says the s. 12 *LAA* analysis should be part of the *Shannex Inc. v. Dora Construction Ltd*., 2016 NSCA 89, summary judgment motion test. In other words, it should be considered within the analytical framework of the summary judgement motion itself. She says there is no need for two motions. She argues the s. 12 analysis should be considered within question three of the *Shannex*, *supra*, test,

where the judge is to determine whether the claim has a reasonable chance of success. The Plaintiff further says that because a trial judge is not at liberty to weigh evidence during a summary judgment motion, the judge, in considering the s. 12 factors, can consider the factors but not weight evidence in relation to the factors.

[13] The Defendant says both motions must be given their full effect and not mingled. The Defendant says the factors to be considered on a s. 12 motion are heavily factual and that it would be virtually impossible for the Court to determine a s. 12 motion to disallow a limitations defence without making findings on the evidence. The Defendant further states the Plaintiff should not be permitted to raise s. 12 as a summary judgment avoidance tactic.

[14] I do not agree with the Plaintiff's position that the proper procedure is to co-mingle a s. 12 argument within a summary judgment motion. Where a Plaintiff seeks to disallow a limitation period defence under the *LAA*, it must be determined on its own merits, separate and distinct from the summary judgment motion. To do otherwise would disregard the direction in the legislation and would unreasonably distort the legislation's structure and meaning beyond what was intended.

[15] First of all, s. 12(3) of the *LAA* specifically uses the words "upon application." In addition, the party seeking to disallow a limitation period defence has the burden of proof in relation to that motion. On a summary judgment motion, the party seeking to dismiss the claim as a result of the expiry of the limitation period, has the burden of establishing there are no genuine issues of material fact in dispute with regard to the limitation period, no questions of law or mixed questions of law and fact, and so on.

[16] Our Nova Scotia Court of Appeal has repeatedly warned against weighing evidence in a summary judgement motion, as this is the function of the trial judge. The NSCA in *Martin Marietta Materials Canada Ltd. v. Beaver Marine Ltd.*, 2017 NSCA 61, cautioned against weighing evidence and also discussed what is meant by 'weighing of evidence':

> 30 Weighing the evidence is to determine what use can be made of the evidence or the persuasiveness of it on a matter in issue in the proceeding once it is admitted.

[17] The s. 12(3) motion, by its very wording, requires weighing of evidence. The statute sets out the factors that must be considered in assessing the degree of hardship to the parties. In order to assess hardship the judge is directed to have regard to all circumstances and in particular, the factors set out in s-s 5. The factors to be

considered on a s. 12 motion are heavily factual. In short, in order to make a determination as to whether to disallow a limitation defence, the judge must weigh the evidence. It would be impossible for the Court to determine a s. 12 motion to disallow a limitations defence without making findings on the evidence.

[18] The Plaintiff says the s. 12 argument should be addressed in question 3 (whether the claim has a reasonable chance of success) of the *Shannex*, *supra*, test. However, if one were to follow the Plaintiff's reasoning it would lead to a scenario where any claimant who has missed a limitation period, but is not beyond the further two-year bar, would have a reasonable chance of success by simply raising a s. 12(3) argument, as the judge considering a summary judgment motion would not be entitled to weigh evidence. Therefore, the assessment of the s. 12(5) factors would have to be left for trial. I note that determining whether a claim has a real chance of success attracts a lower burden than the civil standard applicable to the s. 12 *LAA* assessment.

[19] To follow the Plaintiff's line of reasoning, a Defendant would be forced to await trial before there could be a determination as to whether the limitation period defence would stand. This would be a waste of time, expense and judicial resources. This, in my opinion, flies in the face of the direction in *Civil Procedure Rule 1.01*, which states:

> **1.01 Object of these Rules**
>
> These Rules are for the just, speedy, and inexpensive determination of every proceeding.

[20] In addition, I am mindful of the Supreme Court of Canada's call for proportionate legal proceedings in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) ("*Hyrniak*"), at para. 31, where the Supreme Court stated:

> Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes ... an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311 (N.L. C.A.), at para. 53).

[21] There is no logical rationale for co-mingling a s. 12(3) argument within a summary judgment motion where there can be no weighing of evidence. It is logical to assume s. 12(3) motions will be heard early in the legal proceeding so as to avoid

unnecessary expense and court time, if it is ultimately determined the limitation defence must stand.

[22] I note that in the cases of *Nixon v. Chignecto-Central Regional School Board*, 2019 NSSC 272, and *Bourque v. Morrison*, 2019 NSSC 291, both Justices Campbell and Coady respectively, addressed the s. 12(3) motion before then addressing the summary judgement motion.

[23] In conclusion, a s. 12(3) application is a distinct application or motion to be determined on its own merits in accordance with the applicable provisions in the legislation. I am firmly of the view that I should proceed to consider the merits of the s. 12 motion first and then the summary judgement motion.

***Limitation of Actions Act* (s. 12)**

[24] Section 12(3) of *LAA* permits a judge, notwithstanding the expiry of a limitation period, to disallow a defence arising therefrom and permit the claim to proceed. It states:

> 12(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.

[25] While the legislature set strict time limits for bringing an action in most matters (including this claim) within two years from the day on which the claim is discovered, it also specifically provided for possible relief from the two year period for claims to recover damages in respect of personal injuries. This is an equitable remedy available only if the claimant can satisfy the court that it is just to do so in light of the courts assessment of the factors in s. 12(5) and balancing the degree of hardship in all of the circumstances.

[26] The courts discretion under s. 12 is limited in time. A court may not exercise its jurisdiction provided in s. 12 if the claim is brought more than two years after the expiry of the limitation period.

[27] In assessing the degree of hardship, I must consider all of the factors set out in s. 12(5). As the Court of Appeal in *Barry v. Halifax (Regional Municipality)*, 2018 NSCA 79, has said, these must be assessed and also weighed in the context of all of the various circumstances in order to determine the relative degrees of hardship and whether it is just to disallow a limitation defence.

[28] Section 12(5)of the *LAA* states:

> (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;
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> (b) any information or notice given by the defendant to the claimant respecting the limitation period;
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> (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 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 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.

[29] The Plaintiff has the burden of proof on the s. 12 motion, as the party seeking to set aside the limitations defence. As J. Bourgeois said in *Barry*, *supra*:

> 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 s. 12(3) 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 a sufficient foundation to permit a comprehensive consideration of the factors in s. 12(5) in order to better inform the hardship assessment. ...

[30] The parties agree the limitation period began to run on the date of the motor vehicle accident. There is no discoverability issue here. They further agree that the two year limitation period expired on July 18, 2019.

[31] Regardless of the Plaintiff's position of co-mingling of the two motions, the Plaintiff addressed all of the factors in s. 12(5) of the *LAA* and says an assessment of the various factors results in there being a more significant hardship to the Plaintiff, because if she is not successful, her claim will be at an end.

[32] The Defendant acknowledges that this is a personal injury case and the claim was brought within two years of the expiry of the limitation period as required under s. 12. However, the Defendant maintains that on an assessment of the factors set out in s. 12(5), the Court should not exercise its discretion to disallow the limitation defence.

Consideration of the s. 12(5) Factors:

Length of and reasons for the delay

[33] As I have noted, the parties agree the limitation period expired on July 18, 2019. It is not in dispute that there was a delay of approximately six months before the Defendant was specifically named. A prior claim against an unidentified motorist was commenced on October 28, 2019.

[34] The Plaintiff has not provided any reason for the delay in initiating her claim.

Any information or notice given by the defendant to the claimant respecting the limitation period

[35] Although her initial affidavit stated otherwise, Ms. Saulnier acknowledged in her supplemental affidavit that she was aware of the two year limitation period before it expired. She says :

> On or about the 5th of February of 2021, I reviewed the audio recording dated May 14, 2019, and with an emphasis specifically at timestamp 30:30 forward, in the Supplemental Affidavit of Andrew Fischer sworn on February 5, 2021. Upon review, I was aware there was an issue with my personal injury claim after two years elapsed from the day of the collision, July 18, 2017.

[36] In cross examination Ms. Saulnier confirmed that on May 14, 2019, she and Mr. Partington discussed that the limitation period would be over and done with in July.

[37] The Defendant says the Plaintiff was forwarded, by the independent adjuster, ClaimsPro, a letter on October 31, 2017, referencing the two year limitation period and also was told by Mr. Partington of The Personal, on May 14, 2019, of the requirement to commence a claim within two years of the motor vehicle accident. Ms. Saulnier disputes receipt of the letter. Regardless, it is clear by May 14, 2019, Ms. Saulnier knew the limitation period of two years would expire in July of 2019. In fact, it appears Ms. Saulnier knew of the two year limitation period before she called Mr. Partington in May 2019, as when they come to that part of the discussion she says “I gotta do this because I didn’t know if after two years it was over and done with.” Mr. Partington responds that she is correct and that it is over and done with after the two years and she has up until July, but that is a few months away.

[38] Ms. Saulnier knew about the limitation period well before July 2019 and there was no reason advanced as to why she failed to heed that date. In addition, there is no evidence to indicate that The Personal communicated with the Plaintiff in a way that would have led her to believe that the limitation period would not be an issue. While they were discussing resolution, the Plaintiff clearly knew the limitation period would expire in July.

The effect of the passage of time on the ability of the defendant to defend the claim (Defence and Cogency of Evidence)

[39] The Defendant knew about the motor vehicle accident by at least July 26, 2017, a little over a week after the motor vehicle accident occurred. On this date TD

Insurance, Mr. Saulnier's insurer, wrote to The Personal advising of the motor vehicle accident. The Plaintiff herself called The Personal on August 17, 2017.

[40] The Defendant had ample time to investigate after receiving notice of the claim. They spoke with Ms. Saulnier on a number of occasions. She provided a release to The Personal on April 28, 2018, to obtain her section B file, and on July 18, 2018, The Personal appears to have utilized the release to request the s. B file.

[41] The Defendant, Mr. Benwell, provided a statement to The Personal on August 2, 2017. It is also noteworthy that The Personal was seeking a settlement proposal from the Plaintiff as early as April of 2018. I note as well that discovery examination of both the Plaintiff and Defendant took place in 2020.

[42] The Defendant says in argument that it is significant that the cause of action in this case stems from a motor vehicle collision. The Defendant says these types of claims are particularly susceptible to prejudicial delay on the basis of fading memories, not just of the parties, but also treatment providers and other possible witnesses who may be called at trial. The Defendant says the Plaintiff's claim for general damages (if any) could be subject to the minor injury cap, given the nature of her claimed injuries. The Defendant further says this determination becomes more complicated with the passage of time, and as a result of any other health issues the Plaintiff may have, given the minor injury definition in the legislation.

[43] Delay, even a brief delay, can have a significant adverse effect on the cogency of evidence. Here the delay was brief. The Defendant's insurer had an opportunity to investigate the claim and the evidence filed by the Defendant is silent regarding any effect on his ability to defend the claim caused by the passage of time.

[44] The Defendant points to the fact that Mr. Partington, the claims advisor who had carriage of the file prior to the expiry of the limitation period, went on medical leave on July 8, 2019, but this is before the expiry of the limitation period and the Defendant would be in the same position it is now if the action had been commenced between July 8 and July 18. The six month delay is not the cause of any possible issue with Mr. Partington's evidence, according to the record before the court.

[45] The Plaintiff, on cross examination, admitted that she had not provided the chiropractic information and her pay stubs to Mr. Partington as she had agreed to do on the May 14th call. However, there was no evidence that this information was lost. In fact, the affidavit disclosing documents of the Plaintiff refers to the chiropractic

information being disclosed, or at least some chiropractic information being disclosed.

[46] The Defendant has not indicated a loss of evidence nor any adverse impact on the evidence as a result of the delay. In short, there is nothing to suggest that the six month delay has compromised the cogency of the evidence. There was no evidence presented to indicate that the Defendant's ability to defend this claim is impaired by the approximate six month delay.

The conduct of the defendant after the claim was discovered

[47] I have not seen any evidence in the record upon which to conclude the Plaintiff was detrimentally influenced by the actions of the Defendant. There is no evidence that the Defendant communicated with Ms. Saulnier in a manner that would have led her to believe the limitation period would not be an issue. In fact the reverse is true, The Personal (Mr. Partington) confirmed the limitation period with her. There is nothing in the conduct of the Defendant that contributed to the delay. In short, there is no evidence before me that the Defendant, after being notified of the proposed claim, acted in such a way as to prejudice Ms. Saulnier.

[48] Further, I am satisfied that the conduct of The Personal during the period when Mr. Partington thought the Plaintiff was represented by Nicolle Snow and sent repeated communications to Ms. Snow, did not prejudice the Plaintiff.

The duration of any incapacity of the claimant arising after the date on which the claim was discovered

[49] Ms. Saulnier acknowledges that she was not under any incapacity after the motor vehicle accident of July 18, 2017.

The extent to which the claimant acted promptly and reasonably once the claimant knew a claim may arise against the defendant

[50] The Defendant says despite many interactions with insurance professionals, the Plaintiff did not act promptly or reasonably to pursue her claim. This is despite the fact that the Plaintiff had been involved in earlier litigation regarding another motor vehicle accident, and was also helping her mother with a "big lawsuit." The Defendant says the Plaintiff had enough litigation experience to know that she had to diligently pursue her claim.

[51] I am satisfied that Ms. Saulnier acted promptly in advising The Personal of her claim, despite failing to heed the two year limitation period. According to the Personal's own file, she contacted them directly on August 17, 2017. As I have noted above, prior to that her insurer contacted The Personal. Initially it was difficult for the ClaimsPro adjuster to get in touch with Ms. Saulnier concerning a statement, but by April of 2018 Ms. Saulnier contacted The Personal again and provided details of her injuries and a release to The Personal to obtain section B information. She had further discussions with them and discussed her injuries and timing for a possible resolution.

[52] There are audio recordings of some of the Plaintiff's calls with Mr. Partington of The Personal, including on April 10, 2018; April 23, 2018; July 11, 2018; and May 14, 2019. The parties ultimately agreed that these recordings would form part of the record before the court.

[53] In conclusion, the Plaintiff did advise The Personal early on of the motor vehicle accident. As noted above there was no explanation as to why she did not heed the advice in May 2019, that there was a two year limitation period.

<u>The steps, if any, taken by the claimant to obtain medical, legal or other advice and the nature of any such advice</u>

[54] Ms. Saulnier filed her discovery transcript as an exhibit to her affidavit and her affidavits disclosing documents, which contain extensive information. Her discovery examination transcript is also appended to the affidavit of Mr. Fisher.

[55] In the discovery transcript Ms. Saulnier speaks of her injuries and the treatment she has received. She speaks about the pain she has experienced, medication she has been prescribed and pain injections she received monthly, at least as of the date of the discovery. The documents attached to Ms. Saulnier's affidavit confirm visits to physio and chiropractic clinics as early as 2017.

[56] The Personal's own records note she told them about physio, chiropractic treatments, and pain injections. The Defendant says in his brief:

> Regarding medical advice, the Plaintiff received treatment from a number of treatment providers (including chiropractic, massage therapy, and physiotherapy treatments) after the accident. On several occasions, she told The Personal about her injuries and the treatment she was seeking. It appears she also received some Section B benefits from Primmum (TD Insurance).

[57] The Defendant states that he accepts, for purposes of these motions, that the Plaintiff had not retained counsel in relation to the accident until she retained the Wagners Law Firm in or around October 2019. The Defendant says Ms. Saulnier was not diligent in retaining counsel for this accident despite her previous experience with litigation.

[58] As noted, the evidence indicates the limitation period had already expired when Ms. Saulnier retained legal counsel concerning her claim. Given her knowledge of the two year limitation period, certainly by May 2019, I agree she was not diligent as she waited to retain counsel until several months after the expiry of the limitation period.

The strength of the claimant's case

[59] The Nova Scotia Court of Appeal in *Barry*, *supra*, noted a preference for evidence on liability together with details of the nature, extent, duration and causation of the injuries:

> 90 To successfully claim against RSA, Ms. Barry will be obligated to establish that she is "legally entitled" to damages from an unidentified driver. In this motion, she provided little evidence to establish a strong case for liability. Further, although it appears she undertook some physiotherapy following the accident, there is insufficient evidence adduced to advance a strong case regarding the nature, extent, duration or causation of any injuries being claimed as arising from the incident.

[60] While this is an issue ultimately for the trial judge, it would appear the Defendant does not dispute the fact that he rear ended the Plaintiff's vehicle. Mr. Benwell, the Defendant, said at discovery starting on p. 18:

> P18 …and then as I let my foot off of the brake, the car in front of me didn't I bumped into them with the front of my car.
>
> P21
>
> Q At what point did you notice that Ms S vehicle wasn't moving…
>
> A. Point of impact.
>
> Q. And this distraction led you to drive your car---your vehicle drove into….the back of her vehicle?
>
> A. Correct.

[61] Mr. Fisher on cross examination said that on receipt of Mr. Benwell's statement on August 2, 2017, that it was clear to The Personal, Mr. Benwell had caused the motor vehicle accident.

[62] The nature of this claim as a rear end motor vehicle accident is not legally or factually complex. The Defendant acknowledges in its brief:

> A plaintiff is likely to have a relatively strong case on liability in the case of a rear-ender. Here, however, there is a possible defence of contributory negligence, as the Plaintiff said on discovery that she had turned her head at the time of impact (albeit while stopped at a red light) because she was looking for her debit card in her purse and/or trying to close up her purse. This weakens the Plaintiff's case on liability. The Defendant has not admitted liability.

[63] Mr. Benwell's defence pleads contributory negligence, which is a matter for a trial judge to sort out, but for the purposes of this motion, the simple fact that both agree this claim involves a rear end collision with the Defendant's vehicle impacting the Plaintiff's, is sufficient for this factor to weigh in the Plaintiff's favour.

[64] The Defendant takes issue with the evidence the Plaintiff presented as exhibits to her affidavit. The Defendant says the Plaintiff has not provided a strong case on damages in her motion materials despite this being an essential part of s. 12(5)(h). He says the Plaintiff purports to rely on medical reports attached to her affidavit, with no independent evidence from her treatment providers. He says the reports are inadmissible hearsay and opinion evidence, and significantly undercut the Plaintiff's argument under s. 12(5)(h).

[65] The Defendant refers to *MacAulay v. Ali*, 2013 NSSC 271, where Justice Wood, as he then was, held that a chiropractic report that was attached to a paralegal's affidavit and a functional capacity evaluation (which the Defendant had taken from the Plaintiff's affidavit disclosing document and attached to an affidavit from his insurer):

> have clearly not been proven. The factual statements in those documents are hearsay and any opinions require qualification of the author as an expert.

[66] I note, in that case, both documents in issue were reports and not file notes taken in the usual course of business, and there was no affidavit from the Plaintiff personally.

[67] The Plaintiff points to the *Bezanson v. Sun Life Assurance Company*, 2015 NSSC 1, decision of Justice Boudreau, who in considering the admissibility of a family doctor's entire file, completed a thorough review of the Supreme Court of Canada decision in *Ares v. Venner*, [1970] SCR 608, and focused on the business records exception to hearsay evidence by statute and common law. Regardless, Ms. Saulnier cannot dump all of the documents and reports, complete copies of both of the Plaintiff's affidavits disclosing documents in her affidavit as exhibits and expect they will all be found to be admissible.

[68] As I have noted earlier during this proceeding, in the future I strongly suggest that counsel determine which specific documents they wish to place before the court rather than dumping huge volumes of documents for the court to sort through. Counsel must ensure the documents are properly admissible on the motion or risk failing to satisfy this s. 12(5) factor.

[69] I do not take the comments of the Nova Scotia Court of Appeal in *Barry*, *supra*, to mean that *Rule 55* expert evidence is necessary for s. 12 motions, nor do I take the comments to mean that I am to do an analysis of medical reports, assess whether there are pre-existing injuries impacting the claim, etc. These are matter for the trial judge. Clearly there must be admissible evidence in relation to this s. 12(5) factor, but it need not come through expert medical opinion.

[70] The Plaintiff says, in her affidavit, that as a result of the motor vehicle accident she has experienced pain in her head, neck, left shoulder, back, jaw, hands and right ankle. She further says that she has impairments and restrictions with regard to bending and lifting which impact her activities of daily living such as mowing the lawn, laundry, making beds putting away dishes, picking up two small dogs, and the ability to wear boots with a heel. She further says she has impairments and restrictions to her ability to participate in hobbies including riding her motorcycle, knitting and sewing.

[71] The Plaintiff's discovery transcript, as I have noted, is an exhibit to the affidavit of Mr. Fisher and also to the Plaintiff's own affidavit. In that discovery transcript, Ms. Saulnier's evidence includes various references to pain that she has experienced after the motor vehicle accident, and the treatment that she has received. She says that damage to her vehicle from the motor vehicle accident was over $1,000 (for the back bumper). The insurance file indicates the exact cost was $833.

[72] Ms. Saulnier also indicated that she has been receiving injections for pain in her left shoulder, down her left spine across her right shoulder and into the bottom

of her back. At the time of discovery, these were monthly. During her discovery she was asked to list the injuries from the accident of July 17 and she states the list includes her neck, left shoulder and a little bit on the right shoulder, neck, low back. She indicates for example, that her right shoulder hurt the same night of the accident and when asked about when her low back pain began, she indicated the same night and she thought, at the time, she was having a heart attack.

[73] She stated in her discovery that she attended physiotherapy and also a chiropractor for her neck. The records illustrate that she attended Bedford Sackville Physiotherapy clinic from November 2017 to early-December 2017. The Scotia Chiropractic Health Center records indicate assessments as early as July 2017.

[74] In addition, as noted above, Ms. Saulnier has appended to her affidavit extensive medical documentation indicating subsequent to the motor vehicle accident that she attended her family physician, physiotherapy and chiropractic clinic, and visited a specialist etc. Some of these records / documents can be utilized by the Plaintiff to simply indicate the fact that they exist, rather than for the truth of any opinions they contain. Clearly the medical reports are not admissible in the manner presented for the truth of their contents.

[75] The Plaintiff has not specified which documents in the affidavits disclosing documents should be considered for their factual content, and I have not considered any of the contents of these documents, or the medical reports. With respect to the medical documents, the Plaintiff's counsel referenced in the brief and pointed to in oral submissions, much of this is also opinion evidence and I have disregarded it. I have solely looked at the dates regarding chiropractic and physiotherapy records and other appointments.

[76] The Personal's own file references Ms. Saulnier reporting to them time missed from work, some details of her injuries, treatment she was receiving. For example, physiotherapy, chiropractic sessions, and pain injections in her back, and includes a release for them to access her section B file. The files notes are primarily from 2018 and are attached as Exhibit A to the affidavit of Mr. Fisher sworn January 25, 2021.

[77] Ms. Saulnier's own insurer indicates in a letter dated May 5, 2020, that the medical indemnity payments made to date totalled $1,255 and that no disability income benefits had been paid.

[78] As I note above, it is not my role on a s. 12 motion to determine liability, causation, or quantum of damage. I do not take the statements in the *Barry* case to

indicate otherwise. Clearly, that is for the trial judge. I am simply to consider the strength of Ms. Saulnier's case as one of the factors in s. 12.

[79] The claim relates to a motor vehicle accident where the Plaintiff's vehicle was rear ended. It appears there was damage to the vehicle of the Plaintiff, her insurer paid $833 to repair the vehicle with the indicated date of loss being July 18, 2017. While I recognize there are facts in dispute regarding the Plaintiff's evidence, the uncontradicted evidence of the Plaintiff is that after the motor vehicle accident she experienced pain, attended physiotherapy, chiropractic treatment, received injections for pain, and has restrictions in her daily activities of living. There was no contradictory evidence presented and The Personal's file, in fact, supports much of this evidence.

[80] I am satisfied that the Plaintiff has presented sufficient evidence for this factor to weigh in her favour. In fact, Ms. Saulnier's own affidavit and discovery evidence is sufficient for me to conclude that this factor weights in her favour.

Any alternative remedy or compensation available to the claimant

[81] The Plaintiff says there is no alternative remedy. The Defendant says it accepts, for the purposes of these motions, that the Plaintiff had not retained counsel in relation to the motor vehicle accident, until she retained the Wagner's law firm in around October 2019. However, the Defendant says there may be a LIANS claim.

[82] The record is certainly not clear regarding any other alternative remedy. With regard to any discussions the Plaintiff had with Mr. Manthorne, I am in agreement with the Defendant, that Exhibit D to Mr. O'Reilly's affidavit, contains hearsay evidence and I have disregarded it.

[83] I have set out above the factors from s. 12(5) of the *LAA* for consideration and I have considered each of them. I am now to assess and balance the above factors with the objective of achieving a just outcome in all of the circumstances, having regard to the degree of hardship to the respective parties.

[84] Ms. Saulnier emphasizes that her claim will be at an end as she will not be able to advance her claim if the limitation defence stands. However, this will be a constant in these s. 12 motions. It cannot be seen to be controlling the process because if it were then s. 12(3) motion outcomes would become, in essence, automatic. All of the factors set out above must be carefully assessed to avoid this.

As Justice Campbell said in *Nixon, supra*, institutional defendants with deeper pockets must not be disadvantaged, all litigants must be treated even handily.

[85] However, in reality, the variable in these motions will often be what is the hardship caused by disallowing the defence to the Defendant. This must be carefully considered in all of the circumstances and particularly in the context of any impact on the Defendant's ability to defend the claim.

[86] Counsel for the Defendant argued that hardship to the Defendant is firstly, the effect of passage of time generally. I note that the Defendant's affidavit evidence is silent on this. Secondly, the Defendant says that the s. 12 factors favour the defendant when fully assessed. I disagree that in assessing the factors they favour the Defendant. The Defendant's insurer, The Personal, received information about the motor vehicle accident from both the Defendant and Ms. Saulnier. Shortly after the motor vehicle accident the Defendant provided his insurer with his statement. The Personal received a letter from the Saulnier's insurer which states "Injuries : Kathy Saulnier." This was sent within two weeks of the motor vehicle accident.

[87] Ms. Saulnier contacted The Personal herself a month after the motor vehicle accident, and notes indicate she reported injuries relevant to the motor vehicle accident. The Plaintiff also spoke with The Personal on several further occasions and provided a Release for her section B file, as I have noted above. The Personal had every opportunity to investigate and, in fact, actively sought out a settlement proposal as early as April of 2018.

[88] As noted above, there was no affidavit evidence filed that indicates that as a result of the six month delay, evidence was lost or the Defendant's ability to fully defend himself has been otherwise compromised by death of witnesses, or loss of witnesses, etc. The loss to the Defendant would be solely loss of its limitation defence. While this is a significant loss, it does not tip the hardship scale in favour of the Defendant.

[89] I have considered the above factors and the degree of hardship to Ms. Saulnier and to the Defendant, respectively. I am satisfied that based upon the record before me, the degree of hardship analysis favours Ms. Saulnier. As such, the limitation defence should be disallowed. This amounts to relieving against the approximate six month period between the expiry of the limitation period on July 18, 2019, and the bringing of the action on January 6, 2020.

[90] In Conclusion, under the *LAA* I have the discretion to disallow a time limitation defence if it appears just to do so, having regard to the degree of hardship. I conclude, based on all of the circumstances and in particular the factors in s. 12(5) as mandated by s. 12(3), that it is just to allow this action to proceed. Therefore the defence based on the expiry of the limitation period is disallowed.

Summary Judgement Motion

[91] The Defendant brought its motion for summary judgment on the basis that the applicable limitation period had expired before the Plaintiff's action was commenced. As I have disallowed the limitation period defence, which results in extending the limitation period for approximately six months, the Defendant's summary judgment motion cannot succeed. It is dismissed.

Costs

[92] Costs are awarded to the Plaintiff in the amount of $1,500 payable in the cause. Plaintiff's counsel is asked to prepare the order.

Jamieson, J.