

In the Court of Appeal of Alberta

Citation: Knibb v The Carstairs Battle Cats, 2014 ABCA 303

Date: 20140916
Docket: 1401-0083-AC
Registry: Calgary

Between:

Bobby Louis Knibb, a Dependent Adult, by His Guardian, Wanda Noren

Respondent (Plaintiff)

- and -

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

Respondents (Defendants)

- and -

The Carstairs Battle Cats, Adam Piper and Seven Young

Appellants (Third Parties)

- and -

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

Not Parties to the Appeal (Third Parties)

The Court:

**The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice J.D. Bruce McDonald**

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice K. M. Eidsvik
Dated the 20th day of December 2013
Filed on the 10th day of April 2014
(2013 ABQB 754, Docket: 0601 05893)

Memorandum of Judgment

The Court:

Introduction

[1] The appellants appeal the denial of their application to dismiss a third party notice against them. Following oral argument, we advised counsel that the appeal was dismissed with reasons to follow. These are those reasons.

Background Facts

[2] Bobby Knibb was seriously injured when a vehicle struck him while he was walking late at night in Carstairs, Alberta on June 5, 2004. The respondent Foran drove the vehicle. Prior to the accident, Knibb had been at a ball tournament and drinking at a beer tent operated by members of the appellant baseball team, The Carstairs Battle Cats.

[3] Knibb is cognitively and physically disabled as a result of this accident. On December 13, 2004 Wanda Noren, Knibb's mother was appointed both trustee and guardian for her son pursuant to the provisions of the *Dependant Adults Act*. As a result of that appointment, Noren was given the power to commence and settle litigation relating to the Knibb's estate (section 39(j) of the *Dependant Adults Act*).

[4] That power was qualified by the express terms of the order that "any settlement with respect to personal injury is to be approved by court order". Subsequently, the appointment as guardian and trustee was continued pursuant to the provisions of the *Adult Guardianship and Trusteeship Act*, SA 2008, c A-4.2. By order granted on August 8, 2011, which order expressly stated, *inter alia*, that the trustee had authority "[t]o continue representing the adult in the law suit with regards to his accident in 2004".

[5] On May 15, 2006, Noren filed a Statement of Claim on Knibb's behalf naming Gregory Foran and Foran Equipment Ltd. (the Foran respondents) as defendants.

[6] On June 12, 2008, the defendants filed an amended Third Party Notice naming The Carstairs Battle Cats, Adam Piper, Seven Young and others as third parties, and alleging that they contributed to Knibb's injuries by over-serving him at the beer tent prior to the accident. The third parties took the position that any action against them was barred by the *Limitations Act* and applied for a summary trial to have the Third Party Notice dismissed on that basis.

Decision of the Trial Judge

[7] At the summary trial, all parties agreed that Knibb was a “dependent adult” under the *Dependant Adults Act*, now a “represented adult” under the *Adult Guardianship and Trusteeship Act*, and accordingly, is a “person under disability” as defined in the *Limitations Act*.

[8] Section 5 of the *Limitations Act* provides:

5(1) The operation of the limitations 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 that the operation of the limitations periods provided by this Act was suspended under this section.

[9] The third parties argued that the “claimant” in section 5 is Wanda Noren, the guardian and trustee appointed with full power to deal with any lawsuit on behalf of Knibb, and not Knibb himself.

[10] The trial judge rejected that argument. She stated at *Knibb v Foran*, 2013 ABQB 754 at paras 36-37:

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 limitations 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.

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.

Grounds of Appeal

[11] The issue on appeal is whether, for the purposes of section 5 of the *Limitations Act*, is Knibb “the claimant” or is his trustee Wanda Noren?

Standard of Review

[12] The issue of the trial judge's interpretation of the definition of "claimant" in section 5 of the *Limitations Act* raises a question of law and hence is reviewed on the standard of correctness.

Appellants' Submissions

[13] The appellants submit the limitation period pursuant to section 3(1) of the *Limitations Act* expired prior to June 2008 when they were served with the third party notice because Noren, as guardian and trustee of Knibb, knew or ought to have known of the claims against the third parties, and that the claims warranted bringing a proceeding, for more than two years.

[14] They submit that section 5 does not apply on the facts of this case. Noren's actions as guardian or trustee have the same effect as if the represented adult had acted while having capacity.

[15] The *Limitations Act* defines "claimant" as "the person who seeks a remedial order". Only Noren has authority and capacity to seek a remedial order, not Knibb. The appellants submit in this case, the "claimant" is Noren, and as Noren is not disabled, section 5 does not apply.

[16] The appellants further submit a guardian must act in the best interests of the represented adult. The only harmonious way to interpret the *Limitations Act* in conjunction with the *Adult Guardianship and Trusteeship Act* is to find section 5 does not apply here. The purpose of the *Limitations Act* is to avoid belated actions and it would be an absurd result if section 5 applied to permit a guardian to bring an action decades later.

[17] The appellants submit their interpretation is consistent with the other provisions in the *Limitations Act* dealing with minors and estates.

[18] In anticipation of the respondents' submissions made in the court below, the appellants submit that courts should not rely on the Alberta Law Reform Institute reports to determine the Legislature's intention. Further, section 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.

Respondents' Submissions

[19] The respondents submit section 5 applies here and the "claimant" can only be Knibb, who all agree is a disabled person under the *Limitations Act*. The respondents submit that this is a matter of common sense since the injured party is Knibb, not Noren. Further, the *Limitations Act* in other sections distinguishes the difference when people are represented by guardians or not – such as in the case of a minor. If the Legislature had intended that a claimant include a guardian, it could have said so expressly.

[20] The respondents also argue that to suggest the suspension ceases when a guardian is appointed is unreasonable because the appointment of the guardian 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 with powers to sue or not.

[21] If section 5 does not work to suspend the limitation period in this case, then the section would in effect be a nullity or meaningless. If a guardian is the “claimant”, then there is no situation when section 5 would apply.

[22] The respondents point 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. As well, other sections in the *Limitations Act* specifically allow for the suspension of the limitation periods to be lifted, for example, 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, it could have specified a similar provision for those under general forms of disability.

[23] They submit the duties of the guardian in this context are irrelevant; under the *Adult Guardianship and Trusteeship Act*, authority to commence an action is permissive not obligatory. There is no obligation on a guardian to commence an action, thus, a limitation period is overly prejudicial to a disabled adult; the indefinite suspension of the limitation period is a harmonious way of interpreting the *Adult Guardianship and Trusteeship Act* and the *Limitations Act* together.

[24] The respondents submit the appellants ignore the important policy consideration that meritorious claims should be allowed to proceed. The interests of both plaintiffs and defendants need to be considered, not just defendants’ need to be protected from aged claims.

Analysis and Decision

[25] As was pointed out by the Foran respondents in their Factum at paragraph 2, the basis for the appellants’ summary trial application was premised on the argument that they were no longer potentially liable to the plaintiff due to the expiration of the plaintiff’s limitation period to sue them directly: *Howalta Electrical Services Inc. v CDI Career Development Institutes Ltd.*, 2011 ABCA 234, 515 AR 163; *Arcelormittal Tubular Products Roman SA v Fluor Canada Ltd.*, 2013 ABCA 279, 556 AR 188 at paras 27 – 32. Therefore any contribution claim of the Foran respondents against them could not succeed.

[26] This in turn raises the issue as to whether for the purposes of section 5 of the *Limitations Act*, a “person under disability” includes a claimant for whom an order of trusteeship has been granted and which order contains an explicit power to commence and settle litigation relating to that person’s estate.

[27] Section 5 of the *Limitations Act* provides as follows:

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 that the operation of the limitation periods provided by this Act was suspended under this section.

A “person under disability” is defined to include:

1(h)(i) a represented adult as defined in the *Adult Guardianship and Trusteeship Act* or a person in respect of whom a certificate of incapacity is in effect under the *Public Trustee Act*, ...

[28] We can see no principled basis to draw any distinction between a representative that has express powers to sue on behalf of a represented adult (as is the situation here) as opposed to one that does not.

[29] We note the respondents’ argument that the effect of section 5 is that the only “claimant” can be Knibb and that he is a disabled person under the *Limitations Act*. We note that given the nature of Knibb’s disability, it is apparent that he will be a disabled person, in all likelihood, for the rest of his life. The respondents’ argument, taken to its logical extreme, means that the proceedings arising from the accident in question could be undertaken literally decades into the future.

[30] Section 59 of the former *Limitations of Actions Act* dealt expressly with the situation where a trustee had been appointed for a person under a disability:

59(1) When a person entitled to bring an action to which this Part applies is under disability at the time the cause of action arises, he may commence the action at any time within 2 years from the date he ceases to be under disability.

(2) Subsection (1) does not apply

(a) if the person under disability is a minor in the actual custody of a parent or guardian, or

(b) if the person under disability is a person in respect of whom

(i) a committee is appointed under *The Mentally Incapacitated Persons Act*, or

(ii) a guardianship order under the *Dependent Adults Act* is in effect and the guardianship order

(A) appoints a plenary guardian in respect of the person under disability, or

(B) appoints a partial guardian who has capacity to commence an action.

[31] Counsel for the Foran respondents at para 37 of their Factum quote from Report No. 4 of the Alberta Law Reform Institute wherein the Institute expressly adopted the position of not bringing forward into the new legislation, the old section 59 of the *Limitations of Actions Act* or some variation thereof. Their report stated in part as follows:

It can be seen that in the situations covered by subsection (2), the applicable limitation period will operate as though the person were not under disability. If we agreed with the policy reflected by subsection (2), we would not restrict its application to tort claims. However, we do not agree with this policy. Our reasons is simple enough. We are familiar with too many cases in which a parent, a committee, or a guardian, as the case may be, has permitted a limitation period to expire without bringing a claim, to the serious prejudice of a person under disability. Hence we will not recommend that any provisions analogous to subsection (2) be included in the new Alberta Act.

[32] It is entirely proper for the court, in interpreting legislation such as the *Limitations Act*, to have reference to the reports prepared by the Alberta Law Reform Institute: *Daniels v Mitchell*, 2005 ABCA 271, 371 AR 298 at paras 28 – 29.

[33] The trial judge, in support of the interpretation being advanced on behalf of the respondents before this court, wrote at para 39 in part as follows:

If a guardian did not 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.

[34] Curiously, on the facts of this case, the plaintiff does not have the onus of proof with respect to the Foran respondents. It is admitted that Knibb was a pedestrian when he was hit by the vehicle being driven by the respondent Gregory Foran on the evening of June 5, 2004. As a result, section 186 of the *Traffic Safety Act* RSA 2000 c T-6 places the onus of proof squarely

upon Gregory Foran to establish that the loss or damage did not entirely or solely arise through his negligence or improper conduct.

[35] We see no basis in the *Limitations Act* to hold that the “claimant” is anyone other than Knibb. This interpretation can arguably lead to undesirable consequences in that the commencement of an action could be delayed for years or perhaps decades. That said, given the express wording of the current *Limitations Act* and the complete absence of any provision analogous to section 59 of the former *Limitations of Actions Act*, this interpretation is not “manifestly absurd, or extremely harsh, unjust, or capricious”; *Boardwalk Reit LLP v Edmonton (City)*, 2008 ABCA 220, 437 AR 347 at paras 78-79.

Conclusion

[36] In the result, we see no error in law made by the trial judge and accordingly the appeal is dismissed. Given the wording of the *Limitations Act*, in order to effect the result being sought by the appellant, resort must be had to the legislature of this Province.

Appeal heard on September 8, 2014

Memorandum filed at Calgary, Alberta
this 16th day of September, 2014

O'Brien J.A.

Martin J.A.

McDonald J.A.

Appearances:

P. J. Stein, QC
for the Appellants

B. L. Boeckx
for the Respondents Knibb, Bobby Louis and others

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S. E. Fisher
for the Respondents Foran, Gregory and others