SUPREME COURT OF YUKON

Citation: *Estate of Malik et al.* v. *Estate of Sidat* and *Malik et al.* v. *Security National Insurance Company,* 2009 YKSC 43

Date: 20090430
Docket S.C. No.: 07-A0147
Registry: Whitehorse

BETWEEN:

THE ESTATE OF KHALID MALIK, DECEASED, NAHEED MALIK, and LUQMAN MALIK, HALEEMA MALIK and BISMAH MALIK, INFANTS, BY THEIR LITIGATION GUARDIAN MUHAMMED JAVED

Plaintiffs

AND:

THE ESTATE OF NOAMAN SIDAT, DECEASED

Defendant

07-A0153

AND BETWEEN:

NAHEED MALIK, and LUQMAN MALIK, HALEEMA MALIK and BISMAH MALIK, INFANTS, BY THEIR LITIGATION GUARDIAN MUHAMMED JAVED

Plaintiffs

AND:

SECURITY NATIONAL INSURANCE COMPANY

Defendant

Before: Mr. Justice H. Groberman

Appearances:

Daniel Shier	Appearing for the Plaintiffs on 07-A0147
Norah Mooney	Appearing for the Plaintiffs on 07-A0153
William Hembroff	Appearing for the Defendant on 07-A0147
Richard Buchan	Appearing for the Defendant on 07-A0153

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] GROBERMAN J. (Oral): I have before me applications in two matters to strike portions of the statements of claim. The matters are related and I shall treat this as an application in the matter of the estate of Khalid Malik against the estate of Noaman Sidat, deceased. It is common ground, I think, that the other action against an insurer must stand or fall in the same manner as the primary action between the estate of Malik and the estate of Sidat.

[2] These are claims arising out of the death of Khalid Malik, who died on July 24, 2006, in a motor vehicle accident. The defendant, Mr. Sidat, also died in the accident, and it is alleged that he was the driver of the motor vehicle and was negligent. An action was not brought until February 15, 2008. At issue on this application are claims that arise under the *Fatal Accidents Act*, R.S.Y. 2002, c. 86, in favour of Mr. Malik's wife and his children. The defendant argues that the claims are time-barred, not having been brought within the one-year period provided by s. 8(4) of the *Fatal Accidents Act*. That section provides as follows:

> Except if it is expressly declared in another Act that it operates despite this Act, an action, including an action to which subsection 2(5) or (6) applies, may be brought under this Act within one year after the death of the deceased, but, subject to subsection 5(4), no such action shall be brought thereafter.

[3] It is common ground that apart from sections of the *Survival of Actions Act*, R.S.Y. 2002, c. 212, that I will refer to, none of the other provisions described would extend the time period beyond one year from the date of death of the deceased.

[4] The *Survival of Actions Act* provides in s. 4 that certain actions against a deceased are preserved and survive the death of that person. Section 9(3) of that Act

states that:

> Proceedings on a cause of action that survives under section 4 may be brought
>
> (a) within the time otherwise limited for the bringing of the action, which shall be calculated from the date the damage was suffered; or
>
> (b) within one year from the date the damage was suffered, whichever is the longer period.

[5] As I read s. 4 of the *Survival of Actions Act* it is in broad enough terms to cover claims under the *Fatal Accidents Act*, and as I read s. 9(1) of the *Survival of Actions Act* it clearly applies explicitly, notwithstanding any provision in the *Fatal Accidents Act*. The result is that under the *Fatal Accidents Act* there is a one-year limitation from the date of the deceased's death, and under the *Survival of Actions Act* there is a one-year limitation from the date damage was suffered.

[6] The first issue in this case is whether the application as brought ought to succeed. It has been brought under Rule 18 and Rule 20. In my view this is not a claim that can be struck under Rule 20 since it depends on a pleading of a defence. Because Rule 20 will apply only when the statement of claim does not state a proper cause of action it appears to me that, at least in the action against the Sidat estate, Rule 20 cannot be used. It may be that Rule 20 is apt in the insurer's defence because that action depends upon the success of the Sidat action, and therefore if the Sidat action is dismissed under Rule 18, conceivably Rule 20 would be sufficient to strike the claims in the other action.

[7] It is clear to me that the causes of action that are challenged should be struck

from the statement of claim unless an argument can be made that the limitation periods set out in the *Fatal Accidents Act* and *Survival of Actions Act* can be extended under the doctrine of discoverability or disability.

[8] The doctrine of discoverability serves to extend a limitation period so that it does not start to run until such time as material facts needed to found the cause of action are reasonably discoverable.

[9] The doctrine of disability provides that a person who is disabled from bringing an action by mental infirmity or being an infant does not have time run against him or her until such time as the disability is cured.

[10] In my view, the limitation period cannot be extended in this case on the basis of the ground of disability. It is clear in the *Statutes of Yukon* that there is no intent that all limitation periods be extended for disability, and in particular I note that within the *Limitation of Actions Act,* R.S.Y. 2002, c. 139, s. 5 extends the limitation period for persons under disability only for certain types of action and not others. There is nothing in either the *Fatal Accidents Act* or the *Survival of Actions Act* that can be read as extending the periods for persons under disability.

[11] I also note that under the *Fatal Accidents Act* it is normally the executor or the administrator that is to bring the action, and in my view it is not appropriate to read the *Act* as allowing an extension in cases where minors may benefit from the action.

[12] That leaves the doctrine of discoverability, which has been the subject of considerable litigation in Canada. The general rule with respect to discoverability has

been set out in the cases of *Peixeiro* v. *Haberman*, [1997] 3 S.C.R. 549, and in the case of *Fehr* v. *Jacob (Man. C.A.)*, 1993, 14 C.C.L.T. (2d) 200. In the *Fehr* v. *Jacob* case, which was quoted with approval by the Supreme Court of Canada in *Peixeiro*, it was said:

> In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

[13] That general rule was also applied by the Ontario Court of Appeal in the case of *Waschkowski* v. *Hopkinson Estate*, 2000, 47 O.R. (3d) 370. In that case Justice Abella J.A., as she then was, explained at paras. 8 to 9 that the limitation period in the *Trustee Act*, R.S.O. 1990, c. T.23, was not extended by discoverability. She quoted from *Peixeiro* and held that "there is no temporal elasticity possible when the pivotal event is the date of a death."

[14] In the case of *Czyz* v. *Langenhahn,* 1998, 158 D.L.R. (4th) 615, the Alberta Court of Appeal was called upon to interpret a section of the *Limitations of Actions Act*, R.S.A. 1980, c L-1 5, which provided that an action

> … for negligence or malpractice by reason of professional services requested or rendered may be commenced within one year from the date when the professional services terminated in respect of the matter that is the subject of the complaint but not afterwards.

The Court, citing *Fehr* v. *Jacobs, supra,* held that that period could not be extended by the discoverability doctrine.

[15] On the face of it, the legislation we are here considering is similar. The provision in the *Fatal Accidents Act* explicitly provides that the action shall be brought within one year of the death of the deceased. While the language in the *Survival of Actions Act* is less clear, in that it depends on the date the damage arises, it seems to me that there is no issue here with respect to determining the date of death.

[16] Were there no other case law on the issue, I would have thought that the analysis in the *Fehr* case would apply and that the one-year limitation period cannot be extended by the doctrine of discoverability. There are, however, two Canadian cases that suggest otherwise.

[17] The first is the decision of Mr. Justice Vertes in the Supreme Court of the Northwest Territories in *Norn* v. *Stanton Regional Hospital*, [1998] N.W.T.J. No. 88. In that case a statute which is similar in all material respects to the Yukon *Fatal Accidents Act* was construed as allowing discoverability because the cause of action depended on the death being wrongful. Thus, notwithstanding that the *Act* provided for a one-year limitation from the date of death, Mr. Justice Vertes concluded that it was at least arguable that the discoverability doctrine applied. He therefore refused to strike the claim on a summary judgment application.

[18] In the case of *Burt* v. *LeLacheur*, 2000 NSCA 90, the Nova Scotia Court of Appeal held that the doctrine of discoverability applied to a statute that set the date of death as the date from which the limitation was to be measured.

[19] The most recent authoritative decision in this area is the 2005 decision of the Supreme Court of Canada in *Ryan* v. *Moore*, [2005] S.C.J. No. 38. In that case the Court cited *Fehr* and *Peixeiro,* with approval, and also relied on the *Waschkowski* case. On the face of it, that decision suggests that no extension can be provided where there is a clear event that is supposed to be the commencement of the limitation period.

[20] Were it not for the Supreme Court of Canada's discussion of the *Burt* v. *LeLacheur* case I would have no hesitation in finding that that case held that legislation of the sort we are here considering is not subject to extension by discoverability. However, in the *Ryan* case, the Supreme Court of Canada cites *Burt* v. *LeLacheur* and, rather than finding it wrongly decided, distinguishes it, saying at para. 30:

> In *Burt*, the death of a person for which an action can be brought under the *Fatal Injuries Act* does not merely refer to the time of death as provided in the *Survival of Actions Act*, but to a "wrongful death". It is not an event totally unrelated to the accrual of the cause of action. Hence, the death of the person there is in fact a "constituent element of the cause of action", contrary to the present case.

[21] The *Ryan* case, then, seems to suggest that in addition to the question of whether a statute provides for a specific event as the beginning of a limitation period, one must also look to the constituent elements of a cause of action. To the extent that that can be read as the ratio of the *Ryan* case, it would appear that discoverability might be read into a statute such as Yukon's *Fatal Accidents Act*.

[22] In my view, the matter being complex and not free from doubt, it is not an appropriate one to be decided under Rule 18. In particular, it seems to me that if there are complex legal issues to be decided, it makes sense that they be decided in the

context of either a summary trial under Rule 19 or after trial, so that if the matter is appealed on an issue of law it is appealed together with any other matters that are appealable rather than being dealt with separately. It would be a different matter if the issue was a straightforward issue of law; however, in my view, Rule 18 is not an appropriate vehicle to decide a complex issue of law such as the one that I have before me.

[23] That is not the end of the matte, though, because even assuming discoverability might be a factor under the statute, it is clear from the decision of this Court in *Malcolm* v. *Kushniruk*, 2005 YKSC 51, that the onus in a summary judgment application will be on the plaintiff to demonstrate that there is some case to be put forward on the issue of discoverability.

[24] The evidence that I have before me consists of the affidavit of Muhammed Javed, who is the litigation guardian in this matter. He deposes to the situation of Naheed Malik, the widow of Khalid Malik, in the period following his death, and he deposes that she was in difficult circumstances, with limited abilities in English and limited support in Canada. She ultimately returned to Pakistan, where she continues to reside.

[25] The affidavit, I must say, is very weak in terms of showing that the plaintiff, Naheed Malik, could not reasonably have discovered the material facts necessary to bring this action during the limitation period and, indeed, quite quickly after the death of her husband. It is weak evidence but it is not no evidence. Were this, again, a summary trial I would have no hesitation in finding the affidavit insufficient for the plaintiff to meet

the onus on her in respect of discoverability. The evidence does, however, go far enough, it seems to me, on a summary judgment application to show that the matter is not completely devoid of merit and to demonstrate that it is appropriate that the matter not be struck under Rule 18.

[26] For that reason, I decline to strike the portions of the statement of claim that are in issue. Costs will be in the cause.

[27] Counsel, there was a third application, that being an application for amendment. I take it, given my reasons, that that application should be allowed, or am I wrong in that regard?

[Submissions re amendment application]

[28] This is an application to amend the statement of claim to allege that the action is brought pursuant to the *Fatal Accidents Act*. The original statement of claim alleged that the action was brought pursuant to the *Survival of Actions Act*.

[29] As I understand it, and I do not have the statement of claim in front of me right now, the reference to the *Survival of Actions Act* was to s. 2. In fact, the action in part is brought pursuant to s. 4 of the *Survival of Actions Act* through the *Fatal Accidents Act*.

[30] The defendant argues that there may be prejudice to it in that this application is brought after the expiry of the limitation period. I have ruled in earlier reasons this afternoon that it is not entirely clear that the matter ought to be dismissed on the limitation period argument. Nonetheless, the defendant suggests that further prejudice might arise in that we are now well beyond the date on which the statement of claim

was filed and, further, a further period of time has passed.

[31] In my view, the suggested amendment is not prejudicial to the defendant. It will not extend the limitation period, in the sense that the limitation period did not cease to run until the date that the writ of summons was filed. I do not see any prejudice arising due to the amendment as a result of the fluxion of time between the date of filing of the writ and today's date, because in my view it was not, and is not, necessary to refer to the *Fatal Accidents Act*.

[32] Rule 20 provides that:

> A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

[33] With respect to objections on points of law or pleadings on conclusions of law, both Rule 20(9) and 20(10) are permissive in allowing conclusions of law or objections of law to be contained in pleadings. While it is good pleadings practice to include reference to a statute that is relied upon, it is not necessary to do so, and therefore the absence of the reference to the *Fatal Accidents Act* - no pun intended, but - is not fatal.

[34] In the result, the amendment, while consistent with good pleadings practice and while it assists in defining the action more carefully, is not necessary, and therefore its inclusion will not in any way prejudice the defendant. I am, therefore, going to allow the amendment.

[35] For simplicity's sake I am going suggest as well, although it is not asked for, that I allow an amendment to plead s. 4 of the *Survival of Actions Act*. I will not do that if that

is objected to on grounds that are not already covered by my decision, but it just seems to me that it ought to be in the pleading. Mr. Hembroff, do you have any objection to that?

[36] MR. HEMBROFF: No objections, My Lord. I understand the point.

[37] THE COURT: All right, thank you. I do not want you to have to come back. All right, thank you, and costs of this application, unless there is argument otherwise, will be in the cause. Is there any --

[38] MR. HEMBROFF: The only point, I just noted from that decision that I got from Justice Manderscheid just recently, is that the application of the plaintiff was successful to amend, and his view was that regardless of success or failure of that application, an application to amend, costs go to the opposite party.

[39] THE COURT: Were you not here already, and had I --

[40] MR. HEMBROFF: I was here already, sir.

[41] THE COURT: -- been under the impression that you spent a great deal of time on this --

[42] MR. HEMBROFF: I was here already, sir, so.

[43] THE COURT: -- I would have granted you costs, but --

[44] MR. HEMBROFF: Right, but --

[45] THE COURT: -- given the circumstances, I am not going grant the

costs except as costs in the cause. Sorry, I am sorry, there will be no costs of this application. Is that your point?

[46] MR. HEMBROFF: Yeah, that's my point. I thought if --

[47] THE COURT: Sorry, I am confused. Yes, there will be no costs of this application.

[48] MR. HEMBROFF: Right. Thank you. My Lord, just, I think it was probably implicit but not explicit, with respect to my application, costs in the cause as well?

[49] THE COURT: Yes.

[50] MR. HEMBROFF: Okay.

[51] THE COURT: Yes.

[52] MR. HEMBROFF: Thank you.

[53] THE COURT: Thank you, Mr. Hembroff.

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GROBERMAN J.