NOVA SCOTIA COURT OF APPEAL
Citation: *Magee v. Lauzon*, 2024 NSCA 23

Date: 20240229
Docket: CA 524945
Registry: Halifax

Between:

Charles Magee

Appellant

v.

Paul Lauzon

Respondent

Judge:	The Honourable Justice Joel E. Fichaud
Appeal Heard:	January 15, 2024, in Halifax, Nova Scotia
Subject:	Disallowance of limitation defence – *Limitations of Actions Act*, S.N.S. 2014, c. 35, s. 12.
Summary:	The vehicles driven by Messrs. Lauzon and Magee collided, injuring Mr. Lauzon. There was evidence that Mr. Magee was impaired by alcohol and his vehicle crossed into Mr. Lauzon's lane. Mr. Lauzon sued Mr. Magee. However, his Notice of Action was filed outside the two year limitation in s. 8(1)(a) of the *Limitations of Actions Act*. Mr. Magee's defence pleaded the limitation. Upon Mr. Lauzon's motion under s. 12 of the *Act*, a judge of the Supreme Court of Nova Scotia disallowed Mr. Magee's limitations defence. Mr. Magee appealed to the Court of Appeal.
Issues:	The issue is whether the judge made an appealable error in her application of s. 12.
Result:	The Court of Appeal dismissed the appeal. The judge made no palpable and overriding error of fact and no error of law respecting the interpretation and application of the criteria in

s. 12. Section 12(3) contemplates the judge will weigh the effects of the criteria listed in s. 12(5) to arrive at an over-all balance of the respective hardships to the plaintiff and defendant from allowing or disallowing the limitations defence. This is a discretionary exercise. The judge weighed the criteria and balanced the hardships without error in principle. The outcome did not lead to a patent injustice.

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Judges:	Bryson, Fichaud and Van den Eynden JJ.A.
Appeal Heard:	January 15, 2024, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs per reasons for judgment of Fichaud J.A., Bryson and Van den Eynden JJ.A. concurring
Counsel:	Sheree L. Conlon, K.C. and Chloe Jardine for the appellant Robert Carter, K.C. and Allison Harris for the respondent

Reasons for judgment:

[1] The vehicles driven by Messrs. Lauzon and Magee collided. Mr. Lauzon was injured. He sued Mr. Magee. However, Mr. Lauzon's Notice of Action was filed outside the two-year limitation in s. 8(1)(a) of the *Limitations of Actions Act*, S.N.S. 2014, c. 35. Mr. Magee's Defence pleaded the limitation. Upon Mr. Lauzon's motion under s. 12 of that *Act*, a judge disallowed Mr. Magee's limitation defence.

[2] Mr. Magee appeals. The issue is whether the judge made an appealable error in her application of s. 12.

Background

[3] On March 9, 2018, the Respondent Paul Lauzon was driving northward on Connector Road, New Minas. His 17 year old daughter Robin was a passenger. The Appellant Charles Magee was driving southward. He had consumed four vodkas. His vehicle crossed into the lane of Mr. Lauzon's vehicle. In the head on collision, Paul and Robin Lauzon were injured.

[4] On March 21, 2018, the Lauzons retained Darlene Lamey, then of the Waterbury Newton law firm in Kentville, as counsel for their claim against Mr. Magee. Early on, Ms. Lamey communicated with Pembridge Insurance Company of Canada ("Pembridge"), Mr. Magee's insurer. However, Ms. Lamey did not file a Notice of Action. Her affidavit acknowledges that "through inadvertence, I then lost track of the limitation period". Almost four years passed. She deposed that on February 28, 2022, she realized her omission. Then she transferred the file to another lawyer, who acted with more dispatch.

[5] On March 7, 2022, Paul and Robin Lauzon, represented by their new counsel, filed separate Notices of Action in the Supreme Court of Nova Scotia against Mr. Magee.

[6] The *Limitations of Actions Act*, as amended, says:

> **8 (1)** Unless otherwise provided in this Act, a claim may not be brought after the earlier of
>
> (a) two years from the day on which the claim is discovered; and

> (b) fifteen years from the day on which the act or omission on which the claim is based occurred.
>
> …
>
> **18** The limitation periods established by this Act do not run while a claimant is a minor.

[7] Paul Lauzon's limitation period expired on March 9, 2020. Robin Lauzon ceased to be a minor on December 7, 2019, her 19th birthday, meaning her limitation period expired on December 7, 2021. Paul Lauzon's Notice of Action was almost two years late and Robin's was three months late.

[8] Mr. Magee's Defences to both claims pleaded the expiry of the limitation period.

[9] Subsection 12(3) of the *Limitations of Actions Act* authorizes a judge to disallow a limitations defence. According to ss. 12(1), (2) and (6), disallowance is available, in the judge's discretion, when a personal injury claim that would be barred by s. 8(1)(a) is brought within two years of the expiry of the limitation period. The Lauzons' claims satisfy those pre-conditions.

[10] The criteria set out in ss. 12(3) and (5) govern the judge's discretion to disallow the limitations defence. The judge applies the criteria to the circumstances then balances the hardships to the plaintiff and defendant from upholding or disallowing the limitations defence.

[11] Under s. 12(3), Paul and Robin Lauzon moved in the Supreme Court of Nova Scotia for disallowance of the limitations defence. Mr. Magee countered with motions under *Civil Procedure Rule* 13.04 for summary judgment to dismiss both Notices of Action, as the claims were statute barred.

[12] On October 12, 2022, Justice Ann Smith heard the motions. Mr. Lauzon filed affidavits of Paul Lauzon, Robin Lauzon, Ms. Lamey and Jeff Mitchell, a lawyer with Mr. Lauzon's current law firm. Mr. Magee filed an affidavit of Larry Kelly, a litigation specialist with Pembridge. There was neither oral evidence nor cross-examination on the affidavits.

[13] On May 2, 2023, Justice Smith issued her decision. After discussing the criteria in ss. 12(3) and (5), she concluded:

> [137] On balance, the hardship assessment favours Robin Lauzon on these facts.

> [138] In the case of Paul Lauzon, the situation is more complicated. …
>
> [141] On balance, taking into account all the circumstances, and giving consideration to each s. 12(5) factor, this Court determines that the hardship assessment favours Paul Lauzon.

The judge disallowed Mr. Magee's limitations defence to each claim and dismissed Mr. Magee's motions for summary judgment. Later I will discuss the judge's reasons.

[14] On June 26, 2023, Mr. Magee filed a Notice of Application for Leave to Appeal and Notice of Appeal against Paul Lauzon. On July 10, 2023, Mr. Lauzon filed a Notice of Contention. We have no appeal from the judge's ruling on Robin Lauzon's Notice of Action.

[15] This Court heard the appeal on January 15, 2024.

Issue

[16] Mr. Magee's factum says:

> 39. There is one issue on appeal – did the motions judge err in principle and in her application of ss. 12(3) and 12(5) of the *LAA*?

[17] Mr. Magee's submissions and the points in Mr. Lauzon's Notice of Contention canvassed the criteria in ss. 12(3) and (5) and addressed the burden of proof and evidential standards, the drawing of inferences and the assignment of weight in the balancing exercise.

Standard of Review

[18] The motions judge considered evidence and made findings of fact. The use of ss. 12(3) and (5) involves the interpretation of the statutory criteria. After applying the findings to the criteria, the judge balanced the potential hardships and reached an outcome.

[19] Findings of fact or of mixed fact and law with no extractable legal error are reviewed for palpable and overriding error, meaning a finding that is clearly wrong and affected the outcome: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, paras. 8, 10, 19-25, 21-36; *H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, at paras. 65 and 69.

[20] Statutory interpretation is an extractable issue of law that is reviewed for correctness.

[21] Balancing the impacts of disparate criteria is a discretionary exercise. A discretionary ruling is reviewed for error in legal principle or whether it results in a patent injustice. It is presumed a judicial discretion will not be exercised to cause a patent injustice. Consequently, the "patent injustice" standard is a subset of error in legal principle. See generally: *Innocente v. Canada (Attorney General)*, 2012 NSCA 36, at paras. 22, 26-29; *R. v. Nova Scotia (Ombudsman)*, 2017 NSCA 31, para. 24. Respecting ss. 12(3) and (5) see: *Barry v. Halifax (Regional Municipality)*, 2018 NSCA 79 ("*Barry*"), paras. 33-34 and *Halifax Regional Municipality v. Carvery*, 2023 NSCA 79 ("*Carvery*"), paras. 20-23.

Leave to Appeal

[22] Section 40 of the *Judicature Act*, R.S.N.S. 1989, c. 240, requires leave for an interlocutory appeal. Leave is granted when the appellant has raised an arguable issue. This means a submission that, if accepted, could result in the appeal being allowed: *Burton Canada Company v. Coady*, 2013 NSCA 95, para. 18.

[23] Mr. Lauzon's factum says that "the matter does not raise a novel issue", the motions judge's decision is "reasonable and correct" and leave should be denied.

[24] I respectfully disagree. Leave for an interlocutory appeal neither turns on novelty nor involves the Court's assessment of the relative reasonableness of the parties' submissions. Mr. Magee's submissions, if accepted, would mean the motions judge's ruling would be overturned. His grounds of appeal are arguable on their face. This means the Court must hear the arguments. Whether the argument is reasonable is for the merits ruling. I would grant leave to appeal.

Analysis

[25] Subsections 12(3) and (5) of the *Limitations of Actions Act* say:

> **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] Subsections 12(3) and (5) came into force on September 1, 2015. They modified the test from the former ss. 3(2) and (4) of the *Limitations of Actions Act*, R.S.N.S. 1989, c. 258. This Court has interpreted s. 12 in *Barry* and *Carvery*.

[27] Mr. Magee's factum, para. 48, says "it is submitted that clarification is needed in the proper application of the s. 12(5) factors…".

[28] My views are these.

[29] In *Carvery*, para. 27, Justice Bourgeois adopted for s. 12 Justice Cromwell's characterization of the objective of the former s. 3 (*Butler v. Southam Inc.*, 2001 NSCA 121, paras.137-143). Justice Cromwell, para. 137, said that aim was to assess whether the "prejudice to the plaintiff is disproportionate to the importance, in a particular case, of the achievement of the purposes for which the limitation period exists". The assessment of proportionality helps to focus the balancing exercise under s. 12(3).

[30] According to s. 12(5), before engaging in the balance, the judge "shall have regard" to "all" the material circumstances, including those listed in s. 12(5)(a) through (i). Of course, some criteria may have insignificant weight in the circumstances of a particular case, but the judge should nonetheless consider them and say so. See *Barry*, para. 73 and *Carvery*, para. 35.

[31] The burden of proof is governed by the normal principles in civil cases. In *Snell v. Farrell*, [1990] 2 S.C.R. 311, at p. 321, Justice Sopinka for the Court summarized those principles:

> … The legal or ultimate burden of proof is determined by the substantive law "upon broad reasons of experience and fairness": 9 *Wigmore on Evidence*, # 2486, at p. 292. In a civil case, the two broad principles are:
>
> > 1. that the onus is on the party who asserts a proposition, usually the plaintiff;
> >
> > 2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

Justice Sopinka's often-cited passage was recently applied in *MacNeil v. Kajetanowicz*, 2019 NSCA 35, para. 47.

[32] Under s. 12, it is the plaintiff's motion to disallow the limitations defence. Consequently, the plaintiff bears the ultimate onus to establish the favorable

balance prescribed by s. 12(3). At the end of the day, if the judge is not satisfied the balance favours the plaintiff, the motion will be dismissed. See *Barry*, paras. 75 and 78 and *Carvery*, paras. 29-30.

[33] However, a proposed fact the defendant asserts to support its side of the balance also must be supported by evidence. Without evidential support, the trier of fact may reject the cogency of the defendant's proposition. See *Barry*, para. 78 and *Carvery*, para. 30. This is not an improper reversal of onus, as Mr. Magee's counsel submits. Rather, it applies *Snell*'s principles: the party who asserts a proposed fact should either find supporting evidence in the record or, if there is none, adduce the supporting evidence, especially when that evidence is particularly within that party's knowledge.

[34] The reason for the delay cited by s. 12(5)(a) normally can be cogently addressed only by evidence from the plaintiff (*Carvery*, para. 31). Here, unlike *Carvery*, the plaintiffs filed affidavits. Conversely, evidence of prejudice to the defendant normally would emanate from the defendant. In either case, cogency is an issue of fact based on whatever evidence is adduced and is reviewed for palpable and overriding error.

[35] At the hearing in this Court, Mr. Magee's counsel submitted a motions judge under s. 12 is not permitted to draw inferences, meaning any inference is an error of law. I respectfully disagree. A trier of fact can make a finding based on a reasonable inference from the evidence and the finding, whether based on explicit evidence or inference, is reviewed for palpable and overriding error: *Housen,* paras. 19-25; *Johansson v. General Motors of Canada Ltd.*, 2012 NSCA 120, para. 81, quoting Lord Wright in *Grant v. Australian Knitting Mills Limited*, [1936] A.C. 85 (H.L.), pp. 96 and 101; *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115, para. 30, per Cromwell J.A. for the Court. Nothing in s. 12 strips the motions judge of the usual powers of a trier of fact.

[36] According to s. 12(3), the outcome depends on a balance of hardships to the plaintiff and defendant. The balance represents what the motions judge considers to be a "just" outcome after the judge applies the criteria in s. 12(5) assisted by the proportionality assessment discussed in *Butler* and adopted in *Carvery*.

[37] Both parties' factums acknowledge the balancing exercise is discretionary and attracts the appellate standard of review to discretionary rulings. The Court of Appeal reviews for error in legal principle or patent injustice. Absent such an

appealable error, the Court of Appeal does not re-calibrate the weighing or re-balance with its own scale. See *Barry*, paras. 34 and 72, and *Carvery*, para. 22.

[38] I will turn to the motions judge's analysis of the criteria in s. 12(5).

[39] **Length and reasons for the delay – s. 12(5)(a):** The judge, para. 38, found that Mr. Lauzon's delay – just short of two years – was "of significant duration". I agree. It was barely under the maximum, *i.e.* two years, beyond which the option to disallow under s. 12 would no longer apply.

[40] Mr. Magee discounts the judge's inferences as impermissible. His factum, para. 33, submits there is "no evidence" from Mr. Lauzon of the reasons for the delay. I am unable to agree.

[41] Paragraphs 7 and 17 of Mr. Lauzon's affidavit say that twelve days after the accident, he retained Ms. Lamey as his lawyer to represent him on the claim, and his intent has always been to pursue the claim. Ms. Lamey's affidavit confirms the retainer and says, in para. 15, that, "through inadvertence, I then lost track of the limitation period for this file and was unaware of the limitation period expiring March 9, 2020, without a Notice of Action being issued".

[42] Ms. Lamey's affidavit, para. 18, says "I became aware of the missed limitation period on or around February 28, 2022", then she "notified the clients of the problem", and arranged to transfer the file to new counsel.

[43] On March 7, 2022, Mr. Lauzon's new counsel filed the Notice of Action.

[44] The judge found:

> [41] Based on the evidence, it is clear that the [*sic*] Paul Lauzon acted diligently in quickly retaining legal counsel for himself and his daughter Robin. …

[45] The judge's findings respecting the plaintiff's "prompt and reasonable action" under s. 12(5)(f) also pertain to s. 12(5)(a):

> [113] The Court finds that the Plaintiffs acted promptly and reasonably in advancing their claims. Paul Lauzon quickly retained a lawyer and sought legal advice for himself and his daughter. It was reasonable for him to rely on legal counsel to advance his and his daughter's claims and to follow her advice once she was retained. …
>
> [114] The failure in this case to commence actions on time was that of Darlene Lamey and not Paul or Robin Lauzon.

[46] There is an evidential basis for the judge's findings. Shortly after the collision, Mr. Lauzon retained Ms. Lamey, upon whom he relied, and after the limitation problem came to light, he promptly retained new counsel who sued immediately. In *Carvery*, para. 32, Justice Bourgeois noted the plaintiff's failure to file an affidavit precluded cross-examination and impaired the defendant's ability to respond. Here, Mr. Lauzon filed an affidavit, on which Mr. Magee declined to cross-examine.

[47] As I have discussed, I reject Mr. Magee's submission that, under s. 12, a judge is precluded by law from drawing an inference. Insofar as the motions judge's findings are inferential, the inferences were reasonable with no palpable and overriding error.

[48] The plaintiff's reasons for the delay are "significant" to the exercise under s. 12(3) and the plaintiff's diligence, if established, "will weigh in favour of a plaintiff being permitted to continue with their claim": *Carvery*, para. 28.

[49] **Information from the defendant to the claimant – s. 12(5)(b):** Ms. Lamey's affidavit says neither Mr. Magee nor his insurer, Pembridge, gave notice of the two-year limitation period. However, neither did Mr. Magee or his insurer give misleading information about the limitation period. The limitation was not discussed between Ms. Lamey and Pembridge.

[50] The motions judge, paras. 42-45, accurately summarized this evidence and concluded:

> [45] There is no evidence that the Defendant provided notice to either the Plaintiffs or Ms. Lamey that the limitation period was two years. However, the Plaintiffs were represented by counsel throughout the two-year period. This is not a situation where the Plaintiffs were acting, on their own behalf, and the Defendant, through its dealings with them, led them to believe that there was no limitation period, or that a limitation period was not running against them.

[51] The finding reflects no appealable error.

[52] **Effect of passage of time on the defence and the evidence – s. 12(5)(c):** The motions judge, paras. 47-102, extensively reviewed the evidence on this criterion. I will summarize the evidence and Justice Smith's findings.

[53] The event was on March 9, 2018. Until April 2022, after the Notice of Action was filed, the carriage of the defence was with Pembridge. The affidavits of

Ms. Lamey and Mr. Kelly of Pembridge attach the file material and relate the chronological communications involving Pembridge from March 2018 to April 2022:

- Mr. Kelly said the accident was reported to Pembridge on March 12, 2018.
- Laura Dawe was Pembridge's initial claims adjuster. On March 16, 2018, Ms. Dawe corresponded with the RCMP, learned the names of the Plaintiffs and requested police reports.
- Ms. Dawe's notes say that, on March 21, 2018, Mr. Magee informed her that, on the day of the event, he had four drinks of vodka, "made a decision to get behind the wheel", "knew the weather was bad and I made the choice so that choice is on me" and "I know I have an issue with alcohol". Ms. Dawe's notes add that Mr. Magee was charged with driving over the blood alcohol limit and causing bodily harm.
- Ms. Dawe's notes say that, on April 19, 2018, she spoke with Mr. Lauzon, he said he had a concussion and had retained Ms. Lamey as his lawyer, and he gave Ms. Lamey's contact information to Ms. Dawe.
- Nicole Branch replaced Ms. Dawe as Pembridge's claims advisor. On April 24, 2018, Ms. Branch emailed Ms. Lamey with a request for "preliminary details as to the nature of your clients injuries and any anticipated special damages".
- On April 26, 2018, Pembridge received a letter of April 23, 2018 from Ms. Lamey, advising that she was retained by Paul and Robin Lauzon for the claim.
- On May 1, 2018, Ms. Branch again emailed Ms. Lamey, requesting "preliminary" medical information respecting Mr. Lauzon "so that I may update my file and set up proper reserves".
- On May 17, 2018, Ms. Lamey emailed Ms. Branch with a summary of the medical information respecting Paul and Robin Lauzon.

  I have received some preliminary reports on Robin Lauzon & Mr. Paul Lauzon's health status.

  Robin: (student)

She has experienced constant pain in her mid-sternum. She has attended chiropractic treatments as prescribed to address this. She has to date a WAD 1 diagnosis,, restricted range of motion, Muscular Chest and Sternum pain.

Paul: (music therapy teacher/university music teacher and performance musician) Right handed.

Paul has the following injuries: Diagnosed with concussion. Referred to physiotherapist concussion clinic. Experiencing: light sensitivity, sound sensitivity, difficulty with visual patterns, eye strain, headaches, dizziness, light headedness, confusion, difficulty with decision making, slowed mental response, and delayed mental acuity and processing time, nausea, memory difficulties, concentration difficulties, inability to multi-task, organize and maintain sustained thought, difficulty reading and visual with computer triggering headaches, nausea, dizziness. Mood extremes, changes, irritability, personality difference, crying.

Flash backs, intense worry, sadness lethargy, fatigue, lethargy, decreased appetite, insomnia, anxiety, referred to psychologist/counsellor

Neck pain and restricted mobility

Back pain and restricted mobility

Injury to (left) knee, swelling and pain-uses cane since accident

Wrist pain (right),

Referred to chiropractic, and physiotherapy.

Right handed musician and music therapist/professor-University professor – employed full time-receiving accommodation at Teaching job since accident. Difficulty with mental clarity. Unable to perform all duties of employment, marking, reading and teaching since accident. Unable to perform. Had just completed a CD prior to accident – had booked performances pre-accident that have now been cancelled.

Mr. Lauzon is 71 years old. He was a full functioning full time university professor, music therapist and performing musician prior to the accident. He has (*sic*) the sole earner for a young family.

Yours Very Truly

Darlene Lamey

- On December 27, 2018, Ms. Branch emailed Ms. Lamey to request a copy of the section B file for both Paul and Robin Lauzon.
- On May 18, 2019, Ms. Branch emailed Ms. Lamey and again requested the section B file and amounts expended for both Paul and Robin Lauzon.

- Ms. Lamey did not reply to Ms. Branch's requests of December 27, 2018 and May 18, 2019.
- In September 2019, Ms. Lamey left Waterbury Newton and joined Atlantica Law Group.
- Paul Lauzon's limitation period expired on March 9, 2020.
- On October 6, 2021, Ms. Branch left a phone message at Waterbury Newton, asking whether that firm still represented Paul and Robin Lauzon. Later that day, Waterbury Newton's managing partner, Paul Walter, phoned Ms. Branch to inform her that Ms. Lamey had left the firm in September 2019 and moved to Atlantica Law, and he gave Ms. Branch Ms. Lamey's contact information.
- On October 6, 2021, Ms. Branch emailed Ms. Lamey at Atlantica Law to ask whether a Notice of Action had been filed for Paul and Robin Lauzon.
- Ms. Lamey did not reply to Ms. Branch.
- Pembridge performed a court search, confirmed no action had been commenced, and closed its file on October 12, 2021.
- According to Ms. Lamey, it was on February 28, 2022 that she realized the limitation period had expired. On March 6, 2022, she transferred the Lauzon file to another lawyer, Jeff Mitchell of NOVA Injury Law.
- The next day, on March 7, 2022, Mr. Mitchell filed separate Notices of Action and Statements of Claim, for Paul and Robin Lauzon, against Mr. Magee.
- On March 7, 2022, Mr. Mitchell left a voicemail for Chantal Caron, a Bodily Injury Advisor with Pembridge, respecting Paul and Robin Lauzon.
- In April 2022, Pembridge retained counsel to take carriage of the Defence.

[54] After reciting the evidence, the motions judge made the following findings:

> [99] The Defendant may have lost the ability to test the credibility of possible statements and documentation early on. To that extent, it has suffered some prejudice. However, it has not lost the opportunity to obtain complete medical

> documentation concerning the claims. It may discover the Plaintiffs and request information which it deems relevant to its assessment of their claims for general and specific damages. It may still test their credibility if that documentation reveals inconsistencies in what was said closer in time to the collision than at later points in time. Pembridge has not lost this opportunity; it has been delayed but delay alone does not establish prejudice on these facts.
>
> [100] There is no evidence before the Court that due to the delay the Defendant was deprived of the opportunity to investigate the cause of the collision and whether its insured was at fault for it. It knew of the collision shortly after it occurred. It knew as well, through its insured, that he was likely at fault for the collision.
>
> [101] This Court accepts that the length of delay impacted the Defendant insurer's ability to defend the damages aspect of the claims closer in time to the collision. However, the fact remains that the medical evidence exists and can now be tested by the Defendant's insurer.
>
> [102] The Court's analysis of factor (c), on balance, favours the Plaintiffs.
>
> …
>
> [138] … As of the date of the hearing of these motions, the Plaintiffs had not provided the Defendant with an Affidavit Disclosing Documents for Paul. His present counsel has sworn an Affidavit saying that his medical information has been gathered and is available. Why it has not (as of the date of hearing of these motions) been provided to the Defendant's counsel, is unknown to this Court. However, the fact remains that it is available. Paul Lauzon can be discovered and further relevant material can be requested by the Defendant.
>
> [139] The Defendant does not suggest that there are issues arising from its ability to defend the liability issue arising from the collision. It knew about the collision almost as soon as it happened, and it dealt with its insured and the police early on. It could have developed whatever evidence it wished concerning the cause of the accident soon after it happened. It has not shown that it was impeded or prejudiced in any way in that sense by the delay in commencing either Action.
>
> [140] There is no question that Pembridge should have and would have benefited in its defence of Paul Lauzon's claim for damages by having earlier disclosure of his medical information. I accept that Pembridge was prejudiced somewhat by the delay in receiving medical reports. However, the evidence has not been lost, but rather its receipt delayed. This is not a situation where medical evidence has been destroyed or for some other reason is not available. Pembrooke [*sic* Pembridge] can still test Paul Lauzon's credibility based on the medical documentation, if it wishes to do so.

[55] As to liability, at the outset Mr. Magee acknowledged to Pembridge his "issue with alcohol", his choice to drive in bad weather after four vodkas and "that

choice is on me". The delay has occasioned no discernable prejudice to the defence of liability.

[56] As to damages, the late production of medical reports has delayed progress, for which there is recourse in the *Civil Procedure Rules*. Nonetheless, based on Mr. Mitchell's affidavit, the judge found the medical evidence exists, so it will be produced and tested at trial. The defendant has had and retains the right to require an independent medical examination.

[57] There is no palpable and overriding error.

[58] **Defendant's conduct after the claim – s. 12(5)(d):** The judge found (paras. 104-106) that the Lauzons and their counsel made no requests to Mr. Magee or Pembridge, "[t]he Defendant bears no responsibility for the delay" and, "[o]n balance, factor (d) weighs in favour of the Defendant". The evidence supports this finding.

[59] **Incapacity of the claimant – s. 12(5)(e):** Robin Lauzon was a minor, which delayed the onset of her limitation. However, this appeal involves Paul Lauzon, who was not incapacitated. As the judge (para. 107) found, this factor does not significantly impact the balance of hardships under s. 12(3).

[60] **The claimant's prompt and reasonable action – s. 12(5)(f):** Mr. Magee's counsel contended that Paul and Robin Lauzon did not act promptly or reasonably.

[61] The motions judge rejected that proposition:

> [113] The Court finds that the Plaintiffs acted promptly and reasonably in advancing their claims. Paul Lauzon quickly retained a lawyer and sought advice for himself and his daughter. It was reasonable for him to rely on legal counsel to advance his and his daughter's claims and to follow her advice once she was retained. Paul Lauzon clearly had interactions with Darlene Lamey prior to May 17, 2018 when Ms. Lamey sent Ms. Branch a detailed summary of Paul and Robin's health status. Ms. Lamey's evidence was that she was in regular contact with Paul concerning his injuries and condition until March 2020 (the onset of COVID-19). Ms. Lamey's Affidavit provides that she continued to work on the Lauzon claims throughout 2021 and met with Paul on February 19, 2021 to review his medical condition and prepare third-party disclosure.
>
> [114] The failure in this case to commence actions on time was that of Darlene Lamey and not Paul or Robin Lauzon.

[62] As I have discussed respecting s. 12(5)(a), the judge's finding reflects no palpable and overriding error of fact.

[63] Mr. Magee submits the judge erred in legal principle by distinguishing between Mr. Lauzon and his counsel respecting the delay in filing the Notice of Action. I disagree. Subsection 12(5)(g) – *i.e.* "the steps … taken by the claimant to obtain … legal … advice" – contemplates that the plaintiff is expected to rely on legal advice. This expectation would not shelter a plaintiff who adopted his counsel's inertia. However, there is no evidence Mr. Lauzon participated in Ms. Lamey's procrastination, and no cross-examination of Mr. Lauzon or Ms. Lamey explored the point. This left the judge to draw a reasonable inference from the evidence as it stood.

[64] **Steps to obtain expert advice and the advice received – s. 12(5)(g):** The evidence showed that the Lauzons promptly retained counsel and sought medical attention. Mr. Lauzon's affidavit, para. 7, says he retained Ms. Lamey on March 21, 2018, twelve days after the collision. Immediately after Ms. Lamey noticed the limitation problem and withdrew, Mr. Lauzon retained new counsel. Mr. Lauzon's affidavit describes his medical treatment. Robin Lauzon's affidavit described her treatment. Based on the evidence, the judge found:

> [117] This Court finds that the record is sufficient to establish the following, from the Affidavit of Paul Lauzon, and from the standpoint oh his perspective:
>
> - Following the accident, his right wrist was splinted by Emergency Health Services and he travelled in an ambulance to the Valley Regional Hospital.
> - The attending physician observed a large hematoma on the underside of his right wrist.
> - He was diagnosed with a soft tissue injury to his right wrist and a left knee injury.
> - He saw his family doctor, Dr. Grant, on March 22, 2018. He advised Dr. Grant that he was experiencing flashbacks to the accident, was not sleeping and had very low energy. He was having headaches and reported that even half an hour in front of a computer increased his headaches significantly. He was also having neck pain. Dr. Grant suggested that he see a chiropractor. Dr. Grant also diagnosed him with a concussion.
> - He went to CBI Physiotherapy for an initial consultation on April 2, 2018. He was experiencing daily nausea, recurrent headaches, interrupted sleep, dizziness and light headedness. He was also

> experiencing stress at work, nervousness driving and trouble with attention and memory. He was having word-finding difficulties.
>
> - He received chiropractic treatment for his right wrist and left knee and was discharged on May 5, 2018. His physical injuries were feeling somewhat better at that time, but his concussion symptoms remained.
>
> [118] In terms of Robin Lauzon, her Affidavit provides the following in terms of interactions with health care providers:
>
> - Following the accident, she went to the Valley Regional Hospital complaining of chest wall pain.
>
> - She saw her family doctor, Dr. Grant, on March 18, 2018. Dr. Grant diagnosed her with whiplash and noted that she had anxiety related to driving. Dr. Grant recommended psychotherapy.
>
> - She began experiencing pain in her shoulders. She was referred for chiropractic treatment with Dr. LaPierre for constant sternum discomfort. She attended therapy with Dr. LaPierre for 20 sessions until July 25, 2018.
>
> - In March 2019, Dr, Grant referred her for osteopathy for her shoulder and chest pain.
>
> - She has been, according to her, diagnosed with whiplash, collarbone, and shoulder injuries.
>
> [119] This Court finds that Paul Lauzon acted promptly and reasonably in addressing his claim through his retention of legal counsel, for himself personally, and for his daughter Robin as her Litigation Guardian, soon after the collision.
>
> [120] Both Robin and Paul Lauzon each acted reasonably and promptly in obtaining medical advice and care following the collision.

[65] The judge's findings are supported by the evidence and disclose no palpable and overriding error.

[66] **Strength of the claimant's case – s. 12(5)(h):** The judge concluded:

> [127] This Court concludes that each Plaintiff has adduced sufficient evidence to establish a claim which is not frivolous, and which deserves to be resolved on the merits.
>
> [128] Factor (h) favours disallowing the Defendant's limitations defences.

[67] In this Court, Mr. Magee submits that "not frivolous" is too low a bar, and the word "strength" in s. 12(5)(h) means the plaintiff must show a "strong" case.

[68] I disagree that showing a "strong" case is a pre-condition to a successful motion under s. 12. Section 12 does not enact a minimum standard for each criterion. Subsection 12(3) cites the relative "degree" of the parties' hardships. Under s. 12(5)(h), the degree of "strength" affects the weight. The stronger the plaintiff's case, the more heavily the criterion favours the plaintiff's motion to disallow the limitations defence. The weaker the case, the less weight favours the motion.

[69] According to Pembridge's file note, Mr. Magee acknowledged to Ms. Dawe that "I have an issue with alcohol" and, on March 9, 2018, he had four drinks of vodka, then "made a decision to get behind the wheel" when he "knew the weather was bad", and "I made the choice so that choice is on me".

[70] Mr. Lauzon has a strong case against Mr. Magee on liability.

[71] The vehicles collided head-on. Ms. Lamey's letter of May 17, 2018, quoted above, recited Mr. Lauzon's injuries. Likely there will be issues respecting the severity or lasting effect of the injuries and quantification. But Mr. Lauzon has a strong case that Mr. Magee's negligence caused him significant injury.

[72] The judge's conclusion that the "strength of the claimant's case" criterion favors disallowance of the limitations defence discloses no error.

[73] **Alternative remedy or compensation – s. 12(5)(i):** Ms. Lamey admits that due to her "inadvertence', she missed the limitation period. The judge found:

> [133] The *LAA* directs this Court to consider factor (i). This Court does so. The Plaintiffs have a potential claim against their former lawyer in negligence. The Court gives some weight to this factor.
>
> [134] Factor (i) weighs slightly in favour of disallowing the Plaintiffs' claims.

[74] The judge made no error of law. Section 12 does not give factor (i) super-priority. The factor is to be weighed in the balance. The overall balance is for the judge, barring error in law or patent injustice. I will discuss this further in the next passage on "The balance".

[75] **The balance – s. 12(3):** Justice Smith (paras. 135-142) balanced the hardships further to s. 12(3).

[76] The judge concluded:

> [140] There is no question that Pembridge should have and would have benefitted in its defence of Paul Lauzon's claim for damages by having earlier disclosure of his medical information. I accept that Pembridge was prejudiced somewhat by the delay in receiving timely medical records. However, that evidence has not been lost, but rather its receipt delayed. This is not a situation where medical evidence has been destroyed or for some other reason is not available. Pembrooke [*sic*] can still test Paul Lauzon's credibility based on the medical information, if it wishes to do so.
>
> [141] On balance, taking into account all of the circumstances, and giving consideration to each s. 12(5) factor, this Court determines that the hardship assessment favours Paul Lauzon.

[77] From the circumstances as applied to the statutory criteria, the judge depicted the patterns of hardship to Messrs. Magee and Lauzon:

- Mr. Magee suffered no hardship respecting defence of liability, as Pembridge knew of the collision almost immediately and then conducted its investigation (paras. 100 and 139). As to damages, the judge acknowledged that Paul Lauzon's medical reports had not been produced in a timely manner. However, in the judge's view, the hardship to the Defendant was mollified because, according to the affidavit of Mr. Lauzon's current counsel, the information is available. The medical reports will be produced and may be tested in discovery and at trial. The Defendant has had and retains the right to an independent medical examination of Mr. Lauzon. The Defendant's hardship was delay, not loss of evidence or opportunity to challenge at trial. Undue delay invokes other remedies, such as adjustments to pre-judgment interest or costs.
- Mr. Lauzon has a strong case, acted promptly and reasonably to obtain legal and medical advice and relied on that advice. He may have recourse against his lawyer.

[78] Section 12 does not say the plaintiff's motion to disallow fails if the defendant shows any hardship. Rather, the judge is to balance the defendant's and plaintiff's hardships. The balance is not a linear exercise. Some of the criteria in s. 12(5) will favour the plaintiff, others will favour the defendant and often the various criteria will have no common denominator. The judge is expected to marshal coherence from the disorder. As stated in *Butler* and adopted in *Carvery*, the balancing exercise is assisted by assessing whether the plaintiff's loss of the

opportunity to litigate is disproportionate to the purposes for which the limitation period exists.

[79] Here, it may seem counter-intuitive that a clearly negligent lawyer would escape liability. However, the balance under s. 12 is whether Mr. Lauzon's loss of a claim is disproportionate to the purposes of the limitation. A principal purpose of the limitation is to protect Mr. Magee from delay-induced impairment to his defence for the collision on March 9, 2018. Holding Mr. Lauzon's lawyer to account for her negligence may be sound policy from the perspective of professional responsibility. But it is not a principal objective of the *Limitations of Actions Act*.

[80] The judge applied the test under s. 12, made no palpable and overriding error of fact or error of law and there is no patent injustice. It is not the Court of Appeal's role to conduct a *de novo* balancing exercise. I would dismiss the appeal.

Conclusion

[81] I would grant leave to appeal but dismiss the appeal.

[82] Mr. Magee says appeal costs should be $2,000 payable to him if he succeeds but only $300 to Mr. Lauzon if his appeal is dismissed. I disagree with the equation. I would order appeal costs of $2,000, all inclusive, payable forthwith by Mr. Magee to Mr. Lauzon, in any event of the cause.

Fichaud J.A.

Concurred in:

Bryson J.A.

Van den Eynden J.A.