SUPREME COURT OF NOVA SCOTIA

Citation: A.B.C. v. Nova Scotia (Attorney General), 2011 NSSC 475

Date: 20111223
Docket: Hfx. No. 262658
Registry: Halifax

Between:

A.B.C.

Plaintiff

v.

The Attorney General of Nova Scotia, representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendant

DECISION

Restriction on publication: Restriction on publication of plaintiff's name under *Civil Procedure Rules* 85.04(1) and (2) and 85.05(1) and (2).

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice A. David MacAdam

Heard: September 19, 20, 21, 22, 26, 2011, in Halifax, Nova Scotia

Final Written Submissions: December 7, 2011

Counsel: Mark T. Knox, for the Plaintiff
Glen Anderson, Q.C. and Darlene Willcott, for the Defendant

By the Court:

Introduction

[1] The plaintiff (ABC) was repeatedly sexually abused by his probation officer, Caesar Lalo (Lalo), between January 1984 and June 1985, when ABC was between 14 and 16 years old. ABC commenced this proceeding, claiming damages against the defendant as Mr. Lalo's employer, in February 2006. The statement of claim alleged causes of action in assault, negligence, contract, and breach of fiduciary duty. The defendant has acknowledged vicarious responsibility only in respect to the cause of action founded upon sexual assault. Shortly before trial, the issue of damages was resolved between the parties. The only outstanding issue is the defendant's assertion that ABC's claim is limitation-barred.

Limitations legislation

[2] The relevant provisions of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258, include sections 2, 3 and 4. The basic limitation period appears in section 2, along with a specific provision governing claims arising from sexual abuse:

> **Limitation periods**
>
> **2** **(1)** The actions mentioned in this Section shall be commenced within and not after the times respectively mentioned in such Section, that is to say:
>
> (a) actions for assault, menace, battery, wounding, imprisonment or slander, within one year after the cause of any such action arose;
>
> ....
>
> **(5)** In any action for assault, menace, battery or wounding based on sexual abuse of a person,
>
> (a) for the purpose of subsection (1), the cause of action does not arise until the person becomes aware of the injury

or harm resulting from the sexual abuse and discovers the causal relationship between the injury or harm and the sexual abuse; and

(b) notwithstanding subsection (1), the limitation period referred to in clause (a) of subsection (1) does not begin to run while that person is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse.

[3] Section 3 deals with the disallowance or invocation of time limitations. It provides, in part:

Disallowance or invocation of time limitation

3 **(1)** In this Section,

(a) "action" means an action of a type mentioned in subsection (1) of Section 2;

....

(2) Where an action is commenced without regard to a time limitation, and an order has not been made pursuant to subsection (3), the court in which it is brought, upon application, may disallow a defence based on the time limitation and allow the action to proceed if it appears to the court to be equitable having regard to the degree to which

(a) the time limitation prejudices the plaintiff or any person whom he represents; and

(b) any decision of the court under this Section would prejudice the defendant or any person whom he represents, or any other person.

...

(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

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

(b) any information or notice given by the defendant to the plaintiff respecting the time limitation;

(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;

(d) the conduct of the defendant after the cause of action arose, including the extent if any to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

(e) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

(f) the extent to which the plaintiff acted promptly and reasonably once he 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 an action for damages;

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

[4] Where a plaintiff claims to have been under a disability, section 4 is relevant:

Plaintiff under disability

4 If any person who is entitled to any action mentioned in Section 2 is, at the time any such cause of action accrues, within the age of nineteen years or a person of unsound mind, then such person shall be at liberty to bring the same action, so as such person commences the same within such time after his or her coming to or being of full age or of sound mind, as other persons having no such impediment should, according to this Act, have done, or within five years, whichever is the shorter time.

Background

[5] ABC was born in Halifax and has lived there most of his life. His father died before he was born, and his mother began a relationship with the man who became his stepfather. His parents both worked, and he and his siblings had a good deal of independence. ABC's stepfather would use corporal punishment on him, and his mother was physically abusive as well. ABC reported to Dr. S. Gerald Hann, who prepared a Psychological Assessment Report, that he was careful not to get in trouble with his mother, which, Dr. Hann notes, later influenced his decision not to inform her of the sexual abuse by Lalo.

[6] ABC's mother and stepfather separated when he was about 13 years of age. Dr. Hann noted that there was a change in ABC's behaviour at that age. His school attendance suffered, and his teachers began raising concerns about his functioning around 1982. ABC reported to Dr. Hann that he began using drugs around the age of 13, initially hash, marijuana, acid, and crack cocaine. He started using alcohol and Valium when he was 16, with increasing frequency and intensity. Around this time he had his first encounters with the law, resulting in a period of probation, commencing in January 1984, when he was about 14 ½ years old. This also resulted in his meeting Lalo, who was appointed as his probation officer. In a statement given to Constable Aileen Mitchell-Halliday on August 6, 1997, ABC stated that the abuse by Lalo started at the first meeting and was repeated at subsequent meetings.

[7] ABC attended public schools in Halifax, getting to grade 10. He obtained his GED while incarcerated. His encounters with the law continued throughout the 1980s and 1990s, and included theft, drug trafficking, uttering threats and breaches of probation. On May 5, 2003, he was convicted of drug trafficking, conspiracy to commit an indictable offence and failure to comply with a recognizance.

[8] In his report, Dr. Hann stated that ABC experiences difficulty in his current relationship "predominantly related to his use of drugs and involvement with the law." ABC reported erectile dysfunction, which had not been medically investigated. Dr. Hann noted that erectile dysfunction can be related to organic or psychological reasons, or both, and commented that ABC's "long-standing drug and alcohol abuse, anxiety, and depression, could also be significantly contributing to his erectile dysfunction."

[9] Between 1990 and 2007 ABC has had several injuries, including motor vehicle accidents in January 1990 and April 2001.

Issue

[10] The issues are whether the limitation period for commencing this action expired prior to February 2006, and, if so, whether the defendant is entitled to rely on the limitation period, or whether the plaintiff has established that it should be disallowed.

The law

[11] Pursuant to s. 2(1)(a) of the *Limitation of Actions Act*, the limitation period for assault is one year after the cause of action arose. Pursuant to s. 4, where the person entitled to bring the action is under the age of 19 years, the limitation period only begins to run when the person turns 19. As such, on its face, the limitation period would have expired in May 1989, when ABC turned 20. However, it is also necessary to consider the specific provision respecting sexual abuse at s. 2(5), which provides, at s. 2(5)(a), a statutory expression of what is often referred to as the "discoverability principle". Additionally, s. 2(5)(b) is relevant where the prospective plaintiff "is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse", in which case the running of the limitation period is suspended.

[12] Counsel for ABC calls this a unique case, and suggests that it is unprecedented to raise a limitation defence where an acknowledgment of fault and injury has already been made in a case of sexual abuse. The defendant does not dispute that Lalo sexually abused ABC, that the defendant is responsible for Lalo's acts, that ABC provided a written police statement regarding the abuse in 1997, that ABC assisted the police and the Public Prosecution Service and that there are "volumes of records" concerning ABC's period of probation with Lalo as his probation officer, and "extensive school records" of ABC's upbringing. To deny the claim in these circumstances, plaintiff's counsel submits, would essentially vitiate the acknowledgment of fault and prevent an assessment of damages, and would not be equitable.

[13] In its prehearing submission, the defendant, Attorney General, sets out a time line of dates that are said to be relevant to discoverability. Beginning with ABC's birth in May 1969, and the assaults between January 1984 and June 1985, the relevant dates (in the defendant's view) continue as follows:

May 11, 1988: ABC reaches the age of majority and the limitation period commences;

May 11, 1989: The limitation period for assault expires;

May 11, 1994: The limitation periods for breach of contract and negligence expire;

November 18, 1996: ABC's counsel advises the Department of Justice of ABC's intention to submit a claim for compensation for abuse he suffered as a resident at Shelburne;

August 6, 1997: ABC gives a statement to the Halifax Regional Police in which he states, "it's been bothering me for years. I've tried drugs and drinking but they only help for a minute.... I feel that if I come forward and he is charged, I might begin to feel better about it";

March 26, 1998: ABC's counsel advises the Department of Justice that ABC was a "Lalo victim," rather than a Shelburne victim;

1997-1998: ABC attends counselling with *t in relation to the abuse by Lalo;

June 18, 1999: ABC gives a second police statement, in which he indicates that he has received counselling in relation to the assaults by Lalo;

August 2004: The Lalo criminal proceedings end (see 2004 NSSC 154);

February 20, 2006: ABC commences this proceeding.

[14] The plaintiff adds various elements to this timeline. He states that while he was on probation he told another probation officer, George MacDonald, and a police officer named Bowes, that Lalo was a “fruit” and a “faggot”, but his accusations were not taken seriously and he received no help. He says his physician between 1995 and 1999, Dr. Tilley, did not discuss sexual abuse, depression or anxiety. He says the counselling sessions with * were not successful, and he stopped them prematurely, believing that “the healing wouldn't start for me until he was dealt with through the courts.” He says he was "embarrassed and ashamed" and found it “very, very, very hard” to talk about the assaults. He also dealt with substance abuse, anxiety, depression and erectile dysfunction. * agreed

that ABC was not ready for therapy. He first spoke to another family physician, Dr. Archibald, in 2004, about his problems with drug use and depression, at a time when he felt that the criminal proceeding was causing him to relive the past. He began taking antidepressants at this time. The plaintiff says his first psychological assessment and diagnosis was by Dr. Hann in 2007. He subsequently began therapy with a substance abuse therapist.

[15] The plaintiff acknowledges that he met with lawyers in 1997, when his criminal lawyer, Josh Arnold, referred him to John McKiggan in relation to a motor vehicle accident. However, he says Mr. McKiggan was not retained for the purpose of the present proceeding. He further says that a Senior Crown Attorney, Catherine Cogswell, suggested in the course of the criminal proceeding that complainants should not "rush into civil proceedings during the criminal trial" (as paraphrased by counsel), so as not to interfere with the criminal process. Charges relating to the plaintiff appeared in the third indictment against Lalo.

[16] The plaintiff notes that the Department of Justice was aware of his complaint. It was initially classified as a complaint relating to Shelburne, and he was denied counselling on the basis that he had not been in Shelburne. When this was corrected, the counselling with * was able to proceed. A notice of intended action was provided on October 20, 2005.

[17] The plaintiff also points out that he was incarcerated for varying periods in 1989 (four months), 1991 (one month), 1992 (six months), 1993, 1996 (30 days), 2001 (90 days on weekends), 2002 (16 days on weekends) and 2003 (two years and four months, including time on remand). The 1993 and 2003 sentences were federal ones.

Discoverability

[18] The purposes and objectives of limitation periods were described by LaForest J., for the majority, in *K.M. v. H.M.*, [1992] 3 S.C.R. 6, [1992] S.C.J. No. 85, at paras. 22-24:

> 22 Statutes of limitations have long been said to be statutes of repose.... The reasoning is straightforward enough. There comes a time, it is said, when a

> potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations....
>
> 23 The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim;...
>
> 24 Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion....

[19] La Forest J. observed that these rationales did not fit well with an action for incest, as was involved in that case. He took the view, at para. 30, that:

> 30 ...the only sensible application of the discoverability rule in a case such as this is one that establishes a prerequisite that the plaintiff have a substantial awareness of the harm and its likely cause before the limitations period begins to toll. It is at the moment when the incest victim discovers the connection between the harm she has suffered and her childhood history that her cause of action crystallizes....

[20] Kelly J. dealt with the discoverability issue in the context of historic sexual abuse in *D.K. v. B.D. Estate* (2000), 187 N.S.R. (2d) 160, [2000] N.S.J. No. 330 (S.C.). He stated, at para. 25, that:

> 25 ...the significant matter to be determined here was when did Ms. D.K. reach the state of mind specified in s. 2(5) of the Act in relation to the alleged tortuous acts of assault and battery. When was she "aware of the injury or harm resulting from the sexual abuse and discover the casual relationship between the injury or harm and the sexual abuse", and further when was she "reasonably capable of commencing a proceeding" as described in s. 2(5)(b)?

[21] The same question arises in respect to ABC and his claims against the defendant. However, there are two separate questions arising out of subsection 2(5). The first is the two-pronged question of when the person became aware of the injury or harm resulting from the sexual abuse and discovered the causal relationship between the injury or harm and the sexual abuse (s. 2(5)(a)). The second (and distinct) question is when the person was "reasonably capable of commencing a proceeding" having regard to his "physical, mental or psychological condition resulting from the sexual abuse."(s. 2(5)(b)).

[22] In respect to the first question, I note the following observations by the court in *Jack v. Canada (Attorney General)*, [2004] O.T.C. 706, [2004] O.J. No. 3294 (Ont. Sup. Ct. J.), in the context of summary judgment, at paras. 81-84 (citations omitted):

> 81 Counsel have referred to legal authorities regarding the discoverability rule. Discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it or to sue....
>
> 82 A cause of action arises for the purposes of a limitation period when the material facts on which the action is based have been discovered or ought reasonably to have been discovered, by the exercise of reasonable diligence....
>
> 83 The rule of reasonable discoverability is to ensure that the plaintiffs have sufficient awareness of the facts to be able to bring an action. The suggestion that a plaintiff requires a "thorough understanding" of such facts even after the action is brought, sets the bar too high. Similarly, to say that a plaintiff has to know the precise cause of her injuries before the limitation period started to run would also place the bar too high....
>
> 84 The exact extent of one's loss need not be known before a cause of action can be said to have accrued. Once a plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent nor the type of damage need be known....

[23] Although the claim in *Jack* was not similar to that in the present case (it related to negligence in connection with the contamination of a house), these comments are nevertheless relevant to this proceeding. ABC knew it was Lalo who was assaulting him and knew that it was wrong. He knew he had a right to sue Lalo. He may not have known that he had a right to sue the defendant as well; the evidence on this point is unclear. However, "(i)t is the discovery of the facts giving rise to a cause of action that starts the time running, not the discovery of the applicable law. Ignorance of the law does not postpone the starting of the time period.": *Milbury v. Nova Scotia (Attorney General)*, 2007 NSCA 52, at para. 27.

[24] The plaintiff submits that the factual context of a sexual assault claim distinguishes discoverability in this situation from cases such as *Jack* and *Milbury.* The plaintiff submits that "self-fault" and "self-blame" are considerations going to

discoverability between the abuse and the harm, suggesting that professional intervention provides the necessary nexus.

[25] In his statement to Constable Mitchell-Halliday, ABC said that after leaving Lalo's office for the last time, he "saw the younger policeman who worked there not Cpl. Bowes. I told him that Cesar had grabbed my arm and flung me in a chair. He just said, you probably deserved it and kept walking." In his testimony, ABC appeared to say that it was Cpl. Bowes whom he told that Lalo had flung him into a chair. He also said the first time he told anyone about what had happened was when he made the statement in 1997. He said until then he had blocked out the events.

[26] ABC made a second statement, in June 1999, to Constable Peter Burdock. This statement was apparently taken at the request of Catherine Cogswell, the lead prosecutor in Lalo's criminal trials. The focus of Cst. Burdock's questioning related to whether ABC had applied for compensation and whether he had spoken to a lawyer in relation to these events. ABC said he had not, although he said he did have a lawyer, John McKiggan, who had received a copy of his 1997 statement. When testifying he clarified that although Mr. McKiggan was his lawyer in relation to a motor vehicle accident, and had prepared a notice of intended action, he had never been retained to pursue compensation in relation to Lalo's assaults.

[27] Mr. McKiggan testified that he had represented ABC in respect to a 2000 motor vehicle accident. He also said that in 2002, ABC came to his office without an appointment, apparently having just got out of jail. He appeared agitated. He had apparently been told that he needed to file a notice of intended action against the Province in order to obtain counselling. Mr. McKiggan said he was not retained to commence a proceeding against Lalo, but that he did prepare the notice, using the 1997 statement for reference. He said ABC did not tell him any of the details of Lalo's assaults.

[28] ABC filed a complaint against Mr. McKiggan with the Nova Scotia Barristers' Society. He said he called Mr. McKiggan the day Lalo was found guilty and Mr. McKiggan said he was going to "take care of my case." He said that the statement he wrote in 1997 had been faxed to Mr. McKiggan's office by the investigating officer on September 9, 1997, and that he had signed an agreement for fees, although he did not have a copy of it.

[29] The relationship of ABC and Mr. McKiggan is ambiguous. Both testified that Mr. McKiggan was not retained to pursue an action. However, ABC's 2005 complaint to the Bar Society alleges that he had retained Mr. McKiggan to pursue an action in August 1997. In his evidence, Mr. McKiggan indicated that, other than representing him in respect to the motor vehicle accident, he only assisted ABC in preparing the notice of intended action, on the understanding that ABC needed it in order to obtain counselling. He said his only discussion with ABC would have been the same discussion he had with other potential claimants against Lalo. His firm had been involved in claims for compensation by residents of the Shelburne School for Boys. There was apparently a public perception that many of the claims were false. The firm decided not to participate in any claims against Lalo except where there were criminal convictions. Mr. McKiggan said he could not recall if this conversation would have occurred at the time he met with ABC about preparing the notice of intended action, or at some other time. He said there was no written fee agreement because ABC never retained him to pursue a claim against Lalo. ABC’s evidence was that his purpose in going to see Mr. McKiggan was to get counselling, not money. In respect to the complaint he said he was confused.

[30] The evidence that ABC asked Mr. McKiggan to prepare a notice of intended action to assist him in obtaining counselling appears to be corroborated by the Attorney General’s file. A note dated May 13, 2002, indicates that ABC came to the office seeking a referral for counselling, apparently having been told he was ineligible. He indicated that his lawyer had filed a notice of intended action. Another note, dated May 14, 2002, says the author spoke to Mr. McKiggan, who advised that a notice of intended action had been prepared, but that he did not yet represent ABC. Mr. McKiggan apparently said he would forward a copy of the notice of intended action to Dale Darling of the Department of Justice.

[31] Dale Darling testified that her position involved managing potential claims against the Province by residents of the Shelburne School, or other residential schools, as well as claims respecting Lalo. She had no recollection of the call referred to in the note of May 14, 2002. She said she did not receive a notice of intended action from Mr. McKiggan or from ABC. She said she could not find an acknowledgment in the files by her to Mr. McKiggan or to ABC, which she said she would expect to find if she had received the notice.

[32] The defendant's file does contain a letter dated November 16, 1996, from Mr. Arnold to the Department of Justice advising that his firm were the solicitors for ABC, that ABC was a former resident of the Shelburne School for Boys, and that he intended to submit a claim for compensation for abuse he suffered at the school. ABC testified that he was never a resident of the school and, although the letter purports to be copied to him, he says he never saw it and that "they got it mixed up." Mr. McKiggan testified that at the date of this letter he was not a member of the firm. The earliest letter in the defendant's file that he identified as written by him, is dated March 26, 1998. In this letter, Mr. McKiggan wrote, "[w]e represent [ABC] but he is a Lalo victim." He testified that the letter was stating, in effect, that ABC was not a Shelburne claimant. It is unclear why he would write that "we" represent ABC, if the firm had not been retained in that regard. As noted earlier, Mr. McKiggan said he had no recollection of speaking with ABC prior to 2000, when he represented him in relation to the motor vehicle accident that occurred in February of that year. Mr. McKiggan said at that time there was no discussion about ABC's abuse by Lalo.

[33] Notwithstanding the 1996 and 1998 correspondence suggesting the firm had been retained, the response by ABC in the 1999 statement to Cst. Burdock that Mr. McKiggan was his lawyer, the August 1997 date of retention suggested in ABC's Bar Society complaint, it appears that in a telephone conference on May 14, 2002, apparently with Dr. Elsie Blake, of the Family Services Association, Mr. McKiggan said he did not yet represent ABC. The Family Services Association was contracted by the Province to provide counselling to victims of abuse in provincial residential schools and to some of those alleging abuse by Lalo.

[34] Both ABC and Mr. McKiggan maintain that Mr. McKiggan was never retained to seek compensation on behalf of ABC. It is clear, primarily from the defendant's records, as well as from Ms. Darling’s evidence, that ABC sought counselling as early as July 1999, and was apparently advised that to be eligible for counselling he must file a notice of intended action against the Province. Mr. McKiggan was retained at least in that regard.

[35] It appears that, apart from the statement to Constable Mitchell-Halliday, ABC never communicated the details of Lalo's assaults to anyone until he met with Dr. Hann in 2007. In his statement, responding to the question of why he had come forward at that time, he said it had been bothering him for years, that he had tried drugs and drinking, and that he felt that if he came forward and Lalo was

charged, he might begin to feel better. He said he did not tell anyone about the assaults, but that he had met with *, initially in order to prepare for his statement to Constable Mitchell-Halliday.

[36] * said ABC did not discuss details of the assaults. She said her initial purpose was to help him prepare to give a police statement. She said that in their 12 or 13 meetings ABC was "polite, shy and felt embarrassed." She said she intended to impress upon him that he was the victim, not the criminal. In their meetings, he said little about the abuse and how it impacted on his life. She concluded from his body language that he was embarrassed; his head was always down and he did not establish eye contact. She said he had "self-hatred." He was able to deal with this when Lalo, by his guilty plea, admitted he had wronged him. On cross-examination she said the admission of guilt was the beginning of healing, but ABC would need continuing therapy.

[37] On cross-examination, * said she was not sure whether ABC had a lawyer at the time she met with him. She acknowledged that she could not specifically recall what they discussed. She suggested that drug abuse was a means of coping, and that this led to his criminal activity. She said she would have tried to address this. She suggested that it could have been caused by Lalo's assaults, but ABC was not very talkative. He never said it was because of Lalo.

[38] Dr. J.F. Archibald first saw ABC (as a family physician) in 1996. He said ABC told him about the abuse by Lalo on March 18, 2004. This was three days after the scheduled start of the criminal trial, which had not proceeded because of Lalo's guilty plea. Dr. Archibald's note states, "[a]bused by Cesar Lalo as a child & is in court now trouble sleeping, can't relax". Dr. Archibald scheduled an appointment for ABC with a mental health nurse in his office. ABC failed to keep the appointment. He testified that he was not ready to open up about what had happened. On cross-examination, Dr. Archibald acknowledged that ABC did not attribute his difficulty in sleeping to Lalo.

[39] Dr. Archibald said that on subsequent visits the focus of the discussion was on particular complaints, including injuries from several accidents. On February 1, 2008, ABC reported poor sleeping, weight loss, early-morning awakening, poor appetite and suicidal thoughts. He volunteered that he was depressed. Dr. Archibald said he believed that between 2006 and December 1, 2007, he and ABC did not discuss the abuse by Lalo. His sense was that ABC was reluctant to talk

about the matter. In his experience this was not unusual, as it causes patients distress to talk about such events.

[40] ABC testified that before giving the statement, in 1997, he had never told anyone what had happened to him. When he gave the statement he was living with his mother, father and his siblings. In reference to a note in the defendant's file dated June 26, 1998, indicating that he had withdrawn, (presumably from the counselling by *), ABC said he withdrew from the program because he was not ready. He said it was too painful and he could not talk about it.

[41] ABC's counsel points out that the transcript of his sentencing on May 2, 2003, for trafficking in marijuana, breach of recognizance, and conspiracy to traffick in cocaine, includes no reference to Lalo, despite ABC's knowledge that he faced imprisonment. He received a sentence amounting to 28 months in respect to the various charges, and was paroled in December 2003. At the time he saw Dr. Archibald, ABC was on parole, residing in a halfway house in Halifax. However, he said his experience in the halfway house was not successful. He was returned to prison on three occasions on account of drug use.

[42] ABC stated that when he met with Cst. Mitchell-Halliday and * he was not planning to launch an action, nor did he intend to do so when he met with Mr. McKiggan in 2002, and when he saw Dr. Archibald in 2004. ABC said he first became aware of a time limitation for commencing a legal proceeding, when he got out of jail in September or October 2005. He said he had not previously intended to start a legal action, but was only looking for counselling. It was when he transferred his file from Mr. McKiggan to Mr. Knox, his present counsel, that it came to his attention that he may have been too late.

[43] ABC acknowledged that he had used drugs and committed crimes before the abuse by Lalo. He said he had only come to believe in the last four or five months that there was a connection between the abuse and his ongoing drug use. As to the unsuccessful counselling with * , ABC said that at that time he did not understand the effects of Lalo's abuse and could not think about what had happened. After Lalo’s guilty plea, things became clearer to him. He said the only way he could be aware of the harm that had been caused to him was to speak to a mental health professional. Although he knew what had physically been done to him, he said he did not know about the resulting psychological harm that resulted until he was able to speak to a professional.

Legal Analysis

[44] The Attorney General cites *Borden v. Nova Scotia (Attorney General)*, 2010 NSCA 15, where the appellants claimed against the Nova Scotia Home for Colored Children and the Children's Aid Society of Colchester County, on the basis of vicarious liability, for assault and negligence. The claims arose from events that allegedly occurred while the appellants were living at the home and in foster homes. The chambers judge held that the claims were statute-barred because the appellants were substantially aware of the harm they had suffered, and its likely cause, many years before they commenced proceedings. It appeared that there never had been a time when the appellant Mr. Borden did not remember the abuse, and he had spoken about it to various people. He said he was aware even before he left the home at age 19 that the abuse caused him problems in relationships with women, problems with authority and with violence. The second appellant, Mr. Smith, had talked to his wife and others about the abuse and its effects on him, and went so far as to be interviewed by the author of a book in which he described the abuse. The chambers judge concluded that both appellants had discovered or ought to have discovered the cause of action shortly after they reached the age of majority, several decades earlier.

[45] Hamilton J.A. held that the chambers judge had correctly applied the proper legal principles in his assessment of the evidence and in concluding that both appellants' actions were statute-barred. The appellants were substantially aware of the harm to which they had been subjected many years before the lawsuit was filed. She found no error in the chambers judge's conclusion that two psychologist's reports did not create a genuine issue for trial. She said, at paras. 15-16:

> [15] I am also satisfied that the judge did not err in finding that Dr. Hayes' bare opinions did not create a genuine issue for trial. The assumptions on which both opinions were based were shown to be entirely at odds with the sworn evidence given at discovery by Messrs. Borden and Smith themselves. Thus Justice Goodfellow did not err in concluding that Dr Hayes' opinions were shown to be completely unsustainable.
>
> [16] It would seem to stretch credulity for the appellants to seriously suggest they were only now beginning to understand the connection between these alleged events and the harm they say they suffered, when in fact they commenced these actions in 2001/2002. Dr. Hayes' conclusions on discoverability, i.e. that the

> appellants did not fully understand the connection between the alleged events giving rise to their claim and the harm they suffered until after they commenced their law suits, sets the bar for discoverability too high....

[46] Hamilton J. found support for this conclusion in *K.L.B. v. British Columbia*, 2003 SCC 51, to which she referred at para. 16, citing paras. 54-55, where McLachlin C.J.C. said, for the majority:

> 54 The appellants argue that their tort actions are not statute-barred because their causes of action were not reasonably discoverable "prior to commencement of these actions". They rely on the trial judge's finding that "[n]one of the plaintiffs had a substantial awareness of the harm and its likely cause prior to commencement of these actions" (para. 140). This finding was based upon the evidence of a psychologist, Dr. Ley, who assessed the appellants after they had commenced their actions and concluded that they lacked a "thorough understanding" of the psychological connection between their past abuse and their current state.
>
> 55 This approach to reasonable discoverability is problematic. It rests on evidence that the plaintiffs lacked sufficient awareness of the facts even after they had brought their actions. Since the purpose of the rule of reasonable discoverability is to ensure that plaintiffs have sufficient awareness of the facts to be able to bring an action, the relevant type of awareness cannot be one that it is possible to lack even after one has brought an action. The "thorough understanding" proposed by Dr. Ley – an understanding not present even after suit was launched – thus sets the bar too high....

[47] I am satisfied that ABC had sufficient awareness of the fact that he had been abused and who had abused him, at the time of or prior to reaching the age of majority, so as to satisfy the "discoverability principle" codified in s. 2(5)(a) of the *Limitation of Actions Act*. He may not have been aware of the specific harms that the abuse had caused him, or the casual link between the abuse and the harm. However, having regard to *K. L. B.*, *supra,* such awareness is not necessary in applying the "discoverability rule." As noted above, McLachlin C.J.C. said as much at paras. 54-55. She continued, at paragraph 56:

> 56 All of the appellants were aware of the physical abuse they sustained at the time that it occurred. They may not have been aware of the existence of a governmental duty to exercise reasonable care in making and supervising their placements. They may also not have been immediately aware of the harm that the abuse caused to them or of the causal link between the abuse and the harm.

> Indeed, in *M. (K.) v. M. (H.)*, *supra*, La Forest J., writing for the majority, acknowledged that awareness of the connection between harm suffered and a history of childhood abuse is often elusive....

[48] The Chief Justice went on to reference the steps taken by the claimant in seeking compensation for the damage suffered while in foster care. She said, at paras. 56-57:

> 56 ...However, in 1986, K. and V. consulted with a lawyer about the possibility of receiving compensation from the government for damage suffered while in foster care. The lawyer told them that he thought they had a cause of action, and suggested they consult a lawyer in Victoria who specialized in such claims. V. did not follow up on this advice, perhaps as a result of a sense of powerlessness and a concern that she was to blame. In 1990, three of the appellants made a complaint to the Ombudsman, who informed the Superintendent that "[a]ll of the complainants are seeking financial compensation for the events which occurred while in the care of the Superintendent". In June of 1991, all of the appellants met with a Ministry representative. With his assistance, they made a formal request for counselling and for a settlement from the government for physical and mental abuse suffered in the Pleasance and Hart homes.
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> 57 The appellants could not have come away from these meetings with anything less than an awareness that the government may have breached a duty that it owed to them, and that an action against the government would have a reasonable prospect of success. They now contend that they did not have access to some of the information that they needed in order to conclude that an action would have a "reasonable prospect of success" because the Crown failed to provide them with their child-in-care records. However, the only facts that are contemplated by the statute as necessary for determining whether an action has a reasonable prospect of success relate to the existence and the breach of a duty. The meetings between the appellants and various members of the government suggest that the appellants, by June of 1991 at the latest, had acquired sufficient awareness of those facts to start the limitation period running.

[49] Although there is some evidence that ABC consulted with a lawyer, I am not persuaded that this was done with the intention of seeking compensation from the defendant, or from anyone else. There is correspondence, as well as the statement to Cst. Burdock in 1999, and various notes in the defendant's file, suggesting that Mr. McKiggan was ABC's lawyer. In his complaint to the Bar Society, ABC stated he had retained Mr. McKiggan to initiate a lawsuit against the provincial government on his behalf. However, both Mr. McKiggan and ABC denied that,

apart from preparing a notice of intended action, Mr. McKiggan was never retained by ABC to sue the defendant, or anyone, seeking compensation for harm caused by the assaults by Lalo. Nowhere in the notes, in the defendant's file, or in the records of the various calls involving ABC or Mr. McKiggan, is there any reference to ABC seeking compensation. The notes consistently reference ABC's request for counselling, not compensation.

[50] Experts are not required to establish that ABC suffered psychological and emotional harm as a result of the assaults by Lalo. The court is entitled to take judicial notice that such effects can be expected, albeit they may not occur in every case. Paragraph 2(5)(b) of the *Limitation of Actions Act* provides that the limitation period does not begin to run while the person "is not reasonably capable of commencing a proceeding because of that person's physical, mental or psychological condition resulting from the sexual abuse." In this regard, there is the evidence of ABC and others that reference his inability to discuss what had happened. Until he saw Dr. Hann, the only person to whom ABC had described what had occurred was Cst. Mitchell-Halliday. ABC testified as to why he had come forward at that time. It did not mean that he was then able to discuss the details of what had occurred, in a proceeding other than one in which the person who had abused him was being tried. Incidents of disclosure like those referenced by the court in *Borden*, *supra*, are here absent. Similarly, the steps to seek compensation referenced by the Supreme Court of Canada in *K. L. B.*, *supra*, are also not present. With the help of * , ABC was able to give a statement to Cst. Mitchell-Halliday in 1997. He did not repeat these details to anyone until he met with Dr. Hann.

[51] If paragraph 2(5)(b) has any meaning, then the inability of ABC to come forward and initiate a civil claim for compensation because he was unable to discuss the circumstances, would be a basis to find that he was not reasonably capable of commencing a proceeding because of a condition resulting from the sexual abuse. The conditions need not be physical, but include mental or psychological conditions as well.

[52] Alternatively, it could be suggested, on the evidence, that by 2004, following Lalo's guilty plea, ABC was "reasonably capable of commencing a proceeding". In that case, section 3 of the *Limitation of Actions Act* is relevant. Subsection 3(6) permits the court to extend a limitation period that would otherwise have expired for period of up to four years. Section 3 was considered in *Butler v. Southam Inc.*,

2001 NSCA 121, a case involving a defamation claim by employees of the Shelburne Youth Centre. Cromwell J.A. (as he then was) addressed the purposes of section 3, at paras. 137-143 (citations omitted):

> [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.
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> [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.... However ... 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.... 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....
>
> [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.

[140] Where, as here, the limitation provision in issue has purposes in addition to those of finality and preservation of the cogency of evidence, the extent to which these other purposes are defeated by the disallowance of the limitation period should be considered as an aspect of assessing the relative degrees of prejudice to the plaintiff and the defendant.

[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.... 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 generally.... 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....

[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. 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....

[53] Many of the factors listed in section 3 are relevant here. The length of the delay, and reasons for it, have been reviewed in some detail. On the evidence there was no information or notice given by the defendant to the plaintiff respecting the time limitation. In respect to whether the evidence would be likely less cogent due to the passing of time, it appears that by 1997 the defendant knew the nature of the assaults by its employee, Lalo, upon ABC. Information about ABC's interaction with Lalo was particularly within the knowledge of the defendant. There is no reason to conclude that the evidence is likely to have been more cogent if this claim had been filed earlier. Moreover, the Attorney General has admitted liability, meaning that freshness of evidence is not a concern on that issue, at least.

[54] On the question of prejudice, Cromwell J.A. said in *Butler*, at paras. 164-165:

> [164] Section 3(4)(c) is concerned with the impact on the cogency of evidence of the delay from the expiry of the limitation (or notice) period. This is an illustration of the general principle that prejudice to the defendant is to be assessed by comparing the present position of the defendant with the position the defendant would have been in if the action had been started on the day before the limitation period expired. The judge appears to have overlooked this point and considered the impact of the passage of time generally rather than limit his consideration to the impact of the missed notice and limitation periods. For example, while there was evidence that tapes of interviews had been lost through recycling of the tapes, it was clear that this recycling was done without regard to the notice or limitation periods. In other words, the loss through recycling of tapes was no greater after the expiry of the limitation period than it would have been before it. The loss cannot, therefore, be attributed to the delay in proceeding after the notice and limitation periods had expired.
>
> [165] More fundamentally, the cogency of evidence does not turn simply on whether every piece of paper or every conceivable witness is available or on whether conversations and sources have been forgotten. The primary consideration should be the significance of any loss of cogency for the proper disposition of the case on its merits having regard to the issues to be determined at trial.

[55] The defendant has admitted vicarious liability for Lalo's conduct. Therefore, the defendant has satisfied itself that the allegations by ABC were in fact true. There is no evidence that the conduct of the defendant would have been different if

the proceeding had been initiated earlier. I note also s. 3(4)(e) of the Act, which provides as a factor for consideration "the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action". Cromwell J.A. said, in *Butler*, at paras. 153-154:

> [153] In my respectful view, the judge adopted too strict a test for determining disability within the meaning of s. 3(4)(e). Although the judge does not make explicit what meaning he attached to "disability", my reading of his reasons is that he was looking for a condition that rendered the plaintiffs' incapable of pursuing their legal rights. In my view, the relevant consideration under s. 3(4)(e) is whether a plaintiff had reduced physical or mental abilities as a result of matters arising after the accrual of the cause of action which could excuse, in whole or in part, the plaintiff's failure to comply with the limitation provisions.
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> [154] I do not accept the respondents' argument that "disability" in s. 3(4)(e) is restricted to those matters set out in s. 4 which, if they exist at the time the cause of action accrues, essentially stop the time from running. The only reference to "disability" in s. 4 is in the heading which, according to s. 12 of the *Interpretation Act*, forms no part of the enactment. Moreover, one of the items referred to in s. 4 is absence from the province which is not a disability in any normal sense of the word. The purpose of s. 4 is to set out matters which prevent the running of time; the purpose of s. 3(4) is to set out a list of factors to be considered, along with all the relevant circumstances, in determining where the equities of the specific case lie. There is no reason as a matter of interpretation to equate disability in the header of s. 4 with disability in the text of s. 3(4) and in my view it is inconsistent with a liberal construction of these remedial provisions to do so. Moreover, a broader definition of disability in s. 3(4)(e) is more consistent with the section's focus on the plaintiff's diligence in pursuing the claim.

[56] In *Smith v. Clayton* (1994), 133 N.S.R. (2d) 157(S.C.), the court considered disability in s. 3, noting that it is not a question of legal disability or competence, which are addressed elsewhere in the Act, but rather the practical disability that may arise from the event surrounding the claim.

[57] Even if ABC, in March of 2004, following Lalo's guilty plea, had moved sufficiently forward that it could no longer be said that he was not reasonably capable of commencing a proceeding, it is also clear that he continued to be reticent about discussing the assaults and their effects on him. He was still operating under a disability, as explained by Cromwell J.A. in *Butler*, *supra*, and that disability was the result of the assaults by Lalo.

[58] Paragraph 3(4)(f) provides that one of the factors for consideration is the extent to which the plaintiff acted promptly and reasonably. With regard to the circumstances under which ABC lived following the plea of guilty until initiating this proceeding, frequently consisting of incarceration as a result of breaches of parole, it cannot be said that he did not act promptly and reasonably. Although ABC is responsible for these breaches, in a practical sense his absence from the community helps to explain the failure to more promptly initiate this proceeding. I am not satisfied that any delay between March 2004 and February 2006 is a substantial factor in disallowing a claim for extension of the limitation period under section 3.

[59] Paragraph 3(4)(g) requires the court to consider any steps taken by the plaintiff to obtain medical, legal or other expert advice. Certainly, in respect to seeking compensation against the defendant, it appears that ABC took no such steps until contacting his present counsel.

The application of s. 3(6)

[60] With respect to s. 3(6) - which limits the court's discretion to disallow a limitations defence to a period of four years after the limitation period expires - the plaintiff submits that the four-year period begins to run at the point of discovery; in other words, the discoverability principle will extend the starting point of the s. 3(6) extension. This does not appear to be controversial. The defendant agrees that the four-year extension can apply from the time the plaintiff became aware of the injury or harm and the sexual abuse. Thus the defendant agrees that s. 3(6) applies to s. 2(5), but maintains that the action is nevertheless barred on the facts.

[61] The plaintiff submits that s. 3(6) permits the court to entertain an extension of the limitation period if he became aware of the harm resulting from the sexual abuse and was reasonably capable of commencing a proceeding on or after February 20, 2001 (five years before the commencement of the proceeding.) In this regard, he references (as alternatives) his April 2002 request to Mr. McKiggan to prepare a notice of intended action; Lalo's acceptance of responsibility in March 2004; or his increased awareness after leaving prison in September 2005. Any of these events, he says, would fall within a period of one year (for the limitation period) plus four years (for the discretionary extension).

[62] The defendant maintains that the plaintiff was aware of the harm caused by the abuse when he turned the age of majority in May 1988. The defendant says this is confirmed by the 1997 and 1999 police statements, and insists that nothing occurred subsequently to lead to a different conclusion. Further, the defendant argues, even if the plaintiff did not go to Mr. McKiggan with the intention of commencing a legal proceeding, his request for counselling indicated that he was aware of the harm he had suffered. The defendant emphasizes the general rule that the extent of the loss need not be known to the plaintiff for the cause of action to accrue: *Smith v. Nova Scotia (Attorney General)*, 2009 NSSC 137, at para. 15, affirmed at 2010 NSCA 14.

[63] The Plaintiff says the evidence does not indicate that the elements of s. 2(5) have all been met. He says his 1997 police statement was given (in words of counsel) "in guarded fashion" and "with the assistance of a counsellor/therapist". These considerations, he says, do not indicate that he had knowledge of the psychological harm, that he had connected it to the sexual abuse and that he was reasonably capable of commencing an action at the times relied on by the defendant. For this reason, the plaintiff argues that this is not a situation like that in *Smith, supra.*, where the plaintiff had spoken in detail, both privately and in more public forums (such as being interviewed for a book) about the abuse and the harm he had suffered. In this case, the plaintiff's position is that the self-doubt, self-blame, embarrassment and shame he experienced left him unable to talk about the abuse he had experienced.

Conclusion

[64] The limitation defence is struck. Considering the circumstances of ABC and s. 2(5)(b) of the *Limitation of Actions Act*, I am satisfied that prior to the commencement of this proceeding, ABC was not reasonably capable of commencing a proceeding because of his mental and psychological condition resulting from the sexual assaults by Lalo. The defendant is vicariously liable for Lalo's conduct.

[65] In these circumstances it is not for the defendant to say that ABC should have initiated this proceeding at an earlier time. His reactions to Lalo's sexual assaults included embarrassment, shyness, reticence to talk about what had occurred, and, as indicated by *, at one point self-hatred. If others, subjected to similar assaults, were reasonably capable of commencing a proceeding, such as

this, that does not mean that ABC was similarly able to do so. It is the effect on him, not on some abstract victim, on which section 2(5)(b) of the Act is to be considered. In many cases where the section has not been applied, the evidence has been that the victim not only was aware of the circumstances of the offences, and the identity of the offender, but had actually taken steps to initiate a legal proceeding, or had freely discussed the events and their effects. Such was not the case with ABC. The provision requires only that it be the effect of the conduct of the offender that results in the victim not being reasonably capable of commencing a proceeding. I am satisfied that this was the case here.

[66] Commencing a proceeding is not limited to filling out a statement of claim and filing it with the proper authorities. It requires the claimant to be able to instruct counsel, which would, of necessity, involve discussing details of what had occurred and the effect of the conduct on the claimant. As already noted, it is not necessary that the claimant have a "thorough understanding" of the harm. However, in any proceeding for compensation it is necessary to allege that some harm has occurred. On all the evidence, ABC was, unable to properly instruct counsel, at least until 2005. Therefore the defence that the preceding is limitation-barred is struck.

[67] In the alternative, the evidence is clear that until Lalo's guilty plea, ABC was unable to initiate a proceeding against him. Mr. McKiggan testified that, following the publicity generated by the compensation claims in respect of the Shelburne School for Boys, his firm had decided not to take on claims in relation to Lalo unless there had been a conviction. ABC testified that he felt no one would believe him. That opinion had some justification, in view of his attempt to inform another probation officer, at least in very general terms, about Lalo's conduct, with no result. Until Lalo pleaded guilty, ABC was entitled to consider that he was not reasonably capable of commencing a proceeding against him, both because of the mental or psychological condition resulting from the sexual abuse and in regard to whether he would be believed. In so finding I am aware that ABC testified that at this time he had not considered suing either the defendant or Lalo.

[68] Considering the factors set out in section 3, I am satisfied, that the time for commencing this proceeding should be extended from March 2004 to February 2006.

MacAdam, J.