NOVA SCOTIA COURT OF APPEAL
Citation: *Halifax Regional Municipality v. Carvery*, 2023 NSCA 79

Date: 20231107
Docket: CA 521276
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

Tirrell Shane Carvery and Andrea MacNevin

Respondents

Judge: The Honourable Justice Cindy A. Bourgeois
Appeal Heard: October 3, 2023, in Halifax, Nova Scotia
Subject: *Limitation of Actions Act*; disallowance of limitation defence
Summary: On April 2, 2017, Tirrell Shane Carvery, had the doors of a Metro Transit bus make contact with his body as he was boarding. The limitation period for bringing an action against the Halifax Regional Municipality ("HRM") is one year. Although he was represented by the respondent Andrea MacNevin before the expiry of the limitation, Mr. Carvery did not file an action against HRM within the one year period. A claim was eventually filed, with the assistance of new counsel, on February 11, 2019 - 10 months after the limitation period expired.

In March 2019, Mr. Carvery amended his Notice of Action and Statement of Claim to include allegations of negligence and breach of contract against Ms. MacNevin, specifically in relation to the missed limitation period. Ms. MacNevin filed a Statement of Defence.

In its Statement of Defence, HRM specifically relied, in addition to other things, on the one year limitation period, and asserted Mr. Carvery's action was statute-barred.

In May 2022, Ms. MacNevin filed a motion in which she sought to have HRM's limitation defence to Mr. Carvery's claim disallowed pursuant to s. 12(3) of the *Limitation of Actions Act*, S.N.S. 2014, c. 35. In practical terms, if HRM was precluded from relying on its limitation defence, Mr. Carvery would be able to advance his claim against it, and seek damages accordingly. The effect of disallowing HRM's defence would be to inoculate Ms. MacNevin from the consequences of missing the limitation period.

Mr. Carvery did not file an affidavit.

The motion was granted, and HRM's limitation defence to Mr. Carvery's claim was disallowed. HRM appealed to this Court.

Issues:

(1) Should leave to appeal be granted?

(2) Did the motion judge err in finding the respondent MacNevin had standing to bring a motion for disallowance pursuant to s. 12(3) of the *Limitation of Actions Act*?

(3) Did the motion judge err in her application of ss. 12(3) and (5) of the *Limitation of Actions Act*?

Result:

Leave granted and the appeal is allowed.

The motion judge erred in concluding a co-defendant had standing to seek the disallowance of another defendant's limitation defence.

The motion judge further erred by granting the motion on the basis of an inadequate evidentiary record. Only Mr. Carvery had the knowledge to fully address the required factors enumerated in s. 12(5). A lack of affidavit from him was fatal to the motion.

The motion judge made further errors in the application of the s. 12(5) factors.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 21 pages.

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Halifax Regional Municipality

Appellant

v.

Tirrell Shane Carvery and Andrea MacNevin

Respondents

Judges:	Farrar, Bryson and Bourgeois, JJ.A.
Appeal Heard:	October 3, 2023, in Halifax, Nova Scotia
Held:	Appeal allowed with costs, per reasons for judgment of Bourgeois, J.A.; Farrar and Bryson, JJ.A. concurring
Counsel:	Edward J. Murphy, for the appellant William Mahody, K.C. and Christine Murray, for the respondent MacNevin Michael Dull, for the respondent Carvery

Reasons for judgment:

[1] On April 2, 2017, Tirrell Shane Carvery, had the doors of a Metro Transit bus make contact with his body as he was boarding. The limitation period for bringing an action against the Halifax Regional Municipality ("HRM") is one year.[1] Although he was represented by the respondent Andrea MacNevin before the expiry of the limitation, Mr. Carvery did not file an action against HRM within the one year period. A claim was eventually filed, with the assistance of new counsel, on February 11, 2019 - 10 months after the limitation period expired.

[2] In March 2019, Mr. Carvery amended his Notice of Action and Statement of Claim to include allegations of negligence and breach of contract against Ms. MacNevin, specifically in relation to the missed limitation period. Ms. MacNevin filed a Statement of Defence.

[3] In its Statement of Defence, HRM specifically relied, in addition to other things, on the one year limitation period, and asserted Mr. Carvery's action was statute-barred.

[4] In May 2022, Ms. MacNevin filed a motion in which she sought to have HRM's limitation defence to Mr. Carvery's claim disallowed pursuant to s. 12(3) of the *Limitation of Actions Act*, S.N.S. 2014, c. 35 ("the *LAA*"). In practical terms, if HRM was precluded from relying on its limitation defence, Mr. Carvery would be able to advance his claim against it, and seek damages accordingly. The effect of disallowing HRM's defence would be to inoculate Ms. MacNevin from the consequences of missing the limitation period.

[5] The motion was heard and granted by Justice Ann E. Smith, with written reasons being reported as 2022 NSSC 371.

[6] HRM appeals to this Court and asserts the motion judge's disallowance of its limitation defence was anchored in errors of law. I agree. For the reasons to follow, I would allow the appeal and set aside the lower court order.

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[1] *Halifax Regional Municipality Charter*, S.N.S. 2008, c. 39, s. 376.

Background

[7] In his Amended Statement of Claim filed March 11, 2019, Mr. Carvery alleges:

- As he stepped up into HRM's bus, the doors prematurely closed on his body which resulted in "straining, tearing, and trauma to the muscles, tendons and ligaments in his neck, causing pain, swelling and stiffness";

- The above incident was the result of the carelessness and negligent actions of HRM;

- He retained Ms. MacNevin to pursue a negligence claim against HRM and she failed to file a claim within the legislated time limit; and

- As a result of Ms. MacNevin's negligence and breach of contract, he has potentially lost the opportunity to bring an action against HRM.

[8] In its Statement of Defence filed May 17, 2019, HRM pled the claim was statute-barred. In addition, HRM denied it was negligent in the operation of the bus; alleged Mr. Carvery was contributorily negligent; had failed to mitigate his damages, and any injury or loss suffered was due to other causes.

[9] Ms. MacNevin filed a Statement of Defence on May 22, 2019 in which she denied her representation of Mr. Carvery was negligent. Further, she pled Mr. Carvery had no cause of action against her until a court determined his claim against HRM was statute-barred. In relation to the strength of Mr. Carvery's claim, she further asserted:

> 12. In the event that a cause of action exists against the Defendant as alleged, the Defendant states:
>
> a. the Plaintiff has lost only the opportunity to proceed with **a challenging and highly uncertain action**; and
>
> b. the Defendant puts the Plaintiff to strict proof that the Plaintiff's Claim had a "reasonable prospect" of succeeding and yielding recovery for the Plaintiff.
>
> . . .

> 14. The Defendant states that if the Plaintiff suffered any injuries as a result of the Alleged Incident, **such injuries have totally resolved and/or any injury, ongoing problems or complaints were not caused by or contributed to by the Alleged Incident and were pre-existing prior to the Alleged Incident**.
>
> [Emphasis added]

[10] Mr. Carvery was discovered on February 9, 2021.

[11] On May 13, 2022, Ms. MacNevin filed a Notice of Motion seeking to have HRM's limitation defence disallowed. In support of the motion, she filed her own affidavit, and that of Michael Dull, Mr. Carvery's current legal counsel. An affidavit was not provided by Mr. Carvery.

[12] In response, HRM filed an affidavit of Joel Plater, Manager of Risk and Insurance Services, and Katie Logan, legal assistant. Ms. Logan's affidavit attached a transcript of Mr. Carvery's discovery examination from the year before.

[13] On May 30, 2022, Mr. Carvery's legal counsel wrote to the court, advising as follows in relation to the upcoming motion:

> I have had the benefit of reviewing the motion materials submitted on behalf of Andrea MacNevin. I write to advise the court that the plaintiff adopts Ms. MacNevin's submissions and supports her motion to disallow the limitations defence of HRM.

[14] The motion commenced on June 6, 2022. Mr. Carvery did not take an active role, although his counsel was present on a watching brief.

[15] At the outset, HRM raised as a preliminary matter whether Ms. MacNevin had standing to bring the motion. It argued s. 12 of the *LAA* was intended to be a mechanism whereby a claimant seeks relief from a limitation defence raised by a defendant. It was not meant to be a means for a lawyer who had failed to file an action in time to avoid potential liability for their inadvertence.

[16] After hearing from the parties, the motion judge concluded Ms. MacNevin had standing to seek disallowance of HRM's limitation defence. The motion was further adjourned to permit a discovery examination of Ms. MacNevin.

[17] The motion resumed on August 31, 2022. The discovery evidence of Ms. MacNevin was entered into evidence, as was an Agreed Statement of Facts. It is not necessary to consider the factual underpinnings of the matter beyond what has already been set out in order to resolve the appeal.

Issues

[18] In its Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory), HRM sets out the following grounds of appeal:

> The Learned Chambers Judge erred in the formulation and application of the legal principles relating to the disallowance of a limitations defence by:
>
> (a) Permitting a person other than the claimant to apply under s. 12(3) of the *Limitation of Actions Act*, S.N.S. 2015, c. 35 to disallow a limitation defence raised against the claimant;
>
> (b) Failing to have regard to all the circumstances as directed by s. 12(5) of the *Limitation of Actions Act*, S.N.S. 2015, c. 35, and in particular to the availability of alternative sources of compensation to the Plaintiff; and
>
> (c) Holding the applicant and the respondent to different evidentiary standards.

[19] After having considered the record and the submissions of the parties, I would re-state the issues to be determined on appeal as follows:

1. Should leave to appeal be granted?

2. Did the motion judge err in finding the respondent MacNevin had standing to bring a motion under s. 12(3) of the *LAA*?

3. Did the motion judge err in her application of ss. 12(3) and (5) of the *LAA*?

Standard of Review

[20] In *Laframboise v. Millington*, 2019 NSCA 43, Justice Saunders noted:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail.
>
> [Citations omitted]

[21] Whether a would-be litigant has standing is a question of law, and attracts a correctness standard.

[22] The motion judge's determination as to whether or not a limitation defence is disallowed is discretionary in nature. Provided the motion judge has not erred in law or the outcome is not patently unjust, this Court will defer to her decision.

Legal principles

[23] In considering the arguments advanced on appeal, and the cases referenced therein, it is evident there are differing views regarding the proper application of ss. 12(3) and (5) of the *LAA* not only between the parties, but also amongst the judges of the Nova Scotia Supreme Court. Consequently, it may be helpful to set out the principles which govern motions to disallow a limitation defence.

[24] The provisions in question came into effect on September 1, 2015. This Court has considered their interpretation and application in *Barry v. Halifax (Regional Municipality)*, 2018 NSCA 79 ("*Barry*"). Before looking at the particulars of the matter before us, I will provide direction regarding motions brought pursuant to s. 12(3), as well as the intended application of the factors in s.12(5) of the *LAA*.

[25] Sections 12(3) and (5) provide:

> **Disallowance on invocation of limitation period**
>
> **12 (3)** Where a claim is brought without regard to the limitation period applicable to the claim, and an order has not been made under subsection (4), the court in which the claim is brought, upon application, may disallow a defence based on the limitation period and allow the claim to proceed if it appears to the court to be just having regard to the degree to which
>
> (a) the limitation period creates a hardship to the claimant or any person whom the claimant represents; and
>
> (b) any decision of the court under this Section would create a hardship to the defendant or any person whom the defendant represents, or any other person.
>
> …
>
> **(5)** In making a determination under subsection (3), the court shall have regard to all the circumstances of the case and, in particular, to
>
> (a) the length of and the reasons for the delay on the part of the claimant;
>
> (b) any information or notice given by the defendant to the claimant respecting the limitation period;
>
> (c) the effect of the passage of time on
>
> (i) the ability of the defendant to defend the claim, and
>
> (ii) the cogency of any evidence adduced or likely to be adduced by the claimant or defendant;
>
> (d) the conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts that were or might be relevant to the claim;
>
> (e) the duration of any incapacity of the claimant arising after the date on which the claim was discovered;

> (f) the extent to which the claimant acted promptly and reasonably once the claimant knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to a claim;
>
> (g) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice the claimant may have received;
>
> (h) the strength of the claimant's case; and
>
> (i) any alternative remedy or compensation available to the claimant.

[26] The above provisions apply only to claims brought to recover damages for personal injuries (s. 12(2)) and cannot be utilized if more than two years have elapsed since the expiry of the relevant limitation period (s. 12(6)).

[27] The Legislature's choice of words in ss. 12(3) and (5) is similar, but not identical, to those which were contained in the former legislation.[2] The key distinctions will be addressed later in these reasons. What has not changed, however, is the underlying purpose of limitation periods in general and, with one exception, the principles as set out in *Butler v. Southam Inc.*, 2001 NSCA 121 by Cromwell, J.A. as follows:

> [137] Limitation and notice provisions are blunt instruments. They defeat a plaintiff's claim no matter how meritorious the case, no matter how diligent the plaintiff and no matter how little the defendant in fact has been prejudiced. Section 3 of the **Limitation of Actions Act** provides for a measure of judicial discretion to be used on equitable grounds to prevent unduly harsh results from the strict application of limitation and notice provisions. Underlying this grant of discretion is recognition by the Legislature that limitation and notice provisions may lead to harsh and unjust results by barring actions where, in the particular case, there is little reason to do so. In other words, the Legislature's decision to permit the court to disallow limitation defences recognizes that such defences may result in prejudice to the plaintiff which is disproportionate to the importance, in a particular case, of the achievement of the purposes for which the limitation period exists.

[2] *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, ss. 3(2) and (4).

[138] The crucial assessment under s. 3 is the one required by ss. 3(2): the determination of what is equitable having regard to the degree which the decision will prejudice the plaintiff and the defendant. It may be convenient to speak of this as a comparison of the relative degrees of prejudice (see, for example, **MacCulloch v. McInnes Cooper and Robertson**, supra at § 48 - 55). However, as Goodfellow, J. pointed out in **Smith v. Clayton**, (1994), 133 N.S.R. (2d) 157; N.S.J. No. 328 (Q.L.)(S.C.) at § 42 - 44, the decision about what is equitable cannot be based solely on the relative degrees of prejudice. This is because, in one sense, the prejudice to either party is total whichever decision the Court makes. If the limitation period is disallowed, the defendant is totally prejudiced in the sense that he or she is deprived of a complete defence to the action: see, Hallett, J. (now J.A.) in **Anderson v. Co-operative Fire and Casualty Co.** (1983), 58 N.S.R. (2d) 163 at § 18; aff'd (1983), 62 N.S.R. (2d) 378 (S.C.A.D.). Conversely, if the limitation defence is not disallowed, the prejudice to the plaintiff is absolute in the sense that the cause of action is lost: see **Anderson** per Hallett, J. at § 16; **Smith** at §42 - 44.

[139] In considering what is equitable, a fundamental consideration is whether the harsh result to the plaintiff of the loss of a cause of action is disproportionate to the purposes served by giving effect to the limitation provision in issue in the particular case. For example, if the primary purpose served by the relevant limitation period is finality, furtherance of this objective at the cost of the loss of the plaintiff's cause of action may often be regarded as disproportionate, particularly where the delay in relation to the limitation period is short. This is implied by the fact that the Legislature has addressed the issue of finality by restricting the length of time by which a limitation period may be extended: see ss. 3(6) and 3(7) and by providing a mechanism for a potential defendant to apply to terminate a right of action: see ss. 3(3). The situation may well be different when other purposes of the limitation period are in issue in the particular case. For example, there may be concerns that the plaintiff's delay has prejudiced the defendants in their defence. **The limitation period's objective of preserving the cogency of evidence must be carefully considered both generally, and in relation to the specific prejudice to the defendants in the particular case.**

. . .

[141] **The prejudice to the plaintiff flowing from the loss of the cause of action cannot generally be controlling on its own**; if it were, disallowance of the limitation defence would be virtually automatic because such prejudice is absolute: see **Smith** at § 44. The specific matters to be considered which are set out by the Legislature in ss. 3(4)(a) - (g) **make it clear that the diligence of the plaintiff, broadly defined, in pursuing his or her rights is an important factor in exercising the discretion to disallow a limitation defence**. For example, s. 3(4)(a) refers to the length and the reasons for the plaintiff's delay, s. 3(4)(e) to any disability of the plaintiff after the date of the accrual of the cause of action;

> s. 3(4)(f) to the extent to which the plaintiff acted promptly and reasonably once he or she knew the defendants' acts might be capable of giving rise to an action and s. 3(4)(g) to the steps taken by the plaintiff to obtain expert advice and the nature of that advice. **All of these factors, in my view, relate to aspects of the plaintiff's diligence in pursuing the claim. Such diligence is, therefore, an important aspect of the assessment of the prejudice to the plaintiff resulting from the limitation defence.**
>
> [142] **This concern with the plaintiff's diligence reflects both an underlying purpose of limitation periods and a widely accepted principle of fairness. The idea that plaintiffs should act with diligence underlies statutory limitation periods generall**y: see, for example, J.S. Williams, *Limitation of Actions in Canada* (2d, 1980) at 5. Moreover, concern with the plaintiff's diligence is consistent with s. 3(2)'s focus on what is equitable. **It will generally be less equitable for a limitation defence to defeat the claim of a diligent plaintiff than of one who has sat on his or her rights.** This reflects the old equitable maxim that delay resulting from lack of diligence defeats equity: *vigilantibus, non dormientibus, jura subveniunt*: see Sir Robert Megarry and P.V. Baker, *Snell's Principles of Equity* (27th, 1973) at 33.
>
> [143] In assessing the prejudice to the defendant it is important to focus on prejudice attributable to delay after the expiry of the limitation period.[3] This is made clear, for example, in s. 3(4)(c) which requires consideration of the impact of delay on the cogency of evidence compared to what it would have been had the action been started within the time limit. The cases have consistently recognized this: see, for example, **Bollivar v. Hirtle's Estate** (1990), 97 N.S.R. (2d) 247 (S.C.A.D.) at § 11; **Fern v. Christie's Estate** (1986), 76 N.S.R. (2d) 271 (T.D.) at p. 275; **Vickery v. Murphy and Yarmouth Regional Hospital** (1986), 73 N.S.R. (2d) 429 (S.C.) at § 23.
>
> [Emphasis added]

[28] As is clear from the above, the diligence of a plaintiff[4] who has missed a limitation period is a critical factor in assessing the degree of hardship suffered. On a motion to set aside a limitation defence, a significant focus will be on **why** the plaintiff has missed the limitation period. There may be circumstances which demonstrate the plaintiff was diligent and has a cogent reason for being tardy. In such instances, the equities will weigh in favour of a plaintiff being permitted to continue with their claim. On the other hand, if the evidence demonstrates the plaintiff was lackadaisical or otherwise acted in a questionable manner in advancing their claim, this will weigh against granting relief.

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[3] The new *LAA* has different wording, and is one of the distinctions that will be addressed later herein.

[4] The use of "plaintiff" is intended to include a person who brings an action on behalf of an infant or an incapacitated claimant.

[29] A defendant should not be deprived of a limitation defence unless the plaintiff establishes it would be unjust and unduly harsh for it to be maintained. It is for the plaintiff to tip the scales in their favour, not for a defendant to justify why it should be entitled to maintain its legally valid defence. In this regard, I note and endorse the comments of Campbell, J. in *Nixon v. Chignecto-Central Regional School Board*, 2019 NSSC 272:

> 52. The evidence in this matter does not allow me to exercise discretion in favour of the Plaintiff to disallow the defence based on the missed limitation period. It has not been shown that the hardship to the Plaintiff in not disallowing the defence outweighs the hardship to the [Defendant]. That assessment must be based on a dispassionate consideration of the circumstances. It cannot be denied that there are good reasons to feel sympathetic toward Ms. Nixon's plight. She has been seriously injured. She is an individual litigant for whom the decision has real and personal negative consequences. Hardship in this context does not mean that an institutional defendant with "deeper pockets", should always be disadvantaged. Litigants must be treated evenhandedly. Ms. Nixon has missed the limitation period and it is she who must show why the School Board should not be allowed to rely on that defence. She has not done that.

[30] In *Barry*, this Court stressed the importance of the plaintiff adducing evidence on a motion to set aside a limitation period:

> [77] Before undertaking a consideration of the various factors, a preliminary observation is in order. Although s. 12(3) requires a court to consider the degree of hardship to both claimant and defendant, it should not be forgotten that this exercise is triggered due to a claimant having missed a limitation period created by virtue of the *Act* or other enactment. **As such, the burden rests on the claimant to establish that any defence arising from the lapsing of that period ought to be disallowed.**
>
> [78] **It is incumbent on a claimant to adduce evidence which addresses the factors contained in s. 12(5), in order to inform the s. 12(3) assessment**. Although s. 12(5) mandates a judge to "have regard to all the circumstances of the case", **those who fail to provide an evidentiary foundation do so at their peril**. Similarly in response, a defendant (or proposed defendant) is well-advised to provide a sufficient foundation to permit a comprehensive consideration of the factors in s. 12(5) in order to better inform the hardship assessment. I turn now to consider the factors.
>
> [Emphasis added]

[31] As will become apparent when discussing the specific factors contained in s. 12(5), many will be difficult, if not impossible, to fully assess without direct

evidence from the plaintiff. Although counsel or others may be able to provide evidence regarding procedural matters, it is the plaintiff who will have the knowledge required for a motion judge to meaningfully undertake a balancing of the hardships as required in s. 12(3).

[32] The absence of an affidavit from a plaintiff on a motion brought pursuant to s. 12(3) will result in the motion judge having an inadequate evidentiary foundation to properly consider the factors in s. 12(5). Given the plaintiff carries the burden on the motion, the result will be a dismissal. Furthermore, the absence of an affidavit from the plaintiff creates an unfair disadvantage for a defendant who is precluded from testing the plaintiff's assertions of hardship on cross-examination.

[33] This is not novel. In *Halifax (Regional Municipality) v. Nicholson*, 2009 NSCA 109, a motion judge's order striking a limitation defence under the old legislation was set aside. There, this Court found the motion judge had erred in admitting unsworn hearsay evidence as it unfairly precluded cross-examination by the defendant. Further, the plaintiff did not file an affidavit on the motion. The Court noted:

> [32] In addition, the judge gave no consideration to the fact the onus was on Mr. Nicholson on his application, yet he failed to file an affidavit explaining the reasons for his delay, one of the factors s.3(4)(a) mandates that the judge consider. This information would be within his knowledge.

[34] From the case authorities submitted on appeal, I am aware there are several decisions made pursuant to s. 12(3) where a limitation defence has been set aside notwithstanding the lack of direct evidence from the plaintiff. On the basis of the concerns noted above, these decisions should not be relied upon as having precedential value.

[35] I turn now to s. 12(5). As noted in *Barry* (para. 73), it is necessary for a motion judge to consider all of the factors enumerated therein.

(a) the length of and the reasons for the delay on the part of the claimant

[36] Although the length of the delay in advancing a claim may be established by evidence adduced by other witnesses, "the reason for the delay on the part of the claimant" can only be fully answered by the plaintiff. Affidavits from counsel

cannot speak to the understanding and intentions of the plaintiff, nor do they afford an opportunity for the defendant to challenge their diligence.

[37] The importance of the length of the delay will be contextually driven. For example, a claim filed 10 months past a limitation period may not be significant where a defendant was aware of an incident causing injury to a plaintiff and that a claim would be forthcoming. However, a delay of 10 months may be found to be significant if a claim comes as a complete surprise to a defendant.

[38] Further, the significance of the delay will depend on the limitation period in question. Where the Legislature has chosen to impose a shorter limitation period, such as in the case of the *HRM Charter*, then a delay of 10 months will be more significant than in the case of an action that attracts a longer limitation period.

> *(b) any information or notice given by the defendant to the claimant respecting the limitation period*

[39] Contrary to lower court decisions that state or imply otherwise, this provision does **not** create an obligation for a defendant to advise the plaintiff about the limitation period generally, nor its impending expiry. No such requirement is imposed on a defendant in any other type of claim. Section 12(5)(b) should not be interpreted as placing such an onus on a defendant in personal injury matters. It is an error in principle for a motion judge to find a defendant's silence respecting the limitation period governing the claim weighs in favour of the plaintiff.

[40] The purpose of this factor is to determine what type of information, if any, the plaintiff received from a defendant regarding the existence and length of the limitation period in order to assess the reasonableness of their subsequent conduct.

[41] If a plaintiff was misinformed by a defendant regarding the limitation period, or communications between them were such that it could be reasonably understood the period was being waived, then the equities would favour the late-filing plaintiff. On the other hand, if a defendant advised the plaintiff about the existence of a limitation period, and in the face of this information the claim was still filed late, the equities would weigh against a tardy plaintiff.

> *(c) the effect of the passage of time on the ability of the defendant to defend the claim, and the cogency of any evidence adduced or likely to be adduced by the claimant or the defendant*

[42] The wording of this factor has changed from that found in the previous legislation. Section 3(4)(c) read:

> **(4)** In making a determination pursuant to subsection (2), the court shall have regard to all the circumstances of the case and in particular to
>
> …
>
> (c) the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent **than if the action had been brought or notice had been given within the time limitation**;
>
> [Emphasis added]

[43] As noted in *Barclay*, the bolded wording specifically required the motion judge, in assessing the impact on the cogency of the evidence, to focus on the delay occurring only after the expiry of the limitation period. In the new *LAA*, the Legislature has chosen to remove those words from s. 12(5)(c). I am satisfied that in doing so, the intention was to broaden the court's assessment of the impact of all delay associated with the plaintiff's advancement of their claim.

[44] When faced with a motion to grant relief to a plaintiff who has failed to abide by a limitation period, it is open to a defendant to adduce evidence regarding all sources of delay attributable to a plaintiff. A plaintiff who has diligently met their other obligations in advancing the claim will be viewed favourably. However, if missing the limitation period is part of a pattern of foot-dragging on the plaintiff's part, this would weigh against granting relief.

> *(d) the conduct of the defendant after the claim was discovered, including the extent, if any, to which the defendant responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts that were or might be relevant to the claim*

[45] The purpose of this factor is to assess whether the defendant's conduct contributed to the plaintiff's delay in filing a claim. If so, then the equities will

favour the plaintiff being granted relief from the limitation period. If the defendant's conduct was not a factor in the plaintiff's delay, this will weigh against the motion being granted.

[46] A plaintiff who seeks to have a motion judge weigh this factor in their favour should produce evidence of not only the defendant's impugned conduct, but how it impacted their ability to prepare and file their claim within the limitation period. A defendant will be expected to respond to any such allegations with relevant evidence, or risk having the plaintiff's allegations weigh against maintaining its limitation defence.

> *(e) the duration of any incapacity of the claimant arising after the date on which the claim was discovered*

[47] The purpose of this factor is, again, to explore why a plaintiff may have been delayed in commencing a claim. If a plaintiff was incapacitated (especially if due to injuries allegedly caused by the defendant), their tardiness in filing a claim may be understandable. This would weigh in their favour on the motion.

[48] However, the absence of incapacity is also relevant – it removes a possible excuse for the late filing and militates against concluding the plaintiff was diligent in advancing their claim. The lack of incapacity on the plaintiff's part favours maintaining the limitation defence.

[49] I am aware that where there has been no incapacity suffered by a plaintiff, some judges have found this factor to be "irrelevant", "inapplicable" or "neutral". In my view, such an approach is flawed, and demonstrates an uneven and improper balancing of the factors in favour of a capable, but tardy, plaintiff.

> *(f) the extent to which the claimant acted promptly and reasonably once the claimant knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to a claim*

[50] This factor requires a plaintiff to provide direct evidence. Although other witnesses may provide relevant evidence as to what a plaintiff objectively did and when, only the plaintiff can speak to what they knew, when they knew it, and why they took a particular course of action. A court will be unable to assess the

reasonableness of a plaintiff's actions without their evidence. Nor can a defendant challenge the reasonableness thereof without being able to test the plaintiff's evidence through cross-examination.

> *(g) the steps, if any, taken by the claimant to obtain medical, legal or other expert advice and the nature of any such advice the claimant may have received*

[51] The purpose of this factor is, like others, to ascertain why the plaintiff was late in the filing of the claim, and whether their diligence, or a lack thereof, is a relevant consideration. A plaintiff who quickly seeks out expert advice arising from an incident could be seen as diligently attending to their potential claim. A plaintiff who does nothing risks being viewed in a contrary light.

[52] But the circumstances are not always straightforward and require a motion judge to contextually assess the plaintiff's conduct in advancing their claim. For example, if the evidence demonstrates a plaintiff quickly sought out expert assistance, but did not act on appropriate advice received, this may give rise to concerns about their diligence. As with the other factors, a demonstrated lack of diligence weighs against relieving a plaintiff of a limitation defence.

[53] Again, it is the plaintiff who has the firsthand knowledge of the steps taken and the nature of the advice received, and consequently, carries the burden of adducing evidence accordingly. The only way for a defendant to fairly respond to an assertion that a plaintiff has been diligent in obtaining advice, and the nature of it, is through cross-examination.

> *(h) the strength of the claimant's case*

[54] This factor was not enumerated in the previous legislation. Its inclusion in s. 12(5) makes the "strength" of the plaintiff's case a necessary consideration. Succinctly, a defendant should not be deprived of a valid limitation defence in the face of a weak claim. A plaintiff who demonstrates they have a strong case in relation to liability and damages will have a better chance of having a limitation defence set aside than one who does not.

[55] The plaintiff bears the burden of establishing, on evidence, the nature of their case. The Legislature has chosen to express this obligation in terms of the

"*strength*" of the case. It could have chosen words such as "*whether the claimant's case is arguable*" or similar language, but it did not. In my view, the plaintiff must demonstrate their case is more than "arguable". Although a plaintiff will not be expected to meet the evidentiary requirements of a trial, given the motion is intended to set aside an otherwise valid defence, they must put their best foot forward. This would include establishing an evidentiary basis for both liability and damages.

[56] A motion judge will be required to consider the evidence and record before them to assess the strength of the claim, including that adduced by the defendant. To fairly respond to the motion, a defendant is entitled to test the asserted strength of the claim by cross-examination of the plaintiff and other affiants.

(i) any alternative remedy or compensation available to the claimant

[57] This is also a newly enumerated factor in the *LAA*. If a plaintiff has received compensation in relation to the matters giving rise to the claim, then the equities weigh against setting aside a limitation defence. However, this factor is not restricted to a consideration only of remedies that have been received, but also those that may benefit the plaintiff in future.

[58] If a motion judge concludes it is more likely than not that a plaintiff will receive another source of compensation in relation to their claimed damages (i.e. from disability insurance, or another tortfeasor), this would weigh against granting the plaintiff relief against the limitation defence.

[59] It is the plaintiff who possesses the best knowledge regarding what other sources of recovery they may have available to them, and bears the obligation to canvass this in their affidavit evidence.

[60] Where a limitation period has been missed, the plaintiff's former lawyer is another potential source of compensation. However, a review of the case law considering this factor demonstrates a continuing misapplication of this Court's decision in *Smith v. Lord*, 2013 NSCA 34. Specifically, a number of decisions have relied on *Smith v. Lord* as authority for the proposition that claims against lawyers are too speculative, and therefore should not be considered on a disallowance motion.

[61] There is no such blanket prohibition which precludes a lawyer's alleged negligence from being considered as an alternate source of compensation on a disallowance motion. A motion judge who concludes otherwise has erred in principle.

[62] *Smith v. Lord* was not a case involving a limitation defence. Rather, the issue before the Court was whether a motion judge erred in setting aside an *ex parte* order that had dismissed the plaintiff's claim. Several arguments were advanced on appeal, including that the motion judge had given insufficient weight to the alleged negligence of the plaintiff's lawyer. In responding to that argument, Justice Farrar wrote:

> [52] With respect to the potential alternative remedy against his former counsel, whatever action Mr. Lord may have against his former counsel and its potential success is mere speculation. In my view, it was appropriate for the motions judge to give it little weight in his deliberations.

[63] The Court's two sentence conclusion regarding the speculative nature of the plaintiff's claim against his counsel was based on the record in that case. It should not be viewed as a principle of broader application.

[64] Whether a plaintiff may have an alternative source of recovery against their former lawyer will depend on the evidence presented. Based on the evidence adduced, such a claim may be speculative. However, in other instances, a motion judge may find on the record before them it is more probable than not that an alternative source of recovery is available to the plaintiff in relation to their losses. If so, this would weigh against disallowing the limitation defence.

[65] Having clarified the principles governing motions under s. 12(3), I turn to the matter under appeal.

Analysis

Should leave to appeal be granted?

[66] As this is an interlocutory appeal, leave is required. In *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, Justice Fichaud wrote:

> [27] This is an appeal from an interlocutory motion, for which leave is required. In *Burton Canada Company v. Coady*, 2013 NSCA 95, Justice Saunders, for the majority, set out the test for leave to appeal:
>
> > 18. …The question of whether leave to appeal ought to be granted is one of first instance. The well-known test on a leave application is whether the appellant has raised an arguable issue, that is, an issue that could result in the appeal being allowed.
> >
> > [Citations omitted]

[67] The respondents properly acknowledged leave ought to be granted.

Did the motion judge err in finding the respondent MacNevin had standing to bring a motion under s. 12(3) of the LAA?

[68] HRM repeats the arguments made in the court below respecting Ms. MacNevin's alleged lack of standing. It has provided no case authorities in support of this ground of appeal. On the other hand, Ms. MacNevin submits there are reported cases where co-defendants and intervenors have brought similar motions.[5]

[69] I have carefully considered the wording of s. 12 of the *LAA*, the *Civil Procedure Rules* and the case authorities presented. I also note there are significant difficulties that arise when a co-defendant seeks to set aside another defendant's limitation defence. For example:

- The equities being balanced on a s. 12(3) motion are between the plaintiff and the defendant who has pled a limitation defence. The evidence a co-defendant can adduce may be relevant, but cannot, as explained earlier, be sufficient on its own to sustain the motion;

- To be successful on the motion, a co-defendant must rely on the co-operation of the plaintiff to provide the necessary evidence. Although that may be possible in some circumstances, in the larger context, the plaintiff is an **opposing party** who may not wish to share certain aspects of their evidence as it relates to the diligence of their conduct,

[5] *Morris v. Royal Bank of Canada*, 2007 NSSC 73; *Day v. Guarantee*, 2003 NSCA 13.

> the nature of the advice they have received or the strength of their case;
>
> - The co-defendant may find itself in the awkward position of making representations on the motion that are in conflict with its pleadings. This occurred in the present matter. Ms. MacNevin's Statement of Defence alleged Mr. Carvery's claim was "challenging and highly uncertain", and any injuries he had suffered due to the bus incident were "minor" and had resolved. However, in her arguments on appeal, Ms. MacNevin submits Mr. Carvery's case is "strong" and his injuries significant. It is difficult to reconcile the pleadings on which Ms. MacNevin wants the court to ultimately rely upon, with the assertions she made in support of the motion, and now on appeal.

[70] Although a co-defendant may provide evidence and argument in support of a disallowance motion, it is a plaintiff who must, for the reasons outlined earlier, be the moving party. It is only a plaintiff who has the ability to respond fully to the enumerated factors. In these circumstances, the motion judge was incorrect in concluding Ms. MacNevin had standing to advance the motion in her own right.

Did the motion judge err in her application of ss. 12(3) and (5) of the LAA?

[71] I am satisfied the motion judge erred in several material respects.

[72] In the court below, counsel for HRM raised concerns regarding the adequacy of the evidence presented in support of the motion. These concerns were noted by the motion judge in her written reasons:

> [26] Counsel for HRM says that to demonstrate hardship, evidence must be adduced on all of the factors enumerated in s. 12(5) of the *LAA.*
>
> [27] Counsel says that in this case evidence of hardship to Mr. Carvery is lacking in certain respects. Counsel points to the fact that Mr. Carvery has chosen not to bring a motion of his own to set aside the limitation defence. **Counsel also notes that Mr. Carvery has chosen not to participate in any active format in Ms. MacNevin's motion, with the exception of a solicitor's affidavit from Mr. Dull which counsel describes as "limited in scope".**
>
> . . .

> [29] Counsel for HRM says that Ms. MacNevin has essentially placed herself in the plaintiff's shoes, and thus the [sic] bears the onus which would normally fall to the claimant to demonstrate hardship. Further, **HRM says that since Mr. Carvery did not file an affidavit on the motion, counsel had no opportunity to test his evidence. Counsel says that what the Court is left with is an evidentiary record provided by Ms. MacNevin which speculates on the hardship to Mr. Carvery if the limitation defence is struck**. Counsel for HRM points out that if Ms. MacNevin's motion is successful, Mr. Carvery "loses his claim against her".
>
> [Emphasis added]

[73] As outlined above, to properly assess the legislated factors, evidence from Mr. Carvery was essential. Although his discovery evidence was part of the record, that did not alleviate his onus to provide an evidentiary foundation for the factors enumerated in s. 12(5). Further, HRM's ability to question Mr. Carvery at a discovery held a year before was not a suitable replacement for cross-examination on the motion.

[74] The motion judge erred in failing to recognize the fatal deficiency in the evidence, as well as the unfairness to HRM in being prevented from challenging through cross-examination the assertion of hardship made on Mr. Carvery's behalf. As a result of this deficiency, the motion judge's subsequent assessment of the evidence, and the conclusions she drew therefrom, cannot be given deference.

[75] Additionally, the motion judge also clearly misapplied two of the enumerated factors in s. 12(5). With respect to s. 12(5)(e), she determined:

> [101] There is no evidence related to any incapacity of Mr. Carvery during the relevant period. Accordingly, this factor is irrelevant, or at best neutral to the Court's consideration.

[76] As noted above, this factor is not neutral to the assessment. In the circumstances before her, the lack of incapacity on Mr. Carvery's part would weigh against granting the relief sought by Ms. MacNevin.

[77] Also, with respect to the relevance of the potential negligence of Ms. MacNevin, relying on *Smith v. Lord*, the motion judge determined:

> [123] Although Ms. MacNevin is a named Defendant in the within action, I do not accept, as argued by HRM, that a claim against her in negligence, if

> successful, provides Mr. Carvery with an alternative remedy or compensation within the meaning of factor (i).

[78] Based on the record before her, the motion judge should have considered whether the claim against Ms. MacNevin provided Mr. Carvery with an alternative remedy in relation to his alleged losses. Her failure to do so, based on a misapplication of *Smith v. Lord*, was an error in principle.

Disposition

[79] For the reasons above, I would allow the appeal, set aside the motion judge's order, dismiss Ms. MacNevin's motion and reverse the costs awarded in the court below. I would further award costs on appeal to HRM in the amount of $2,000, inclusive of disbursements, payable by Ms. MacNevin.

Bourgeois, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.