SUPREME COURT OF NOVA SCOTIA
Citation: *Murray v. Morrisey*, 2024 NSSC 44

Date: 20240131
Docket: 478657
Registry: Truro

Between:

Tyler Murray

Moving Party (Defendant)

v.

Matthew Morrisey

Respondent (Plaintiff)

DECISION
Motion for Summary Judgment on Evidence

Judge: The Honourable Jeffrey R. Hunt

Heard: September 8, 2023, in Truro, Nova Scotia

Decision: January 31, 2024

Counsel: Robert Kimball and Augustus Richardson, K.C., counsel for the Motion Respondent (Plaintiff)
Christine Nault, counsel for the Moving Party (Defendant)

By the Court:

Introduction

[1] The matter before the court is a summary judgment motion based in a limitations defence. The underlying proceeding has a long and somewhat complicated procedural history. The event that precipitated the litigation took place on October 15, 2016 on a dirt trail near Belmont Mountain, Colchester County.

[2] Two all-terrain vehicles, one driven by Josh Bulmer and the other by Jaden Dean, were driving towards each other on the trail. One of the central issues in the underlying proceeding will be how these two vehicles came to collide. This impact apparently caused Josh Bulmer to either be thrown off or to ditch his ATV, which then allegedly carried on riderless in the direction of, and eventually into, a third ATV driven by Tyler Murray with his friend Matthew Morrisey as a passenger.

[3] Murray and Morrisey were initially represented by the same counsel, Brad Yuill. This was the case up until May 2018, when Murray changed representation. Both Murray and Morrisey brought action against Bulmer and others. A complex

set of procedural steps unfolded over a number of years. In order to provide a context for the present motion, I will set out below a basic timeline of events.

[4] This summary judgment motion has been prompted by Matthew Morrisey's effort in 2022 to amend his pleadings to add his fellow plaintiff, Tyler Murray, as a defendant in the Action. This is strongly opposed by Murray.

Position of the Moving Party

[5] Tyler Murray says the attempt to add him as a defendant to this proceeding at this late stage should be summarily dismissed as the applicable limitation period has long expired. He argues that Morrisey's effort to extend the limitation period on discoverability grounds is unfounded and should be rejected.

[6] In answer to the alternative argument that section 22 of the *Limitation of Actions Act,* c. 35, S.N.S. 2014 permits his addition as a defendant, even if the limitation period has expired, he says this is based on an incorrect interpretation of this provision.

[7] On this basis, he says there are no material facts requiring a trial because the claim as advanced is statute barred and thus has no prospect of success. Accordingly, he is entitled to an order striking the claim against him pursuant to Civil Procedure Rule 13.04.

Position of the Responding Party

[8] Matthew Morrisey, in reply, argues that his effort to add Tyler Murray as a defendant is not statute barred. He grounds this in a number of alternative arguments:

1. He says his claim against Murray was not discovered until December 9, 2020, and accordingly, under section 8 of the *Limitation of Actions Act*, he had two years from that date to advance his claim.
2. In the alternative, even if the limitation period has expired, section 22(b) of the *Act* permits him to add Tyler Murray because the conditions in that section are met on the facts of this matter.
3. As a final alternative, he says Civil Procedure Rule 83.11 gives the Court residual discretion to permit the amendment to add Murray as a defendant.

[9] He says that, as a matter of fairness, his claim against Murray ought to be permitted to proceed. He asks that the summary judgment motion be dismissed and the matter allowed to proceed to trial on the merits.

Issues

1. Considering s. 8 of the *Limitation of Actions Act*, including the operation of the discoverability principle, has the limitation period for the claim by Matthew Morrisey against Tyler Murray expired?
2. In the event the limitation period has expired, does the operation of section 22(b) of the *Limitation of Actions Act* permit the addition of Murray as a defendant, notwithstanding the expiration?
3. Does the Court have residual discretion, under Civil Procedure Rule 83.11(3), to permit the addition of Tyler Murray as a defendant?

4. On the basis of the answers to issues 1-3, is Murray entitled to summary judgment on the *Shannex* test?

Record on the Motion

[10] The evidentiary record before the court is as follows:

Advanced by Moving Party (Murray):

1. Affidavit of Tyler Murray dated May 23, 2023
2. Affidavit Mandy Nauss (adjuster) dated May 24, 2023;
3. Affidavit of Michael Dull (solicitor) dated May 26, 2023.

Advanced by Respondent (Morrisey):

1. Affidavit of Lisa Euloth (adjuster) dated March 12, 2020 (filed pursuant to CPR 23.03(2);
2. Affidavit of Augustus Richardson (solicitor) dated July 13, 2023.

[11] No party sought to cross examine on any affidavit.

Context of the Motion and Evidence

[12] It is something of a challenge to offer a distillation of all the steps which have been undertaken in this matter. There is a decision on a earlier motion in this proceeding, reported as *Morrisey v. Bulmer*, 2020 NSSC 294, which provides further background on the procedural steps up to that point.

[13] A number of parties in the underlying proceeding are not participating in the present motion. These include Jaden Dean, represented by Wendy Johnson

K.C., Royal and Sun Alliance, represented by Wayne Francis, Tyler Murray (as a plaintiff only), represented by Michael Dull, and Josh Bulmer, self-represented. It is a source of potential confusion for the reader that Tyler Murray appears in this proceeding in two capacities with separate counsel. This motion is advanced by him in his capacity as a putative defendant who is attempting to strike the claim filed against him.

[14] Throughout these reasons I may refer to Tyler Murray by name, or as the Moving Party. I may refer to Matthew Morrisey by name, or as the Respondent.

[15] A simplified timeline is as follows:

October 15, 2016	ATV collisions occur.
January 2017	Solicitor Yuill commences acting for both Morrisey and Murray.
February 2017 – April 2018	Various document disclosure made by the plaintiffs.
May 2018	Murray discharges Yuill and retains solicitor Dull.
May 14, 2018	Murray commences actions against Bulmer and Royal and Sun Alliance (RSA) as Section D insurer. RSA defends with denial.
July 18, 2018	Morrisey commences action against Bulmer. Bulmer defends and advances third party claim against Dean.
July 2019	Joint multi-party discoveries are conducted by consent across the separate actions.

July 25, 2019	Solicitor Yuill seeks to add RSA as defendant in Morrisey proceeding by consent. RSA refuses consent.
July 20, 2020	Contested motion proceeds in which RSA is added as a defendant to the proceeding.
December 9, 2020	RSA files Statement of Defence to Section D claim. Defences includes allegations against Murray.
April 20, 2021	Consent consolidation order jointing the two proceedings (actions of Morrisey and Murray).
June 2021 – February 2022	Solicitor Yuill begins process of advising other parties of intention to add Murray as a party defendant to the proceeding.
February 22, 2022	Morrisey files amended pleading adding Murray as Defendant. This was filed without prejudice to Murray's right to advance limitation defence.
July 7, 2022	Murray (as defendant) defends and crossclaims through Solicitor Nault.
February 13, 2023	Morrisey changes counsel from Solicitor Yuill to Solicitor Kimball.
May 29, 2023	Counsel for Murray (as defendant) files summary judgment motion seeking to strike Morrisey claim on limitation grounds.

I have reviewed and assessed all the affidavits together with the attached exhibits. I will touch on various relevant portions of these materials in the discussion and analysis to follow.

Relevant Rules and Legislation

[16] Several civil procedure rules will be discussed throughout these reasons. For ease of reference, I will set these out followed by the relevant provisions of the *Limitation of Actions Act.*

Civil Procedure Rules

[17] Civil Procedure Rule 13.04 provides the framework for considering summary judgment on evidence:

> **13.04 Summary judgment on evidence in an action**
>
> (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> > (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
> >
> > (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

(a) determine a question of law, if there is no genuine issue of material fact for trial;

(b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[18] The parties to the motion have also made submissions regarding Civil Procedure Rules 35 and 83, which deal with procedural aspects of adding a party to an existing proceeding:

35.05 How a party joins further parties

A party who starts a proceeding may join a further party by amending the originating document, or notice of claim against third party, as provided in Rule 83 - Amendment.
….

35.08 Judge Joining Party

(5) Despite Rule 35.08(1), a judge may not join a party if a limitation period, or an extended limitation period, has expired on the claim that would be advanced by or against the party, the expiry precludes the claim, and the person protected by the limitation period is entitled to enforce it.

83.04 Amendment to add or remove party

(1) A notice that starts a proceeding, or a third party notice, may be amended to add a party, except in the circumstances described in Rule 83.04(2).

(2) A judge must set aside an amendment, or part of an amendment, that makes a claim against a new party and to which all of the following apply:

(a) a legislated limitation period, or extended limitation period, applicable to the claim has expired;

(b) the expiry precludes the claim;

(c) the person protected by the limitation period is entitled to enforce it.

(3) A notice may be amended to remove a party from a proceeding, but the removed party may make a motion for costs or other relief.

83.11 Amendment by judge

(1) A judge may give permission to amend a court document at any time.

(2) An amendment cannot be made that has the effect of joining a person as a party who cannot be joined under Rule 35 - Parties, including Rule 35.08(5) about the expiry of a limitation period.

(3) A judge who is satisfied on both of the following may permit an amendment after the expiry of a limitation period, or extended limitation period, applicable to a cause of action:

(a) the material facts supporting the cause are pleaded;

(b) the amendment merely identifies, or better describes, the cause.

Limitation of Actions Act

[19] The following provisions of the statute were referred to in the course of submissions:

General Limitation Periods

8(1) Unless otherwise provided in this Act, a claim may not be brought after the earlier of

(a) two years from the day on which the claim is discovered; and

(b) fifteen years from the day on which the act or omission on which the claim is based occurred.

(2) A claim is discovered on the day on which the claimant first knew or ought reasonably to have known

(a) that the injury, loss or damage had occurred;

(b) that the injury, loss or damage was caused by or contributed to by an act or omission;

(c) that the act or omission was that of the defendant; and

(d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

….

Claims Brought After Expiry of Limitation Period

Claims Added to Proceedings

22 Notwithstanding the expiry of the relevant limitation period established by this Act, a claim may be added, through a new or amended pleading, to a proceeding previously commenced if the added claim is related to the conduct, transaction or events described in the original pleadings and if the added claim

(a) is made by a party to the proceeding against another party to the proceeding and does not change the capacity in which either party sues or is sued;

(b) adds or substitutes a defendant or changes the capacity in which a defendant is sued, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits; or

(c) adds or substitutes a claimant or changes the capacity in which a claimant sues, but the defendant has received, before or within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in defending against the added claim on the merits, and the addition of the claim is necessary or desirable to ensure the effective determination or enforcement of the claims asserted or intended to be asserted in the original pleadings. 2014, c. 35, s. 22.

Caselaw

[20] The law with respect to summary judgment on evidence in this province cannot reasonably be the subject of disagreement. The Court of Appeal has recently delivered a complete summary of the relevant legal principles. This discussion is found in *Arguson Projects Inc v. Gil-Son Construction Limited*, 2023 NSCA 71 at paragraphs 31 through 42. I incorporate here by reference the entirety of this discussion which provides a synthesis of the law, including most importantly the leading case of *Shannex v. Dora Construction Ltd*, 2016 NSCA 89 together with a number of other authorities which guide the application of the *Shannex* principles.

[21] In *Shannex*, at paragraphs 34 through 42, Justice Fichaud set out five sequential questions to be asked when summary judgment is sought pursuant to Rule 13.04:

> 1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
> 2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
> 3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success?
> 4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?
> 5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?

[22] In the matter before the court we are dealing with a specialized aspect of summary judgment, this being a motion based in a limitation defence. When a

summary judgment motion is advanced on this basis, the moving party must demonstrate there is no genuine issue of material fact requiring trial. At its core, the question is whether any material dispute exists as to whether the limitation period expired prior to the filing of the claim at issue.

[23] In *Nova Scotia Home for Coloured Children v. Milbury,* 2007 NSCA 52, the Nova Scotia Court of Appeal engaged in an analysis of summary judgment within a limitations context. The court commented, in part:

> [20] Did the defendants establish that there are no genuine issues of fact on the question of whether the plaintiff's action is statute barred because the limitation period has expired? ...
> . . .
>
> [23] When the defendant pleads a limitation period and proves the facts supporting the expiry of the time period, the plaintiff has the burden of proving that the time has not expired as a result, for example, of the discoverability rule ...
>
> [24] In the context of a summary judgment application where a limitation defence is pleaded, the defendant applicant must first establish that there is no genuine issue of fact for trial. In this case the defendants have established that the statutory limitation period has long expired. Unless the discoverability principle applies, the defendants satisfied the first part of the summary judgment test on the facts alleged by the plaintiff, that is, that the wrongs were committed at the latest in 1947, and that the longest limitation period, six years, expired in 1972, six years after the plaintiff reached the age of majority in 1966. Since the defendants have met the initial threshold, the plaintiff has to demonstrate that there is a real chance of success by presenting evidence that the limitation period has not expired, because of the discoverability principle. [Emphasis added]

[24] Although this decision pre-dates the *Shannex* case, it has been affirmed in numerous subsequent decisions that it remains the appropriate framework within which to apply the *Shannex* principles in the context of a limitation defence: see

Halef v. 3104457 US Investments Inc., 2023 NSSC 65; *Jesty v. Vincent A. Gillis Inc*, 2019 NSSC 320; *Wright v. Ratcliffe,* 2023 NSSC 287; *River John Oceanfront Resort Ltd. v. Bureau*, 2019 NSSC 153.

[25] Also relevant to the consideration process are the following principles:

> **"Best foot forward":** Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all
>
> these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": see CPR 13.04(4) and (5); *Coady v. Burton Canada Co, 2013 NSCA 95*, para. 87; *Shannex*, para 36.
>
> **"No assessment of witness credibility":** As the court engages in the analysis of the summary judgment motion, it is not to engage in the weighing of evidence or assessment of witness credibility. If such is required in order to resolve the proceeding, this must strictly be left to a hearing on the merits: see *Hatch Ltd. v. Atlantic Sub-Sea*, 2017 NSCA 61, paras 26-32.

Analysis

Issue 1 - Considering s. 8 of the *Limitation of Actions Act*, including the operation of the discoverability principle, has the limitation period for the claim by Matthew Morrisey against Tyler Murray expired?

[26] The Moving Party argues that the relevant statutory limitation period in this case began to run on the date of the accident, this being October 15, 2016. The Respondent submits that this position ignores the discoverability element encompassed in s. 8(2). He says the clock was not triggered until December 9,

2020. This was the date RSA entered its Section D defence which included certain allegations against Murray.

[27] Section 8(2) of the *Limitation of Actions Act* provides as follows:

> 8(2) A claim is discovered on the day on which the claimant first knew or reasonably ought to have known
>
> (a) that the injury, loss or damage occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the defendant; and,
>
> (d) that the injury, loss or damage is sufficiently serious to warrant a proceeding.

[28] The leading case on weighing matters of discoverability is *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31. Justice Moldaver speaking for the Court commented as follows:

> [42] In my respectful view, neither approach accurately describes the degree of knowledge required under s. 5(2) to discover a claim and trigger the limitation period in s. 5(1)(a). I propose the following approach instead: a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This approach, in my view, remains faithful to the common law rule of discoverability set out in *Rafuse* and accords with s. 5 of the *LAA*.
>
> [43] By way of explanation, the material facts that must be actually or constructively known are generally set out in the limitation statute. Here, they are listed in s. 5(2)(a) to (c). Pursuant to s. 5(2), a claim is discovered when the plaintiff has actual or constructive knowledge that: (a) the injury, loss or damage occurred; (b) the injury loss or damage was caused by or contributed to by an act or omission; and (c) the act or omission was that of the defendant. This list is cumulative, not disjunctive. For instance,

knowledge of a loss, without more, is insufficient to trigger the limitation period.

[44] In assessing the plaintiff's state of knowledge, both direct and circumstantial evidence can be used. Moreover, a plaintiff will have constructive knowledge when the evidence shows that the plaintiff ought to have discovered the material facts by exercising reasonable diligence. Suspicion may trigger that exercise (*Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16, 406 D.L.R. (4th) 252, at para. 42).

[45] Finally, the governing standard requires the plaintiff to be able to draw a plausible inference of liability on the part of the defendant from the material facts that are actually or constructively known. In this particular context, determining whether a plausible inference of liability can be drawn from the material facts that are known is the same assessment as determining whether a plaintiff "had all of the material facts necessary to determine that [it] had *prima facie* grounds for inferring [liability on the part of the defendant]" (*Brown v. Wahl*, 2015 ONCA 778, 128 O.R. (3d) 583, at para. 7; see also para. 8, quoting *Lawless v. Anderson*, 2011 ONCA 102, 276 O.A.C. 75, at para. 30). Although the question in both circumstances is whether the plaintiff's knowledge of the material facts gives rise to an inference that the defendant is liable, I prefer to use the term plausible inference because in civil litigation, there does not appear to be a universal definition of what qualifies as *prima facie* grounds. As the British Columbia Court of Appeal observed in *Insurance Corporation of British Columbia v. Mehat*, 2018 BCCA 242, 11 B.C.L.R. (6th) 217, at para. 77:

> As noted in *Sopinka*, *Lederman & Bryant: The Law of Evidence in Canada*, some cases equate *prima facie* proof to a situation where the evidence gives rise to a permissible fact inference; others equate *prima facie* proof to a case where the evidence gives rise to a compelled fact determination, absent evidence to the contrary. [Citation omitted.]

Since the term *prima facie* can carry different meanings, using plausible inference in the present context ensures consistency. A plausible inference is one which gives rise to a "permissible fact inference".

[46] The plausible inference of liability requirement ensures that the degree of knowledge needed to discover a claim is more than mere suspicion or speculation. This accords with the principles underlying the discoverability rule, which recognize that it is unfair to deprive a plaintiff from bringing a claim before it can reasonably be expected to know the claim exists. At the same time, requiring a plausible inference of liability ensures the standard does not rise so high as to require certainty of liability (*Kowal v. Shyiak*, 2012 ONCA 512, 296 O.A.C. 352) or "perfect knowledge" (*De Shazo*, at para. 31; see also the concept of "perfect certainty" in *Hill v. South Alberta Land Registration District* (1993), 1993

> ABCA 75 (CanLII), 8 Alta. L.R. (3d) 379, at para. 8). Indeed, it is well established that a plaintiff does not need to know the exact extent or type of harm it has suffered, or the precise cause of its injury, in order for a limitation period to run (*HOOPP Realty Inc. v. Emery Jamieson LLP*, 2018 ABQB 276, 27 C.P.C. (8th) 83, at para. 213, citing *Peixeiro*, at para. 18).

[29] Discoverability in the context of a limitation based summary judgment motion was directly addressed in the leading case of *Nova Scotia Home for Coloured Children v. Milbury*, supra. The Court of Appeal commented:

> 26 The comments on discoverability in the context of a summary judgment application in *Jack v. Canada (Attorney General)*, [2004] O.J. No. 3294 (Ont. S.C.J.) are instructive:
>
> > . . .
> >
> > 87 The facts upon which any plaintiff relies to fall within the discoverability rule must have an objective basis. <u>Objective facts supporting negligence that were discovered at a later point in time beyond a limitation period are an absolute pre-requisite to the extension of the limitation period.</u>
> >
> > 88 In order to establish that there is a genuine issue for trial with respect to Jack's claim that she did not have the requisite material facts available to her until "in and around 1994", Jack must adduce evidence to support her claim that the necessary information was not discoverable until that time. In my opinion, she failed to do so. Further, Jack must provide evidence demonstrating that there is a factual issue surrounding her failure to discover the alleged negligence before 1994 that requires resolution at trial... [emphasis added].

[30] The Moving Party in the present case argues that the Respondent has failed to adduce evidence supporting the claim that the claim they now wish to advance was not discoverable before December 2020. They note that no affidavit has been advanced from the lawyer who represented both Morrisey and Murray up until May 2018. Further, no affidavit from Matthew Morrisey has been filed.

[31] It has also been argued that the decision of RSA to frame their defence to the Section D claim in a particular fashion cannot be a proper basis for discoverability. No underlying facts have changed in this scenario. Nothing new has been discovered.f

[32] In *Quadrangle Holdings v. Coady*, 2013 NSSC 416, Justice Moir made reference to facts and not law as the driving factors in the discoverability analysis:

> 42 Quadrangle made several arguments against the proposition that, for more than two years before it started the Alberta suit, it knew, or ought to have known, that a proceeding was warranted. Justice McCarthy explained Quadrangle's submissions in detail, but he answered them with a pointed simplicity: "discoverability refers to facts, not law.":
>
> > As stated in *Salna* [2011 ABCA 20], discoverability refers to facts, not law...

[33] I have also been directed by the Moving Party to the decision in *Lima v. Moya*, 2015 ONSC 324; appeal dismissed, 2015 ONSC 3605 (Div. Ct.). While it is a case with some factual similarities, I am mindful of the care that should be exercised when considering caselaw where the underlying legislation has differences from our own.

[34] In *Lima* the Special Master refused to permit a passenger, who initially sued the driver of the other vehicle in a two vehicle collision, to subsequently (and outside the presumptive limitation period) add his own driver as a defendant. This decision was upheld by the Divisional Court.

[35] The Moving Party on the present motion points to a number of similarities to our present facts, including the discussion in *Lima* of the possible application of the 1% rule. The court comments on the common practice in Ontario of passengers suing all drivers of involved vehicles in an accident scenario. The decision goes so far to comment on how the court would have been prepared to take judicial notice of such a practice.

[36] I have concluded that, in the circumstances, it would be unwise to attempt to take too much from this decision. I am concerned about the legislative differences. Additionally I would not be prepared to apply the doctrine of judicial notice quite as broadly as the court in *Lima*.

[37] I do however acknowledge the Moving Party's larger point. This being that because we do not have any direct evidence from the lawyer who represented both parties jointly up to May 2018, and then Morrisey alone until February 2023, there is a lack of insight into what might have been known and considered earlier with respect to a possible claim by Morrisey against Murray.

[38] The Moving Party on this motion argues that this is fatal to the position of the Respondent. While I do not accept that this point, standing alone, is fatal, I do recognize that putting one's best foot forward might encompass consideration of

providing evidence from all available sources as to what was known and unknown at the relevant times.

[39] It is further pointed out by the Moving Party that the allegations by Morrisey against Murray in the contested pleading are all matters which would have been in known by Morrisey at the time of the original accident. These include allegations of excessive speed, some degree of impairment, or having operated a vehicle designed for one passenger rather than two. Murray submits that nothing new was learned on any of these subjects between the time of the accident and the filing of the challenged pleading. This appears to run directly contrary to the direction in *Milbury, supra*, at para. 26, that newly discovered objective facts are an essential pre-requisite to the discoverability analysis.

[40] While I decline to draw an adverse inference against the Respondent for failure to advance this evidence, as urged by the Moving Party, it is the case that its absence meant some questions were left unanswered. These include the question of whether Morrisey originally declined to sue his friend and driver Murray based partly in their relationship, among other factors.

[41] The Respondent has argued that it will be unfair for him not to be allowed to advance this new claim against Murray, when other parties may be allowed to point to the actions of Murray as contributing factors in the accident. My

conclusion is that any effort to add this claim must fall within the existing statutory provisions.

[42] Having considered the evidence and submissions of both parties, I have concluded that even considering the principle of discoverability, the limitation period for the commencement of this claim by Morrisey against Murray had expired by the time notice was given of the potential claim. I recognize that the possibility of a potential claim was first raised as early as June 2021, although the actual filing did not take place until February 22, 2022. The limitation period had expired in October 2018, prior to both the giving of notice or the actual filing.

[43] Accordingly, the first issue is answered in the affirmative. The applicable limitation period had expired prior to the advancement of the claim by Morrisey against Murray.

Issue 2 - In the event the limitation period has expired, does the operation of section 22(b) of the *Limitation of Actions Act* permit the addition of Murray as a defendant, notwithstanding the expiration?

[44] A substantial amount of the Respondent's focus in arguing this motion was on the operation of this subsection. With respect, I do not find myself in agreement with the his position that this provision permits the addition of this claim notwithstanding the expiration of the limitation period. I will explain why this is the case.

[45] In summary, Morrisey's argument is as follows:

> A court may add a claim against a party where the limitation period has expired where:
>
> a. the added claim is **related to** the conduct, transaction or events described in the original pleadings;
>
> b. the claim **adds** or substitutes **a defendant** or changes the capacity in which the defendant is sued; and
>
> c. the defendant has received, before or **within the limitation period applicable** to the added claim plus the time provided by law for the service of process, **sufficient knowledge** of the added claim **that the defendant will not be prejudiced** in defending against the added claim on the merits.
>
> (Respondent Brief, para 41. Emphasis in original.)

[46] In my view, even if it is accepted that the new claim is related to the events described in the original pleading, and operates to add a new party defendant, the argument fails at the third step.

[47] In undertaking my review of s. 22, I have considered the decision of the Court of Appeal in *Beasy Nicoll Engineering Limited v. GEM Health Care Group*, 2022 NSCA 44. While this case was largely concerned with the application of s. 22(1), the comments of the Court of Appeal were useful in understanding how the subsection operates in the context of the section as a whole.

[48] In order for the court to find that s. 22(b) operates to relieve Morrisey from the usual obligation to advance a claim during the limitation period, plus the one year period for service, he must demonstrate that Murray received sufficient knowledge of the added claim such that he will not suffer prejudice in defending on the merits. Claim is a defined term in the statute. I have also been referred to the discussion of what constitutes an "added claim" in the decision of *Poff v. Great Northern Data Supplies (AB) Ltd*, 2015 ABQB 173.

[49] I am not satisfied that the conditions of s. 22(b) have been established in this case. To so fundamentally change the nature of Murray's relationship to this litigation after so many years would work a material prejudice against Murray as a defendant.

[50] I am unpersuaded by the argument of Respondent counsel that because there are some common insurance companies here, this operates to mitigate any prejudice and implies a degree of shared knowledge with respect to claims.

[51] That is a reasoning path that I do not find compelling at all. I consider it contrary to the principle that in most instances we do not weigh the insurance status of parties: see *MacKean v. Royal & Sun Alliance*, 2015 NSCA 33, para 25.

[52] I am dealing with Tyler Murray, as an individual, facing a pleading which on its face exposes him to certain allegations of liability. I have considered his affidavit. I reject the suggestion that he will suffer no prejudice in now attempting to mount a defence many years post the closing of pleadings, and an even greater number of years post accident. Not only his affidavit, but the affidavit of Mandy Nauss as well, bears this out.

[53] I note that the wording of the s. 22(b) speaks to knowledge of the "added claim". Presumably this means knowledge not of the accident itself, or the existence of litigation in general, but of the added element of himself as a target from who damages are sought, sufficient that he will not be prejudiced in his defence. There is no evidence that he had such knowledge in the relevant period. For almost the entirety of this proceeding he has been a claimant. He has been a party seeking recovery, not someone exposed to the risk of a tort judgment. There is evidence as to the advanced procedural state of the proceeding. Pleadings have long closed. Oral discovery concluded in July 2019. On the date this motion was argued, all parties acknowledged there was a pending request for date assignment conference.

[54] Given the totality of the circumstances of this matter, I reject the argument that s. 22 of the *Limitation of Actions Act* operates to permit the addition of Murray as a defendant. The pre-conditions in s. 22(b) have not been met.

Issue 3 - Does the Court have residual discretion, under Civil Procedure Rule 83.11, to permit the addition of Tyler Murray as a Defendant?

[55] Counsel for Morrisey submits that notwithstanding any other provision, including the operation of the *Limitation of Actions Act*, the court has residual discretion to add under CPR 83.11. This section has been set out above.

[56] I cannot agree that this is the case. I have considered the caselaw and submissions advanced in support of this position. With respect to the arguments advanced by counsel, I find that they do not take into account the more recent direction from the Court of Appeal in *Automattic Inc v. Trout Point Lodge Ltd*., 2017 NSCA 52, which I find to be a complete answer to this issue.

[57] In this case Justice Farrar dealt directly with the operation of Rule 83.11 as it pertains to the addition of parties after the expiry of a limitation period.

[58] He commented as follows:

> [38] The Rules are clear and do not require elaboration – simply put, you cannot add a person as a party to the proceeding when a limitation period or extended limitation period has expired. It follows that a motions judge must determine the applicable limitation period before adding a party.

> [39] I agree with the comments of Bourgeois, J. (as she was then) in *Sweeney-Cummingham v. I.B.G. Canada Ltd.*, 2013 NSSC 415, where she held that the new Rules specifically direct motions judges to consider limitation issues on motions to add parties :
>
> > [44] In her oral submission, counsel for the Plaintiffs submit that even if the Court finds that a limitation period and extended limitation has passed, the Court still retains a general discretion to amend the pleadings. With respect, I disagree. The new Rules specifically direct the Court to consider limitation issues on motions to add a party. The wording in Rules 35.08(5) and 83.04(2) are clear and in my view constitute a mandatory direction to the Court. Pursuant to Rule 2.03(3), the Court's general discretion cannot be used to override such a provision.
>
> [Emphasis in original]
>
> [40] Although Bourgeois, J. was referring to Rule 83.04(2) which requires that a judge must set aside an amendment or part of an amendment against a new party where a limitation period has expired, her analysis applies equally to Rule 83.11(2) which prevents a judge from adding a party to a proceeding where the limitation period has expired.
>
> [41] Wood, J. following *Sweeney* in *Thornton v. RBC General Insurance Company*, 2014 NSSC 215 puts it succinctly:
>
> > [59] … With a motion to amend the proceeding to add a new defendant under Civil Procedure Rule 35.08, the Court must consider whether the limitation period has expired as of the date of the motion. …
>
> [42] The motions judge failed to ascertain the applicable limitation period and by failing to do so, she erred in allowing Ryan Markel to be added as a party. The Rules are mandatory and do not leave any residual discretion in a motions judge to add defendants without making that inquiry.

[59] I am fully satisfied that this analysis applies in the present circumstance. The circumstances existing in the caselaw advanced by counsel for the Respondent is distinct from the present circumstances. This case is not one where all the material facts underpinning the claim against Murray as a defendant were already

plead (unlike *Russell v. Aviva Canada Inc*., 2022 NSSC 2). The circumstances here are entirely different.

[60] Issue 3 is answered in the negative. CPR 83.11 does not operate in these circumstances to create a residual discretion to circumvent the operation of the *Limitation of Actions Act*.

Issue 4 – On the basis of the answers to Issues 1-3, is the Moving Party entitled to summary judgment on the *Shannex* test?

[61] I have concluded that the claim by Morrisey against Murray is statute barred by operation of the *Limitations of Actions Act*, even after recourse to the notwithstanding provisions of s. 22.

[62] Additionally, I have rejected the argument that CPR 83.11 provides a residual discretion to add him in the circumstances.

[63] Given that this is a limitations defence matter, I will approach the application of the *Shannex* test in the fashion adopted by Justice Rosinski in *Cameron v. Nova Scotia Association of Heath Organizations LTD Plan*, 2018 NSSC 90; appeal dismissed, 2019 NSCA 30:

First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?

> It does not – the defendant, as the moving party has the onus and has established there is no genuine issue of fact, or mixed law and fact, for resolution at trial regarding the expiry of the limitation period. This period had expired prior to the filing of the challenged pleading.

Second Question: Does the challenged pleading require the determination of question of law, either pure, or mixed with a question of fact?

> It does – these being the issues of the operation of s. 22 of the *Limitation of Actions Act* and CPR 83.11. It is appropriate to determine these questions and it is my conclusion that neither s. 22 nor Rule 83.11 operate to provide residual means of adding Murray as a defendant, in the circumstances of this proceeding.

Third Question: Does the challenged pleading have a real chance of success?

> No, it does not – a pleading that is statute barred, with no route to extension, is destined to fail. It is not necessary in the circumstances to address the remaining questions.

Conclusion

[64] A statute-barred claim cannot give rise to any genuine issues of material fact and has no prospect of success at trial. In such a situation, summary judgment must follow.

[65] The motion for summary judgment is granted. The attempt by Morrisey to add Murray as a defendant is struck. The Moving Party will produce the order. If the parties are unable to agree on costs, I will entertain written submissions within 30 days.