Date: 1998 06 22
Docket: CV 06976

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MARCEL NORN, CECIL LAFFERTY, GEORGE LAFFERTY, MARCELLA NORN, RAYMOND NORN, DWIGHT NORN and TRINA NORN

Plaintiffs

- and -

STANTON REGIONAL HOSPITAL, STANTON YELLOWKNIFE HOSPITAL BOARD OF MANAGEMENT, THE COMMISSIONER OF THE NORTHWEST TERRITORIES, DR. DONALD HADLEY, YVONNE McNEIL and JOHN DOE

Defendants

Application by defendant for summary judgment based on limitations period; denied. Application by plaintiffs to amend the Statement of Claim; granted.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Yellowknife , Northwest Territories
on June 12, 1998

Reasons filed: June 22, 1998

Counsel for the Plaintiffs: Allan A. Garber

Counsel for the Defendant
Stanton Regional Hospital: Charles Thompson

Counsel for the Defendant
Hadley: Jack Williams

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REASONS FOR JUDGMENT

[1] Does the discoverability rule apply to fatal accident claims for purposes of fixing the limitation period? And is this an appropriate issue to decide on a summary judgment application? These are the main questions put before me for resolution.

[2] The plaintiffs are relatives of the late Honorine Norn who died on April 15, 1994. She died from complications following surgery performed in Yellowknife by the defendant Hadley. An autopsy conducted shortly after death concluded that the cause of death was septic shock and peritonitis. The family of the late Ms. Norn requested a formal coroner's inquest into the circumstances of the death. The inquest was held from December 3rd to 5th, 1996, in Yellowknife. Why it took so long to convene the inquest I do not know. The plaintiffs assert that it was only after that inquest that they learned that the cause of Ms. Norn's death may have been due to negligence on the part of the attending physician and others associated with the defendant hospital.

[3] On April 2, 1997, the plaintiffs commenced what is commonly referred to as a "dependants' action" pursuant to the *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3. The Statement of Claim alleges negligence in the care and treatment of the deceased. The plaintiffs seek damages pursuant to that Act.

[4] The defendants have filed Statements of Defence in which they deny negligence. In addition the defendants also specifically plead that the action is statute-barred having been

commenced more than two years after the death. They rely in this regard on s.6(2) of the *Fatal Accidents Act*:

> (2) An action under this Act may not be brought after two years from the death of the deceased.

[5] The defendant hospital has now applied for summary judgment dismissing the action on the basis that the claim is statute-barred.

[6] The plaintiffs, on the other hand, have applied to amend the Statement of Claim. The proposed amendments would (a) add a claim on behalf of the estate pursuant to the *Trustee Act*, R.S.N.W.T. 1988, c. T-8; (b) add the administrator of the estate as a party to the action (Letters of Administration having been granted only on February 4, 1998); and, (c) add a pleading to the effect that the true facts of the circumstances surrounding the death were concealed by the defendants.

[7] I heard argument on both applications at the same time since the issues are interconnected.

[8] The position of the defendant is that the *Fatal Accidents Act* (indeed the *Trustee Act* as well) sets a fixed limit of two years from the date of death. Since this is an objective fact, independent of the plaintiffs' state of knowledge, then there is no room to import the discoverability rule. That rule, in general, provides that a limitation period does not begin to run until the plaintiff has knowledge of the material facts upon which the cause of action is based. In this argument the defendant has support from a formidable array of case law: *Sawh v Petrie* (1986), 189 A.P.R. 223 (N.S.C.A.); *Fehr v Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.); *A.J. v Cairnie Estate*, [1993] 6 W.W.R. 305 (Man. C.A.), leave to appeal to S.C.C. denied; *Snow v Kashyap* (1995), 389 A.P.R. 182 (Nfld. C.A.); and, most recently, *Czyz v Langenhahn*, [1998] A.J. No. 432 (C.A.). In addition, J.S. Williams, in *Limitation of Actions in Canada* (2nd ed., 1980), makes the comment that the limitation period specified in fatal accident legislation is "absolute" (at page 181). The Ontario Court of Appeal, in *Swain Estate v Lake of the Woods District Hospital* (1992), 9 O.R. (3d) 74 (leave to appeal denied), referred to the two-year limit in fatality cases as a "cap" on the limitations period.

[9] Plaintiffs' counsel argued that there is a knowledge requirement imported into the limitation period in the *Fatal Accidents Act*. He referred specifically to s.2:

> 2. Where the death of a person is caused by a wrongful act, neglect or default that, if death had not resulted, would have entitled the person injured to maintain an action and recover damages in respect of the injury, the person who would have been liable if death had not resulted is liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to culpable homicide.

Counsel submitted that there must be some knowledge on the part of a plaintiff that the death was "caused by a wrongful act, neglect or default" before the limitation period starts to run. It is, in other words, only with the knowledge that a cause of action exists that the time can start to run against the plaintiff. Otherwise, even though one may be aware of the death, one may never have a chance to go to court because one did not know, within the time limit, that a cause of action existed. I think a good argument can be made that s.2 creates the statutory cause of action (since such an action does not exist independently of statute) and has nothing to do with the limitations period stipulated in s.6 of the Act. But, for reasons that follow, I need not come to a definitive answer on this point.

[10] Much of the argument before me revolved around the impact of the recent Supreme Court of Canada judgment in *Haberman v Peixeiro* (1997), 151 D.L.R. (4th) 429. That case dealt with the interpretation of the limitation period found in the Ontario *Highway Traffic Act* for damage claims arising from motor vehicle collisions: "no proceeding shall be brought...after the expiration of two years from the time the damages were sustained" (s.206). The traditional view was that this provision fixed the limitation period at two years from the date of the collision. There were, however, two significant features to the fact situation. First, the statutory no-fault insurance regime in Ontario imposed a condition precedent to launching an action ("permanent serious impairment"). Second, it was conceded that the injured plaintiff did not know that his injuries were such so as to meet that condition precedent until after the expiry of the two year period. The Supreme Court held that the cause of action does not accrue until that condition precedent is known to the plaintiff.

[11] The unanimous judgment in *Peixeiro* was written by Major J. He wrote that the discoverability rule applied to the <u>particular</u> case and <u>generally</u> to all limitations statutes:

> Whatever interest a defendant may have in the universal application of a limitation period must be balanced against the concerns of fairness to the plaintiff who was unaware that his injuries met the conditions precedent to commencing an action... (page 439)

> Since this Court's decisions in *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, and *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 244, 31 D.L.R. (4th) 481, discoverability is a general rule applied to avoid the injustice of precluding an action before the person is able to raise it.
>
> (page 440)

> I agree with the Court of Appeal that to hold that the discoverability principle does not apply to s.206 *HTA* would unfairly preclude actions by plaintiffs unaware of the existence of their cause of action. In balancing the defendant's legitimate interest in respecting limitations periods and the interest of the plaintiffs, the fundamental unfairness of requiring a plaintiff to bring a cause of action before he could reasonably have discovered that he had a cause of action is a compelling

> consideration. The diligence rationale would not be undermined by the application of the discoverability principle as it still requires reasonable diligence by the plaintiff.
>
> (page 441)

[12] The defendants in *Peixeiro*, as the defendant before me, placed much reliance on the reference by Major J. to the Manitoba Court of Appeal judgment in *Fehr v Jacob* (noted above). That case involved a medical malpractice claim for injuries. The applicable statute imposed a limitation period of two years from the date the services terminated. It was admitted that the action was commenced beyond the two year period. The Manitoba Court ruled that the statute imposes a fixed period, irrespective of the plaintiff's knowledge, and that there is no basis for application of the discoverability rule. The Manitoba Court referred to the rule as one applicable only to situations where the limitation period is based on the accrual of the cause of action (at page 204):

> The plaintiff's counsel invites us to elevate the discoverability rule from one applicable to cases where the limitation period runs from the accrual of the cause of action to one of general application. He argues that the rule is in effect a principle under which time stands still for limitation purposes, no matter what the language of the statute is, until all the material facts are known.

[13] The particular reference in *Peixeiro* is found at pages 440-441:

> In this regard, I adopt Twaddle J.A.'s statement in *Fehr v Jacob* (1993), 14 C.C.L.T. (2d) 200 (Man. C.A.), at p. 206, that the discoverability rule is an interpretive tool for the construing of limitations statutes which ought to be considered each time a limitations provision is in issue:
>
> > In my opinion, the judge-made discoverability rule is nothing more than a rule of construction. Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from "the accrual of the cause of action" or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge-made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge-made discoverability rule may not extend the period the legislature has prescribed.

Defendant's counsel argued that by "adopting" this statement the Supreme Court has ruled that the discoverability rule has no application to limitation statutes with time running from a fixed event (such as the date of death in this case). As persuasive as this argument sounds, I am not entirely convinced that that is what is meant.

[14] First, Major J. "adopts", as noted above, the statement that "the discoverability rule is an interpretive tool for the construing of limitations statutes". If he "adopts" any more than that he does not say so. Further, if the contention is that Major J. agrees with the Manitoba Court that

the discoverability rule is not one of general application, then regard should be had to the comments of Major J. immediately following the quoted extract:

> The appellant submitted here that the general rule of discoverability was ousted because the legislature used the words "damages were sustained", rather than the date "when the cause of action arose". It is unlikely that by using the words "damages were sustained", the legislature intended that the determination of the starting point of the limitation period should take place without regard to the injured party's knowledge. It would require clearer language to displace the general rule of discoverability. The use of the phrase "damages were sustained" rather than "cause of action arose", in the context of the *HTA*, is a distinction without a difference. The discoverability rule has ben applied by this Court even to statutes of limitation in which plain construction of the language used would appear to exclude the operation of the rule. (emphasis added)

[15] If there is a contradiction here then, with respect, it is for the Supreme Court to sort out, not I on a summary judgment application. I note, however, that already one Court of Appeal judgment has referred to *Peixeiro* as deciding that the discoverability rule is a rule of general application: *Aguonie v Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222 (Ont. C.A.), at pages 230 - 231. I also note that at least one commentator suggests that, by the recognition of knowledge of any condition precedent to the action as a factor, the Supreme Court has confirmed the application of the discoverability rule to questions of causation. B. Legate, in her recent article "Limitation Periods in Medical Negligence Actions Post-Peixeiro", (1998) 20 Advocates' Quarterly 326, wrote as follows on the impact of *Peixeiro* on the application of the discoverability rule to the causation element as part of a cause of action (at page 334):

> The Supreme Court of Canada has reframed and clarified the rule in *Peixeiro* by confirming its applicability to conditions precedent to an action being successful. Each element of the cause of action must therefore be known to the plaintiff or with reasonable diligence known to her. Fault, causation and damage are each elements of the cause of action.

[16] If Ms. Legate is correct in these views, then she would appear to support the submission of plaintiffs' counsel that, even though the date of death is known, the limitation period is subject to the plaintiffs' knowledge that they have a cause of action, i.e., their knowledge of the causation element, that being equated to a condition precedent to commencing action.

[17] The test on a summary judgment motion is well-known. The motions judge must take a hard look at the evidence to determine whether there is a genuine issue for trial: see *923087 N.W.T. Ltd. v Anderson Mills Ltd.*, [1997] N.W.T.R. 212 (S.C.), at pages 221 - 223. If there is no genuine issue for trial, the court must grant summary judgment: Rule 176(2). And, if the only genuine issue is a question of law, the court may, not must, determine that question and grant summary judgment: Rule 176(4). The "genuine" issue is usually one of fact or one of mixed fact and law, but it may also be one of pure law where, as here, the state of the law is in flux. The case law, even while recognizing that a summary judgment motion is an effective way

of avoiding expensive and lengthy litigation, demands that it must be clear that a trial is unnecessary to resolve the issues. As stated in the *Aguonie* case (noted above) at page 235:

> ...it must be clear to the motions judge, where the motion is brought by the defendant, as in this appeal, that it is proper to deprive the plaintiffs of their right to a trial. Summary judgment, valuable as it is for striking through sham claims and defences which stand in the way to a direct approach to the truth of a case, was not intended to, nor can it, deprive a litigant of his or her right to a trial unless there is a clear demonstration that no genuine issue exists, material to the claim or defence, which is within the traditional province of a trial judge to resolve.

[18] I am also mindful of the principle enunciated in *Papamonolopoulos v Toronto Board of Education* (1986), 56 O.R. (2d) 1 (C.A.), leave to appeal to S.C.C. refused, to the effect that provisions of a statute of limitations should be liberally construed in favour of the individual whose right to sue is in question. Where two interpretations of a statute are possible, the courts favour that interpretation which enables the plaintiff to bring the action.

[19] I am not convinced, even if I were to consider this issue as one of pure law, that the answer is so clear-cut as to deprive these litigants of the opportunity to advance their claim if they can. There may be facts that pertain to this issue. The plaintiffs should be able to put everything before the trial judge. This does not mean that the defendant is wrong in its assertions that the claim is statute-barred. They are entitled to advance that argument at trial. All my decision means is that I do not think the issue can be resolved on this summary basis.

[20] This leads me to a further ground militating against a summary disposition of this action. This also has relevance to the plaintiffs' application to amend the Statement of Claim.

[21] The plaintiffs allege that the facts relating to Ms. Norn's death were concealed from them. They say that they did not learn that they may have a cause of action until after the coroner's inquest which, of course, did not take place until after expiry of the two year period. There is some evidence offered in support of this allegation.

[22] One month after the date of death, and after receipt of the autopsy report, Dr. Hadley wrote a letter to the nurse who was in direct contact with the Norn family. In his letter, Dr. Hadley commented on how the cause of death was inexplicable and how some things may never be known. Shortly thereafter a meeting was held with the Norn family attended by another physician, a Dr. McMillan. It is alleged, under oath, that Dr. McMillan told the family that everything had been done properly and in accordance with accepted medical procedures. These statements, contained in several affidavits, were not tested by cross-examination.

[23] The significance of this allegation is that, even if the discoverability rule per se does not apply to the limitation period set out in s.6(2) of the *Fatal Accidents Act*, that period may nevertheless be extended due to the fraudulent concealment of the cause of action.

[24] The applicable rule is that where a cause of action is fraudulently concealed by the defendant, the limitation period will not start running until the plaintiff discovers the true situation. This rule dates back to the case of *Booth v Earl of Warrington* decided by the House of Lords in 1714: see J.C. Morton, *Limitation of Civil Actions* (1988), at pages 101 - 102. The rule is statutorily proclaimed by s.3 of the *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8:

> 3. When the existence of a cause of action has been concealed by the fraud of the person setting up this Part or Part II as a defence, the cause of action shall be deemed to have arisen when the fraud was first known or discovered.

Counsel acknowledge that s.3 may not be available specifically for this action since this is not one of the types of actions outlined in the relevant parts of the statute. Nevertheless, even without any express provision, equity and probably the common law would interpose to extend the time in a similar manner. In other words, the availability of this response to a limitations defence is not restricted to the statute: see Williams, Limitation of Actions in Canada (Chapter 15); and H. David, "Postponement of Limitation Periods: The Innocent Defendant", (1986) 6 Advocates' Quarterly 385.

[25] Many cases have applied the discoverability rule where the existence of a cause of action has been concealed by fraud. This has been so even where the limitation period is one that can be regarded as determined without reference to the plaintiff's knowledge (as in the *Fehr v Jacob* case). For example, the case of *Evans v Crook* (1995), 81 Alta. L.R. (3d) 433 (Q.B.), dealt with a malpractice claim. The applicable period was one year from the date when the professional services were terminated "and not afterwards". A summary judgment motion by the defendant was refused because there was some evidence to suggest that the defendant engaged in a design to conceal the cause of the plaintiff's injuries. In *Castillo v Calgary General Hospital* (1994), 34 C.P.C. (3d) 46 (Alta. C.A.), the court recognized the applicability of the concealment principle although there it held that, even if there was concealment, all the necessary information had been disclosed more than the applicable time period prior to the commencement of action. Those cases dealt with malpractice claims for personal injuries but the principle may be equally applicable to fatal accident claims. I emphasize may since I know of no case that has addressed this point in a fatality claim. And, as noted in *Photinopoulos v Photinopoulos*, [1989] 2 W.W.R. 56 (Alta. C.A.), the term "fraud" does not necessarily involve moral turpitude. It means merely unconscionable conduct (such as, perhaps, the lack of truthful dealings between doctors and patients).

[26] It seems to me that the applicability of the fraudulent concealment principle to the cause of action in this case is a question of mixed law and fact. Based on the allegations contained in the affidavit material, I cannot say that the answer is clear cut. Defendant's counsel submitted that the plaintiffs expressed concerns about the cause of death well before the expiry of the two year limit and therefore they were not diligent in pursuing their cause of action. It seems to me

that if a court is called upon to assess the degree of diligence exhibited by the plaintiffs, then that is very much a factual issue that should go before a trial judge.

[27] For all these reasons I dismiss the motion for summary judgment.

[28] With respect to the application to amend the Statement of Claim, defendant's counsel submitted that the proposed amendments, in particular those setting up the estate action under the *Trustee Act*, are out of time and should not be allowed. He recognized however that this issue is intertwined with that of the application of the discoverability rule. He referred me to the judgments of my colleague Richard J. in *Stewart Estate v Stewart Estate*, [1994] N.W.T.R. 276 (S.C.) and *Irish v MacKenzie Hotel* (N.W.T.S.C. No. 06072; December 1, 1997). In both those cases Richard J. denied applications to amend Statements of Claim to add an estate claim after expiry of the two-year limitation set out in s.31(3) of the *Trustee Act*: "An action...may not be commenced after two years from the death of the deceased." In both cases the dependants' claim under the *Fatal Accidents Act* was brought in time.

[29] As a general rule there is no inherent jurisdiction in any court to extend a statutory limitation period. There is, however, power to amend pleadings after expiry of a limitation period if there are "special circumstances", especially lack of prejudice. This power has been used to allow amendments so as to add a new cause of action, to add a new party plaintiff, and to add additional defendants: *Basarsky v Quinlan*, [1972] S.C.R. 380. But this power has always been exercised only where the original claim was brought in time. In the *Irish* case, Richard J. found no special circumstances to justify the amendment sought. The *Stewart Estate* case was decided on a point of *ex post facto* rectification of the proceedings. Neither case is particularly apt to the situation in the present case since they did not deal with the possible applicability of the discoverability rule.

[30] Plaintiffs' counsel noted that if the discoverability rule applies, or if the limitation period is extended on the basis of a fraudulent concealment of the cause of action, then this amendment would not be out of time. The plaintiffs allege that they did not ascertain the cause of action until the results of the coroner's inquest were known on December 5, 1996. Hence, by their argument, the limitation period does not expire until December 5, 1998. That is what distinguishes this case from *Stewart Estate* and *Irish*.

[31] I have concluded that the amendments sought should be allowed. All of the issues, factual and legal, can then be placed before the trial judge. This does not preclude the defendants from arguing every possible defence including the defence that the action is statute-barred completely. I make no decision on that. I have concluded merely that these are issues that should go to a trial where the legal principles can be defined and applied with the benefit of a complete factual background.

[32] The plaintiffs' application to amend the Statement of Claim is allowed. They are to file and serve the Amended Statement of Claim, in the form appended to their Notice of Motion filed June 9, 1998, within twenty-one days of the date of these Reasons for Judgment. The defendants will have twenty-one days thereafter to file and serve an Amended Statement of Defence.

[33] Counsel may speak to the matter of costs if they are unable to agree.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 22nd day of June, 1998

Counsel for the Plaintiffs: Allan A. Garber

Counsel for the Defendant
Stanton Regional Hospital: Charles Thompson

Counsel for the Defendant
Hadley: Jack Williams

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