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April 16, 2013

VIA COURIER

Michael Jack
c/o Lloyd Tapp
252 Angeline Street North
Lindsay, Ontario
K9V 4R1

Dear Mr. Tapp:

Re: Her Majesty the Queen in Right of Ontario as represented by the Ministry of Community Safety and Correctional Services et al. ats Michael Jack
Court File No. CV-12-470815
Court File No. CV-13-476321
Our File No. 250-11741

Please find enclosed our Factum and Book of Authorities in the above noted matters, served upon you pursuant to the *Rules of Civil Procedure*.

Yours very truly,

A. Patel

Lisa Compagnone
Senior Counsel

Encls.

LC/ap

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April 16, 2013

VIA PROCESS SERVER

Registrar
Superior Court of Justice
393 University Ave., 10th Fl.
Toronto ON M5G 1E6

Dear Registrar:

Re: Michael Jack v. Her Majesty the Queen et al.
Court File No. CV-12-470815
Court File No. CV-13-476321

Please be advised that I represent Her Majesty the Queen in Right of Ontario as Represented by the Ministry Of Community Safety and Correctional Services operating as The Ontario Provincial Police and its employees Marc Gravelle, John Pollock, Jennifer Payne, Jamie Brockley, Melynda Moran, Mary D'amico, Richard Nie, Brad Rathburn, Robert Flindall, Peter Butorac, Ronald Campbell, Colleen Kohen, Hugh Stevenson, Mike Armstrong and retired employee Mike Johnston (collectively, the Crown Defendants) in the above noted actions.

Please find enclosed our Respondent Factum and Book of Authorities returnable April 22, 2013 in response to the Defendant Ontario Provincial Police Association's motion under Rule 21.

Yours truly,

Lisa Compagnone
Senior Counsel

Encl.

Court File No. CV-12-470815

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL JACK

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES OPERATING AS THE ONTARIO PROVINCIAL POLICE AND ITS EMPLOYEES MARC GRAVELLE, JOHN POLLOCK, SHAUN FILMAN, JENNIFER PAYNE, JAMIE BROCKLEY, MELYNDA MORAN, MARY D'AMICO, RICHARD NIE, BRAD RATHBURN, ROBERT FLINDALL, PETER BUTORAC, RONALD CAMPBELL, MIKE JOHNSTON, CHRIS NEWTON, COLLEEN KOHEN, HUGH STEVENSON AND MIKE ARMSTRONG

ONTARIO PROVINCIAL POLICE ASSOCIATION AND ITS REPRESENTATIVES SHAUN FILMAN, KAREN GERMAN, JIM STYLES AND MARTY MCNAMARA

Defendants

FACTUM OF THE RESPONDING PARTY/THE DEFENDANTS, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO ET AL.

April 16, 2013

MINISTRY OF THE ATTORNEY GENERAL
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TO

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Self- Represented Plaintiff

TO

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Lawyer for the Defendants, Ontario Provincial Police Association and its representatives Shaun Filman, Karen German, Jim Styles and Marty McNamara.

Court File No. CV-12-470815

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MICHAEL JACK

Plaintiff/Responding Party

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES OPERATING AS THE ONTARIO PROVINCIAL POLICE AND ITS EMPLOYEES MARC GRAVELLE, JOHN POLLOCK, SHAUN FILMAN, JENNIFER PAYNE, JAMIE BROCKLEY, MELYNDA MORAN, MARY D'AMICO, RICHARD NIE, BRAD RATHBURN, ROBERT FLINDALL, PETER BUTORAC, RONALD CAMPBELL, MIKE JOHNSTON, CHRIS NEWTON, COLLEEN KOHEN, HUGH STEVENSON AND MIKE ARMSTRONG

ONTARIO PROVINCIAL POLICE ASSOCIATION AND ITS REPRESENTATIVES SHAUN FILMAN, KAREN GERMAN, JIM STYLES AND MARTY MCNAMARA

Defendants/Responding Party

FACTUM OF THE DEFENDANT
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES OPERATING AS THE ONTARIO PROVINCIAL POLICE AND ITS EMPLOYEES (EXCEPT S.FILMAN AND C.NEWTON)

OVERVIEW

1. The Statement of Claims dated December 2012 and March 2013 should be dismissed on a summary basis as there are no genuine issues for trial. The Statement of Claims were filed about three years after the last incident relied on to support the claim of discrimination and harassment.

PART I: NATURE OF THE MOTION

a. This factum is filed in support of the Defendant Association Motion requesting the Plaintiff's claim be dismissed on the grounds that the limitation period set out in s. 4 of the *Limitations Act, 2002* has expired.

PART II: FACTS

December 2012 – First Statement of Claim and Statutory Notice to the Crown

2. In December 2012 a Statement of Claim (Court File No. CV-12-470815) was filed naming the Crown as the Defendant Employer and naming its employees. This statement was a nullity as against the Crown for lack of notice as prescribed by s. 7(1) of the *Proceedings Against the Crown Act*. As well, it was not properly served on the named employees.

Affidavit of Jeffrey Bagg, Defendant Employer's Motion Record,[1] Tab 2.

3. On December 21, 2012 the Crown as Defendant Employer accepted Notice of Intent to commence a Claim and thus, a Statement of Claim could be filed as against the Crown on or after February 25, 2013.

Affidavit of Jeffrey Bagg, Defendant Employer's Motion Record, Tab 2.

---

[1] Note: all references to the Defendant Employer's Motion Record relate to the Moving Party's motion record on the motion for consolidation in Superior Court Action No. CV-13-476321.

4. The Defendant Association has moved to dismiss the first Statement of Claim filed in December 2012, Court File No. CV-CV-12-470815.

Notice of Motion, Defendant Association Motion Record, Tab 1.

5. On March 15, 2013 a second Statement of Claim was served on the Defendant Employer and its named employees (except S. Filman and C. Newton) on March 15, 2013, Court File No. CV-13-476321. The Defendant Employer has moved to consolidate Court File No. CV-13-476321 to Court File No. CV-12-470815.

Affidavit of Jeffrey Bagg, Defendant Employer's Motion Record, Tab 2.

Notice of Motion, Defendant Employer's Motion Record, Tab 1.

Prior to December 15, 2009 the Alleged Facts, Incidents and/or Acts Relied Upon to Support the Claim had all Occurred

6. By January 9, 2009 the Plaintiff commenced his probationary employment. He was assigned to the Peterborough Detachment as a Probationary Constable in the bargaining unit represented by the Defendant Association.

Statement of Claim at paras. 7, 9, 20, Defendant Employer's Motion Record, Tab B.

7. By December 2009 the Plaintiff pleads the following alleged facts, incidents and/or acts occurred:

- The Plaintiff alleges from January 2009 to December 2009 "he was immediately subjected to numerous acts of harassment and discrimination due to his status as a foreign born individual and ...heavy Russian accent.";

- the Plaintiff claims that from October 2009 to December 2009 as a result of his thick accent he was unfairly reprimanded and treated differentially;

- the Plaintiff claims that from January 2009 to December 2009 coach supervisor(s) treated him differently;

- the Plaintiff claims that from early on he was subjected to unfair charges/reprimands and internal complaints;

- The Plaintiff alleges that early on his performance evaluations were unfair as they failed to credit his work, relied on unsubstantiated charges/reprimand and that such evaluations continued up to December 2009;

- The Plaintiff pleads that after making a workplace dispute in August 2009 he was subject to reprisal that continued up to December 2009;

- The Plaintiff pleads that even after he was re-assigned in September 2009 his workplace continued to be "poisoned", he continued to be subject to nick names and the ongoing differential treatment.

  Statement of Claim at paras. 9, 23, 26, 28,29, 31(b) to (e), 33(a) to (c)(e) to (o)(s)(u), 34, 35(i)(ii)(viii)(ix), 36, 38 to 50, 54, 55, 58 to 60, 64, 66 to 71, 97, 101, 114, 126, 153, 160, 166, Defendant Employer's Motion Record, Tab B.

8. By May 2009 the Plaintiff advanced the workplace disputes set out below:

- The Plaintiff pleads that in May 2009 he raised a number of workplace disputes alleging amongst other things discrimination, harassment and false accusations;

- The Plaintiff also pleads in August 2009 he brought forward a workplace dispute alleging amongst other things discrimination to the Defendant Association;

- The Plaintiff pleads that in August 2009 upon the advice of the Defendant Association he refused to sign performance evaluations;

- The Plaintiff pleads in October 2009 he provides a memorandum to the Defendant Employer raising complaints.

  Statement of Claim at paras 33(dd), 37 (b) to (e), 38 to 45, 51, 63, 123, Defendant Employer's Motion Record, Tab B.

9. By October 2009 according to the claim the Plaintiff's health commenced deteriorating, and according to the claim by December 2009 he was "experiencing chronic fatigue."

  Statement of Claim paras. 61, 62, 63, 99, Defendant Employer's Motion Record, Tab B.

Human Rights Tribunal

10. By December 14, 2010, approximately one year after the employment relationship was ended, an application was filed with the Tribunal. Legal Counsel assisted the Plaintiff with this application.

  Statement of Claim at paras 199, 200, Defendant Employer's Motion Record, Tab B.

11. As part of the pre-hearing disclosure the Plaintiff was provided with disclosure. Contrary to the implied undertaking rules at the Tribunal the Plaintiff is attempting to rely on e-mails to rebut the presumption that he knew of his alleged claim on the days of the incidents.

  Ontario Human Rights Tribunal rule 3.3

  Statement of Claim at paras. 11, 151(ii), 140 to 142, 155, 159, 161, 163, 194, 225, Defendant Employer's Motion Record, Tab B.

12. The Plaintiff pleads that this civil action was commenced after learning during mediation from a Tribunal Vice-Chair that the monetary award being requested had never been issued by the Tribunal previously.

Statement of Claim at para. 213, Defendant Employer's Motion Record, Tab B.

PART III: ISSUE

a. This Honorable Court should dismiss the action on grounds that the alleged ongoing discrimination ceased three years prior to the filing of the Statement of Claims contrary to section 4 of the *Limitations Act*;

PART IV: LAW

a. This Honorable Court should dismiss the action on the grounds that the alleged ongoing discrimination ceased three years prior to the filing of the Statement of Claim

13. The Defendant Employer supports the motion for an Order, before trial, dismissing this action in its entirety against all Defendants on the grounds that the two year limitation period set out in section 4 of the *Limitations Act* has expired.

Limitations Act, s. 4.

Rules of Civil Procedure, r. 21.01(1)(a).

14. There is no issue of fact required to be tried in relation to the limitation period and thus, a summary judgement dismissing the entire action should succeed.

> *Alexis v. Toronto Police Service Board*, [2009] O.J. No. 376 at para. 21, Defendant Employer's Book of Authorities, Tab 1.
>
> *Jamal v. HMQ*, 2013 ONSC 1290 at paras. 22, 23, Defendant Employer's Book of Authorities, Tab 2.
>
> *Panther Film Services Inc. v. Tayar*, 2012 ONSC 7226 at para. 7, Defendant Employer's Book of Authorities, Tab 3.

15. Section 4 of the Limitations Act sets out that "...a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered."

> *Limitations Act*, s. 4.

16. Unless rebutted it is assumed that the Plaintiff knew of the material facts of his claim, the acts or omissions on which the claim is based, on the day of the incident. To rebut this presumption the Plaintiff must prove that he did not discover and could not with due diligence discover his claim on the day of the incident.

> *Alexis, supra* at paras. 35, 41-44, Defendant Employer's Book of Authorities, Tab 1.
>
> *Panther Film, supra* at paras. 12, 20, Defendant Employer's Book of Authorities, Tab 3.
>
> *Zapfe v. Barnes*, [2003] O.J. No. 2856 at para 24, Defendant Employer's Book of Authorities, Tab 4.

17. Ignorance of the law is not a defence to expiry of limitation period.

> *Webster v. Almore Trading*, 2010 ONSC 3854 at para 9, Defendant Employer's Book of Authorities, Tab 5.

Boyce v. Toronto Police Services Board, 2011 ONSC 53 at para. 37, Defendant Employer's Book of Authorities, Tab 6.

18. This limitation period cannot be extended or abridged.

Alexis, supra at paras. 28-30, Defendant Employer's Book of Authorities, Tab 1.

Joseph v. Paramount Canada's Wonderland, 2008 ONCA 469 at paras 23 to 27, Defendant Employer's Book of Authorities, Tab 7.

19. From January 2009 to December 2009 the Plaintiff pleads he experienced ongoing acts and incidents that he alleges supports what is in essence his overarching claim of ongoing harassment and discrimination.

Statement of Claim at paras. 7, 9, 20, 23, 26, 28, 29, 31(b) to (e), 33(a) to (c)(e) to (o)(s)(u) (dd), 34, 35(i)(ii)(viii)(ix), 36, 37(b) to (e), 38 to 50, 51, 54, 55, 58 to 60, 63, 64, 66 to 71, 97, 101, 114, 123, 126, 153, 160, 166, Defendant Employer's Motion Record, Tab B.

20. The Plaintiff has not provided a viable defence to dismissing this claim on ground of expiry of the limitation period.

21. In light of this courts jurisprudence the Plaintiff's defence of "ignorance of the law" must be rejected.

Statement of Claim paras. 198, 200, 220, Defendant Employer's Motion Record, Tab B.

22. Plaintiff's attempt to rely on disclosure obtained during the Human Rights proceedings to rebut the statutory presumption set out in rule 6 should be dismissed solely on the grounds of injustice.

23. Alternatively, it is respectfully submitted that the discoverability rule is not an issue and that the Plaintiff was aware of the alleged material facts to support his claim prior to December 15, 2009. The Plaintiff did not discover after the expiry of the limitation period new material facts to support his underlying claim.

24. The Statement of Claim against the Defendant Employer and its named employees should be dismissed as the statutory limitation period expired at a minimum three years prior to any of the below steps taken to commence these legal proceedings:

- On December 27, 2012 the Plaintiff provided notice of his intent to bring a claim against the Crown; and/or

- On March 15, 2013 the Plaintiff filed and served a Statement of Claim against the Defendant Employer and its employees (except S. Filman and C. Newton).

25. Having regard to the foregoing, this Honourable Court should dismiss this Action including both Statement of Claims as the limitation period has elapsed; there is no genuine issue to be tried and no viable defence to its application.

PART IV – ORDER SOUGHT

26. The Defendant therefore respectfully requests that this Honourable Court make an Order striking out the Claim and dismissing the action herein, with costs of the action and this motion to be paid by the Plaintiff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

This 15th day of April 2013.

Lisa Compagnone
Counsel for the Defendants, Her Majesty the Queen in Right of Ontario as represented by the Ministry Of Community Safety and Correctional Services operating as the Ontario Provincial Police and its Employees

A

B

Schedule "A"
List of Authorities

1. *Alexis v. Toronto Police Service Board*, [2009] O.J. No. 376 (ONSC).
2. *Jamal v. HMQ*, 2013 ONSC 1290
3. *Panther Film Services Inc. v. Tayar*, 2012 ONSC 7226.
4. *Zapfe v. Barnes*, [2003] O.J. No. 2856, 66 O.R. (3d) 397 (ONCA).
5. *Webster v. Almore Trading & Manufacturing Co.*, 2010 ONSC 3854.
6. *Boyce v. Toronto Police Services Board*, 2011 ONSC 53.
7. *Joseph v. Paramount Canada's Wonderland*, 2008 ONCA 469.

Schedule "B"
Relevant Statutory Provisions

***Limitations Act, 2002*, 2002, c. 24, Sch. B**

Basic limitation period

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194**

To Any Party on a Question of Law

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

Human Rights Tribunal of Ontario: Rules of Procedure (effective July 1, 2010)

Confidentiality of Documents Disclosed Under These Rules

3.3 Parties and their representatives may not use documents obtained under these Rules for any purpose other than in the proceeding before the Tribunal.

***Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27**

Notice of claim

7. (1) Subject to subsection (3), except in the case of a counterclaim or claim by way of set-off, no action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, and the Attorney General may require such additional particulars as in his or her opinion are necessary to enable the claim to be investigated.

MICHAEL JACK and **HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO et al.**

Plaintiff

Defendants

Court File No. CV-12-470815

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

FACTUM OF THE RESPONDING PARTY, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO et al.

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Counsel for the Defendants Her Majesty the Queen in Right of Ontario and its employees.

Court File No. CV-12-470815

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

MICHAEL JACK

Plaintiff

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTRY OF COMMUNITY SAFETY AND CORRECTIONAL SERVICES OPERATING AS THE ONTARIO PROVINCIAL POLICE AND ITS EMPLOYEES MARC GRAVELLE, JOHN POLLOCK, SHAUN FILMAN, JENNIFER PAYNE, JAMIE BROCKLEY, MELYNDA MORAN, MARY D'AMICO, RICHARD NIE, BRAD RATHBURN, ROBERT FLINDALL, PETER BUTORAC, RONALD CAMPBELL, MIKE JOHNSTON, CHRIS NEWTON, COLLEEN KOHEN, HUGH STEVENSON AND MIKE ARMSTRONG

ONTARIO PROVINCIAL POLICE ASSOCIATION AND ITS REPRESENTATIVES SHAUN FILMAN, KAREN GERMAN, JIM STYLES AND MARTY MCNAMARA

Defendants

BOOK OF AUTHORITIES OF THE RESPONDING PARTY/THE DEFENDANT, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO ET AL.

April 16, 2013

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Lawyer for the Defendants, Ontario Provincial Police Association and its representatives Shaun Filman, Karen German, Jim Styles and Marty McNamara.

Case Name:

Alexis v. Toronto Police Service Board

Between
Gladys Alexis, Plaintiff, and
P.C. Darnley, P.C. Shannon Mcparland, the Toronto Police Service Board, Scarborough General Hospital and Jane Doe, Defendants, and
Dr. Michael Heiber, Intervenor

[2009] O.J. No. 376

187 C.R.R. (2d) 194

2009 CanLII 2896

Court File No. 08-CV-350753 PD1

Ontario Superior Court of Justice

A.J. O'Marra J.

Heard: January 5, 2009.
Judgment: January 30, 2009.

(59 paras.)

Civil litigation -- Limitation of actions -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Time -- When time begins to run -- Discoverability -- Expiry of limitation periods -- Effect of -- Motion by defendants for summary judgment dismissing action as being statute barred -- Cross-motion by plaintiff to amend claim to include add psychiatrist as a defendant -- Plaintiff sued defendants for damages for breach of Charter Rights when they committed her to hospital in 2005 for psychological assessment due to plaintiff's indication to commit suicide -- Plaintiff released after one day -- Action commenced in 2008 -- Motion allowed -- Cross-motion dismissed -- Two-year limitation period expired -- Limitation period commenced to run when plaintiff released from hospital as all facts required to commence action were known by plaintiff at that time.

Motion by the defendants for summary judgment dismissing the action against them as being statute

barred by the two-year limitation period. Cross-motion by the plaintiff to amend the statement of claim to include the psychiatrist as a defendant. The police attended at the plaintiff's residence in 2005 after she sent an e-mail to the Premier of Ontario indicating that she contemplated suicide. The police took her to hospital where she was admitted as an involuntary patient for a psychiatric assessment. She was not found to be in danger to herself or others and was discharged. In 2008, the plaintiff commenced the present action for damages due to breach of her Charter rights. The plaintiff argued that the limitation period did not apply to actions for Charter remedies and, if it applied, the court should extend the limitation period under the doctrine of special circumstances. The plaintiff argued that the cause of action was not known or discoverable until there had been complete access to the records of the Toronto Police Service and the hospital.

HELD: Motion allowed. Cross-motion dismissed. The two-year limitation period applied to all litigants, including the claims made under the Charter in this case. The doctrine of special circumstances no longer applied under the Limitations Act, 2002. The plaintiff had not rebutted the presumption that the claim was discoverable on the day the acts or omissions on which the claims were based had occurred. The plaintiff had actual knowledge of the material facts with respect to her cause of action for the claims based on the alleged unlawful search of her home, detention and imprisonment from October 7, 2005 when she was released from hospital. She knew what had happened to her residence and to her at the hospital. She knew who was involved. All of the material facts necessary for the plaintiff to commence her action were known to her as early as October 2005.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 7, s. 8, s. 9, s. 10, s. 24(1)

Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 4, s. 5(1), s. 5(2)

Mental Health Act, R.S.O. 1990, c. M.7,

Rules of Civil Procedure, Rule 20, Rule 20.04

Counsel:

Osborne Barnwell, for the Plaintiff.

Anna L. Marrison, for the Defendants.

Stuart Zacharias, for the Intervenor.

REASONS FOR JUDGMENT

A.J. O'MARRA J.:--

OVERVIEW

1 On October 5, 2005, the plaintiff sent an e-mail letter to the Premier of Ontario in which she stated that due to her many physical and financial difficulties all that she could foresee on her horizon was suicide. The next day, on receipt of the information, police officers of the Toronto Police Service attended to her residence. When she was located she was escorted to the Scarborough Hospital. There she was admitted under a Form 1 as an involuntary patient for a psychiatric assessment pursuant to the *Mental Health Act*, R.S.O., 1990, c. M-7. On October 7, 2005, she was assessed by a physician and found not to be a danger to herself or others. She discharged herself on that date.

2 On March 12, 2008, the plaintiff commenced an action against the police officers, the Toronto Police Service, the hospital and a nurse, referred to as Jane Doe, claiming damages under s. 24(1) of the *Charter of Rights and Freedoms* for breaches of her rights under s. 7, 8, 9 and 10 of the *Charter*.

3 The defendants have brought this summary judgment motion to dismiss the plaintiff's claim against them as being a statute barred by the application of the two year limitation period prescribed in the *Limitations Act*, 2002, S.O. 2002, c.24. It is the defendants' position that all of the material facts were known by the plaintiff on or about October 7, 2005 at the latest, and, accordingly, the limitation period expired on or about October 7, 2007.

4 On October 16, 2008 the plaintiff brought a cross motion to amend her statement of claim, after the defendants' motion for summary judgment was commenced, to include the name of the nurse referred to as Jane Doe and to add as a party the psychiatrist who admitted her for psychiatric assessment, Dr. Michael Heiber. Counsel for Dr. Heiber appeared on the motion to oppose the amendment to name the psychiatrist as being statute barred by application of the *Limitation Act*, 2002. Dr. Heiber was granted leave to intervene under Rule 13.01.

FACTS

5 In January, 1995, the plaintiff injured herself when she slipped and fell on ice. She claims that severe chronic pain has prevented her from continuing her work as a personal support worker from that time forward. During the evening of October 5, 2005, she sent a letter via e-mail to the Premier of Ontario outlining the distress she was experiencing as a result of having received an eviction notice from her landlord, Ontario Housing, her inability to find work or to "get welfare, get disability, or get [a] pension because of my age and the color of my hair". She asked the Premier as to what her options were "as all I could see on my horizon is suicide".

6 The letter was forwarded to the Toronto Police Service and officers were dispatched to the

plaintiff's home. On arrival at her apartment the officers received no response on knocking at the door but could hear music playing inside. The officers made inquiries of the building landlord in order to gain access to the apartment. They were informed it would take more than an hour for someone to attend with a key. They were of the view that a forced entry was necessary to ensure the plaintiff had not acted on her threat of suicide. On entering the apartment they found that she was not there. Further inquiries resulted in them locating and speaking with the plaintiff at her ex-husband's home. After some discussion she agreed to accompany the officers to the hospital. On arrival at the hospital she was left in the care of the hospital staff.

7 While in the emergency department the plaintiff told the nurse she had felt that suicide was her "only way out". The physician in attendance, Dr. Heiber completed an application for psychiatric assessment, a Form 1. It provided authority to admit the plaintiff to the hospital for a period of up to 72 hours for the purpose of a psychiatric assessment.

8 While still in the emergency department, the plaintiff was provided a document referred to as a Form 42 under the *Mental Health Act*. It indicated Dr. Heiber, whose name was handwritten on the form, had examined her on October 6, 2005 and had made an application for her to have a psychiatric assessment. Also, on the form he indicated he had a reasonable belief she had threatened to cause serious harm to herself. On the bottom of the form there is printed the following statement, "You have the right to retain and instruct a lawyer without delay". She was admitted to the hospital.

9 The next day, October 7, 2005, Dr. Ashley Bender, another psychiatrist cancelled the Form 1 on her assessment of the plaintiff. Dr. Bender recommended that the plaintiff remain in the hospital as a voluntary patient to permit her to obtain the benefit of counselling to assist her with respect to her many difficulties. However, the plaintiff discharged herself that day.

10 On returning home she found that there was some damage to the apartment door due to the forced entry made by the police officers. She found that some of her personal papers had been disturbed. On October 13, 2005 she sent a letter of complaint to the Toronto Police Service stating the following:

> On Wednesday, October 5th about 7:00 p.m. I sent a letter to the Premier of Ontario relating my situation and asking him for an option. On Thursday about (sic) October 6 about 5:30 p.m. I was arrested and later locked up in the mental unit at the Scarborough General Hospital, 8th floor, Room 808 in bed number 2.
>
> Before the mentioned ordeal, the police broke my door down, they searched my apartment, and they violated my *Human Rights* and invaded my privacy by entering my computer, my telephone and other areas of my personal belongings. The officers' names and badge numbers are as follows: #7909, S. Darnley and #7100 S. Mcparland. I was not at home, but the officers proceeded to contact the people whose numbers were registered in the memory of my phone. They found

me; I gave them the address where I was and they came and took me to the hospital.

11 The plaintiff then met with counsel who had been assisting her since 2002 with respect to her disability and compensation claims. She contacted him to assist her to determine whether she had a cause of action relating to what had happened to her. She met with him on December 13, 2005. After explaining the circumstances to him counsel directed her to apply for Legal Aid. He told her that after being retained he would request documentation from the police and the hospital.

12 She made application and Legal Aid was granted. In her affidavit the plaintiff details her attendances to lawyer's office: February 1, 2006; May 15, 2006; July 31, 2006; March 8, 2007; and July 4, 2007. She indicates that on each occasion she was told by her lawyer that he thought she had "a good case" but he would not be sure until he reviewed the records of the police and the hospital.

13 The complaint report from the Toronto Police Service was provided to the plaintiff January 18, 2006. All other records relating to the police officers' involvement, including their notes, were made available by November 13, 2006. The hospital records were received by counsel on June 5, 2007.

14 The plaintiff states in her affidavit that in July 2007 she terminated her relationship with that counsel as a result of a disagreement with him "as to the direction the case was going". In July 2007 she retained her present counsel who issued the statement of claim in this matter on March 12, 2008.

Position of the Parties:

15 It is the position of the defendants and the intervenor, Dr. Heiber, that the action is statute barred due to the expiration of the two year limitation as prescribed in the *Limitations Act*, 2002, and as such there is no genuine issue for trial. All material facts were known to the plaintiff, or ought to have been known to her by October 7, 2005.

16 With respect to Dr. Heiber, it is his position that the two year limitation period applicable to the plaintiff's claims had expired well before the plaintiff brought her motion, on October 16, 2008 to add him as a party defendant. Even if it took some time for her to discern his involvement or identity that information was available through the exercise of due diligence well before October 16, 2006, if it was reasonably discoverable with due diligence, the limitation period expired prior to her seeking to add him as a party. A party cannot be added after the expiration of a limitation period.

17 Also, the defendants submit that the plaintiff has failed to produce any expert opinions or other evidence to support allegations of medical negligence with respect to the medical health professionals as is necessary in such actions. In support of their position they rely on *Hardy v. The Hospital for Sick Children*, [2001] O.J. No. 4008 (S.C.J.); *Claus v. Wolfman* (1999), 52 O.R. (3d)

673, affirmed (2000) 52 O.R. (3d) 680 (C.A.). Further, they submit the plaintiff has not alleged the facts necessary to establish willfulness or malice on the part of the defendants to obtain a s. 24(1) Charter remedy, relying on *Ferri v. Ontario (Attorney General)*, [2007] O.J. No. 397 (C.A.) and *Hawley v. Bapoo,* [2007] O.J. No. 2695 (C.A.).

18 The plaintiff advances three grounds to dismiss the summary judgment motion. Firstly, the limitation period does not apply to actions for *Charter* remedies relying on the Ontario Court of Appeal decision in *Prete v. Ontario* (1993), 110 D.L.R. (4th) 94 (O.C.A.). Secondly, if the *Limitation Act* does apply in this case, then the court should exercise its discretion under the doctrine of special circumstances to extend the limitation period because of the following:

a) she contacted counsel within the two year limitation period;
b) she filed a complaint with the Toronto Police Service; and
c) she believed there was no limitation on a cause of action under the *Charter*.

19 Thirdly, the plaintiff claims that her cause of action could not have been discovered until all of the hospital records and police reports were in the possession of her counsel.

Issues:

1. Does the *Limitations Act,* 2002 apply to claims under the *Charter of Rights and Freedoms?* If it is answered "yes":
2. Does the doctrine of special circumstances apply to extend the limitation period?
3. Does the doctrine of discoverability apply in this case to suspend the tolling of the limitation period?
4. Is the plaintiff statute barred from adding Dr. Heiber as a party to her action?
5. If the action is not statute barred has the plaintiff provided the necessary evidentiary basis to support allegations of medical negligence or the necessary facts in support of a constitutional tort and s. 24(1) remedy under the *Charter?*

Summary Judgment Motions: General Principles

20 Justice Osborne in *1061590 Ontario Limited v. Ontario Jockey Club* (1995), 21 O.R. (3rd) 547 at p.557 addressed succinctly the purpose of Rule 20 motions and the role of the motions court:

> The purpose of Rule 20 is clear. The rule is intended to remove from the trial system, through the vehicle of summary judgment proceedings, those matters in which there is no genuine issue for trial: See *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168 (Gen. Div.), *Irving Ungerman Ltd. v.*

> *Galanis* (1991), 4 O.R. (3rd) 545, 83 D.L.R. (4th) 734 (C.A.). The motions judge hearing a motion for summary judgment is required to take a hard look at the evidence in determining whether there is, or is not, a genuine issue for trial. The onus of establishing that there is no triable issue is on the party, in this case, the purchaser. However, a respondent on a motion for summary judgment must lead trump or risk losing: See Rule 20.04(1). Generally, if there is an issue of credibility which is material a trial will be required: See *Irving Ungerman Ltd., supra.*

21 On a Rule 20.04 motion the persuasive burden is on the moving party to satisfy the court that there is no genuine issue for trial. It must be clear based on the evidence before the summary judgment court that a trial is unnecessary. Although the moving party has the ultimate burden of proof to show that there is no genuine issue for trial, the responding party has an evidentiary burden. The responding party must show that there is a "real chance of success" by responding with evidence setting out specific facts showing that there is a genuine issue for trial: At the summary judgment stage, the court is entitled to assume that the record contains all the evidence which the parties will present if there is a trial: See *Dawson v. Rexcraft Storage and Warehouse Inc.*, [1998] O.J. No. 3240; 164 D.L.R. (3rd) 257 (C.A.); *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 (S.C.C.); *Hi-Tech Group Inc. v. Sears Canada Inc.*, [2001] O.J. No. 33 (C.A.); and, *Esses v. Bank of Montreal*, [2008] O.J. No. 3675 (C.A.).

***Limitations Act, 2002* and *The Charter*:**

22 The plaintiff relies on *Prete v. Ontario (Attorney General)* (1993), 110 D.L.R. (4th) 94 as authority for the proposition that a claim for a remedy under s. 24(1) of the Charter cannot be statute barred by a provincial limitation act. The Ontario Court of Appeal allowed the plaintiff in that case to sue the government for relief despite the expiry of the six month limitation period in the *Public Authorities Protection Act*. The majority found that the Charter objective of controlling the excesses of governments was not served by permitting those same actors to determine their own limitation period. After describing the historic purposes of limitation periods the Court of Appeal stated at p.101 of the decision the following:

> The purposes are best served when Charter remedies are sought, by the court refusing relief on the basis of laches, in appropriate cases. The purpose of the Charter, insofar as it controls excesses by governments, is not at all served by permitting those same governments to decide when they would like to be free of those controls and put their houses in order without further threat of complaint.

23 At the time *Prete* was decided there was a six month limitation period for actions against the Crown under the *Public Authorities Protection Act* whereas the general limitation period for tort claims against others was six years. The *Limitations Act*, 2002, which came into force on January 1, 2004 instituted a two year limitation period of general application to all litigants in Ontario. The six

month limitation period for commencement of actions against public authorities contained in the *Public Authorities Protection Act* was repealed.

24 *Prete* has been consistently distinguished by courts of other jurisdictions because of the difference between the six month limitation period for actions against public authorities and the general limitation period of six years for all other tort actions that existed at the time: See *Zadworny v. Manitoba (Attorney General),* [2007] M.J. No. 413, 2007 MBCA 142 (Man. C.A.); *Garry v. Canada,* 2007 ABCA 234, 429 A.R. 292 (A.C.A.); *St. Onge v. Canada* (1999), 178 F.T.R. 104 (F.C.T.D.), aff'd [2001] F.C.J. No. 1569, 2001 FCA 308; *Ravndahl v. Saskatchewan,* [2007] S.J. No. 282 (Sask. C.A.); *Bush v. City of Vancouver et al,* (2006) 272 D.L.R. (4th) 281 (B.C.C.).

25 In *Zadworny,* Scott C.J.M. of the Manitoba Court of Appeal was of the view that the court in *Prete* had proceeded on the basis that in an action where *Charter* relief is claimed "it does not behoove government to immunize itself in a unique way from the application of the *Charter* through a provision which benefits only the government itself".

26 Most recently, in *Jourdain* v. *Ontario,* [2008] O.J. No. 2788 (S.C.J.) Shaw J., in considering the application of the *Limitations Act*, 2002 in a claim of damages for negligence, malicious prosecution, defamation, and breaches of the plaintiff's *Charter* rights, distinguished *Prete* for the same reason. Following the enactment of the *Limitations Act,* 2002 and the repeal of the *Public Authorities Protection Act,* public authorities in Ontario no longer benefit from a preferential position in relation to others. The two year limitation period applies to all litigants. A plaintiff is no longer disadvantaged in bringing *Charter* claims against public authorities. It cannot be said that the government has enacted legislation that effectively immunizes itself from Charter claims.

27 Similarly, I am of the view that the creation of a limitation period of general application resulting in the leveling of the playing field distinguishes *Prete* in this case. It was observed by Hugessen J. in *St. Onge* v. *Canada, supra*, at para. 5 that a prescription deadline which generally applies to all actions of the same nature and does not in any way discriminate against certain groups of litigants does not contravene the Charter. The *Limitations Act, 2002* applies to the claims made under the *Charter* in this case.

Doctrine of Special Circumstances:

28 The Ontario Court of Appeal in *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401 recently addressed the issue. The result provides no comfort for the plaintiff. The doctrine of special circumstances by which a court could exercise its discretion to extend the application of the limitation period no longer applies under the *Limitations Act*, 2002.

29 In that case, the plaintiff issued a statement of claim less than two months after the expiration of the two year limitation period under the *Limitations Act*, 2002. The defendant had notice of the claim, a written statement from the plaintiff and substantial medical documentation of the injuries well within the limitation period. However, through the inadvertence of counsel the statement of

claim was not issued until after the limitation period expired. Although the action was statute barred, the motions judge concluded he had discretion under the doctrine of special circumstances to extend the time period where inadvertence caused the delay and it caused no prejudice to the defendant.

30 The Court of Appeal held that the *Limitations Act, 2002* was intended to be comprehensive in its reform. It does not contain any provision that refers to special circumstances or allows a court to extend or suspend the running of the limitation period based on special circumstances. Further, the common law doctrine of special circumstances that originated from *Basarsky v. Quinlan*, [1972] S.C.R. 380 and the *Rules of Civil Procedure* previously used to do so only permit authority to add or amend a claim or party to an existing action, not to allow an action to be commenced after the expiry of a limitation period.

Doctrine of Discoverability:

31 I now turn to the main issue on this motion the applicability of the doctrine of discoverability. Section 4 of the *Limitations Act*, 2002 states:

> Unless this act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day in which the claim was discovered.

32 Section 5(1) of the Act states that a claim is discovered on the earlier of,

a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,
(ii) that the injury, loss or damage was caused by or contributed by an act or omission,
(iii) that the act or omission was that of the person against whom the claim is made, and
(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

33 There is a statutory presumption contained in s. 5(2). A claim is discovered on the day the act or omission occurred, unless the contrary is proved. In *Findlay v. Holmes,* [1998] O.J. No. 2796, the Ontario Court of Appeal stated at para. 28:

> The discoverability principle provides that a limitation period will not begin to run until the plaintiff has knowledge of the material facts upon which the cause of action is based; however, the plaintiff must act with reasonable diligence.

34 Similarly in *Soper et al v. Southcott et al* (1998), 39 O.R. (3rd) 737 at 744 the Ontario Court of Appeal observed that "limitation periods are not enacted to be ignored." Where a plaintiff alleges that his or her claim was not discoverable at the time of the events in question, the plaintiff must lead evidence to that effect. In addition, the plaintiff must also have acted with due diligence to pursue discovery of his or her claim.

35 When a defendant pleads that a limitation period has expired the onus is upon the plaintiff to prove that the cause of action arose within the statutory limitation period. There is an evidentiary burden on the plaintiff to prove that the material facts giving rise to the cause of action were not within her knowledge within two years from the date she issued her statement of claim through a lack of due diligence: See *McSween v. Louis*, [2000] O.J. No. 2076 and *Findlay v. Holmes, supra.*

Positions of the Parties:

36 It is the position of the plaintiff that the cause of action was not known, or discoverable until there had been complete access to the records of the Toronto Police Service and the hospital. She contends that it was only on receipt of those records that allowed her to understand properly her cause of action based the defendants' failure to comply with the *Mental Health Act* provisions and their violation of her *Charter* rights. It was not until the hospital records were examined in conjunction with the Form 42 that she learned a physician named Dr. Heiber purported to have examined her on October 6, 2005.

37 The position of the defendants, based on the plaintiffs' pleadings and her affidavit, is that the following material facts were known to her on October 6 or 7, 2005:

a) On October 6, 2005, the plaintiff received a telephone call from the officers and was advised that her apartment door had been broken in, and that they entered her apartment;
b) On October 6, 2005, the plaintiff accompanied the officers to the hospital on their insistence according to her;
c) On October 6, 2005, the plaintiff was admitted to the psychiatric unit of the hospital;
d) On October 7, 2005, the plaintiff was seen by a psychiatrist and was told she could leave the hospital to go home, but that the doctor recommended strongly she stay to meet with a social worker; and
e) On October 7, 2005, the plaintiff went home and "was shocked to see the disarray of her home".

38 In her statement of claim, dated May 28, 2006, issued March 12, 2008 the plaintiff alleges that

the police officers improperly searched her home and improperly detained her. Further, she alleges that the hospital psychiatric staff "illegally" detained her. With respect to allegations of "false imprisonment" they submit the limitation period began to run from the termination of the imprisonment. The Form 1 signed under the *Mental Health Act* was cancelled on October 7, 2005 and the plaintiff left the hospital that evening. Any cause of action for false imprisonment was complete the moment she was free to discharge herself.

39 The intervenor submits that the Form 42 received by the plaintiff on October 6, 2005 is of significance with respect to her attempt to add Dr. Heiber as a defendant party to the action. A reasonable person in the position of the plaintiff, who had filed a complaint about the police within one week of her hospital admission, and sought legal advice from counsel, retained previously to advance a claim on her behalf, within two months of her hospitalization, would have read it herself and provided it to her counsel to read. The document contains the handwritten name of the physician who declared he had examined her and committed her for a psychiatric assessment. A reasonable person, having the document in her possession with the name of the physician inscribed thereon, exercising due diligence could have readily informed herself either directly or through the efforts of counsel by contacting the hospital as to the identity of the physician.

40 If for some reason she could not have readily discerned the physician's name she could have included him in her statement of claim as a John Doe, just as she had with respect to the nurse she referred to as Jane Doe.

Analysis:

41 In my view, the plaintiff had actual knowledge of the material facts with respect to her cause of action for the claims based on the alleged unlawful search of her home, detention and imprisonment from October 7, 2005. Her letter of complaint sent on October 13, 2005 indicates that she believed these violations had occurred. In the letter she makes specific reference to having been arrested and locked up in the mental unit at the Scarborough General Hospital, that the police "broke my door down, they searched my apartment and they violated my human rights and invaded my privacy by entering my computer, my telephone and other areas of my personal belongings". Indeed, she specifically names the officers involved.

42 The plaintiff knew what had happened to her on October 6 and 7, 2005. She knew what had happened at her apartment with respect to the police having entered into it. She had Form 42 in her possession from October 6, 2005 onward, which indicated that an application had been made by a physician for her to have a psychiatric assessment. It contained the name of the physician who purportedly conducted the examination. It indicated that she had the right to retain and instruct counsel without delay. She knew what had happened to her residence and to her at the hospital. She knew who was involved.

43 A reasonable person in the plaintiff's position acting with due diligence ought to have known the following:

a) That the "injury, loss or damage" as a result of the alleged improper apprehension by the police, search of her apartment, false imprisonment, or improper admission to the hospital occurred on October 6, 2005.

b) That the "injury, loss or damage" was caused by or contributed to by the acts of unlawful search, improper apprehension and detention, and false imprisonment and/or improper admission to the hospital.

c) That the acts of unlawful search, detention and imprisonment were acts of the police officers, the nurse and the "attending physician" who signed the Form 42.

44 The plaintiff contends she required the hospital records to discover her injury, loss or damage, the act and the person against whom the claim was to be made. Based on her affidavit she attended to her lawyer's office between February 1, 2006 and July 4, 2007 six times during which her lawyer told her he thought she had "a good case" but would not be sure until he had reviewed the records from the police and the hospital "because he needed to know the facts". However, all of the records were in the possession of counsel by June 2007. Her present counsel, retained in July 2007 had no reasonable explanation for not issuing the statement of claim prior to October 7, 2007.

45 On the summary judgment motion I must assume that the plaintiff has provided a record that reflects the evidence she would rely on at trial. There is no evidence that the hospital records contain any material fact which the plaintiff required before she could recognize her proposed cause of action. Indeed, there is evidence, which indicates that all of the material facts necessary for the plaintiff to commence her action were known to her as early as October 6 and 7, 2005. The evidence demonstrates that the plaintiff had actual knowledge of the material facts necessary for her claim by October 7, 2005 at the latest. She only needed to know sufficient material facts upon which to base her allegations. As noted in *McSween v. Louis supra*, at para. 51:

> To say that a plaintiff must know the precise cause of her injury before the limitation period begins to run, in my view, places the bar too high.

46 In my view, the plaintiff has not rebutted the presumption the claim was discoverable on the day the acts or omissions on which her claims are based had occurred.

47 In summary, the plaintiff had sufficient information with respect to the injury, loss, and damages, the acts involved, where the acts occurred and who was involved. She believed that the police officers had unlawfully searched her apartment, apprehended and detained her. She believed that she had been falsely imprisoned at the hospital by the nurse. She was in possession of Form 42 and by simply reading it she would have known that a physician purported to have examined her and on his reasonable belief committed her for a psychiatric assessment. With due diligence the identity of the physician was readily discernible. The plaintiff did not need the police officers' notes or the hospital records to give rise to her claims. The plaintiff has not rebutted the presumption that the claim was discoverable other than on the date it arose and has failed to disclose a genuine issue

for trial.

48 In this matter the limitation period expired by October 7, 2007. Accordingly, the plaintiff's action is statute-barred against the named defendants and the non-party physician.

Medical Negligence and Constitutional Tort:

49 It is not necessary for me to deal with whether the plaintiff has provided the necessary evidentiary basis to support allegations of medical malpractice or the necessary facts in support of a constitutional tort or s. 24(1) remedy under the *Charter* having found her action statute barred. However, in the interest of completeness, I am prepared to address all of the issues raised on the motion by the parties.

a. Medical Negligence

50 The responding party must show that there is a "real chance of success" by responding with evidence setting out specific facts showing that there is a genuine issue for trial. The defendants assert that with respect to the claims against the medical personnel the plaintiff is required to provide some expert evidence in support of the claim that they failed to meet a standard of care which caused the plaintiff's injury, loss or damages. In the absence of an expert opinion in support of all elements of the cause of action in negligence, a genuine issue for trial has not been raised.

51 The plaintiff contends that her claim is not one of medical malpractice or an allegation of any breach of a standard of care owed by the medical professionals to her. Rather, her claims against the hospital and medical personnel stem from their non-compliance with the *Mental Health Act*.

52 I am unable to accept the plaintiff's position that none of her claim is grounded in the tort of negligence. In her statement of claim and amended statement of claim she states that the hospital and its staff failed to follow procedures, over-reacted to her letter to the Premier, and that the hospital was vicariously liable for the actions of its staff. Vicarious liability in this case is premised on the alleged negligent acts of staff in failing to meet a standard of care. Moreover, the decision to admit the plaintiff to the hospital under a Form 1 was a medical decision made by a physician.

53 In *Claus v. Wolfman supra*, Pitt J. granted summary judgment on a motion to dismiss a medical malpractice claim where the plaintiff had not met the evidentiary onus by providing an expert opinion in support of the contention the defendants fell below the appropriate standard of care provided during her labour and childbirth. He held that a court ought not to be asked to make a finding that an expert or experts failed to meet the standard required of them in the absence of evidence as to what the standard is in the profession. In the decision, affirmed by the Ontario Court of Appeal, Pitt J. stated at para 12:

> ... unless this is a case where the issues to be decided are within the ordinary knowledge and experience of the trier of fact ... the motion must succeed, as the

plaintiff will be unable to prove at trial that the defendants were negligent.

54 In my view, the plaintiff's allegations, based on a failure of the medical professionals to meet the requirements of the *Mental Health Act*, raises, at a minimum, the need of evidence available for the trier of fact to understand the standard of care involved in matters of psychiatric assessments and admissions. In this regard, the plaintiff has not discharged the evidentiary burden and summary judgment would have been granted in favour of the medical defendants on that basis.

b. Constitutional Tort

55 With respect to establishing liability for a constitutional tort and obtaining relief under s. 24(1) of the *Charter*, as stated by the Court of Appeal in *Ferri v. Ontario (Attorney General)*, *supra* at para. 108 and applied in *Hawley v. Bapoo, supra* there must be proof of wilfulness or *male fides* in the creation of a risk or course of conduct that leads to damages. Proof of simple negligence is not sufficient for an award in damages in an action under the Charter: see *McGillivar v. New Brunswick* (1994), 116 D.L.R. (4th) 104 at 108 (N.B.C.A.), leave to appeal refused, [1994] S.C.C.A. No. 408.

56 Whether there has been wilfulness or *male fides* on the part of a purported malfeasor may require not only an assessment of the person's conduct or actions, but also his state of mind or knowledge. It was observed by Watt J.A. in *Esse v. Bank of Montreal, supra* at para. 46 that state of mind or knowledge is "a notoriously difficult fact for a party to prove". Often it is proven by circumstantial evidence and by drawing reasonable inferences. Frequently, proof of knowledge is much better left to the trial judge, who has the benefit of hearing the evidence of the parties, than by a judge assessing the printed record on a motion.

57 In my view, the assessment of whether there was willfulness or *male fides* on the part of the defendants would have been a matter to be determined at trial. However, for all of the reasons cited above the action is statute barred and the motion to dismiss is allowed.

Result:

58 Summary judgment is granted. The plaintiff's action against the defendants is dismissed. The plaintiff's motion to amend the statement of claim to add Dr. Michael Heiber is dismissed.

59 Costs are awarded to the defendants and the non-party intervenor. If the parties cannot agree on the amounts they may file written submission of no more than two pages in length with cost outlines within 30 days of this judgment.

A.J. O'MARRA J.

cp/e/qlrpv/qlcnt/qlrxg/qlaxw/qlhcs

CITATION: Jamal v. HMQ, 2013 ONSC 1290
COURT FILE NO.: 05-CV-286318PD3
DATE: 20130319

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Naseem Jamal, Plaintiff

AND:

The Crown in Right of Ontario (Ministry of Community, Family and Children's Services), Defendant

BEFORE: Carole J. Brown J.

COUNSEL: *Naseem Jamal*, representing herself

Susan Munn, for the Defendant

HEARD: January 23, 2013

ENDORSEMENT

[1] The moving party, Her Majesty the Queen in Right of Ontario as represented by the Ministry of Community and Social Services ("HMQ"), brings this motion to dismiss the statement of claim dated August 19, 2005, on the grounds that (i) the claim is statute-barred by the *Limitations Act*, 2002; (ii) there is no reasonable cause of action disclosed in the statement of claim pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*; (iii) the claim is scandalous, frivolous, vexatious and/or an abuse of process pursuant to Rules 21.01(3)(d), 25.06(1) and 25.11, and (iv) the Court has no jurisdiction with respect to the subject matter of the action.

[2] The plaintiff, Naseem Jamal ("the plaintiff") raised preliminary issues which she wished to have heard prior to HMQ's motion to dismiss the statement of claim. She wished to first argue her application for a binding declaration ordering HMQ to reopen the applicant's file at the Crown Employees' Grievance Settlement Board ("GSB") and/or granting the applicant standing to reopen the applicant's file at the GSB, and also to argue her motion for summary judgment

[3] I advised the plaintiff that the only motion to be heard before me would be the defendant's motion to dismiss the statement of claim, as based on the determination of the Court regarding that motion, the plaintiff's motion and application would then proceed or would be rendered moot. The hearing before me proceeded on the basis of submissions regarding HMQ's motion to dismiss.

Background Facts

Procedural History

[4] The procedural history of this matter is fully set forth in the defendant's factum.

[5] The plaintiff was a unionized, Crown employee and a member of OPSEU from June 15, 1977 to June 28, 2011. OPSEU is and was at all material times, a party to a collective agreement with the Crown, as represented by the Management Board of Cabinet, which governed the terms and conditions of the plaintiff's employment.

[6] Following grievances filed by the plaintiff on June 27, 2000 and June 25, 2001, and as pleaded in paragraph 37 to 51 of the subject statement of claim, the grievances were resolved prior to the hearing by Memorandum of Settlement signed by the parties, pursuant to which the plaintiff received $110,000, agreed to resign from her position, not to raise the subject matter of the grievances in any other forum, and to sign a full and final release in favour of the Crown.

[7] On November 5, 2003, the plaintiff filed an application with the Ontario Labour Relations Board ("OLRB") alleging that OPSEU was in breach of its duty of fair representation under section 74 of the *Labour Relations Act, 1995* and seeking to have the OLRB set aside the settlement that she signed on June 28, 2011. The application related to the representation provided by OPSEU with respect to the above-noted grievances.

[8] Following dismissal of the plaintiff's application by the OLRB, the plaintiff requested that the Board reconsider its decision dismissing her complaint as against OPSEU, which the OLRB refused to do. As a result, the plaintiff applied to the Divisional Court for judicial review of the OLRB's decision. The application for judicial review was dismissed by the Divisional Court and the plaintiff's application for leave to appeal to the Ontario Court of Appeal, and subsequently to the Supreme Court of Canada, were also dismissed.

[9] On January 16, 2004, the plaintiff filed a statement of claim against the Crown alleging that the Crown had engaged in fraud related to the Settlement that she had signed on June 28, 2001 and requesting that the Court set aside the settlement.

[10] On September 21, 2004, this Court dismissed the statement of claim without prejudice to the plaintiff bringing another action against the defendant for negligence. The plaintiff appealed this decision to the Ontario Court of Appeal, which dismissed the plaintiff' s appeal on March 24, 2005.

[11] The plaintiff thereafter made application to the Ontario Superior Court of Justice (Divisional Court) for a mandamus order requiring the GSB to reopen her file and have the settlement of June 28, 2001 set aside. On December 15, 2006, the Divisional Court dismissed the plaintiff's application. The plaintiff thereafter sought leave to appeal that decision to the Ontario Court of Appeal and to the Supreme Court of Canada, which were both dismissed.

[12] The plaintiff filed a further statement of claim on August 22, 2007, requesting that the Court set aside the settlement signed by her on June 28, 2001, and requesting damages as against OPSEU on the basis of its misconduct in its role as her representative. This Court dismissed the statement of claim on April 24, 2008. The plaintiff's applications for leave to appeal to the Ontario Court of Appeal and thereafter to the Supreme Court of Canada were both dismissed.

[13] As indicated at paragraph 1, above, the statement of claim in issue here was commenced on August 19, 2005.

The Statement of Claim

[14] In her statement of claim which is the subject of this motion, the plaintiff alleges, as against HMQ that:

(a) the defendant engaged in fraudulent misrepresentation in allegedly asserting that the OPSEU Pension Trust was the appropriate forum in which to pursue a claim regarding the plaintiff's pension;

(b) the defendant engaged in negligent misrepresentation regarding her alleged attempt to buy back her pension entitlements;

(c) the defendant breached two promises (one regarding a letter of apology and another regarding a different job within the government) made to the plaintiff in the context of her employment; and

(d) the defendant denied the plaintiff her equality rights in the workplace.

[15] HMQ submits that the allegations contained in the statement of claim, or most of them, refer to the above-noted workplace disputes, which have been challenged by the plaintiff in various legal fora since 2001, including the GSB, the OLRB, the Ontario Superior Court, the Divisional Court, with leave to appeal to the Ontario Court of Appeal and the Supreme Court of Canada denied.

Positions of the Parties

The Moving Party, HMQ

[16] It is the position of the moving party that the issues raised in the plaintiff's statement of claim have already been dealt with by various levels of court, that this Court has no jurisdiction over the subject matter of the action and that the plaintiff is, at least in part, statute-barred from proceeding with her claim because it was filed outside the limitation period set forth in the *Limitations Act, 2002*.

The Plaintiff, Responding Party

[17] It is the position of the plaintiff and there has never been a decision on the merits regarding her complaints. She submits that she was never informed about her rights of pension buy-back until two years after the settlement was effected due to negligence or fraud on the part of the Crown, which is not a work-related issue and which is outside the jurisdiction of the GSB. She submits that if she is not given the opportunity to be heard, justice will be denied.

The Issues

[18] The issues to be determined on this motion are:

1. Whether this action should be dismissed on the basis that:

   (a) it is statute-barred pursuant to the *Limitations Act, 2002;*

   (b) it discloses no reasonable cause of action;

   (c) the claim should be dismissed in its entirety, or all or part of the statement of claim should be struck, due to its being frivolous, vexatious or otherwise an abuse of the process of the Court;

2. Whether this action is outside the jurisdiction of this Court, as exclusive jurisdiction over workplace disputes lies with the GSB.

The Limitations Act, 2002

[19] The *Limitations Act, 2002* provides that where a claim based on acts or omissions that took place before January 1, 2004 is discovered before that date, then the former *Limitation Act* applies. Thus, in this action, the former limitation period of six years after the cause of the action arose applies, as the allegations of negligence took place in or about 2001, and therefore the former limitation period applies: *Limitations Act, 2002*, S.O. 2002,c. 24 Schedule B, s.24 (5) 2; *Limitations Act*, R. S. O. 1990 Ch L 15 s. 45 (1) (g).

[20] HMQ argues that the plaintiff was aware of the alleged negligent misrepresentation from 1991, as the plaintiff states that she learned no action had been taken to commence a buy-back of her pension and was advised that the window of opportunity to buy back her pension was closed. The defendant argues that it is clear that the plaintiff became aware that the defendant had not processed her pension buy-back sometime prior to June 28, 2001, as this was raised in the context of the settlement negotiations signed that day. HMQ argues that this action was commenced some 14 years after she learned of the alleged negligent or fraudulent misrepresentation, which is well outside the stipulated limitation period and, therefore, the action should be dismissed.

[21] Based on all of the evidence with respect to the various claims, I agree that this claim is brought significantly outside the applicable limitation period.

Whether This Action Is Statute-Barred Pursuant to the Limitations Act, 2002.

[22] In the normal course, a limitation period issue should be addressed trial, rather than on a Rule 21.01(1)(a) motion, where the issue depends on findings of fact for its resolution. It is generally not appropriate to determine before trial the legal issue of the impact of the limitation period in a case where the discoverability rule is in issue, unless the facts are clearly undisputed.

[23] In this case, it is clear that the discoverability rule is not in issue, and that the plaintiff was aware of the issues which are raised in this statement of claim, and particularly that she was aware that the alleged negligence and/or negligent or fraudulent misrepresentation took place in approximately 1991, as she states that she learned that no action had been taken to commence a buy-back of her pension and she was advised that the window of opportunity for buy back of the pension was closed. It is clear from the evidence that the plaintiff became aware that the defendant had not processed her pension buy-back sometime prior to June 28, 2001, as she raised the issue of being permitted to buy back the pension at the time of the settlement negotiations in June of 2001; thus, some 14 years prior to the subject statement of claim being issued. As a result, I find that this claim is statute-barred.

Whether There Is a Reasonable Cause of Action Set Forth in the Statement of Claim

[24] The moving party, HMQ, argues that the plaintiff has failed to set forth a reasonable cause of action, as she has not pled the facts sufficient to establish the necessary factual elements required to establish negligent misrepresentation and fraudulent misrepresentation. The allegations, as set forth in the statement of claim are bald allegations without the necessary factual elements. These arguments are set forth in the moving party's factum at paragraphs 36 to 44. Based on a review of the statement of claim, I find that the plaintiff has, indeed, failed to set forth the constituent elements required to establish negligent misrepresentation and fraudulent misrepresentation.

[25] The test for determining whether a pleading should be struck is whether, assuming the facts as stated in the statement of claim can be proven, it is plain and obvious that no reasonable cause of action is disclosed. It is clear that, based on the facts as pleaded, the statement of claim, as regards the allegations of fraudulent and negligent misrepresentation, discloses no reasonable cause of action and the claims for negligent and fraudulent misrepresentation would fail.

[26] On that basis, I find that these claims should be struck. Given my findings regarding the *Limitations Act*, as well as my findings regarding Rules 21.01(3)(d) and 25.11, as set forth herein, these claims should be struck without leave to amend.

Whether the Action Is Frivolous, Vexatious or Otherwise an Abuse of the Process of the Court

[27] Rule 21.01(3)(d) provides that the defendant may move before a judge to have an action stayed or dismissed on the ground that the action is frivolous or vexatious or is otherwise an abuse of the process of the Court. Rule 25.11 provides that the Court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document is scandalous, frivolous or vexatious, or is in abuse of the process of the Court.

[28] There is a degree of overlap in the meaning of the terms "frivolous", "vexatious" and "abuse of process". Any action for which there is clearly no merit may justify for classification as frivolous, vexatious or an abuse of process. A common example is where the plaintiff seeks to re-litigate a cause of action which has already been disposed of by a court of competent jurisdiction. The doctrine of abuse of process is predicated on the notion that litigation ought not

to be permitted to proceed where it would violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. The Supreme Court of Canada held, in *Toronto (City) v C.U.P.E., Local 79,* [2003] S.C.J. No. 64, [2003] 3 S.C.R. 77 (S.C.C.), that the doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute. The doctrine of abuse of process is applied, *inter alia*, where the litigation before the Court is found to be, in essence, an attempt to re-litigate a claim which has already been disposed of. Such an application upholds the twin policy grounds that there should be an end to litigation and that no one should be twice vexed by the same cause.

[29] Vexatious proceedings include the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction, where it is obvious that an action cannot succeed, where grounds and issues are rolled forward into subsequent actions and repeated and supplemented.

[30] In this case, it is clear that the plaintiff has set forth, in the subject statement of claim, facts and issues that have been raised by her before the GSB, the OLRB, in statements of claim before this Court, and in applications for leave to appeal before the Ontario Court of Appeal and the Supreme Court of Canada, which were dismissed by the appellate courts.

[31] I find, based on the evidence before me and submissions by the parties, that it would be an abuse of process to re-litigate those claims that have already been disposed of, and for which leave to appeal has been denied. On this basis, I dismiss the statement of claim without leave to amend.

Jurisdiction

[32] The moving party argues that the factual matrix related to this action arises from the workplace. In the circumstances of the plaintiff's case a collective agreement is binding upon the employer, the trade union and the employees in the bargaining unit, which, at all material times, included the plaintiff. Pursuant to the *Employees Collective Bargaining Act, 1993 (CECBA, 1993)*, and the Collective Agreement between OPSEU and the Management Board of Canada, where the dispute arises under the Collective Agreement, the labour arbitration regime prevails. HMQ submits that the essential character of the dispute is one arising under the Collective Agreement and, one which falls within the ambit of the Collective Agreement and, as such, this Court does not have jurisdiction. HMQ argues that the entire subject matter of the claim falls within the employment context, arises from specified workplace actions and, as such, falls outside the jurisdiction of the Courts.

[33] The plaintiff argues that the allegations of negligence, including negligent and fraudulent misrepresentation although they arise within the workplace, do not fall within the ambit of the Collective Agreement as they relate to pension. Further, she argues that there is no jurisdiction under the Collective Agreement to deal with issues of negligence or fraud. The plaintiff argues

that this Court has jurisdiction to hear the allegations of negligence and misrepresentation as set forth in the statement of claim.

[34] Based on all of the evidence, and considering the jurisprudence cited by the moving party at paragraphs 58 to 63 of its factum, I find that the essential character of the dispute as advanced in the statement of claim involves the workplace and is governed by and falls within the ambit of the Collective Agreement. Accordingly, I find that such disputes as those raised in the plaintiff's statement of claim do not fall within the jurisdiction of this Court.

Order

[35] I order that the statement of claim in this action be dismissed, without leave to amend.

Costs

[36] I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Endorsement.

Carole J. Brown J.

Date: March 19, 2013

Case Name:

Panther Film Services Inc. v. Tayar

RE: Panther Film Services Inc. and Diane Freitas, (Plaintiffs/Responding Parties), and Fred Tayar and Associates Professional Corporation, Fred Tayar, Mindy Ilene Tayar and Colby Stuart Linthwaite, (Defendants/Moving Parties)

[2012] O.J. No. 6191

2012 ONSC 7226

Court File No. CV-12-448497

Ontario Superior Court of Justice

B.A. Allen J.

Heard: December 13, 2012.
Judgment: December 19, 2012.

(31 paras.)

Civil litigation -- Limitation of actions -- Time -- Discoverability -- Expiry of limitation periods -- Motion by the defendant lawyers for summary dismissal of the plaintiffs' negligence action allowed -- The lawyers represented the plaintiffs in relation to actions against a bank and an investment firm -- The lawyers later commenced a fees action against the plaintiffs, who filed a statement of defence in May 2009 claiming negligence against the lawyers -- In March 2012, the plaintiffs commenced the underlying negligence action -- The statement of defence in the fees action disclosed that the plaintiffs had actual knowledge of their claim in May 2009 -- The plaintiffs commenced their action outside the two-year limitation period -- Limitations Act, 2002, ss. 4, 5.

Tort law -- Practice and procedure -- Motion by the defendant lawyers for summary dismissal of the plaintiffs' negligence action allowed -- The lawyers represented the plaintiffs in relation to actions against a bank and an investment firm -- The lawyers later commenced a fees action against the plaintiffs, who filed a statement of defence in May 2009 claiming negligence against the lawyers -- In March 2012, the plaintiffs commenced the underlying negligence action -- The statement of defence in the fees action disclosed that the plaintiffs had actual knowledge of their claim in May

2009 -- The plaintiffs commenced their action outside the two-year limitation period -- Limitations Act, 2002, ss. 4, 5.

Statutes, Regulations and Rules Cited:

Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 4, s. 5

Rules of Civil Procedure, Rule 20, Rule 20.04(2.1)

Counsel:

Pathik Baxi, for the Plaintiffs/Responding Parties.

Sandra L. Secord, for the Defendants/Moving Parties.

ENDORSEMENT

B.A. ALLEN J.:--

BACKGROUND

1 This is a motion brought under Rule 20 of the *Rules of Civil Procedure* by the defendant lawyers seeking a dismissal of the underlying action ("the Underlying Action") for being brought outside the two-year limitation period allowed under the *Limitations Act, 2002* for an action in negligence.

2 The plaintiffs Panther Film Services Inc. and Diane Freitas ("the Plaintiffs") are the past clients of the defendants who are an incorporated law firm and individual lawyers employed with the firm ("the Lawyers"). Diane Freitas is a principal of the corporate plaintiff. The Lawyers represented the Plaintiffs from 2004 until 2008 in relation to actions against a bank and an investment firm ("the Bank Action"). On motion before a Master on October 15, 2008, the Lawyers sought to be removed from the record and were permitted to do so by order of Master Brott issued on December 15, 2008. The Plaintiffs retained new counsel and on December 22, 2008 they transferred their file to the new lawyer.

3 The Plaintiffs were delinquent in paying the Lawyers' bill and on April 2, 2009 the Lawyers issued a statement of claim seeking over $125,000 for legal services rendered ("the Fees Action"). The Plaintiffs filed a statement of defence on May 22, 2009 claiming negligence against the Lawyers for their handling of the Plaintiffs' case in the Bank Action.

4 The parties agreed to have the Fees Action converted to an Assessment Hearing. The Assessment Hearing commenced on October 15, 2010 and was scheduled to proceed on subsequent dates in January, May and June 2011. Before the Hearing was to resume in May 2011, the assessment officer recused himself for having received privileged information from Ms. Freitas. The Hearing was re-scheduled for 10 days starting on March 12, 2012.

5 On March 9, 2012, the Plaintiffs commenced the Underlying Action against the Lawyers claiming negligence in their handling of the Bank Action.

THE ISSUE

6 Are the Lawyers entitled to summary judgment against the Plaintiffs on the basis they commenced their action in negligence outside the two-year limitation period allowed under the *Limitations Act, 2002*?

ANALYSIS

7 There are principles that guide the determination of when an order for summary judgment is appropriate when a limitation defence is raised. Applying the requirements of Rule 20, where a defendant moves for summary judgment in relation to a statutory limitation period, in order for the plaintiff to successfully resist the motion, they must adduce evidence of material facts related to the limitation period requiring a trial for determination. The defendant has the legal burden to prove there is no genuine issue requiring a trial. The evidentiary burden is then on the plaintiff to establish evidence of a triable issue. [*Soper v. Southcott*, [1998] O.J. No. 2799 (Ont. C.A.) at para. 14].

8 The plaintiff must "lead trump or risk losing" and demonstrate their case has a real chance of success at trial. The motions court is entitled to assume the evidence contained in the record is all the evidence the parties would rely on if the matter proceeded to trial. [*1061590 Ontario Limited v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 at 557 (Ont. C.A.), and *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257, at 265, (Ont. C.A.)].

9 If the defendant satisfies the court there are no issues of fact required to be tried in relation to the limitation period, the defendant will succeed in obtaining summary judgment. [*Soper*, *supra*, at para. 14]. Simply because the discoverability rule is raised does not, in itself, mean a genuine issue for trial exists precluding it from being decided on a motion for summary judgment, It is appropriate and necessary for the motions judge to consider facts contained in the record in order to decide whether a genuine issue requiring a trial exists. [*Stell v. Obedkoff* (1999), 45 O.R. (3d) 120 (Ont. S.C.J.), at 123-124].

10 The Court of Appeal fashioned a new test to assess when an order for summary judgment under Rule 20.04 (2.1) is appropriate.

> We find the passages set out in *Housen*, at paras. 14 and 18, such as "total

familiarity with the case as a whole", "extensive exposure to the evidence" and "familiarity with the case as a whole", provide guidance as to when it is appropriate for the motion judge to exercise the powers in Rule 20.04(2.1). In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and the issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?

We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice.[*Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, at paras. 50 and 51, (Ont. C.A.)]

11 The limitation period is set out in s. 4 of the *Limitations Act, 2002* which provides a proceeding shall not be commenced after the second anniversary of the day on which the claim was discovered. Section 5 sets out the rules to determine when a claim was discovered. Section 5 provides:

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,
(i) that the injury, loss or damage had occurred,
(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
(iii) that the act or omission was that of the person against whom the claim is made, and
(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1)(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

12 The discoverability rule in s. 5 has the effect of delaying the running of the limitation period until the point at which the party making the claim discovers they have a cause of action. However, there is a presumption that must be rebutted by the party seeking to rely on the discoverability doctrine. That party must rebut the presumption they knew they had a claim on the day of the incident.

13 The Lawyers argue the Plaintiffs knew they had a claim in negligence on May 22, 2009 when they filed their statement of defence in the Fees Action. They asserted negligence in their defence on the basis of the Lawyers' alleged substandard handling of the Bank Action.

14 In their statement of defence in the Fees Action, the Plaintiffs plead the following: they deny the Lawyers followed instructions resulting in unnecessary legal costs and delay; they deny instructing the Lawyers to incur the amount of legal fees claimed; they assert the Lawyers' handling of the litigation in the Bank Action fell far below the standard of care of a solicitor with over 20 years' practice; they assert the Lawyers had a fiduciary duty to provide competent legal advice; they assert the Lawyers breached its duty of care. Without limiting the generality of their negligence claim, the Plaintiffs allege five examples of the Lawyers' professional negligence as follows: the Lawyers delayed the claim four years resulting in prejudice to the Plaintiffs; they delayed in setting the matter down for trial according to the Plaintiffs' instructions causing unnecessary costs; they failed to keep the Plaintiffs updated with respect to the action; they failed to provide the Plaintiffs copies of pleadings or motion records; and they gave carriage of the file to an incompetent junior associate.

15 In essence, the pleadings in the Plaintiffs' statement of claim in the Underlying Action are not fundamentally different from its pleadings in the Fees Action. The Plaintiffs' pleadings in the Underlying Action are based, among other grounds, in negligence, that the Lawyers owed a duty of care: to advise them in a manner consistent with a reasonably competent solicitor; to ensure the solicitors providing advice and legal services were sufficiently qualified and that they provided guidance and supervision to lawyers who worked on the case; to conduct the appropriate research in relation to the issues; to ensure the Plaintiffs were fully informed in a timely manner; to warn of any possible risks associated with a particular course of action; to ensure that all steps taken or agreements made by the Lawyers were proper and fully authorized by the Plaintiffs; and to protect the interests of the Plaintiffs in the course of the Lawyers' dealings with the defendants in the Bank Action.

16 The Plaintiffs in essence take the position they did not know the nature, extent and impact of the Lawyers' negligence until they cross-examined the Lawyers during the Assessment Hearing on October 12 and 15, 2010 and January 5 - 6, 2011. To support that argument the Plaintiffs rely on a chart made an exhibit to Ms. Freitas' affidavit which purports to contain the facts or evidence from the Assessment Hearing that the Plaintiffs say alerted them to a cause of action in negligence. When the Plaintiffs gained knowledge of those facts is the point at which, in their view, the limitation period should have begun to run.

17 However, in order to postpone the triggering of the limitation period a new fact is required to be discovered. [*Morton v. Cowan*, [2001] O.J. No. 4635, Court File No. 5465/98, at paras. 41-44, (Ont. S.C.J.)]. I agree with the Lawyers' view that the Plaintiffs did not adduce any new material facts after the expiry of the prescribed two-year period that would warrant the application of the discoverability doctrine.

18 I find that overall the Plaintiffs' chart simply reiterates in more detail the allegations pleaded in their statement of defence in the Fees Action. In summary, the chart points out the Lawyers' use of junior inexperienced counsel to attend proceedings; the Lawyers' failure to inform the Plaintiffs in a timely fashion; the Lawyers' failure to advise the Plaintiffs on steps in the litigation such as points when resolution might have occurred; the Lawyers giving incompetent advice about steps and litigation strategies that prejudiced the Plaintiffs; the Lawyers' failure to get authorization and to advise the Plaintiffs of the high cost of steps in the proceedings and to explain billings.

19 Courts have determined that where a limitation defence has been asserted, the plaintiff has the evidentiary burden to prove the claim was issued within the limitation period. [*Findlay v. Holmes*, [1998] O.J. No. 2796, at para 25, (Ont. C.A.); *McSween v. Louis*, [2000] O.J. No. 2076, at para. 37, (Ont. C.A.)]. The plaintiff must not only satisfy a subjective test but must also satisfy an objective one. That is, the limitation period begins to run, (a) when the plaintiff had actual knowledge of the fact or facts upon which negligence is alleged or (b) when the plaintiff ought to have reasonably known the fact or facts upon which the negligence is alleged. The second test requires the plaintiff to be evaluated in accordance with the standard of the steps a reasonable person would take to obtain the knowledge. Such a determination is fact driven, to be decided based on the particular circumstances of each case. [*Gaudet et al. v. Levy et al.*, [1984] O.J. No. 3312 577, at 582, (Ont. H.C.J.)].

20 I agree with the Lawyers' position that the record discloses that the Plaintiffs knew or ought to have known they had an action in negligence against the Lawyers in May 2009. I find the statement of defence in the Fees Action discloses the Plaintiffs' actual knowledge of their claim in negligence. The Plaintiffs have not shown the discovery of any fundamentally new facts after that date. It is not enough for the Plaintiffs to make the bald subjective assertion that they did not know they had a claim. The question is whether a reasonable person standing in the Plaintiffs' shoes with the information the Plaintiffs had in May 2009 would have known they had a cause of action in negligence. I think the resounding answer to that question is yes.

21 A plaintiff is not allowed to delay the running of the limitation period until they know the full nature and extent of the claim. I believe that is the approach the Plaintiffs are taking.The Supreme Court of Canada in *Peixeiro v. Haberman* held:

> Once the plaintiff knows that some damage has occurred and has identified the tort feasor, the cause of action has accrued. Neither the extent of the damage nor the type of damage need be known. To hold otherwise would be to inject too

> much uncertainty into cases where the full scope of damages may not be ascertained for an extended time beyond the general limitation period. [*Peixeiro v. Haberman* (1997), 151 D.L.R. (4th) 429, at para. 18, (S.C.C)]

22 Courts have held that a plaintiff seeking to rely on the discoverability doctrine must have exercised reasonable diligence in discovering the material facts. The Ontario Court of Appeal has held a claim is discovered or ought to be discovered when a plaintiff is in power, possession and control of all the information necessary to the plaintiff and their advisors exercising due diligence to bring an action [*Bourne v. Saunby* (1988), 38 O.R. (3d) 555 (Ont. C.A.)].

CONCLUSION

23 I find a full appreciation of the evidence and the issues that are required to determine the limitation issue is achieved in this case by way of summary judgment. The Lawyers have succeeded in meeting the legal burden of demonstrating there is no issue raised in the record with respect to the limitation period that must be determined by a trial. The Plaintiffs on their part have failed to show on the record before the court that there is a triable issue. The Plaintiffs have commenced their action against the Lawyers outside the prescribed two-year limitation period.

24 For all the above reasons, I grant summary judgment.

COSTS

25 Counsel submitted Bills of Costs. The Lawyers were successful on the motion. In accordance with the principle that costs should follow the event, they are entitled to an award of costs.

26 The Ontario Court of Appeal set out the principle that the objective of a determination on costs is to fix an amount the unsuccessful party is required to pay that is fair and reasonable rather than an amount reflecting the actual costs of the successful party. The quantum of costs allowed must be fair, within the reasonable expectations of the parties, and in accord with the principles set out by the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.).

27 This is a case in which partial indemnity costs are appropriate.

28 The Lawyers claim total partial indemnity costs of $29,885.18 inclusive of disbursements and HST. The Plaintiffs would seek total partial indemnity costs of $9,827.87 inclusive of disbursements and HST.

29 I find the fees charged by the Lawyers to be somewhat excessive. The motion was not a complex one. The law on summary judgment motions involving a limitation defence is well settled. I find in the preparation of the case the Lawyers employed the services of more lawyers than I believe was necessary for such a motion. Fees were billed for two senior lawyers, a more junior

lawyer, an articling student and two law clerks with fees totalling $25,147.50. Five hours were estimated and billed for a senior counsel's attendance on the motion. The motion was not so lengthy, lasting under one and a half hours.

30 I find an award of $10,000 inclusive of disbursements and HST to be more appropriate, payable within 30 days of this Order.

ORDER

31 Order accordingly.

B.A. ALLEN J.

cp/e/qljel/qlrdp/qlced

Case Name:

Zapfe v. Barnes

Between
Doris Zapfe, plaintiff/appellant, and
Aileen Mary Barnes, defendant, and
The Town of Strathroy and the Royal Canadian Legion, Sir Arthur Currie Branch 116 and the Corporation of the County of Middlesex, (third parties/respondents)

[2003] O.J. No. 2856

66 O.R. (3d) 397

230 D.L.R. (4th) 347

174 O.A.C. 211

35 C.P.C. (5th) 317

39 M.P.L.R. (3d) 161

41 M.V.R. (4th) 171

124 A.C.W.S. (3d) 262

2003 CanLII 52159

Docket No. C38413

Ontario Court of Appeal
Toronto, Ontario

Feldman, Cronk and Armstrong JJ.A.

Heard: February 6, 2003.
Judgment: July 14, 2003.

(48 paras.)

Municipal law -- Actions against municipalities -- Limitation periods -- Practice -- Pleadings -- Amendment of pleadings -- Parties -- Adding or substituting defendants.

Appeal by the plaintiff, Zapfe, from dismissal of her motion to add two municipalities as defendants in her action for damages arising out of a motor vehicle accident. The accident occurred in January 1999. Zapfe commenced the action against the defendant, Barnes, in December, 2000. Barnes issued a third-party claim against both municipalities by July 2001. The claim against the municipalities was based on negligence with respect to the removal of snow from roadways. The claim was dismissed because it was brought outside the three-month limitation period under section 284(2) of the Municipal Act. Zapfe argued that the limitation period only began to run when she was made aware of the specifics of the potential claim upon discovery of Barnes.

HELD: Appeal allowed. The municipalities were added as defendants, and they were granted leave to plead the limitations defence. It was not clear that the motions judge had considered the discoverability principle, or the plaintiff's explanations. It was not clear whether Zapfe was reasonably diligent in making her claim against the municipalities. The issue would have to be determined at trial with the benefit of more evidence.

Statutes, Regulations and Rules Cited:

Municipal Act, R.S.O. 1990, c. M.45, s. 284, 284(1), 284(1.1), 284(2), 284(5).

Ontario Rules of Civil Procedure, Rules 5, 5.04(2), 26, 26.01.

Appeal From:

On appeal from the order of Justice P.B. Hockin of the Superior Court of Justice dated December 14, 2001.

Counsel:

Alan A. Farrer, for the appellant.
Brian McCall, for the respondent, the Town of Strathroy.
Maura Helsdon, for the respondent, the Corporation of the County of Middlesex.

[Editor's note: A corrigendum was released by the Court October 17, 2003; the corrections have been made to the text and the corrigendum is appended to this document.]

The judgment of the Court was delivered by

1 FELDMAN AND CRONK JJ.A.:-- The appellant, Doris Zapfe, appeals from an order of

Hockin J. of the Superior Court of Justice dated December 14, 2001 dismissing her motion to amend her statement of claim to add two municipalities as party defendants in a negligence action arising out of a motor vehicle accident. The primary question on this appeal is whether the commencement of the three-month limitation period established by s. 284(2) of the Municipal Act, R.S.O. 1990, c. M.45 (the "Act"), as amended, which concerns actions against municipalities for the non-repair of highways, was postponed by the operation of the discoverability principle until after the date of the appellant's amendment motion. In that event, the appellant's proposed claims against the municipalities are not statute-barred. If the limitation period had expired, however, the issue is whether the requested pleadings amendment should have been permitted in the exercise of the court's discretion under rules 5.04(2) and 26.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

2 For the reasons that follow, we would allow the appeal with leave to the respondents to plead the expiry of the limitation period under s. 284(2) of the Act.

I. BACKGROUND

3 On January 5, 1999, the appellant's motor vehicle collided with a vehicle driven by Aileen Mary Barnes while Barnes was exiting a parking lot in Strathroy, Ontario. The appellant commenced an action in negligence against Barnes on December 22, 2000, claiming damages for personal injuries allegedly sustained by her in the accident. At the time of the issuance of her statement of claim, the appellant and her solicitor had no knowledge of the possible involvement in or responsibility for the accident of The Town of Strathroy ("Strathroy") or The Corporation of the County of Middlesex ("Middlesex").

4 Barnes delivered her statement of defence on March 29, 2001. She denied the appellant's claims and asserted that the appellant's own negligence was the cause of the accident. No mention was made in Barnes' statement of defence of the possible responsibility of third parties for the accident, or of the weather conditions at the time of the accident.

5 Subsequently, on April 3, 2001, Barnes commenced third party proceedings against Strathroy (wrongly named, initially, as The Township of Strathroy-Caradoc) and The Royal Canadian Legion, Sir Arthur Currie Branch 116 (the "Legion"). Barnes alleged in her third party claim that her view of the appellant's vehicle was obstructed by large piles of snow lining the perimeters of the parking lot and the adjacent roadway as she was attempting to leave the parking lot. She claimed that the parking lot was owned by the Legion, the snow was on lands occupied by Strathroy and the Legion, and they failed to properly maintain the roadway. She sought contribution and indemnity from the third parties for any sums for which she might be found liable to the appellant at trial, or which might be advanced to the appellant by way of settlement.

6 Barnes' third party claim was served on the appellant or her solicitor on or about April 3, 2001.

7 On July 4, 2001, Barnes brought a motion seeking to amend her third party claim to add

Middlesex as a third party. Barnes' supporting motion record contained a letter from her adjusters dated May 16, 2001 in which it was suggested that Middlesex was responsible for the roadway and that Strathroy was responsible for the adjacent sidewalks.

8 On July 31, 2001, Barnes obtained an order permitting her to amend her third party claim to add Middlesex as a third party. Barnes alleged in her amended claim that Middlesex and/or Strathroy were negligent for failing to maintain the roadway by ensuring that the snow banks lining the street were reduced to such a level as to permit clear vision of the roadway by motorists. She further alleged that Middlesex was responsible for maintenance of the roadway and that Strathroy was responsible for maintenance of the sidewalks. Barnes also repeated her earlier allegation that her view of the roadway was obstructed by large piles of snow at the time of the accident. As a result, she sought contribution and indemnity from Strathroy, the Legion and Middlesex.

9 On September 26, 2001, Strathroy delivered a defence to the third party claim and to the appellant's statement of claim. Middlesex followed suit on October 15, 2001. In those pleadings, the municipalities denied any negligence or responsibility for the accident. They also denied any knowledge of the condition of the roadway and the sidewalks at the time of the accident, including any knowledge of a snow build-up.

10 On or about November 5, 2001,[1] the appellant brought a motion under Rules 5 and 26 of the Rules of Civil Procedure for an order amending her statement of claim to add the third parties as defendants in the main action. In her proposed amended pleading, she alleged that the two municipalities breached their duty to repair a highway by failing to remove the snow on the roadway and the sidewalks where the accident occurred. The appellant's motion was resisted by Strathroy and Middlesex on the basis that the applicable three-month limitation period under s. 284(2) of the Act[2] had expired.

11 The appellant's solicitor swore two affidavits in support of the appellant's amendment motion. In her affidavits, the solicitor, who is an experienced litigation counsel, explained why it was not possible for the appellant to discover with reasonable diligence the facts to form the basis of a cause of action against the municipalities before the examination for discovery of the proposed defendants in the third party proceeding. First, she stated that the appellant had no knowledge of the snow banks which Barnes alleged in her third party claim blocked her view and caused her to hit the appellant's car. Second, she said that she knows only the allegations made by Barnes, which are denied by the third parties in their pleadings. Further, because of the Rules of Civil Procedure, she asserted that she cannot obtain any information directly from the proposed parties except within the litigation process. Consequently, she has only Barnes' allegations, of which she learned only upon service of the third party claim, but no facts to substantiate those allegations.

12 The appellant's solicitor was not cross-examined on her affidavits; nor did the municipalities file any affidavit materials in response to her affidavits. Accordingly, the evidence of the appellant's solicitor is uncontradicted on the record before this court.

13 No examinations for discovery have been held to date in the main action or in the third party proceeding.

II. THE DECISION OF THE MOTIONS JUDGE

14 The appellant's motion was argued before Hockin J. of the Superior Court of Justice on December 14, 2001. For reasons dated June 3, 2002, the motions judge dismissed the motion in relation to Strathroy and Middlesex and granted the requested amendment concerning the Legion. The Legion did not appear on the motion and does not appear to have contested it.

15 In dismissing the appellant's motion concerning the two municipalities, the motions judge observed that the effect of the requested amendment, if granted, would be to add Strathroy and Middlesex as party defendants after the expiry of the applicable limitation period. In that regard, ss. 284(1), (1.1), (2) and (5) of the Act provided at the relevant time:

> 284. (1) The council of the corporation that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in light of all the circumstances, including the character and location of the highway or bridge.
>
> (1.1) In case of default, the corporation, subject to the Negligence Act, is liable for all damages any person sustains because of the default.
>
> ...
>
> (2) No action shall be brought against a corporation for the recovery of damages occasioned by such default, whether the want of reasonable state of repair was the result of nonfeasance or misfeasance, after the expiration of three months from the time when the damages were sustained.
>
> ...
>
> (5) No action shall be brought for the recovery of the damages mentioned in subsection (1) unless notice in writing of the claim and of the injury complained of has been served upon or sent by registered mail to the head or the clerk of the corporation, in the case of a county or township within ten days, and in the case of an urban municipality within seven days, after the happening of the injury, nor unless, where the claim is against two or more corporations jointly liable for the repair of the highway or bridge, the prescribed notice was given to each of them within the prescribed time. S.O. 1996, c. 32, s. 54.

III. ISSUES

16 There are two issues on this appeal: (i) has the commencement of the limitation period under s. 284(2) of the Act been postponed by the operation of the discoverability principle; and (ii) if the limitation period had expired by the date of the appellant's amendment motion, should the appellant's requested pleadings amendment nonetheless have been permitted in the exercise of the court's discretion?

IV. ANALYSIS

(1) The Application of the Discoverability Principle

17 It is common ground that the three-month limitation period under s. 284(2) of the Act applies to the claims sought to be advanced by the appellant against Strathroy and Middlesex. The limitation period expired naturally on April 5, 1999, three months after the date of the accident, unless the discoverability principle operates to postpone the commencement of the limitation period to, at least, until after the appellant's motion to amend her statement of claim was brought at the beginning of November 2001.

18 The discoverability principle was described by Justice Le Dain in Central Trust Co. v. Rafuse, [1986] 2 S.C.R. 147 at 224 in the following terms:

> [A] cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.

See also Kamloops (City) v. Nielsen, [1984] 2 S.C.R. 2.

19 The discoverability principle is an interpretive tool of general application which guides the interpretation of limitations statutes. Consideration of whether it applies in a given case is concerned with balancing fairness for both the plaintiff and the proposed defendant. On the one hand, the plaintiff, through no lack of diligence, is unaware of her cause of action prior to the natural expiry date of the limitation period. In those circumstances, the principle is designed to avoid the injustice of precluding an action or claim before the plaintiff is in a position to commence proceedings. On the other hand, the proposed defendant is entitled to reasonably rely upon limitations statutes in the ordering of its affairs. Application of the discoverability principle postpones the running of a limitation period and therefore precludes the proposed defendant from relying on the protection of the natural expiration of a limitation period: Peixeiro v. Haberman, [1997] 3 S.C.R. 549. See also Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161 (C.A.) and Consumers Glass Co. v. Foundation Co. of Canada (1985), 51 O.R. (2d) 385 (C.A.).

20 The need for the balancing of those competing fairness concerns was confirmed by the

Supreme Court of Canada in M.(K.) v. M.(H.), [1992] 3 S.C.R. 6. In that case, La Forest J., writing for a majority of the court, described the policy reasons for statutory limitations of suits from the perspective of a potential defendant. They include: (i) recognition of the fact that there comes a time when a proposed defendant may reasonably expect that it will not be held to account for past obligations (at para. 22); (ii) the desirable objective of foreclosing claims based on stale evidence, that is, once a limitation period has expired, the potential defendant should be relieved from the need to preserve evidence relevant to the claim (at para. 23); and (iii) the important public benefit to be achieved by requiring plaintiffs to act diligently and not to "sleep on their rights", thus fostering the timely commencement of suits and closure of claims (at para. 24). At the same time, however, as observed by La Forest J. at para. 27, "[F]airness to the plaintiff must also animate a principled approach to determining the accrual of a cause of action."

21 In Peixeiro, Major J. emphasized the requirement for fairness to plaintiffs, but also underscored their due diligence obligations (at para. 39):

> In balancing the defendant's legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling consideration. The diligence rationale would not be undermined by the application of the discoverability principle as it still requires reasonable diligence by the plaintiff.

22 It is not contested that the discoverability principle applies to s. 284(2) of the Act. The principle has been judicially recognized to apply to the limitation of actions against municipalities, including limitations established by the Act: Peixeiro, supra; Bannon v. Thunder Bay (City) (2002), 210 D.L.R. (4th) 62 (S.C.C.); and Bisoukis v. Brampton (City) (1999), 180 D.L.R. (4th) 577 (Ont. C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 52.

23 Rather, the appellant asserts here that the effect of the application of the discoverability principle is to postpone, to the date of the examinations for discovery, the commencement of the limitation period under s. 284(2) of the Act. In contrast, the respondents submit that application of the discoverability principle is irrelevant in this case because the appellant was aware of a potential cause of action as against Strathroy by April 1, 2001 (as a result of Barnes' original third party claim) and as against Middlesex by July 31, 2001 (when Barnes' third party claim was amended to include a claim against Middlesex).

(2) The Postponement of the Limitation Period

24 As appears from the decisions of the Supreme Court of Canada in Central Trust Co. and Peixeiro, the discoverability principle rests by definition on the requirement of due diligence by the plaintiff. Judicial respect for that requirement is inherent to proper regard for the diligence policy rationale which underlies limitations statutes. That requirement dictates the test to be applied in determining the start of a limitation period under the discoverability principle: when can it be said

that the plaintiff knew, or by reasonable diligence could have discovered, the material facts on which to base a cause of action against the proposed defendant?

25 The appellant advances two main arguments in support of her submission that the limitation period under s. 284(2) of the Act has not yet expired.

26 First, the appellant relies on the decision of this court in Aguonie, supra, in support of her assertion that the determination of when a plaintiff acquired, or ought reasonably to have acquired, knowledge of the facts on which her claim is based is a question of fact which should be left for determination by a trial judge on a full evidentiary record.

27 Second, the appellant submits that discovery of a tortfeasor involves more than ascertaining the identity of one who may be liable; rather, it also involves the determination of any acts or omissions which constitute liability.

28 In response, the respondents argue that the appellant's amendment motion was brought outside the three-month limitation period, on any view of the facts. They claim that regardless of which date is considered to be the date upon which the limitation period commenced to run, it has expired. More particularly, more than three months have expired from any of: (i) the date of the accident, which occurred on January 5, 1999; (ii) the appellant's receipt of Barnes' original third party claim on April 3, 2001; (iii) the appellant's receipt of Barnes' motion materials to add Middlesex as a third party on July 4, 2001; or (iv) the delivery to the appellant of Barnes' amended third party claim on July 31, 2001. Accordingly, even assuming that the appellant satisfied her due diligence requirement, the respondents submit that the prescription period has now expired and had expired by the time of the appellant's amendment motion.

29 On the record in this case, we agree with the appellant's position, for several reasons.

30 First, it is not clear to us that the motions judge considered the discoverability principle, which was raised by the appellant as an issue on the amendment motion. The motions judge's analysis proceeded from the premise that the limitation period had expired. He went on to address the issues of prejudice and special circumstances in the context of the rules governing pleadings amendments. In doing so he stated:

> The discovery process was never to be used as a tool to investigate possible causes of action. The plaintiff's obligation is to investigate and, if so advised, to commence proceedings, within time, against those who may have caused or contributed to the injury claimed by the plaintiff as a result of the accident.

31 While that statement properly recognized the appellant's due diligence obligation, it does not indicate that the motions judge related that obligation to the discoverability principle; nor do the reasons of the motions judge suggest that he assessed the evidentiary record before him in the context of the discoverability principle.

32 Second, in Aguonie, the discoverability principle was held to apply to the identity of the tortfeasor and, in addition, to the acts or omissions of a potential tortfeasor identifying him or her as such. Justice Borins (ad hoc), writing on behalf of the court in Aguonie, stated at 170:

> While it is true that many of the cases in which [the discoverability principle] has been applied concern a plaintiff's discovery of the extent of an injury, or the delayed effect or result of a defendant's negligence, this case concerns the discovery of a tortfeasor. *The discovery of a tortfeasor involves more than the identity of one who may be liable. It involves the discovery of his or her acts, or omissions, which constitute liability* [emphasis added].

33 Later in his reasons, Borins J. (ad hoc) said (at 172):

> The starting point for the application of the discoverability rule ... is the time when the appellants' cause of action arose. This will define the starting date of the limitation period. *It is a question of fact when the cause of action arose and when the limitation period commenced. The application of the discoverability rule is premised on the finding of these facts: when the appellants learned they had a cause of action against the respondents; or, when, through the exercise of reasonable diligence, they ought to have learned they had a cause of action against the respondents.* These facts constitute genuine issues for trial ... [emphasis added].

34 In this case, the appellant's solicitor provided an explanation for why she was unable to determine the facts about the alleged snow build-up in the relevant location on the day of the accident. That explanation was not challenged in any way by evidence from the respondents. In addition, there is no evidence before this court on what steps the appellant could have taken to attempt to substantiate Barnes' allegations prior to discovery and the production of documents in the litigation. Since both municipalities deny the facts asserted by Barnes, without an affidavit from them or cross-examination of the appellant's solicitor as to what inquiries could properly have been made outside the litigation process to substantiate or disprove the facts alleged by Barnes, there is no basis on the record for rejection of the evidence from the appellant's solicitor.

35 In most cases one would expect to find, as part of a solicitor's affidavit, a list of the attempts made by the solicitor to obtain information to substantiate the assertion that the party was reasonably diligent. In this case, however, the solicitor has explained why she could take no such steps. No information to the contrary was provided by the respondents.

36 On the record before us, therefore, the question of whether the appellant's solicitor was reasonably diligent cannot be answered with finality. The appellant herself claims that she had no knowledge of the snow banks. Therefore, everything within her knowledge is mere allegations by Barnes, denied by the third parties. Thus, a claim by the appellant against the municipalities at this stage rests only on bare allegations.

37 Whether the appellant's solicitor's explanation as to why no inquiries could be made prior to discoveries to substantiate or disprove Barnes' claims will survive scrutiny on cross-examination, or whether evidence exists that information was available to the appellant upon proper inquiry prior to her amendment motion to ground a cause of action against the respondents, cannot be determined at this stage. As observed by the Nova Scotia Court of Appeal in Burt v. LeLacheur (2000), 189 D.L.R. (4th) 193 at 207, the precise amount of knowledge necessary to trigger the running of time under a limitation period must be determined upon application of the legislation creating the limitation period, using the discoverability principle, to the facts as found. In this case, the crucial fact-finding exercise has not yet occurred and the appellant's asserted version of the facts concerning the discoverability of a cause of action against the municipalities was uncontradicted on the motion before the motions judge. Accordingly, the testing of the appellant's assertion that the limitation period has not yet commenced to run must await either a summary judgment motion or a trial.

38 In our view, therefore, given the evidentiary record before the motions judge, this is a case where the municipalities should have been added as parties in the main action, with leave to the respondents to plead the limitation period.

(3) Other Issues

39 Two additional matters bear mention in this case.

40 First, the three-month limitation period under s. 284(2) of the Act is a prescription of very short duration. The length of that limitation period signifies the high value attached by the Legislature at the time of this accident to the control, and timely closure, of potential negligence actions against a municipality for the non-repair of highways or bridges. The duration of the limitation period suggests that judicial caution should be exercised in relieving against the limitation period.

41 That interpretation is reinforced by s. 284(5) of the Act, which provides in part that no action shall be brought for the recovery of damages in connection with the non-repair by a municipal corporation of a highway or bridge unless written notice of the claim and of the injury complained of has been provided to the municipality within ten days (in the case of a county or township) or within seven days (in the case of an urban municipality) after the injury.

42 Thus, s. 284 of the Act, as in force at the time of this accident, imposes two discrete limitations on the ability to sue a municipality in negligence for damages occasioned by the non-repair of a highway or bridge: (i) the three-month limitation period established by s. 284(2) for commencement of an action; and (ii) the provision for prior written notice of the claim and the alleged injury required under s. 284(5). Those statutory provisions, in combination, serve to underscore the requirement for diligence and timely action by a prospective plaintiff concerning such a claim. The respondents on this appeal, however, did not allege a breach by the appellant of s. 284(5); nor did the appellant claim compliance with it. In those circumstances, it is inappropriate to

further comment on the significance of s. 284(5), if any, in this case.

43 Second, before this court, the appellant argues that the reasoning underlying Rule 5.04(2) of the Rules of Civil Procedure is not applicable to the determination of her right to amend her statement of claim to add the respondents as party defendants. We disagree.

44 A pleadings amendment to add a party to an existing action is governed by the Rules of Civil Procedure. In some cases, the relevant rules must be applied in the context of an amendment sought after the expiry of a limitation period. In other situations, the issue of the expiry of a limitation period does not arise. In no event, however, can the reasoning which supports the rules for pleadings amendments simply be ignored; nor are the rules displaced by the discoverability principle.

45 In this case, the motions judge declined to grant the requested amendment following consideration of rules 26.01 and 5.04(2) of the Rules of Civil Procedure. Those rules read as follows:

> 5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> ...
>
> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

46 The motions judge considered rules 26.01 and 5.04(2) in the context of this court's recent decision in Mazzuca v. Silvercreek Pharmacy Ltd. (2001), 56 O.R. (3d) 768 (C.A.). It is settled law that the courts retain a discretion to permit a pleadings amendment to change the parties to a proceeding, notwithstanding the expiry of a limitation period, if special circumstances justifying the amendment and the absence of non-compensable prejudice to the party opposing the amendment are demonstrated: Basarsky v. Quinlan (1971), 24 D.L.R. (3d) 720 (S.C.C.); and Deaville v. Boegeman (1984), 48 O.R. (2d) 725 (C.A.). Mazzuca confirmed that those principles apply to rules 5.04(2) and 26.01 under the current Rules of Civil Procedure.

47 In this case, the motions judge proceeded on the basis that the applicable limitation period had expired. He did not expressly address the discoverability principle. Application of that principle, depending on the facts concerning the exercise of due diligence by the appellant, may result in the postponement of the commencement of the limitation period under s. 284(2) of the Act. Further, on the record before the motions judge, the appellant's solicitor's uncontradicted explanation concerning the inability to determine, prior to discoveries and productions, if material facts exist in

support of a cause of action against the respondents was relevant to the exercise of the court's discretion under rules 5.04(2) and 26.01. It is not clear from the motions judge's reasons that her explanation was considered by him in the context of the discoverability principle.

V. DISPOSITION

48 For the reasons given, we would allow the appeal. The appellant is entitled to her costs of the appeal on a partial indemnity basis, fixed in the sum of $3,750.00, inclusive of disbursements and Goods and Services Tax.

FELDMAN J.A.
CRONK J.A.
ARMSTRONG J.A. -- I agree.

* * * * *

Corrigendum
Released: October 17, 2003

Revisions have been made in paragraphs 1 and 15; the quote found in paragraph 15 has also been completely replaced.

Paragraph 1 currently reads:

[1] ... The primary question on this appeal is whether the commencement of the three-month limitation period established by s. 284(2) of the Municipal Act, R.S.O. 1990, c. M.45 (the "Act"), ...

Paragraph 1 should read:

[1] ... The primary question on this appeal is whether the commencement of the three-month limitation period established by s. 284(2) of the Municipal Act, R.S.O. 1990, c. M.45 (the "Act"), as amended, ...

Paragraph 15 currently reads:

[15] ... In that regard, ss. 284(1), (2) and (5) of the Act provide:

Paragraph 15 should read:

[15] ... In that regard, ss. 284(1), (1.1), (2) and (5) of the Act provided at the relevant time:

The quote in paragraph 6 has been completely replaced.

cp/e/nc/qw/qlhcc/qlmjb/qljxh

1 On the record before this court, three different dates are suggested as the date upon which the appellant initiated her amendment motion: November 5, November 27 and November 29, 2001. The motions judge, however, indicated that the motion was brought on about November 5, 2001. No party suggests that any earlier date applies.

2 Although the Act was repealed on January 1, 2003 by S.O. 2001, c. 25, s. 484, it was in force at the time of the accident.

Case Name:

Webster v. Almore Trading & Manufacturing Co.

RE: Sewell Webster, Janet Webster and Jonathan Webster by his litigation guardian Sewell Webster, Plaintiffs, and Almore Trading & Manufacturing Company Ltd. o/a Crown Metals, Khon Chu & Michael Horowitz, Defendants

[2010] O.J. No. 3284

2010 ONSC 3854

84 C.C.E.L. (3d) 144

2010 CarswellOnt 5595

Court File No. 08-CV-360194

Ontario Superior Court of Justice

R.W.M. Pitt J.

Heard: June 11, 2010.
Judgment: July 30, 2010.

(22 paras.)

Employment law -- Wrongful dismissal -- Civil liability -- Limitation periods -- Motion by employer for summary judgment dismissing employee's claims dismissed -- Employee worked for five years as truck driver prior to dismissal for theft -- Criminal charges resulted, but were ultimately withdrawn -- Genuine issues for trial existed regarding the discoverability of the action -- Limitation period did not necessarily run from date of termination, and person of employee's background was unlikely to have known of claim until consultation with counsel -- Employer's conduct surrounding dismissal and statements to police raised issues for trial regarding employee's malicious prosecution claim -- Limitations Act, s. 5.

Motion by the defendant employer, Almore Trading and Manufacturing, for summary judgment dismissing the claim of the plaintiff employee, Webster. The employee worked for the employer as

a truck driver for five years. In July 2006, he was dismissed on the grounds of theft. A criminal charge resulted. In August 2008, the employee commenced an action for wrongful dismissal and malicious prosecution. The defendants submitted that there was no genuine issue for trial. The defendants submitted that the wrongful dismissal claim was statute-barred and that there was an insufficient factual basis to establish the necessary elements for the malicious prosecution claim. The employee had a grade eight education. He stated that he was in shock after his termination due to the allegation of theft. He left for his native country of Jamaica until August 2006. A friend suggested that the accused consult counsel, which he did. Counsel advised that there was no point in commencing an action until resolution of the criminal charges. The theft charge was withdrawn in July 2007. The defendants stated that they acted without malice when they merely gave police information about a theft that they believed was true. The employee contended that the statements to police were false.

HELD: Motion dismissed. The factual question of the date of discoverability was a genuine issue for trial. The limitation period for a wrongful dismissal action did not necessarily run from the date of termination. A person of the employee's background was unlikely to have known without consulting counsel that he could be entitled to notice or salary in lieu of notice even if dismissed for dishonesty. There were genuine issues for trial regarding the claim for malicious prosecution. The employer ignored the employee's five years of honest service and did not provide the employee with an opportunity to answer the allegations. The defendants were verbally abusive. It was not plain and obvious as to whether police were provided with false information, or that the employer's statements were not made recklessly.

Statutes, Regulations and Rules Cited:

Limitations Act, 2002, S.O. 2002, c. 24, Schedule B, s. 4, s. 5

Rules of Civil Procedures, R.R.O. 1990, Reg. 194, Rule 20, Rule 20.04(2), Rule 20.04(2.1)

Counsel:

Osborne Barnwell, for the Plaintiffs.

Amanda Potasky (agent for Andrea Davidson), for the Defendants.

ENDORSEMENT

1 R.W.M. PITT J.:-- This motion brought by the defendants pursuant to Rule 20 of the *Rules of Civil Procedures*, R.R.O. 1990, Reg. 194 (the *"Rules"*) is for:

(a) Summary judgment dismissing the plaintiff's claim;
(b) Alternatively, summary judgment dismissing the plaintiff's wrongful dismissal claim and/or the claims made against Michael Horowitz personally.

2 The defendants submit that there is no genuine issue requiring a trial. With respect to the wrongful dismissal claim, it was clearly statute-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. With respect to the malicious prosecution and ancillary claims, there is insufficient factual basis to establish the necessary elements for such cause of action.

The Test for Summary Judgment

3 Rule 20.04(2) provides that the court must grant summary judgment where there is "no genuine issue requiring a trial." While the ultimate burden lies with the moving party, both sides are expected to put forward the best available evidence with respect to the existence or non-existence of material issues requiring trial. See *Healey v. Lakeridge Health Corporation*, [2010] O.J. No. 417 (S.C.J.); *Dawson v. Rexcraft Storage and Warehouse Inc.*, 1998 CanLII 4831 (Ont. C.A.).

The Wrongful Dismissal Claim

4 The defendant corporation terminated Sewell Webster's ("the main plaintiff" or "Mr. Webster") employment on or about July 27, 2006 after 5 years of service as a truck driver on the grounds of the employee's theft from the employer.

5 Mr. Webster commenced an action for wrongful dismissal against the defendants on August 6, 2008. The action is subject to a two-year limitation period, pursuant to section 4 of the *Limitations Act, 2002*. While it appears the action was brought after two years from the date Mr. Webster was fired, he invokes the discoverability principle enumerated in section 5 to support his position that his action is not time-barred. Section 5 provides that:

> **Discovery**
>
> **5.** (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
> (i) that the injury, loss or damage had occurred,
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> (iii) that the act or omission was that of the person against whom the claim is made, and
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5(1).

Presumption

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5(2).

6 Mr. Webster says that when the defendant Mr. Horowitz accused him of theft and terminated his employment, he had committed to visit his native country "to dedicate" his deceased mother's headstone, having previously purchased a ticket. He left for Jamaica on July 29, 2006, two days after the date he was dismissed.

7 He returned to Canada around August 13, 2006 and shortly thereafter a friend suggested that he consult counsel which he did. The charge was withdrawn in July 2007. The defendant did not lead evidence as to when the plaintiff was told he would receive no salary in lieu of notice. In addition, a person with the plaintiff's background is not likely to have known without consulting counsel that he could be entitled to notice or salary in lieu of notice even if dismissed for dishonesty.

8 Paragraph 3, 4 and 5 of the plaintiff's affidavit are as follows:

3. I was in shock when I was accused of theft and terminated. I had planned with the rest of my family to go to Jamaica to dedicate our deceased mother's headstone. The ticket had been purchased and so on July 29, 2006, two days after I was charged and dismissed, I went home to Jamaica. I should note that I had to seek the police permission to do so.
4. I have an equivalent grade 8 education and I must confess that I have never had the need for a lawyer before other than to buy my house and so, I had no knowledge that I had certain time to sue the employer. Anyway, I stayed in Jamaica for two weeks because that was the original plan. I returned to Canada on or around August 13, 2006. I was recommended by a friend name Cleveland Walker to go to see a lawyer by the name of Stephen Cooper.
5. I was told by Mr. Cooper that given that the termination was connected to the criminal charge, it made no sense to start the wrongful dismissal until the criminal matter was completed. He made a comment about the O'Jay Simpson matter when I asked if I could sue them. Anyway, once the criminal matter was completed, I then went to see current counsel who began the claim.

9 Ignorance of the limitation period does not relieve the plaintiff from its operation: *Nicholas v. McCarthy Tetrault*, [2008] O.J. No. 4258 at para. 27 (S.C.J.), aff'd 2009 ONCA 692, leave to appeal dismissed, [2009] S.C.C.A. No. 476. The limitation period starts running the moment the plaintiff "discovered" the potential claim (i.e., knew or by reasonable diligence could have known of the material facts upon which to found suit), not when the plaintiff had assessed the probability of its success. See *Soper (Guardian of) v. Southcott*, 1998 CanLII 5359 at paras. 13-14 (Ont. C.A.); *Smyth v. Waterfall*, [2000] O.J. No. 3494 at para. 10 (C.A.).

10 While the plaintiff's affidavit is not nearly as responsive to the issue as it ought to have been (in fact, paragraph 4 seems to have focused only on ignorance of the limitation period, and paragraph 5 on the irrelevant erroneous legal advice) when paragraphs 3, 4 and 5 and the whole record are carefully digested they drive me inexorably to the conclusion that this is not a case in which it is in the interest of justice for me to exercise the powers under rule 20.04(2.1), but that it would be more consistent with the interest of justice for such powers to be exercised at a trial. See *Zurba v. Lakeridge Health Corp.* (2010), 99 O.R. (3d) 596 at para. 53 (S.C.J.):

> "The factual question as to the appropriate date of discoverability is one which ought to be tried and, *per Aguonie, [1998] O.J. No. 459, supra*, on the facts before me, the outcome is not so certain that I am willing to rule definitively among the alternatives of October 17, 2003, June 2004 or June 2006, despite the amendments to Rule 20. I find that this is not a case in which it is in the interest of justice for me to exercise the powers under rule 20.04(2.1). It would be more consistent with the interest of justice for such powers to be exercised at a trial when credibility can be properly assessed. That assessment of the evidence requires live witnesses in a trial context.

11 Discoverability is largely a question of fact that hinges on the circumstances of the case as to when the plaintiff actually or ought to have found out about the material facts to ground a cause of action. In *Alexis v. Darnley*, 2009 ONCA 847, 2009 CarswellOnt 7528 (C.A.), the Court of Appeal stated at para. 12 that "because discoverability is a factual analysis, it will often be inappropriate to dispose of the issue on a motion for summary judgment."

12 Wrongful dismissal, in my view, raises a particularly difficult issue in the limitation context since it is not a dismissal *per se* that is actionable but rather dismissal without reasonable notice or salary in lieu of such notice, that is actionable. Accordingly, the limitation period for an action for wrongful dismissal does not necessarily run from the date of actual dismissal. It is activated when the cause of action is discovered - that is, the date that the terminated employee knew or ought to have known that he was discharged without cause and without notice or pay in lieu of notice and that a proceeding would be an appropriate way to get redress. The date of discovery may be later than the date of dismissal.

13 I am of the view that the date on which Mr. Webster discovered his claim is a genuine issue

requiring trial. In reaching this conclusion, I have borne in mind the enhanced powers of a judge on a summary judgment motion to weigh evidence, evaluate credibility, draw inferences and order oral testimony.

14 The defendants' cross-examination of the main plaintiff in which he acknowledged that he knew he was "terminated on July 27, 2006 for something you say you did not do" is not dispositive of the issue of when the plaintiff knew that he would receive no salary in lieu of notice, or that July 27, 2006 was the day on which a reasonable person with the abilities and in the circumstances of the plaintiff, first ought to have known that a proceeding would be an appropriate means to seek a remedy.

15 It is not clear from this record that the plaintiff's action which was started within two years from his return from Jamaica and his first consultation with counsel as outlined in paragraph 7 above, must fail on the basis of the *Limitations Act*.

In *Alexis* [*supra*] in which the plaintiff alleged unlawful detention by the police and a hospital to which the plaintiff was committed pursuant to the *Mental Health Act* R.S.O. 1990 CM 7, the Court of Appeal in disposing of the issue of discoverability based on Section 5(1)(a) said:

> a) Knowledge that a proceeding was an appropriate means to seek a remedy
>
> [8] With respect to the claim against the police and hospital, the appellant argues that there was a triable issue as to when she knew or ought reasonably to have known that a proceeding would be the appropriate means to seek to remedy her injury, loss or damage, as provided for by s. 5(1)(a)(iv). In the appellant's submission, until she had received clear legal advice, this element of the discoverability criteria was not satisfied.
>
> [9] I would not give effect to this submission. **Assuming, without deciding**, that legal advice was required to fulfill this requirement, I note that the appellant had obtained legal advice in December 2005 and re-attended the lawyer's office in February 2006 and several times thereafter. This advice was received in excess of two years before the claim was issued. The appellant's evidence is that her counsel consistently expressed his opinion that she had a good case. The fact that counsel advised her that he would have to review the various hospital and police records before being sure does not, in my view, delay the start of the running of the limitation period. [*emphasis mine*]

16 Accordingly, I decline to grant summary judgment on the wrongful dismissal action.

The Malicious Prosecution Claim

17 In *Nelles v. Ontario*, [1989] 2 S.C.R. 170, the Supreme Court of Canada set out the four necessary elements of a *malicious prose* cution action. The plaintiff must establish on a balance of probabilities:

(i) The proceedings must have been initiated by the defendants;
(ii) The proceedings must have been terminated in favour of the plaintiffs;
(iii) Absence of reasonable and probable cause; and
(iv) Malice, or other primary purpose other than that of carrying the law into effect.

18 The defendants acknowledge that the second element (termination in favour of the plaintiff) is not in dispute.

19 The defendants argue that the other three elements cannot be met since:

(i) Mr. Chu and Mr. Horowitz simply gave the police information about a theft that they believed to be true;
(ii) the proceedings were not initiated by them;
(iii) There was a theft. The plaintiff was seen at the scene of the crime. The plaintiff believed there had been a theft. He did not report it to the police nor did he provide any help in apprehending the thieves.
(iv) It was reasonable for Mr. Chu to believe that the plaintiff participated in the theft.

20 As to malice, the defendants say in para. 33 of their factum:

> Despite his claim that the Defendants had a racial bias against him, Mr. Webster admitted on cross examination that with the exception of a few incidents when Mr. Chu punched his card out early (because he believed Mr. Webster had already left for the day), he had no difficulties with Mr. Chu or anyone else in the five years he was employed at Crown Metals prior to this incident. Mr. Webster also admitted that the Crown Metals workforce is made up mostly of minority groups.

21 Mr. Webster has denied all allegations of wrongdoing. The crux of the plaintiffs' position in dealing with the necessary elements is his allegation that Mr. Chu and Mr. Horowitz gave false statements to the police. As to Mr. Chu, that he was a witness to the theft by the plaintiff, Mr. Webster, and as to Mr. Horowitz's that he first told the police he had lost a bin of scrap metal having a value of $15,000, when in fact the actual loss was a skid with some $500 worth of scrap metal. [It is to be noted the charge was for theft under $5,000] Giving the police false information about theft of one's own property in circumstances uniquely within the knowledge of the complainant may satisfy the first, third and fourth factors that need to be established in a malicious prosecution; or at

any rate, it is not plain and obvious that it does not. That, at a minimum, the conduct of both Mr. Chu and Mr. Horowitz was reckless; Mr. Chu's maliciousness could, in addition, be gleaned from the latter's practice of punching the plaintiff's card out early thereby causing him loss of income. With regard to Mr. Horowitz, he ignored 5 years of honest service, did not give the plaintiff an opportunity to answer to the allegations, and verbally abused the plaintiff. In my view, the record raises genuine issues requiring a trial.

Costs

22 Subject to any agreement between the parties, brief written submissions on costs are to be made within twenty (20) days of the release of these reasons.

R.W.M. PITT J.

cp/e/qlafr/qlmxj/qljxr/qlana/qlced

CITATION: Boyce v. Toronto Police Services Board, 2011 ONSC 53
COURT FILE NO.: CV-09-376697
DATE: 20110105

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DEXTER BOYCE Plaintiff	*Roy Wise* and *Leora Wise*, for the Plaintiff
– and –	
TORONTO POLICE SERVICES BOARD, JOHN FEENEY, THOMAS FINDLAY, KAMALJEET KANG, JEFFREY MARTIN, DONALD HERBERT, AARON RODRIGUDES, DONAVAN SMITH, ANNE-MARIE GARISTO, MARK McCULLAGH and various JOHN DOES Defendants	*Doug O. Smith*, for the Defendants, Toronto Police Services Board, Donald Hebert, Aaron Rodrigues, Donavan Smith, Anne-Marie Garisto, and Mark McCullagh *Gary R. Clewley*, for the Defendants John Feeney, Thomas Findlay, Kamaljeet Kang, Jeffrey Martin *Zachary Green*, for Attorney General of Ontario **HEARD:** October 22, 2010

LOW J.

[1] The defendants have brought motions for summary dismissal of Mr. Boyce's action for damages resulting from an assault on him. Initially, the motion was brought by the defendants Toronto Police Services Board, Donald Hebert, Aaron Rodrigues, Donavan Smith, Anne-Marie Garisto and Mark McCullagh only. At the conclusion of argument, and on consent of the plaintiff, a parallel motion was brought by the other defendants on the basis that they adopt and rely on all of the arguments advanced by the original moving parties.

[2] The central issue is whether the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B., applies to the plaintiff's claim.

[3] This action arises out of an incident which took place on September 30, 2004. On that day, the plaintiff entered a guilty plea to a charge of failure to comply with his recognizance prohibiting him from possessing a cell phone. After the court appearance at Old City Hall, he was being held in the cells awaiting transport back to the Mimico Correctional Institution.

[4] The statement of claim, which was issued on April 16, 2009, alleges that a number of the individual defendants assaulted the plaintiff, causing him personal injury. The plaintiff was taken to hospital where he remained for one week. He remained under a doctor's care until November 19, 2004.

[5] There is no allegation in the statement of claim that the plaintiff was incapacitated for any period of time and there was no evidence adduced on this motion to the effect that the plaintiff was incapacitated for any period of time.

[6] The plaintiff claims damages for assault and battery and for breach of his rights under the *Canadian Charter of Rights and Freedoms*.

[7] The following are the salient facts alleged in the statement of claim.

[8] After the plaintiff refused to clean up some juice that he had accidentally spilled in the holding cell, the defendants Feeney, Findlay, Kang, Martin, Hebert, Rodrigues, Smith and a number of unidentified officers knocked the plaintiff to the ground and collectively beat him. It is alleged that the defendant Findlay kicked him in the face, that the defendant Martin kicked him in the chest, and that both continued to beat him, leaving him in leg irons and handcuffs on the cell floor. It is alleged that the plaintiff asked the defendant Garisto to call the ambulance or the police and that she called neither. Instead, the defendants Kang, Rodrigues and other officers entered the cell and Kang punched the plaintiff, after which he was taken to the wagon for transport back to the Mimico Correctional facility.

[9] It is alleged that on the trip to Mimico, the plaintiff was in pain, that he believed his ribs to be broken and that he could not walk, and that the defendant Hebert sank his fingers into the plaintiff's shoulder to deliberately cause pain and to force the plaintiff to walk.

[10] During the trip to Mimico, the plaintiff called out for someone to call the police at traffic lights and stop signs.

[11] After arrival at Mimico, the plaintiff was taken to the Trillium Health Centre, the Mimico hospital unit, for treatment.

[12] At the hospital, the plaintiff gave a statement to a police officer at his own request.

[13] There are a number of additional facts which are not in dispute.

[14] The plaintiff is a 41 year old immigrant from Guyana who arrived in Canada in 1991.

[15] After the incident of September 30, 2004, the defendants Feeney, Findlay, Kang and Martin were prosecuted and were convicted of assaulting a shackled prisoner. The findings of the court were handed down on April 17, 2007 after 14 days of trial. The convicted officers were sentenced to conditional sentences and were discharged from the police service. The defendants Hebert, Rodrigues and Smith were prosecuted and acquitted. The Crown appealed the conditional sentences imposed by the trial court on the four convicted officers and sought custodial sentences. The court of appeal varied the sentences by adding a custodial term to each of the sentences.

[16] In response to the motion for summary dismissal, the plaintiff filed an affidavit which states, at paragraph 38:

> I did not bring this action sooner because:
>
> (i) I was not aware that a limitations period existed until I was so advised by my lawyers;
>
> (ii) I was waiting until the criminal proceedings ended successfully to bring an action to ensure that I had a cause of action as I believed that the Defendants would lie and might be acquitted. If that occurred there would be little hope for me in an action; and
>
> (iii) I was afraid of the Defendants and what they or their friends might do to me if I brought a civil law suit before they were convicted.

[17] The legislation relevant to the disposition of the motion is found in sections 2, 4 and 5 of the *Limitations Act, 2002,* S.O. 2002, c. 24, Sched. B.

[18] Section 2 provides:

> 2. (1) This Act applies to claims pursued in court proceedings other than,
>
> (a) proceedings to which the *Real Property Limitations Act* applies;
>
> (b) proceedings in the nature of an appeal, if the time for commencing them is governed by an Act or rule of court;
>
> (c) proceedings under the *Judicial Review Procedure Act*;
>
> (d) proceedings to which the *Provincial Offences Act* applies;

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

Demand obligations

(3) For the purposes of subclause (1) (a) (i), the day on which injury, loss or damage occurs in relation to a demand obligation is the first day on which there is a failure to perform the obligation, once a demand for the performance is made.

Same

(4) Subsection (3) applies in respect of every demand obligation created on or after January 1, 2004.

[22] This action was commenced on April 16, 2009, over 4½ years after the day on which the cause of action accrued. On the day of the incident, September 30, 2004, the plaintiff himself complained that he had been assaulted, complained of injury, sought the police, and gave a statement to the police while in hospital.

[23] Section 5(1)(a)(iv) does not import an idiosyncratic limitation period calibrated by the claimant's familiarity with or ignorance of the law. The test is an objective one. While it is possible to envisage that a new kind of right might arise that has not been hitherto protected, thus making it arguable that a civil proceeding might not be seen objectively as an appropriate means to seek to remedy, a battery causing personal injury is a classic example of the kind of wrong that is appropriate for redress by court action. A citizen is presumed to know the law of the land.

[24] The statutory presumption is that the plaintiff knew he had a claim on September 30, 2004, and there is no evidence that rebuts the presumption.

[25] Nor does s. 5(1)(b) assist. Section 5(1)(b) is the codification of the common law exception from the rigor of the limitation period based on lack of discoverability, with reasonable diligence, of the cause of action. It has no application in the absence of displacement of the presumption of knowledge of the existence of a claim.

[26] *Prima facie*, the claim is statute barred, having been issued more than two years following the expiry of the limitation period.

[27] The plaintiff argues that the limitation period should not be applied to his claim.

[28] The plaintiff asserts that the provisions of s. 10(1) and (2) of the Act apply to him.

[29] Section 10(1) and (2) provide:

> 10. (1) The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.
>
> Presumption
>
> (2) Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise.

[30] In my view, neither s. 10(1) nor 10(2) applies to the plaintiff. Although the claim is based on assault, there is no evidence that the plaintiff was at any time incapable of commencing the proceeding because of a physical, mental or psychological condition. To the contrary, it appears that the plaintiff consciously delayed commencing his proceeding until after the criminal proceeding was concluded and some of the defendants were convicted. There is no evidence, however, of any disability at any time following the assault, and to the contrary, it is apparent that the plaintiff gave a statement to police concerning the incident, subsequently testified at the criminal proceedings and was prepared to testify at the appeal from discharge proceedings.

[31] Section 10(2) is not engaged because the plaintiff was neither in an intimate relationship with any of the defendants nor was he a dependent on any of them. The fact of physical custody in the particular circumstances described in the statement of claim does not render the relationship between that of the plaintiff and the defendants one of dependence. For a short period of time, there is a nexus between the plaintiff and those required to transport him from the court house cells to the correctional institute. That nexus may give rise to certain duties of care and other duties to refrain from the kinds of action of which certain of the defendants were convicted (as in *R. v. Groot*, 2000 CarswellOnt 2973 at 33). It is not sufficient, however, to create a relationship of dependence.

[32] I therefore cannot accept the argument that s. 10(1) or (2) exempts the plaintiff's claim from the two year limitation period.

[33] The plaintiff submits that s. 5(1)(b) in combination with s. 5(1)(a)(iv) applies to extend the limitation period to a date two years following the criminal convictions on the grounds that a reasonable person in the particular circumstances and with the particular abilities of the plaintiff would have waited for the criminal conviction prior to bringing an action. It is submitted that the plaintiff only knew that a proceeding was an appropriate way of proceeding once the conviction was entered.

[34] I am not able to accede to this argument. First, it is unsupported by the evidence. The plaintiff's evidence, as reproduced above and read as a totality is not that he believed that a

conviction was a precondition of the existence of a cause of action but rather that he did not think that he had a chance of succeeding unless the officers were convicted.

[35] Second, as I have stated above, the effect of s. 5(1)(a)(iv) is not to create a limitation period that varies with the state of legal knowledge of the claimant. One of the chief purposes of any limitations regime is to foster certainty. The construction of s. 5(1)(a)(iv) urged on behalf of the plaintiff would have the exact opposite effect as the limitation period would lengthen proportionately with the degree of ignorance of the claimant.

[36] Third, the submission that the plaintiff's situation engages the discoverability exemption in s. 5(1)(b) by reason of any or a combination of his fear of the defendants or their friends, of the plaintiff's ignorance of the limitation period, or of his belief that in the absence of a conviction there "would be little hope for me in an action" is untenable. Section 5(1)(b) is engaged only when that date is earlier than the date under s. 5(1)(a). Here, it is apparent that the date under s. 5(1)(a) is September 30, 2004.

[37] It is well established that ignorance of a limitation period does not toll the limitation period. Citing *Luscar Ltd. v. Pembina Resources Ltd.*, [1995] 2 W.W.R. 153 (Alta. C.A.) and *Hill v. Alberta (South Alberta Land Registration District)* (1993), 100 D.L.R. (4th) 331 (Alta C.A.), the Court of Appeal reconfirmed in *Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 that error or ignorance of the law does not postpone the limitation period:

> [18] The plaintiffs' ignorance of the limitation period is referred to three times in the Reasons and submissions were made to us that the motion judge had erred in giving any weight to this fact. Reference was made to the decision of the Alberta Court of Appeal in *Hill* where the point was made that error as to, or ignorance of the law did not postpone the running of a limitation period. A slightly fuller discussion of the point is found in *Luscar* at paragraph 127:
>
> > What is it that must be discovered? Discovery applies to the facts, not the law. This point is made in the recent decision of this court in *The Royal Canadian Legion Norwood (Alberta) Branch 178 v. The City of Edmonton*(1994), 149 A.R. 25, 16 Alta. L.R. (3d) 305 (C.A.). In that case, the issue of whether s. 4(1)(e) of the *Limitations Act* refers to discovery of the facts or the law was directly addressed at p. 9 where Lieberman J.A. adopted the reasoning of an earlier decision in the same court:
> >
> > > The issue of whether "discovery" applies to the facts or to the law or to both was addressed by this court in Hill v. South Alberta Land Registration District (1993), 135 A.R. 266; 33 W.A.C. 266; 8 Alta. L.R. (3d) 379. In that decision Côté, J.A., delivering the unanimous judgment of the court,

> referred to a case comment on the trial judgment then under appeal and said at p. 385:
>
> Discoverability relates to facts, not law. Error or ignorance of the law, or uncertainty of the law, does not postpone any limitation period.

[19] Thus, to the extent that the motion judge relied on the plaintiffs' unawareness of the limitation period in her analysis of the discoverability issue, she was in error. Nevertheless, the plaintiffs' ignorance of the existence of a limitation is a possible factor in the good faith analysis under s. 2(8) of the FLA.

[38] The plaintiff next raises s. 16 as a source of relief from the limitation period. Section 16 provides:

> 16. (1) There is no limitation period in respect of,
>
> (a) a proceeding for a declaration if no consequential relief is sought;
>
> (b) a proceeding to enforce an order of a court, or any other order that may be enforced in the same way as an order of a court;
>
> (c) a proceeding to obtain support under the Family Law Act or to enforce a provision for support or maintenance contained in a contract or agreement that could be filed under section 35 of that Act;
>
> (d) a proceeding to enforce an award in an arbitration to which the Arbitration Act, 1991 applies;
>
> (e) a proceeding under section 8 or 11.2 of the Civil Remedies Act, 2001;
>
> (f) a proceeding by a debtor in possession of collateral to redeem it;
>
> (g) a proceeding by a creditor in possession of collateral to realize on it;
>
> (h) a proceeding arising from a sexual assault if at the time of the assault one of the parties to it had charge of the person assaulted, was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether financially or otherwise; [Emphasis added.]
>
> (i) a proceeding to recover money owing to the Crown in respect of,
>
> (i) fines, taxes and penalties, or
>
> (ii) interest that may be added to a tax or penalty under an Act;

(j) a proceeding described in subsection (2) that is brought by,

(i) the Crown, or

(ii) a delivery agent under the *Ontario Disability Support Program Act*, 1997 or the *Ontario Works Act*, 1997; or

(k) a proceeding to recover money owing in respect of student loans, medical resident loans, awards or grants made under the *Ministry of Training, Colleges and Universities Act*, the *Canada Student Financial Assistance Act or the Canada Student Loans Act*.

Same

(2) Clause (1) (j) applies to proceedings in respect of claims relating to,

(a) the administration of social, health or economic programs; or

(b) the provision of direct or indirect support to members of the public in connection with social, health or economic policy.

Same

(3) Without limiting the generality of subsection (2), clause (1) (j) applies to proceedings in respect of claims for,

(a) the recovery of social assistance payments, student loans, awards, grants, contributions and economic development loans; and

(b) the reimbursement of money paid in connection with social, health or economic programs or policies as a result of fraud, misrepresentation, error or inadvertence.

Conflict with s. 15

(4) This section and section 17 prevail over anything in section 15.

[39] The plaintiff argues that his situation should be treated as analogous to that of victim of sexual assault by a person who was in a position of trust or authority in relation to the person or was someone on whom he or she was dependent, whether financially or otherwise. It is argued that shackled prisoners in police custody are at the mercy of court officers who exercise discretion that affects their welfare and that the administration of justice and the rule of law are wholly contingent on the preservation of an honest police force in whom the public trusts to act in the best interest of the public. The plaintiff submits that the policy reasons for exempting

victims of sexual assault by persons upon whom they are dependent are equally applicable to victims of state violence and that the policy should be so extended.

[40] I am unable to accept this argument. Had the legislature intended to exempt claims for damages resulting from state violence, that class of claim would have been enumerated under the various types of claims set out in s. 16. The policy underlying the exemption for victims of sexual assault by persons in a position of trust or authority or by persons upon whom the victim is a dependent is grounded in the likelihood that the dynamic of the relationship will impede the autonomy of the victim. In my view, there is no ambiguity in the legislation that would militate in favour of adding a class of claim to s. 16 that the drafters of the Act did not include.

[41] The plaintiff's final argument is that the common law doctrine of special circumstances should override the two year limitation period in the Act. It is said that the plaintiff was a member of a class of vulnerable persons while in custody, and a victim of abuse of power by an organ of the state. The plaintiff's factum argues that "allowing court officers who abuse their authority to evade liability will corrupt public confidence in the justice system, encourage officers to delay criminal proceedings and encourage criminals to resist arrest. Without the threat of meaningful civil liability, no sufficient deterrence existed to prevent other officers from abusing their authority. Society is prejudiced by providing impunity to public servants who abuse their power. The plaintiff submits that such constitutes special circumstances."

[42] The plaintiff relies on *Basarsky v. Quinlan* [1972] S.C.R. 380 (S.C.C.) at paras. 11 – 13, and *Frohlick v. Pinkerton Canada Ltd.* (2008), 88 O.R. (3d) 401 (C.A.) at para. 28.

[43] The doctrine of special circumstances is no longer viable in the law of limitations in Ontario. In *Joseph v. Paramount Canada's Wonderland*, [2008] O.J. No. 2339; 2008 ONCA 469; 294 D.L.R. (4th) 141; 56 C.P.C. (6th) 14; 2008 CarswellOnt 3495; 90 O.R. (3d) 401; 241 O.A.C. 29, the Court of Appeal had occasion to consider the application of special circumstances under the *Limitations Act, 2002*. At paragraph 13 *et seq.* the Court stated:

> The question to be answered now is whether the legislature intended to preserved the court's common law discretion to extend limitation periods under the new Act by applying the doctrine of special circumstances. As a matter of statutory interpretation, I have concluded that the answer must be no.
>
> The motion judge in this case did not refer to s. 20 of the new Act, but instead, relied on the special circumstances doctrine developed at common law and applied under Rule 26.01 and Rule 5.04(2). In fairness to the motion judge, the parties did not address the effect of the new Act on the special circumstances doctrine and appeared to assume that it was applicable. Instead, the parties focused on whether the doctrine could be applied to relieve against the expiry of a limitation period where no action had been commenced in time, in contrast to case where a new claim or a new party is sought to be added to an existing action that was commenced in time.

> Because s. 4 of the new Act mandates a two –year limitation period "[u]nless this Act provides otherwise", the court must look in the Act for the authority to derogate from the application of the two-year limitation period. These opening words compel the conclusion that the new Act is intended to be comprehensive.
>
> No specific provision in the new Act refers to the doctrine of special circumstances, or specifically allows a court to extend or suspend the running of the limitation period based on special circumstances. To the contrary, s. 21 of the Act precludes the addition of parties to an existing action after the expiry of a limitation period. The late addition of parties to an existing action was one of the main situations where the doctrine of special circumstances was traditionally applied at common law and under Rule 5.04(2).

[44] As the court does not have a discretion under the *Limitations Act, 2002* to extend the limitation period where plaintiff asserts special circumstances, it is unnecessary to consider whether special circumstances have been shown in this case.

[45] For the foregoing reasons, I have come to the conclusion that the *Limitations Act, 2002* does apply to the plaintiff's claim.

[46] Because of lack of time on the day this motion was heard, the plaintiff's challenge to the constitutionality of ss. 4 and 5 of the *Limitations Act, 2002* was not argued. The matter was left on the basis that I would rule first on whether the *Limitations Act, 2002* applied. If the answer was no, the plaintiff's constitutional question would be moot. If the answer was yes, the parties, and counsel for the Attorney General, would return to argue the constitutional issue.

[47] I therefore defer for the time being either granting or dismissing the defendants' motion for summary dismissal.

[48] The parties may contact my assistant to arrange a date for the hearing of the balance of the matter.

Low J.

Released: January 5, 2011

CITATION: Boyce v. Toronto Police Services Board, 2011 ONSC 53
COURT FILE NO.: CV-09-376697
DATE: 20110105

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DEXTER BOYCE

Plaintiff

– and –

TORONTO POLICE SERVICES BOARD, JOHN FEENEY, THOMAS FINDLAY, KAMALJEET KANG, JEFFREY MARTIN, DONALD HERBERT, AARON RODRIGUDES, DONAVAN SMITH, ANNE-MARIE GARISTO, MARK McCULLAGH and various JOHN DOES

Defendants

REASONS FOR JUDGMENT

Low J.

Released: January 5, 2011

Case Name:

Joseph v. Paramount Canada's Wonderland

Between
Innez Joseph, Plaintiff (Respondent), and
Paramount Canada's Wonderland, Defendant (Appellant)

[2008] O.J. No. 2339

2008 ONCA 469

294 D.L.R. (4th) 141

56 C.P.C. (6th) 14

2008 CarswellOnt 3495

166 A.C.W.S. (3d) 762

90 O.R. (3d) 401

241 O.A.C. 29

Docket: C47671

Ontario Court of Appeal
Toronto, Ontario

K.N. Feldman, J.L. MacFarland and D. Watt JJ.A.

Heard: February 7, 2008.
Judgment: June 12, 2008.

(29 paras.)

Civil litigation -- Limitation of actions -- General principles -- Legislation -- Interpretation -- Statutes -- Long-standing practice -- Extension, interruption, suspension and inapplicability -- Jurisdiction -- Ontario -- Appeal from motion judge's decision to extend limitation period to file statement of claim -- At issue was whether the doctrine of special circumstances continued to apply under the new Limitations Act -- Appeal allowed -- The action was statute barred -- No specific

provision in the new Act referred to the doctrine of special circumstances, or specifically allowed a court to extend or suspend the running of the limitation period based on special circumstances.

Appeal by Paramount from motion judge's decision to extend limitation period to file statement of claim. Through inadvertence, Joseph's counsel failed to issue the statement of claim within the limitation period provided under the new Limitations Act. On a motion to determine as a question of law whether the claim was statute-barred, the motion judge applied the common law doctrine of special circumstances and exercised his discretion to extend the limitation period. The issue raised on appeal was whether that doctrine continued to apply under the new Act.

HELD: Appeal allowed. The action was statute barred. No specific provision in the new Act referred to the doctrine of special circumstances, or specifically allowed a court to extend or suspend the running of the limitation period based on special circumstances. Section 20 preserved the extension, suspension or other variation of a limitation period "by or under another Act." However, the special circumstances doctrine that courts had applied at common law and in conjunction with the Rules of Civil Procedure did not constitute the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

Statutes, Regulations and Rules Cited:

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B, s. 4, s. 20

Ontario Rules of Civil Procedure, Rule 5.04(2) c Rule 26.01

Appeal From:

On appeal from the judgment of Justice Gerald F. Day of the Superior Court of Justice, dated August 28, 2007, with reasons reported at 87 O.R. (3d) 473.

Counsel:

Todd J. McCarthy and Colleen E. Arsenault for the appellant.

Tony Afecto for the respondent.

[Editor's note: A corrigendum was released by the Court July 11, 2008; the corrections have been made to the text and the corrigendum is appended to this document.]

The judgment of the Court was delivered by

1 K.N. FELDMAN J.A.:-- This case, released concurrently with this court's decision in *Meady v.*

Greyhound Canada Transportation Corporation, deals with the application of the special circumstances doctrine under the new *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (the "new Act").

2 Through inadvertence, plaintiff's counsel failed to issue a statement of claim within the limitation period provided under the new Act. On a motion to determine as a question of law whether the claim was statute-barred, the motion judge applied the common law doctrine of special circumstances, and to exercise his discretion to extend the limitation period. The issue raised by this appeal is whether that doctrine continues to apply under the new Act.

FACTS

3 The facts of this case are relatively simple. The claim arose out of an incident in which the plaintiff suffered injuries at the defendant amusement park on September 5, 2004. There was no dispute that the new Act applied to this claim, and that the claim was discovered the day the injury occurred. As a result, the two-year limitation period prescribed by the new Act began running on September 5, 2004. The defendant was notified of the claim on September 24, 2004, and obtained both a written statement from the plaintiff as well as substantial medical documentation concerning the injuries, long before the second anniversary of the incident.

4 The plaintiff's lawyer used a tickler system to record upcoming limitation periods and correctly diarized this action. The lawyer drafted the claim and left instructions for his assistant to have the claim issued before September 5, 2006. The assistant was away on vacation the week of September 4, 2006. The lawyer believed the claim had been issued, but the assistant, believing the six-year limitation period prescribed by the former *Limitations Act*, R.S.O. 1990, c. L.15 (the "former Act"), continued to apply, did not issue the claim before going on vacation.

5 When the lawyer later learned of the error, he forwarded the draft claim to the defendant on October 31, 2006 and issued the claim the same day. He advised the defendant on November 2, 2006 that, through inadvertence, the claim had not been issued until October 31, 2006. A copy of the issued claim was sent to the defendant on November 28, 2006 and formally served on January 30, 2007.

6 The defendant moved under rule 21.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to determine, as a question of law, whether the action was statute barred. The motion judge concluded that the action was barred by the two-year limitation period provided by s. 4 of the new Act. Although this was not a situation where an action had been commenced in time and the plaintiff was seeking to add another cause of action or party, the motion judge followed a recent line of cases in the Superior Court[1] and held that he had a discretion under the doctrine of special circumstances to extend the time to commence an action where no action had been commenced within the limitation period. The motion judge found that special circumstances existed where there was inadvertence on the part of the plaintiff's lawyer and no prejudice to the defendant.

ISSUE

7 The issue raised by this appeal is whether courts continue to have a discretion under the new Act to extend a limitation period and allow a claim to be commenced after the period has expired by applying the doctrine of special circumstances.

ANALYSIS

The New Act

8 The new Act came into effect on January 1, 2004. It represents a revised, comprehensive approach to the limitation of actions. As Weiler J. A. stated in *York Condominium Corp. No. 382 v. Jay-M Holdings Ltd.* (2007), 84 O.R. (3d) 414 at para. 2 (C.A.), the aim of the new Act is "to balance the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs." The new Act introduced several important reforms in order to maintain that balance. For example, it protects the right to sue by incorporating the common law doctrine of discoverability into the process for determining the commencement date of the relevant limitation period. It creates greater certainty by consolidating limitation periods. Section 19 eliminates limitation periods contained in other statutes, except those specifically referred to in the new Act or the Schedule to it. It also sets out a list of claims to which no limitation period applies in s. 16. For all other claims, the new act establishes a basic two-year limitation period and an ultimate limitation period of 15 years, subject to certain adjustments. Section 4 establishes the basic limitation period as follows:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

9 In accordance with s. 4, the basic limitation period is subject to some suspensions and extensions that are specified in the Act. For example, ss. 6 and 7 suspend the running of the basic limitation period against an unrepresented minor or incapable person. It is also subject to suspension or extension by other statutes under s. 20, which provides:

> 20. This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

The Special Circumstances Doctrine

10 The special circumstances doctrine originated in Canadian jurisprudence in *Basarsky v. Quinlan*, [1972] S.C.R. 380. In that case, the plaintiff brought a claim within the applicable limitation period, but later sought to add a new claim after the period had expired. The Supreme Court adopted the rule in *Weldon v. Neal* (1887), 19 Q.B.D. 394, that an amendment cannot be made that would prejudice the other party by taking away the existing right of the time bar, except in peculiar or special circumstances that warrant the amendment. The Supreme Court concluded that the defendant was not prejudiced and exercised its power to allow the amendment on the basis of special circumstances.

11 This common law doctrine gradually came to be applied to motions brought under Rule 26 and Rule 5 of the *Rules of Civil Procedure* to amend pleadings or add parties after the expiry of a limitation period. The relevant subsections of these rules read as follows:

> 5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.
>
> 26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

12 Neither of these rules refers specifically to the expiry of a limitation period or to the doctrine of special circumstances. However, following the line of cases that began with *Basarsky v. Quinlan*, these rules have been interpreted to allow a court to add or substitute a party or to add a cause of action after the expiry of a limitation period where special circumstances exist, unless the change would cause prejudice that could not be compensated for with either costs or an adjournment: see e.g. *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (C.A.).

Application of Special Circumstances under the New Act

13 The question to be answered now is whether the legislature intended to preserve the court's common law discretion to extend limitation periods under the new Act by applying the doctrine of special circumstances. As a matter of statutory interpretation, I have concluded that the answer must be no.

14 The motion judge in this case did not refer to s. 20 of the new Act, but instead, relied on the special circumstances doctrine developed at common law and applied under Rule 26.01 and Rule 5.04(2). In fairness to the motion judge, the parties did not address the effect of the new Act on the special circumstances doctrine and appeared to assume that it was applicable. Instead, the parties focussed on whether the doctrine could be applied to relieve against the expiry of a limitation period where no action had been commenced in time, in contrast to cases where a new claim or a new party is sought to be added to an existing action that was commenced in time.

15 Because s. 4 of the new Act mandates a two-year limitation period "[u]nless this Act provides otherwise", the court must look in the Act for the authority to derogate from the application of the two-year limitation period. These opening words compel the conclusion that the new Act is intended to be comprehensive.

16 No specific provision in the new Act refers to the doctrine of special circumstances, or specifically allows a court to extend or suspend the running of the limitation period based on special

circumstances. To the contrary, s. 21 of the Act precludes the addition of parties to an existing action after the expiry of a limitation period. The late addition of parties to an existing action was one of the main situations where the doctrine of special circumstances was traditionally applied at common law and under Rule 5.04(2).

17 Section 20, however, preserves the extension, suspension or other variation of a limitation period "by or under another Act." The question that therefore arises is whether the special circumstances doctrine that courts have applied at common law and in conjunction with the *Rules of Civil Procedure* constitutes "the extension, suspension or other variation of a limitation period or other time limit *by or under another Act*." [Emphasis added.]

18 This court recently considered the interpretation and effect of s. 20 in *Guillemette v. Doucet* (2007), 88 O.R. (3d) 90, a case that involved the assessment of a solicitor's account under the *Solicitors Act*, R.S.O. 1990, c. S.15. Section 4 of the *Solicitors Act* provides that a client cannot refer an account for assessment more than 12 months after the account was delivered, "except under special circumstances to be proved to the satisfaction of the court". This provision was not altered or repealed by the new Act. The client applied to assess the solicitor's accounts more than 33 months after the last account was paid. However, the application judge allowed the account to be referred for assessment based on the special circumstances exception contained in s. 4.

19 After noting that any limitation periods in the *Solicitors Act* no longer applied by virtue of s. 19 of the new Act, Doherty J.A. explained the effect of s. 20 at paras. 25-33 as follows:

> Section 20 retains in force any "extension, suspension or other variation" of a limitation period found in another statute even if the limitation period in that statute is itself no longer applicable to the claim by virtue of s. 19(1) of the *Limitations Act*. ...
>
> Section 20 of the *Limitations Act* places a further qualification on the application of the limitations periods set out in the Act. Section 20 provides that nothing in the *Limitations Act* will affect a provision in another act which extends, suspends or otherwise varies the limitation period found in another Act. Section 20 recognizes that individual statutes may provide for situations or conditions in which the limitation provisions in those statutes should be extended or modified. Those provisions may well be particularly apt for the limitation period addressed in that specific statute. The *Limitations Act* does not seek to standardize the circumstances in which limitation periods can be extended, suspended or otherwise varied by statute.
>
> I think the "special circumstance" qualifier in s. 4 of the Solicitors Act falls within s. 20 of the Limitations Act. The twelve month time period in s. 4 has

repeatedly been described as a limitation period: see e.g. *Enterprise Rent-a-Car Co. v. Shapiro, Andrews, Finlayson* [(1998), 38 O.R. (3d) 257 (C.A.)] at 260-61. Where "special circumstances" exist, the court will order an assessment beyond twelve months after delivery of the account, thereby effectively extending, suspending or otherwise varying the twelve month time limit set out in s. 4.

Consequently, while by virtue of s. 19 of the *Limitations Act*, the two year limitation period in that Act trumps the twelve month limitation period in s. 4, s. 20 of the *Limitations Act* preserves the "special circumstances" exception set out in s. 4 of the *Solicitors Act*.

20 Doherty J.A. acknowledged that the effect of his interpretation of the interaction of the two acts in accordance with ss. 19 and 20 of the new Act was that there is no absolute time bar against the assessment of solicitors' accounts, and that that result may seem inconsistent with the purpose of the new Act, which is to provide certainty in the area of limitations. However, he justified that inconsistency on the basis that solicitors' accounts have always been treated differently from other debts or professional accounts, including the fact that the Superior Court has inherent jurisdiction to review those accounts without any time restrictions.[2]

21 Turning to the interpretation of s. 20 in the context of the common law doctrine of special circumstances, the requirement in s. 20 that the extension must be "by or under another Act" clearly precludes any extension that may be granted at common law as opposed to statute.

22 However, the extension need not be provided only "by" an Act but can also be provided "under" an Act. The *Rules of Civil Procedure* are enacted by the Civil Rules Committee under the authority of s. 66 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Although the Rules are permitted to alter the substantive law in matters relating to practice and procedure, s. 66(3) provides that the Rules may not conflict with an Act.

23 In accordance with s. 66(3), rules 5.04 and 26.01 must not conflict with the new Act, or with the former Act. These rules apply to the amendment of pleadings and the addition of parties at any stage of proceedings. They do not by their terms apply to extend the statutory limitation periods provided in the new Act, nor could they. But they have been used for that purpose through the application of the common law doctrine of special circumstances.

24 Because the Rules themselves are authorized to be made by the *Courts of Justice Act*, they are arguably made "under another Act". However, it is only the interpretation of the Rules by application of the common law that has incorporated the doctrine of special circumstances to extend limitation periods by adding parties or claims after the expiry of a limitation period. The Rules themselves do not do this. In my view, it would be extending the meaning of "under another Act" too far to interpret it as including the application of common law principles used to apply the Rules, even though the Rules themselves are made by regulation "under another Act".

25 I am reinforced in my view by s. 21 of the new Act, which specifically prohibits the addition of parties to an existing action after the expiry of the limitation period. Section 20 would conflict with s. 21 if it were interpreted to extend to the incorporation of the common law special circumstances doctrine, thereby allowing the possible addition of parties after the expiry of the limitation period where special circumstances exist, in conflict with s. 21.

26 This interpretation is also responsive to the concern raised by Doherty J.A. in *Guillemette* that interpreting the new Act to always allow for the possibility of extensions in special circumstances would effectively remove the time bar for adding claims after the expiry of the limitation period. Doherty J.A. addressed this concern in the context of that case by pointing to the unique and special nature of solicitors' accounts. However, if s. 20 were interpreted to include the extension of limitation periods generally by the common law doctrine of special circumstances under the Rules, the effect would be contrary to the purpose of the new Act by removing the certainty of its limitation scheme. Instead, we would continue with the procedure that developed under the former Act where courts were asked to consider in detail the actions of solicitors who missed limitation periods by neglecting to add parties or claims, and to assess in each case whether there should be relief. Because an extension is a matter of discretion, there was always uncertainty and the perception of a degree of unfairness in the application of limitation periods. In my view, to the extent that there may be any ambiguity in s. 20, it should be interpreted in a manner that addresses these concerns and implements the purpose of the new Act.

CONCLUSION

27 I conclude that s. 20 does not refer to the extension of a limitation period under the new Act through the application of the common law doctrine of special circumstances to the *Rules of Civil Procedure*. Rules 5.04(2) and 26.01 must now be applied giving effect to the new Act.

28 In that regard, I add for the sake of completeness that the decision of the motion judge, which followed a line of cases in the Superior Court where extensions were granted that did not involve any amendment of or addition to an existing action, was an error of law even had the doctrine of special circumstances applied. Both the common law doctrine from *Basarsky v. Quinlan* and the *Rules of Civil Procedure* contemplate only the power to amend or add a claim or party to an existing action. They did not give the court the authority to allow an action to be commenced after the expiry of a limitation period.

29 For these reasons, I would allow the appeal and make an order declaring the action statute barred, with costs of the motion and of the appeal to the appellant, fixed in the amount of $5,000, inclusive of G.S.T. and disbursements.

K.N. FELDMAN J.A.
J.L. MacFARLAND J.A.:-- I agree.
D. WATT J.A.:-- I agree.

* * * * *

A new paragraph [1] has been added and in paragraph [2] the reference is "the new Act" instead of the "*Limitations Act*" which is now in paragraph [1].

cp/e/qlkxl/qlclg/qlesm/qltxp/qlcxm/qlesm/qlhcs/qlhcs/qlcas/qlrxg/qlhcs

1 These cases are: *St Denis v. TD Insurance Home and Auto liberty Insurance Co of Canada* (2005), 80 O.R. (3d) 76 (S.C.J.); *Doyley v. York Condominium Corp. No. 487* (2006), 82 O.R. (3d) 629 (S.C.J.); *Munshaw v. Economical Mutual Insurance Co.* (2007), 84 O.R. (3d) 785 (S.C.J.).

2 In contrast to *Guillemette*, in *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, [2008] O.J. No. 1581, 2008 ONCA 320, the statutory provision in the *Professional Engineers' Act* that contained the limitation period and that permitted the discretionary extension of the limitation period was repealed by the new Act, thereby removing any statutory extension provision for s. 20 to operate on.

MICHAEL JACK and **HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO et al.**

Plaintiff **Defendants**

Court File No. CV-12-470815

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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