IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Malcolm* v. *Kushniruk*, 2005 YKSC 51 Date: 20050912
Docket No.: S.C. No. 02-A0065
Registry: Whitehorse

Between:

RONELDA MALCOLM

Plaintiff

And:

JOHN KUSHNIRUK and
ROBIN KUSHNIRUK

Defendants

Before: Mr. Justice L.F. Gower

Appearances:
Timothy S. Preston, Q.C. for the Plaintiff
Mr. Ray Baril, Q.C. for the Defendants

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for summary judgment by the defendants on the ground that the plaintiff failed to commence her action within the two-year limitation period. The plaintiff was injured in a motor vehicle accident on July 23, 2000. The writ of summons was not filed until August 6, 2002, more than two years later. Section 2(1)(d) of the *Limitation of Actions Act*, R.S.Y. 2002, c. 139 (the "*Act*") states that personal injury actions are to be commenced "within two years after the cause of action arose".

[2] The parties acknowledge that the cause of action arises when the plaintiff first becomes aware, or should reasonably have known, that some damage has occurred and has identified the other party allegedly responsible (the "tortfeasor").[1] Putting it another way, a cause of action arises when the material facts on which it is based have been discovered, or ought to have been discovered through the exercise of reasonable diligence.[2] This latter phrase has been referred to alternately as the discoverability principle or the discoverability rule. The material facts include both the plaintiff's awareness of the damage or injury and the knowledge of the other party's identity.

[3] In this case, the plaintiff concedes that she was aware of her personal injury from the date of the accident, or in any event prior to August 6, 2000, which is more than two years before the filing of the writ of summons. However, the plaintiff says that she did not learn the identity of the defendants until several days after the accident. She argues that the onus is on the defendants to prove conclusively that she became aware of their identity more than two years before the filing of the writ and since they have not, then the limitation period does not bar her from commencing this action. The defendants' position is that the plaintiff either became aware of their identity more than two years prior to the filing of the writ of summons, or that she could have discovered their identity with the exercise of reasonable diligence. The defendants also submit that the onus is on the plaintiff to establish that the cause of action arose within the limitation period.

ISSUES

[4] The issues in this application are as follows:

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[1] *Peixeiro* v. *Haberman*, [1997] 3 S.C.R. 549, at para. 18.
[2] *Kamloops (City of)* v. *Nielson*, [1984] 2 S.C.R. 2; *Central Trust Co.* v. *Rafuse*, [1986] 2. S.C.R. 147; and *Ryan* v. *Moore*, 2005 SCC 38.

1. When a limitation defence is raised, who bears the onus of establishing when the plaintiff knew the material facts (in this case, the identity of the defendants), or could have discovered those material facts with the exercise of reasonable diligence?
2. When could the plaintiff, with the exercise of reasonable diligence, have discovered the identity of the defendants?
3. When did the plaintiff actually learn the identity of the defendants?
4. Is the plaintiff's claim barred by the limitation period?

ANALYSIS

#1 When a limitation defence is raised, who bears the onus of establishing when the plaintiff knew the material facts (in this case, the identity of the defendants), or could have discovered those material facts with the exercise of reasonable diligence?

[5] It is acknowledged that the defendants were identified in the police report of the accident. However, the parties have different interpretations of the plaintiff's evidence at her examination for discovery about when she received that report. Her evidence included the following questions and answers:

> "Q Okay. The police prepared a report on the accident?
> A Yes.
> Q Did the Police give you a copy of that report?
> A Yes.
> Q Did the police give you a copy of that report at the scene of the accident?
> A No.
> Q When did they give that to you?
> A I got that report after I had my surgery.
> Q How long after the surgery?
> A I – you know what, I can't give you an exact date, but it could have been a week to ten days approximately, but I'm not positive of what day.
> Q All right.

> A All I know is I had my surgery, and when I got home I had to, I phoned and phoned and phoned, finally they brought the report to me."

[6] The plaintiff had her surgery in the hospital on July 27, 2000. In her first affidavit she attached as an exhibit her statement to the insurance adjuster dated August 9, 2000. In that statement she said she was discharged from the hospital on July 30, 2000. The plaintiff's counsel argued that it is not clear from the questions and answers I have just quoted whether the plaintiff received the police report "a week to ten days approximately" after the date of her actual surgery or after the date of her discharge from hospital. If the plaintiff intended to mean the former, then she might have received the police report as early as August 4th. If she intended to mean the latter, then she would have received the police report on or after August 7th. The plaintiff's counsel goes on to argue that, as the knowledge of the other driver's identity is a material fact in this case, and as the defendants have failed to establish on a balance of probabilities that the plaintiff was in possession of all material facts prior to August 6, 2000, they therefore cannot prove that the cause of action arose more than two years before August 6, 2002, when the action was commenced.

[7] The plaintiff provided no case authority for the proposition that the defendants have the burden of proof here. Plaintiff's counsel simply argued that it was up to the defendants to "prove" the limitation defence, as with any other defence. However, at the hearing, plaintiff's counsel appeared to concede that because the reasonable diligence of the plaintiff is an issue in this context, at the very least, an evidentiary burden must fall upon the plaintiff to establish the relevant facts and conduct capable of constituting

reasonable diligence, as those would generally be expected to be within her knowledge, and not within the defendants' knowledge.

[8] Counsel for the defendants argued that when a defendant pleads a limitation period as a defence, the onus is on the plaintiff to prove that the cause of action arose within the limitation period: *Carleton Condominium Corp. No. 21* v. *Minto Construction Ltd*., [2004] O.J. No. 597, at para. 10 (Ont. C.A.), affirming *Carleton Condominium Corp. No. 21* v. *Minto Construction Ltd.*, [2001] O.J. No. 5124, at para. 208. In other words, the "limitation clock"[3] does not begin to run until the cause of action arises and it is up to the plaintiff to prove when the cause of action arose. I agree.

[9] In *Ryan* v. *Moore,* cited above, the Supreme Court of Canada noted that in some provinces the discoverability rule has been codified by statute. For example, in British Columbia the plaintiff bears the burden of proving that the running of the "limitation clock" has been postponed in a particular case. In *Novak* v. *Bond*, [1999] 1 S.C.R. 808, McLachlin J., as she then was, speaking for the majority, was discussing the provisions of the British Columbia *Limitation Act,* R.S.B.C. 1996, c. 266, at para. 69, where she said:

> "… the Act contains provisions aimed at treating plaintiffs fairly. For example, s. 6(3) to (5) ***reflect the common law view*** that it is unfair to the plaintiff if the running of time commences before the existence of the cause of action is reasonably discoverable. To determine when the running of time should commence … the court is generally directed to consider the actions of a reasonable person in the particular plaintiff's circumstances. … ***the plaintiff bears the burden*** of proving that, on the basis of these tests [as set out in the legislation], the running of time has been postponed in a particular case … "
>
> (emphasis added)

[3] *Ryan* v. *Moore,* cited above, at para. 27.

[10] Thus, British Columbia is an example of a jurisdiction which has codified the discoverability principle in its *Limitation Act*. Further, that statute clearly places the burden of proof on the plaintiff to prove that the discoverability principle applies and that the running of the limitation clock should be postponed in a particular case. Finally, the Supreme Court of Canada has recognized that statutes such as the one in British Columbia "reflect the common law view," which is that the plaintiff bears the onus here.

[11] Accordingly, the plaintiff must establish the date the cause of action arose. One would normally expect the cause of action to arise on the date of the accident.[4] Therefore, if the action was commenced more than two years after the date of the accident, it falls to the plaintiff to establish the cause of action did not arise on that date because:

a) she did not learn all of the material facts until a later date, which is within two years from the commencement of the action; and

b) she could not, even with reasonable diligence, have discovered those material facts until that later date.

#2 When could the plaintiff, with the exercise of reasonable diligence, have discovered the identity of the defendants?

[12] The plaintiff's next argument is that she was reasonably diligent in attempting to discover the name of the defendant driver. In her examination for discovery and her first affidavit, the plaintiff provided details of her circumstances commencing from the date of her surgery, on July 27, 2000. In her affidavit she describes how she was suffering from considerable pain and anxiety for several weeks after her discharge from hospital. At

[4] *Somersall* v. *Friedman,* 2002 SCC 59, at para. 30.

her examination for discovery, after admitting she could not provide the exact date she received the police report, she said:

> "All I know is I had my surgery, and when I got home I had to, I phoned and phoned and phoned, finally they brought the report to me."

[13] However, I indicated to plaintiff's counsel that I found it strange there was a lack of sworn evidence from the plaintiff detailing her circumstances over the earlier period from the date of the accident until the date of her surgery, more than three clear days later.

[14] For example, In both her statement to the insurance adjuster and her examination for discovery, she said that her husband was with her in the vehicle at the time of the accident. Although she was advised by the police to remain in the vehicle, her husband got out of the vehicle and, apparently, had some communication with the driver of the other vehicle. Indeed, one could infer from the following discovery evidence that the plaintiff's husband did obtain information about the identity of the other driver, but simply didn't write it down:

> "Q Did your husband get out of the vehicle at the scene?
>
> A Yes, he did.
>
> Q Did your husband note down information concerning the name of the driver of the other vehicle"
>
> A Did he write it down?
>
> Q **Did he get the information as to who was, who had impacted the rear of the vehicle you were driving?**
>
> A **He didn't write it down**. I know he told everybody to stay until the police came.

Q Okay. Did your husband know Mr. Kushniruk?

A No.

Q Did he take down the licence number of the vehicle?

A I don't know.

Q Did he take down the insurance details of the other vehicle?

A No. Oh, I don't know. I shouldn't say no, that's wrong. I don't know."

(emphasis added)

[15] What is particularly curious about this point is that the defendants' counsel made a specific request of plaintiff's counsel to confirm whether or not the plaintiff's husband obtained any information about the driver of the other vehicle. While the plaintiff's counsel says that he responded to that request, the defendants' counsel has no record of having received such a response. As a result, there is no clear evidence before me on this summary judgment application as to what, if anything, the husband learned about the identity of the other driver.

[16] On the other hand, to the extent one can infer that the plaintiff's husband did learn of the identity of the other driver, it becomes more difficult for the plaintiff to argue that she was reasonably diligent if she made no attempt to discover that information from her husband. Unfortunately, there is no evidence from the plaintiff to clarify this point. In any event, let me be clear that I do not base my conclusion on this inference, but rather on what follows.

[17] It is apparent from the plaintiff's discovery evidence and her statement to the insurance adjuster that she had at least two conversations with the police on the day of

the accident. The first was at the scene of the accident just prior to the arrival of the ambulance which took her to the hospital. The second was after the plaintiff was released from hospital, when she says she went to the police station to provide her statement (presumably the mandatory statement required under s. 95(1) of the *Motor Vehicles Act*, R.S.Y. 2002, c. 153).

[18] This latter reference to her attendance at the police station was not part of the plaintiff's discovery evidence, nor was it addressed in her first affidavit. It appears only in her statement to the insurance adjuster and it prompted me to ask the plaintiff's counsel about the time from the date of the accident until the date of her surgery. It seems to me that during that period of time, again more than three clear days, one would logically and naturally expect the plaintiff to be curious about the identity of the other driver. In particular, one would reasonably expect the plaintiff to have asked the police about the identity of the other driver either at the scene or at the police station later that same day. There is no evidence that the plaintiff was physically incapacitated or suffering to the extent that she was unable to ask such a question of the police on the date of the accident. On the contrary, she was well enough to attend at the detachment to provide her statement.

[19] Admittedly, in her statement to the insurance adjuster the plaintiff did say that the day after the accident, July 24th, she started to have pain in her stomach and, on July 25th, she went to see her family doctor who advised her she had a hernia. She then consulted with another doctor on July 26th and was scheduled for surgery on July 27th. While the plaintiff was undoubtedly preoccupied with her injuries over this period, she was still able to attend two medical appointments. Yet, there is no evidence from the

plaintiff to explain whether she also made an attempt to discover the identity of the other driver over this time period, or if not, why not.

[20] In *Peixeiro*, cited above, at para. 18, Major J., delivering the judgment of the Supreme Court of Canada said:

> "It was conceded that at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period."

This comment was made in the context of the determination that the plaintiff does not need to know the exact extent of her loss for the cause of action to arise. Once she knows some damage has occurred and has identified the party responsible for that damage, the cause of action has accrued.

[21] However, the point can also be made that "ignorance" of the identity of the other party does not delay time under a limitation period either, if that ignorance is the result of the plaintiff's failure to investigate. As McLachlin J., as she then was, said in *Novak* v. *Bond*, cited above, at para. 65, "There is a burden on the plaintiff to act reasonably". Aitken J. of the Ontario Superior Court of Justice in the *Carleton Condominium* case, cited above, reflected that principle at para. 211:

> "The plaintiff is required to act with due diligence in acquiring facts in order to be fully appraised of the material facts upon which a negligence claim can be based."

In my view, this duty also applies to the plaintiff's obligation to ascertain the name of the alleged tortfeasor.

[22] Thus, I am satisfied that the plaintiff could have, by exercising reasonable diligence, learned the identity of the other driver, and ultimately, the identity of the owner

of the other vehicle (the defendants), either on the day of the accident, or at some point prior to the surgery on July 27th.

#3 When did the plaintiff actually learn the identity of the defendants?

[23] A significant part of the argument between counsel was whether the plaintiff had actual notice of the identity of the other driver more than two years before the action was commenced on August 6, 2002. The plaintiff's counsel argued that his client's answer in her discovery - that she did not receive the police report for "a week to ten days approximately" after her surgery - allows for the possibility that she may not have received that report until on or after August 7, 2000. That would mean the cause of action arose within two years of the commencement of the action, and the limitation defence would fail. The defendants' counsel stressed that the plaintiff's answer in her discovery on this point must be interpreted to mean a week to ten days after the date of her surgery, and not the date of her release from hospital. However, the point is moot, as I have found that the plaintiff could have, by exercising reasonable diligence, discovered the identity of the other driver prior to her surgery on July 27th.

#4 Is the plaintiff's claim barred by the limitation period?

[24] In the alternative, plaintiff's counsel argued that even if the discoverability principle operates against the plaintiff, a "contextual view" of her circumstances dictates that her action should not be statute barred. The plaintiff's counsel stressed the injuries suffered by the plaintiff and said that even if she had known all the material facts prior to August 6, 2000, she was still recovering from her injuries on that date. Presumably, this is put forward as an explanation for why the plaintiff did not commence her action sooner. In any event, the plaintiff's counsel says that the "dates in question are so close

as to be in the *de minimis* range". I presume he is referring to the short period of time between the date of the accident on July 23rd and August 6th, 2000, when the two-year period prior to the filing of the writ of summons commenced.

[25] The reference to the need to take a more contextual view of the parties' circumstances comes from the comments of McLachlin J., as she then was, in *Novak* v. *Bond*, cited above, at para. 65. There, she was referring to the fact that many legislatures have moved to modernize their limitations statutes and that as part of that process, attention has been given to ensuring that the statutes address more consistently the plaintiff's interests and not just those of the defendant. In that context she said the following:

> "… Arbitrary limitation dates have been discouraged in favour of a more contextual view of the parties' actual circumstances. To take just one example, it has been well-recognized that it is unfair for the limitation period to begin running until the plaintiff could reasonably have discovered that he or she had a cause of action … Even on this new approach, however, limitation periods are not postponed on the plaintiff's whim. There is a burden on the plaintiff to act reasonably."

[26] In my view, this comment about taking "a more contextual view" was clearly referring to the new legislation across the country dealing with limitations. It was not a statement of the common law. Some of these statutes, for example the British Columbia *Limitations Act* previously noted, have indeed codified the discoverability rule. However, there are also provisions within these various statutes which take into account other particular circumstances of the case, for example, "the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action": Nova Scotia *Limitation of Actions Act*, R.S.N.S., c. 258, s. 3(4)(e), as discussed in *Smith* v. *Clayton*,

[1994] N.S.J. No. 328, at para. 12. It is those types of other circumstances, together with the principle of discoverability, which I believe McLachlin J., as she then was, was referring to in talking about the legislatures taking a more contextual view.

[27] Unfortunately for the plaintiff, the Yukon *Limitation of Actions Act* is not among the modernized limitation statutes which McLachlin J., as she then was, was referring to in *Novak*. Certainly, the Yukon legislation does not contain any provisions respecting the circumstances of the parties such as those in British Columbia or Nova Scotia. Therefore, at common law, I can do no more than apply the discovery principle as an "interpretive tool" for construing the *Act*: *Ryan* v. *Moore*, cited above, at para. 23. I do not have jurisdiction to take into account various other particular circumstances of the parties, in particular those of the plaintiff, at whim, but only as they relate to the principle of reasonable discoverability.

[28] In any event, the circumstances which the plaintiff's counsel says are pertinent are her injuries and her recovery from surgery and these are the same circumstances which I have already discussed in applying the discoverability principle. Therefore, I fail to follow the argument of the plaintiff's counsel that even if I decide the discoverability principle operates against his client, that a contextual view of her circumstances, (i.e. her injuries) would dictate that her action should not be statute barred.

[29] Finally, I wish to address the *"de minimis*" argument. Once again, I disagree with the plaintiff's counsel on this point. As I understood him, when a plaintiff has missed the limitation period by only a few days, as opposed to a few weeks, months or years, there is less prejudice to the defendants, and therefore I ought to take a more lenient view.

Unfortunately, there is no case authority to support that proposition and it is simply not a valid consideration in law.

[30] McLachlin J., as she then was, in *Novak*, cited above, said, at para. 64, that limitations statutes in this country have been held to rest on "certainty, evidentiary and diligence rationales". "Certainty" refers to the right of potential defendants to be secure in their reasonable expectation that they will not be held to account for ancient obligations. The "evidentiary" rationale concerns the desire to prevent claims based on stale evidence. Under the "diligence" rationale, plaintiffs are expected to act in a timely fashion and not "sleep on their rights". While the discoverability rule obviously incorporates the diligence rationale, McLachlin J., as she then was, said at para. 70 that:

> "Certainty and diligence, however, remain important goals. The running of time cannot be postponed indefinitely … Only upon the expiration of the relevant ultimate limitation period can the potential defendant truly be assured that no plaintiff may bring an action against him or her. At that time, any cause of action that was once available to the plaintiff is extinguished. …"

[31] Thus, one of the objectives of limitation periods is that they are definitive of the rights of the parties. In order to be definitive one has to have a fixed and certain date to decide if the limitation period has been missed. It does not matter if, having applied the discoverability rule, the date has only been missed by one day – if it has been missed, the plaintiff is out of luck. Under the Yukon *Limitation of Actions Act*, there is no other reason (except perhaps an agreement between the parties) to extend a limitation period. Certainly, the plaintiff has provided no case authority to suggest otherwise.

[32] Since the plaintiff did not commence this action until August 6, 2002, she has the onus of establishing that her cause of action arose within the two-year period prior to that date. She has failed to meet that onus. Accordingly, her claim is barred by the limitation period in s. 2(1)(d) of the *Limitation of Actions Act*, cited above.

CONCLUSION

[33] The action is dismissed with costs to the defendants.

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GOWER J.