

# Court of Queen's Bench of Alberta

Citation: Knibb v Foran, 2013 ABQB 754

Date: 20131220  
Docket: 0601 05893  
Registry: Calgary

Between:

**Bobby Louis Knibb, a Dependant Adult, by His Guadian Wanda Noren**

Plaintiff

- and -

**Gregory Foran, Foran Equipment Ltd., John Doe I and John Doe II**

Defendants

- and -

**The Carstairs Battle Cats, Adam Piper, Seven Young, John Doe III through John Doe XX, the Carstairs & Community Curling Club, ABC Corporation & DEF Corporation, Weitz Farms Inc., operating as Coaches' Pub, the Coaches' Pub Inc., JS Foong Ventures Inc., operating as Barley's Pub, Barley's Pub, the Town of Carstairs, Scouts Canada Property Society of Alberta, John Doe V., John Doe VI, John Doe VII, GHI Corporation, JKL Corporation and MNO Corporation and Blast Developments Incorporated**

Third Parties

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**Reasons for Judgment  
of the  
Honourable Madam Justice K.M. Eidsvik**

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[1] Bobby Knibb was hit walking along 10<sup>th</sup> Avenue South in Carstairs, Alberta late at night June 5, 2004, by the Defendant Gregory Foran. He had been at a ball tournament and a beer tent

run by the Carstairs Battle Cats baseball team members (the “Battle Cats”). The Stanley Cup finals were on that night – the Calgary Flames lost.

[2] Mr. Knibb was seriously injured and is presently cognitively and physically disabled. His mother, Wanda Knibb, was appointed his guardian and trustee on December 13, 2004, and this was extended on August 8, 2011.

[3] Mr. Knibb, by his guardian, started an action on May 15, 2006 against Mr. Foran and his company. A Statement of Defence was filed on January 18, 2008 and an Amended Third Party Notice was issued on June 12, 2008 against the Battle Cats members, Adam Piper and Seven Young, several un-named John Does, as well as the local curling club.

[4] These Third Party members of the Battle Cats, seek judgement dismissing the Amended Third Party Notice filed against them by way of a summary trial.

[5] They claim that the Third Party Notice was filed against them when the limitation period between them and the Plaintiff had lapsed and, as such, no claim can be brought against them by way of a Third Party Notice or otherwise.

[6] The Defendants and Plaintiff (the “Respondents”) argue that the limitation period against Mr. Knibb has been suspended because he is disabled, pursuant to the provisions of the *Limitations Act*, RSA 2000, and c. L-12. The Third Parties argue that the limitation period was no longer suspended once Wanda Knibb was appointed the guardian and trustee of Mr. Knibb, and that this limitation period has expired.

## Issues

[7] The issues to be reviewed and determined are the following:

1. Threshold issues: Whether this application should be determined at all by way of a summary trial or whether it should go to a full trial on the limitation issues.
2. Evidentiary issues: Whether certain third party affidavits should be allowed, how certain read-ins can be used, and whether certain evidence is hearsay.
3. How section 5 of the *Limitations Act*, which suspends the limitation period, should be interpreted, and more specifically, whether the “claimant” in that section is Bobby Knibb or Wanda Knibb as guardian and trustee.
4. If section 5 does not apply, whether the limitation period has lapsed on the facts of this case pursuant to s. 3 of the *Limitations Act*.
5. If the limitation period has lapsed, and it is not suspended, whether s. 6 (4) of the *Limitations Act* saves the third party claim.
6. If the limitation period has lapsed, whether, by operation of s. 3(1)(c) of the *Tort-Feasors Act* RSA 2000, c. T-5, allows this Amended third Party Notice to be struck.

## Analysis

### 1. Threshold issues – should this application be determined by way of a summary trial?

[8] The Third Parties applied to have the Third Party action dismissed as against them by way of a summary trial pursuant to sections 7.5 – 7.11 of the *Alberta Rules of Court*. The Third Parties refer to the seminal case of *Compton Petroleum Corp v Alberta Power Ltd.* (1999) 242 AR 3 (QB) wherein the Court discussed the fact that the summary trial rules were created so that there could be a summary determination of issues without the need for a full trial in all cases.

[9] The main thrust of the Third Parties' argument is that the limitation period has lapsed and that the factual matrix exists presently to determine this issue. The evidence consists of 38 affidavits filed in this matter, cross examination transcripts, as well as the questioning read-ins of various parties' questioning and an agreed statement of facts.

[10] The Applicants argue that there is no material conflict in the evidence, this is not a complex case, the facts are fairly straightforward and the issue of the limitation period is one of mixed fact and law that can be appropriately determined by summary trial.

[11] The Respondents filed a notice of objection for judgment by way of a summary trial pursuant to *Rule 7.8*. Nonetheless, these parties agree that part of the limitation question can be ruled on, specifically, whether section 5 (1) of the *Limitations Act*, operates here to suspend any limitation period. There is no evidentiary issue with this section 5 argument in that it is a legal question which requires only the filed Guardianship and Trusteeship Orders and the relevant legislation to determine.

[12] On the other hand, the Respondents argue that if I find that section 5 does not apply in these circumstances, then the remaining limitation questions should be sent to trial for resolution. These questions deal with whether the limitation period prescribed in section 3 of the *Limitations Act* has passed (the discoverability section) and if so, whether the provisions of section 6(4) of the *Limitations Act* save the Third Party action.

[13] The Respondents argue that the evidence is conflicting and that any decision will have to make significant credibility findings that could not be sorted out with limited *viva voce* testimony. As such, this part of the limitation question would not be suitable for a summary trial and it would be unjust in these circumstances to proceed with a summary trial on these latter two issues (rule 7.8 (3))

## Discussion

[14] Argument was heard on all of the summary trial limitation issues with the understanding that I would rule on the suitability of a decision on the sections 3 and 6 issues in my decision. I agree with counsel that the section 5 limitation issue is one that can be dealt with appropriately in a summary trial fashion.

[15] For the reasons that follow below, in my view, section 5 of the *Limitations Act* does operate to suspend any limitation period as against the Plaintiff Bobby Knibb indefinitely – or until he is no longer under a disability. Accordingly, the sections 3 and 6 limitation issues will

not need to be dealt with. However, if am wrong on the section 5 interpretation, considering the facts in this case, I believe that it would have been very difficult to rule on the sections 3 or 6 limitation issues in a summary fashion. Some *viva voce* testimony may have helped in this regard, however, it would likely be more expedient in the end to have these issues left for trial.

## 2. Evidentiary Issues

[16] There were several evidentiary objections made at the hearing of the summary trial. They consisted of objections over the use of hearsay evidence and the use of read-ins from questioning against parties other than the ones whose evidence was being read-in.

[17] In my view, these objections were well taken for the most part, but considering that they all deal with issues of evidence surrounding the discoverability issues in sections 3 and 6, they do not need to be dealt with.

## 3. Applicability of the suspension of any limitation period under Section 5 of the *Limitations Act*

### The Third Parties' Position

[18] The Applicant Third Parties argue that the limitation period pursuant to s. 3 (1) had expired prior to the Third Parties being served with the Third Party Notice since Wanda Noren, as guardian and trustee of Bobby Knibb, knew or ought to have known of the claims against the applicant Third Parties, and that the claims warranted bringing a proceeding, for more than 2 years.

[19] The Third Parties anticipated that the Plaintiff and Defendants would assert that section 5 of the *Limitations Act* applies. They were correct. This section states the following:

5(1) The operation of the limitation periods provided by this Act is suspended during any period of time that the claimant is a person under disability.

(2) The claimant has the burden of proving the operation of limitation periods provided by this Act was suspended under this section.

[20] The Third Parties say that the Defendants cannot discharge this burden because this section does not apply on the facts of this case. The *Act* defines "claimant" as "the person who seeks a remedial order". Here, they argue, the "claimant" is Wanda Noren, the guardian and trustee appointed with full power to deal with any lawsuit on behalf of Bobby Knibb. Ms Noren is not disabled, and accordingly the section does not apply.

[21] The Third Parties argue that Ms. Noren has a statutory duty to act in the best interests of Mr. Knibb and that the only harmonious way to interpret the *Limitations Act* in conjunction with the *The Adult Guardianship and Trusteeship Act* SA, 2008 c. A-4.2 (the "AGTA") is to find that section 5 is not applicable here. This is because the purpose of the *Limitations Act* is to avoid belated actions and it would be an absurd result if section 5 applied since then a guardian could bring an action decades later. This would also be consistent with the other provisions in the *Limitations Act* dealing with minors and estates.

## The Plaintiff and Defendants' Position

[22] The Plaintiff and Defendants on the other hand argue that section 5 applies here and that the “claimant” can only be considered to be Bobby Knibb, who all agree is a disabled person under the *Limitations Act*. This, they argue is a matter of common sense since the injured party here is Bobby Knibb, not Ms. Noren. Further, the *Limitations Act* distinguishes in other places the difference when people are represented by guardians or not – such as with a minor. If the Legislature had intended that a claimant include a guardian, it could have said so expressly.

[23] They argue that to suggest that the suspension ceases when a guardian is appointed is unreasonable as it is the appointment of the guardian that defines the adult as “disabled” under section 1 (h) of the *Limitations Act*. This *Act* does not differentiate based on whether the guardian or trustee is appointed powers to sue or not.

[24] These parties also argue that if section 5 did not work to suspend the limitation period in this case then s. 5 would in effect be a nullity or meaningless. If a guardian is the “claimant” then there is no situation when section 5 would apply.

[25] They point out that the predecessor statute, *The Limitations of Actions Act*, RSA 1980, c.L-15, by contrast expressly removed the suspension of the limitation period when a disabled person had a guardianship order in effect. The revisions of the limitation statute was studied by the Alberta Institute of Law Research and Reform and in its *Report for Discussion No.4*, September 1986, it recommended that this suspension not be removed when a guardian is appointed because “We are familiar with too many cases in which a...guardian...has permitted a limitation period to expire without bringing a claim, to the serious prejudice of the person under a disability.” This recommendation was followed by the Legislature.

[26] They refer to legislation in other provinces where it expressly provides for the revocation of the suspension of the limitation period when a guardian is in place – such as the older Alberta legislation.

[27] The Plaintiff and Defendants also refer to three cases where section 5 has been discussed which supports their interpretation: *WAR v Alberta (Attorney General)*, 2006 ABCA 219, *Gayton v Lacasse*, 2010 ABCA 123 and *P(W) v Alberta*, 2013 ABQB 296. The first case dealt with amending pleadings and section 5 was discussed as a way the limitation period could be avoided but the court found in that case, as it did in the latter two cases that the Plaintiffs were not disabled as defined under the *Limitations Act*. The courts dealt with the cases on the basis that if a disability were found, that section 5 would work to suspend the limitation period.

[28] It is noted by these parties that other sections in the *Limitations Act* specifically allow for the suspension of the limitation periods to be lifted such as in the case of a minor where notice can be given to a guardian of the minor to end the suspension (s. 5.1(3)). If the Legislature had wanted, they could have specified a similar provision for those under general forms of disability.

[29] In reply to the Third Parties' position about the guardians obligations to act in the best interests of the adult under their protection and the argument that the *Limitations Act* should be interpreted so as to improve that obligation, the Plaintiff and Defendants reply that: the duties of the guardian in this context are irrelevant; the *AGTA* authority to commence an action is

permissive not obligatory; that because there is no obligation on a guardian to commence an action, a limitation period is overly prejudicial to a disabled adult; and as such, the indefinite suspension, if applicable, of the limitation period, is a harmonious way of interpreting the *AGTA* and the *Limitations Act* together.

[30] In reply to the purpose of the *Limitations Act* these parties argue that the Third Parties are ignoring the important policy consideration that meritorious claims should be allowed to proceed – that there is a balancing of interests between the plaintiffs and the defendants that needs to be considered, not just the defendants side – or the need to protect from aged claims.

[31] The Third Parties replied that the courts should not rely on the ALRI reports to determine the legislature's intention. Further that s. 37 of the *Interpretation Act*, RSA 2000,c. I-8 states that no implications should be made from the fact that an enactment is repealed, substituted or amended as a declaration of the previous state of the law.

### **Discussion**

[32] Bobby Knibb was 22 years old and living with his uncle and aunt in Carstairs when this accident happened. His mother, and now guardian, Wanda Noren, lived in Fort McMurray at the time. Mr. Knibb had life threatening injuries and was in a coma initially. Ultimately, he has recovered significantly but is left with a significant brain injury. He has little recollection of the events of the evening of the accident. There is no question that he is disabled as defined under the *Limitations Act*.

[33] Determining if a limitation period has expired always requires an investigation into the facts of the case to determine when a potential plaintiff knew, or ought to have known, of the injury, that it was attributable to the particular defendant and that the injury warranted bringing an action (section 3 (1) (a) of the *Limitations Act*).

[34] Bobby Knibb, knows that he is seriously injured and this injury warrants bringing a claim, but he admittedly does not have the wherewithal to know or determine who the appropriate defendants in this matter might be. Meanwhile, his mother was initially only concerned about one thing – Mr. Knibb's survival – not how or why the accident happened. There might have been discussion about Mr. Knibb being at a beer tent, certainly she had no first-hand knowledge of this, but there were other conflicting stories as well. She managed to get an initial action started against the driver and vehicle owner who hit Mr. Knibb within a time frame where nobody is complaining of a missed limitation period (and where the discovery of those potentially responsible parties was readily ascertainable). Both Mr. Knibb and Ms. Noren had uphill battles in obtaining other information, so as to explore the possibility that the members of the Battle Cats may have contributed to the accident by over serving Mr. Knibb. Indeed they argue that she didn't know the answers about the identification of these members until November 2012 – many years after the accident. And in fact the potential liability of these members, and causal link to the accident, is still rather vague based on the material presented to me.

[35] I outline these facts in order to highlight, that in my view, this is exactly what section 5 was enacted for – to give these parties, and especially Bobby Knibb who is seriously injured, a break in terms of investigating and getting to the bottom of who may be potentially responsible for the losses Mr. Knibb has and will incur. Because of his disability he does not have the ability

to find out on his own and he must rely on a guardian appointed for him who has the sole power to bring an action when she herself is somewhat hobbled in terms of determining this information – more so in any event than if she was a plaintiff in an action for herself in other circumstances for instance.

[36] I agree with the Plaintiff and Defendants position that the way to interpret this section and the new *Limitations Act* is to find that the Legislature intended to suspend the limitation periods for disabled people indefinitely, while they are disabled, despite the potential that this may mean claims against potential defendants could be brought later than normally would be the case.

[37] I come to this conclusion upon a reading of the full *Limitations Act* and the way that it manages other persons with issues – such as minors. In the latter case, it is clear that the suspension of the limitation period for them can be varied and the clock can begin to tick if the minor’s guardian is served (s. 5.1(3)). Limitation periods are completely governed by statutory enactments and as such if the Legislature had wanted service on a guardian for a disabled adult to enable the start of the clock ticking – they could have said so.

[38] Interestingly legislation in Ontario, B.C. and Saskatchewan all have specific language in their limitation period enactments that make it clear that the limitation period can be made to start as against disabled persons upon specific actions being taken – the lack of this enabling legislation here is noteworthy.

[39] I do not agree that it would be in the best interest of the disabled person to have a limitation period in place so as to avoid a guardian appointed on their behalf from waiting for “decades” to start an action. A guardian has a statutory duty to act in the best interests of their dependant adult and as a result this should include bringing an action as soon as possible whether or not a limitation period applies. The *AGTA* and the *Limitations Act* work together harmoniously in this fashion. If a guardian didn’t bring an action in a reasonable time then they may suffer the consequences of being removed as guardian for instance. In any event, delay harms both parties – faded memories are not very helpful to the plaintiff who has the onus of proof.

[40] The Third Parties attempted to distinguish the cases *WAR*, *Gayton* and *P(W)* on the basis that they were distinguishable on the facts since the issues were really whether or not the Plaintiff was disabled or not – not the interpretation of “claimant” under section 5. They argued that so far there has been no case dealing with this issue and the interrelationship of the *Limitations Act* with the *AGTA* to date. I understand that there has been no case directly on point, but with respect, in my view these cases simply assume that the section applied to suspend a limitation period if it applied, and therefore it was not dealt with specifically. The section is pretty clear as far as I am concerned.

[41] In sum, I do not agree with the novel and imaginative idea of the Third Parties that “claimant” in section 5 of the *Limitations Act* means “guardian” if they have been granted the power to deal with lawsuits on behalf of their charge. The “claimant” is the one who has been injured, here, Bobby Knibb, and any limitation period as against him is suspended indefinitely.

[42] Considering my conclusion about the interpretation of section 5, the remaining issues are moot and are not necessary to be dealt with.

[43] The summary trial application to have the Third Party Notice dismissed is denied.

[44] Costs are awarded to the winning parties on the appropriate column payable forthwith.

Heard on the 28<sup>th</sup> and 29<sup>th</sup> days of October, 2013.

**Dated** at the City of Calgary, Alberta this 20<sup>th</sup> day of December, 2013.

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**K.M. Eidsvik**  
**J.C.Q.B.A.**

**Appearances:**

Walter Kubitz, Q.C. and Susan Fisher  
for the Plaintiff

Barbara L. Boeckx  
for the Defendants

Paul Stein  
for the Third Parties