

CANADA / JUDGMENT

Blueberry River First Nation v. Laird

2020 BCCA 76

COURT

British Columbia Court of Appeal

DECIDED

2 March 2020

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2020 BCCA 76 Blueberry River First Nation v. Laird

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Blueberry River First Nation v. Laird,

2020 BCCA 76

Date: 20200302

Docket: CA46211

Between:

Blueberry River First Nation and Deloitte Wealth Management

Services LLP as Trustee of the Blueberry Trust

Appellants

(Plaintiffs)

And

David Laird, also carrying on business as Woodbridge Professional

Services Group, Joseph Apsassin, Russell Apsassin, Malcolm Apsassin,

Patrick Chipesia, Nig Creek Contracting Ltd., Jane Doe, John Doe,

ABC Corp., and XYZ Corp.

Respondents

(Defendants)

And

Wayne Yahey and Randy Yahey

Third Parties

And

Blueberry River First Nation

Third Party

Before:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Willcock

On appeal from: An order of the Supreme Court of British Columbia,
dated June 7, 2019 (Blueberry River First Nation v. Laird, 2019 BCSC 905,
Fort St. John Registry FOS-S-S22853).

Counsel for the Appellants:

D. Rolf, Q.C.

Counsel for the Respondent:

L. R. Backman, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

February 4, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 2, 2020

Written Reasons by:

The Honourable Mr. Justice Willcock

Concurred in by:

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Groberman

Summary:

The respondent applied to strike the appellants' amended claims as being barred by the Limitation Act. The chambers judge found the factual basis for the claims had been sufficiently set out in the timely initial pleadings and did not strike the claims, but found the available relief should be limited to the lesser quantum of damages initially pleaded because the amended figure represented a shifting of additional responsibility to the respondent. Held: Appeal allowed. There is no discernable qualitative change to the damages claimed and the Limitation Act does not preclude mere quantitative increases.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

- [1] In 1997 Blueberry River First Nation ("BRFN") received a substantial sum in settlement of a claim for damages relating to Canada's surrender and transfer of subsurface rights, with which it created a number of trusts. In July 2007, those trusts were consolidated into one, the Blueberry Trust, to hold the balance of the settlement funds on behalf of the members of the First Nation. Blueberry Trust Society was appointed as the Trustee. As of April 1, 2010, the balance in the Trust was \$32,966,587.
- [2] Between January 2010 and December 31, 2013 the balance in the Trust's account fell to \$16,850,947. A forensic report completed on March 12, 2015 concluded that in that period \$10,057,366.23 of Trust Funds had been transferred to the BRFN general account. David Laird was at all material times the Band Manager/Administrator of BRFN, performing his services through his partnership Woodbridge Professional Services Group.
- [3] On May 8, 2015, the appellants commenced an action against Laird and others seeking to recover funds transferred out of the Trust. The claim described in the initial notice of civil claim is discussed in detail below.
- [4] On October 20, 2018, the appellants amended their notice of civil claim so as to specifically allege against Laird and others:
 - a) breach of contract (specifically, in Laird's case, his contract of employment);
 - b) liability as a stranger to the Trust in receipt of and chargeable with trust property (knowing receipt); and
 - c) breach of trust by knowingly assisting in a fraudulent and dishonest design on the part of the trustees (knowing assistance).
- [5] The respondent applied to dismiss the new claims as statute barred pursuant to s. 8 of the Limitation Act, S.B.C. 2012, c. 13.

- [6] The chambers judge, for reasons indexed as 2019 BCSC 905, did not strike the claims, finding that the factual basis for them had been sufficiently set out in the May 8, 2015 notice of civil claim (appended as Schedule A to his judgment). However, he ordered that the claims for knowing receipt and knowing assistance could only proceed subject to specified limits.
- [7] The limit on the knowing receipt claim was described as follows:
- [35] The Further Amended NoCC not only purports to radically increase the quantum of the claim specified against Laird, it also purports to change the specified claim, from money Laird received, to all money the Plaintiffs allege that they lost by whatever means. Schedule A, and the Amended NoCC with the Particulars provided, do not contemplate, or plead the facts to support, a knowing receipt claim against Laird beyond the amount claimed in the Particulars quoted above, of approximately \$402,000.
- [Emphasis in original.]
- [8] The factual elements of a knowing assistance claim were found to have been imperfectly but sufficiently pleaded but, at para. 48, "only with respect to \$3,620,990.12."
- [9] No appeal is brought from the limit imposed on the knowing receipt claim. However, the appellant says the judge erred in concluding that the claim founded upon knowing assistance was statute barred to the extent it exceeded \$3,620,990.
- [10] For reasons set out below, I am of the opinion the appeal should be allowed and the order varied so as to simply dismiss the respondent's application to strike the knowing assistance claim as statute-barred. In the result, in my opinion, that claim may proceed without a monetary limit.

Litigation History

The Initial Pleadings

- [11] Some difficulty arises from the fact the initial pleadings are poorly drafted. Most of the relevant allegations of fact are not found in Part 1-Statement of Facts, but rather in Part 3-Legal Basis. There are inconsistent references to "misappropriated funds" and "fraudulently obtained funds" and what is now said to be a critical allegation, in para. 24, cited below, is indecipherable.
- [12] Part 2 of the initial notice of civil claim describes the relief sought as:
22. The Plaintiffs seek the following relief, jointly and severally, against the Defendants:
- (a) Damages for misappropriation of funds in the sum of \$3,620,990.12 and such further and other tracing orders as this Court deems just;

- (b) In the alternative, damages for breach of trust, corruption and conflict of interest in the sum of in the sum of \$3,620,990.12 and such further and other tracing orders as this Court deems just;
 - (c) A declaration that the Fiduciary Defendants, as defined below, each acted in a conflict of interest in carrying out their duties;
 - (d) A declaration that the Fiduciary Defendants, as defined below, each acted contrary to the Constitution of the Blueberry Trust and Blueberry River First Nations Governance Manual, as outlined below;
 - (e) In the alternative, Judgment in the sum of \$3,620,990.12 representing damages for unjust enrichment;
 - (f) In the alternative, an Order directing payment of the amount of \$3,620,990.12 held on constructive trust be paid to the Plaintiffs;
 - (g) An Order requiring the Defendants, within a time specified by this Honourable Court, to account to the Plaintiffs for all the Plaintiffs' property, misappropriated corporate funds and all profits derived therefrom;
 - (h) Punitive damages against the Fiduciary Defendants, as defined below, due to the corruption and continued and flagrant breaches of duty of the Fiduciary Defendants;
 - (i) Interest in the amount of prime plus 3% or, in the alternative, pursuant to the Court Order Interest Act, RSBC 1996, c. 79;
 - (j) Costs of this action on a solicitor-client basis, inclusive of all disbursements reasonably incurred in the prosecution of this action or in the alternative, costs on a party and party basis; and
 - (k) Such further and other relief as may be proven at trial and that this Honourable Court shall deem just and equitable.
- [13] The only specific amount referred to in the prayer for relief is the sum of \$3,620,990.12, and that is the specific amount by which the defendants were said to have been unjustly enriched. However, there are also repeated references to other equitable relief.
- [14] Part 3 of the initial notice of civil claim includes the following material allegations:

MISAPPROPRIATED FUNDS

23. The Defendants, or any one or more of them, have wrongfully, fraudulently and without color of right taken or received and converted to his or her or their own use, or to the use of another person or persons presently unknown to the Plaintiffs the total sum of \$3,620,990.12.

24. The fraudulently obtained funds were received by the Defendants between April 1, 2010 and December 31, 2013 (the "Material Time") and totaled the sum of \$10,057,367.00 was disbursed from the Trust to the BRFN accounts. Of the \$10,057,367 disbursed to the BRFN accounts, \$6,658,927.00 was disbursed using a total of 24 cheques from the Trust.

[Emphasis added.]

[15] Paragraph 24 was clarified by amendment on February 22, 2016 so as to read:

23. The fraudulently obtained funds were received by the Defendants between April 1, 2010 and December 31, 2013 (the "Material Time"). The total sum of \$10,057,367 was dispersed from the trust to the BRFN accounts. Of the \$10,057,367 disbursed to the BRFN accounts, \$6,658,927 was dispersed using a total of 24 cheques from the trust.

[16] Part 3 of the initial notice of civil claim continued:

BREACH OF FIDUCIARY DUTIES

49. The Defendants, [Laird and others] (the "Fiduciary Defendants") owed the following fiduciary duties:

- (a) To act in good faith and in the best interest of their beneficiaries;
- (b) To inform themselves and to keep themselves informed of the financial affairs and activities of the beneficiaries;
- (c) To manage and administer those financial affairs and activities in the best interest of their beneficiaries;
- (d) Not to act so as to put themselves in a position in which their personal interests did or might conflict with the interests of their beneficiaries;
- (e) Not to make or receive or facilitate a secret profit or secret payment from or to third parties contrary to the interests of their beneficiaries;
- (f) To account for any such secret profits or payments; and
- (g) Such further and other particulars as may be proven at a Trial of this matter.

51. Further, at all material times, [Laird and others] were given authority, discretion and authorization to act on behalf of the Plaintiffs when conducting the business of the Plaintiffs. Inherent in this authority and discretion is a fiduciary obligation to act in the best interest of the Plaintiffs. [Laird and others] failed to administer their position of authority in the best interests of the Plaintiffs and to make decisions about the financial affairs of the Plaintiff in a manner consistent with a prudent and responsible fiduciary. Contrary to this obligation, they have placed themselves in a conflict of interest and made secret profit as a result of their positions of trust.

53. The Fiduciary Defendants were subject to the Constitution of Blueberry Trust Society governing conduct of the trust monies held in the Trust ("the Trust Funds") which indicate, inter alia:
- (a) Dispositions under the Trust must be consistent with the Trust Purposes, as defined in Article 2.1 of the Trust, including such things as recreational, cultural, community and administrative benefit in favour of BRFN;
 - (b) Prior to disbursing the Trust Funds, the Society must obtain a detailed budget for all proposed expenditures and obtaining agreement from the recipient of the funds that they will report in detail on how the funds are actually spent;
 - (c) Administration of the Trust Funds must be in accordance with the investment policy established by the Trust;
 - (d) The Trustee must not make any loans or borrow money except in limited circumstances and after obtaining professional advise;
 - (e) The Trustee of the Society must retain custody of all accounts pertaining to the Trust Funds;
 - (f) No Director or Officer of the Society must be remunerated for being or acting as Director or Officer of the Society.
54. The Fiduciary Defendants owed a fiduciary duty to the Plaintiffs to exercise their responsibilities in this capacity with a degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. The Plaintiffs state and the fact is that the Fiduciary Defendants failed consistently and on numerous occasions to fulfill their fiduciary duties owed to the Plaintiffs.
55. The Fiduciary Defendants, either individually or through their respective corporations, , were negligent and breached their fiduciary duties to the Plaintiffs, some particulars of which include:
- (a) misappropriated band funds and Trust Funds for personal use;
 - (b) failed to properly conduct and supervise the financial affairs of the Plaintiffs as would a reasonable and prudent fiduciary;
 - (c) acting in a conflict of interest position by providing services to one or more of the Plaintiffs;
 - (d) failed to ensure the prudent maintenance of the Plaintiffs' financial books and records in an accurate and organized manner, thereby jeopardizing the Plaintiffs' financial stability;
 - (e) utilized the Plaintiffs' bank accounts in a confusing and unauthorized manner and failing to keep any substantiating accounting evidence to justify such withdrawals;
 - (f) claimed personal expenses that were not related to their work for the Plaintiffs;
 - (g) failed to account, adequately or at all, for personal expenses;

- (h) wrongfully misappropriated the Plaintiffs' property; and
 - (i) such further and other particulars which may be proven at a Trial of this matter.
56. The Plaintiffs are entitled to relief against the Fiduciary Defendants on the basis that the business or affairs of the Plaintiffs have been carried on or conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the Plaintiffs and its members, particulars of which are set out in paragraph 52 herein.
57. As a result of the breaches of their fiduciary duties, the Plaintiffs have suffered damages in the sum of \$3,620,990.12, particulars of which are set forth in Part II to this Statement of Claim.

BREACHES OF TRUST

68. At all Material Times, the Fiduciary Defendants owed an obligation to the members of BRFN and to the Plaintiffs that they would act in good faith with administering the Trust Funds.
69. The Fiduciary Defendants misappropriated and converted to their own use or uses inconsistent with the purpose of the Trust, the sum of \$3,620,990.12.
70. The Fiduciary Defendants assented to, or acquiesced in, conduct that they knew, or reasonably ought to have known, amounted to a breach of trust and are responsible for causing, converting and misappropriating the Trust Funds that the Defendants received, to uses inconsistent with the Trust.
71. Due to the breach of trust by the Fiduciary Defendants, and failure to comply with their responsibilities and obligations pursuant to common law and equity, the Plaintiffs have suffered damages in the amount of \$3,620,990.12.

[Emphasis added.]

Amended Pleadings

- [17] The October 20, 2018 amended notice of civil claim set out the material facts, as required by the Rules, in Part 1 and, in Part 3, described the legal basis for the material claims as follows:

KNOWING RECEIPT AND KNOWING ASSISTANCE

102. The Defendant Laird knew of the existence of the Trust.
103. The Defendants Joseph, Malcolm, Russell and Patrick, acting variously as the quorum of or a majority of the board of directors of BTS perpetuated a dishonest and fraudulent breaches of trust, that is, they authorized the payments from the Trust described in Part 1 paragraph 34, knowing that those payments were not for purposes permitted under the Declaration of Trust and knowing that they had not done the due diligence required either by a prudent investor or expressly required under the Declaration of Trust.

104. The Defendant Laird participated in meeting with the Defendants Joseph, Malcolm, Russell and Patrick in which the use of the Trust to cover or lessen the effects of his and their mismanagement of the financial affairs of BRDN was discussed and agreed upon.
105. The Defendant Laird refused, neglected or otherwise failed to advise the Defendants Joseph, Malcolm, Russell and Patrick that they would be or were in breach of their obligations under the Trust and, instead, prepared the documents necessary to perpetrate those breaches of trust and have the payments from the Trust described in Part 1 paragraph 34 deposited in the BRFN general account where they were co-mingled with BRFN other revenue and used to avoid that account being overdrawn.
106. The Defendant Laird knew that the funds received by Woodbridge in payment for his services as band manager were, in whole or in part, Trust Funds.
107. The Defendant Nig knew that the funds it received in whole or in part to compensate the Defendant Patrick for his services managing BRFN's Pink Mountain Ranch operation were, in whole or in part, Trust Funds.
108. The Defendants Laird and Nig are constructive trustee and liable to the beneficiaries of the Trust for the loss of \$10,057,366.23 or such amounts as may be proven at trial.

Judgment Below

[18] The judge apparently placed no weight upon the description of the "misappropriated funds" in para. 24 of the initial pleadings and para. 23 after the February 22, 2016 amendment. He held:

[39] Part 3, called the Legal Basis, begins at paragraphs 23-45 under the subheading of Misappropriated Funds. I do not read those paragraphs as addressing a breach of trust, fraudulent and dishonest, or otherwise, or Laird knowingly participating in such breach.

[Emphasis added.]

[19] After identifying the balance of the initial pleadings I have reproduced above as those which describe facts which might support a knowing assistance claim, the judge concluded:

[46] I find that the closest the Plaintiffs can be said to have come in [the initial pleadings], to pleading the facts necessary for an allegation of knowing assistance, is seen in paragraph 55(a) and the paragraphs under the Breach of Trust subheading. In both of those instances however, [the notice of civil claim] specifically capped the claim at \$3,620,990.12.

[47] As I understand the Plaintiffs' submissions on this application, they in effect want to change \$3,620,990.12 to over \$10 million. That is not simply a substantial increase in the quantum of the claim. It is also a shifting of responsibility, to the Defendants referred to in paragraph 55(a) and the breach of trust paragraphs, for the alleged loss of all funds paid out from the trust in the relevant period, for whatever reason.

Discussion and Analysis

- [20] The question of whether an amendment raises a new cause of action is a question of law: *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122 at para. 26.
- [21] The appellants argued before the chambers judge that it was open to him to exercise the discretion described in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.), to allow proposed amendments even if they do contain new causes of action which are otherwise out of time. He declined to exercise that discretion. That decision is not appealed and therefore we are only dealing with a question of law subject to review on a standard of correctness.
- [22] There is no dispute before us with respect to the principles that apply in relation to the amendment of pleadings so as to identify and bar new causes of action after the expiry of a limitation period. There is no such bar to claims based on the facts originally pleaded. The parties do not dispute the rule described in *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848, and relied upon by the chambers judge in this case:

22 a proposed amendment will not be permitted where it advances a "fundamentally different claim" after the expiry of a limitation period: *Frohlick v. Pinkerton Canada Ltd.* In that case, the court did not permit the plaintiff in a wrongful dismissal action to amend the statement of claim to assert a claim for damages for constructive dismissal on the basis that the limitation period had expired. This court dismissed the appeal. The amendment regarding constructive dismissal related to events that occurred prior to the events described in the original statement of claim that were unrelated to that claim. The defendant was unaware of the new allegations prior to the plaintiff seeking the amendments, and the events were not put in issue or encompassed within the original claim.

23 Based on the foregoing, an amendment will be refused when it seeks to advance, after the expiry of a limitation period, a "fundamentally different claim" based on facts not originally pleaded.

[Emphasis added by the Chambers Judge.]

- [23] The respondent does not cross-appeal the dismissal of the application to strike all new claims on the grounds the appellants now advance claims that are fundamentally different from those initially advanced. We must take it as settled, therefore, that the causes of action first pleaded in 2018, including to some extent the knowing assistance claim, are not fundamentally different from those identified in the May 8, 2015 notice of civil claim.

- [24] The appellants contend that having concluded that the factual foundation for a claim founded upon a breach of trust by a trustee was set out in the initial pleadings, the judge ought to have applied the fundamental rule of damages in relation to such a claim: that the plaintiff is entitled to "the actual loss which the acts or omissions have caused to the trust estate": *Fales v. Canada Permanent Trust Co.*, [1977] 2 S.C.R. 302 at para. 42; *Donovan W.M. Waters et al, Waters' Law of Trusts in Canada*, 4th ed. at p. 1279 (Toronto: Carswell, 2012).
- [25] They argue it was an error on the part of the judge to find that the new pleadings "shifted responsibility" to the defendants. They say Laird's responsibility as a constructive trustee is unaltered from the responsibility identified in the initial pleadings. No greater claim or greater responsibility arises from the specific identification of knowing assistance as the cause of action.
- [26] They argue the quantum of damages is not an element of the cause of action. The Limitation Act does not preclude a plaintiff from amending pleadings so as to increase the quantum of damages claimed or specify a quantum that has not previously been specified: *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549. This is said to be the principle underlying the rule that a cause of action accrues before the extent or type of damage is ascertained: *Cartledge v. E. Jopling & Sons*, [1963] A.C. 758 (U.K. H.L.), at p. 772 per Lord Reid, *July v. Neal* (1986), 57 O.R. (2d) 129 (Ont. C.A.); *Cahoon v. Franks*, [1967] S.C.R. 455; *Whitty v. Wells*, 2014 ONSC 502 at para. 23.
- [27] Last, the appellants submit the initial pleadings do not limit the knowing assistance claim to \$3,620,990.12, because the prayer for relief refers to "such further and other relief as may be proven at trial and that this Honourable Court shall deem just and equitable"; and, further, because para. 24 refers to \$10,057,367.00 having been disbursed from the Trust to the BRFN accounts.
- [28] The respondents do not dispute the appellants' description of the elements of a knowing assistance claim. They say identification of impugned transactions is important because the plaintiff bears the burden of establishing the defendant is an accessory to specific reprehensible conduct. They refer to a passage from P.M. Perell, "Intermeddlers or Strangers to the Breach of Trust or Fiduciary Duty" (1998), 21 Adv. Q. 94 at 113, cited in *Alers-Hankey v. Teixeira*, 2002 BCCA 227 at para. 20:
- [The] doctrinal basis for recovery under the doctrine of knowing assistance does not depend on the defendant being enriched. Rather, the rationale is fault-based and equity intervenes to protect the plaintiff's proprietary interest where the defendant actually knew that he was an accessory to reprehensible conduct by the trustee. One very significant difference arising from the different rationales is that the beneficiary's recovery from knowing receipt may be less than the recovery from knowing assistance. This follows because, under the doctrine of knowing receipt, the defendant's liability is measured by his unjust enrichment while, under the doctrine of knowing assistance, the defendant's liability is measured by the plaintiff's injury consequent to the trustee's misconduct. The plaintiff's injury may exceed the defendant's benefit. *Air Canada v.*

M & L Travel Ltd. is an example of this phenomenon.

[29] The respondents say a knowing assistance claim requires the trier of fact to identify discrete transactions which constitute the wrongful transfer of funds and to determine whether the respondent had the requisite knowledge in each case. The respondents contend the claim must be tied to identifiable funds transferred out of the Blueberry Trust accounts. They say the forensic analysis conducted for the appellants before the filing of the initial notice of civil claim identified the transfer of more than \$10 million from the Trust to the BRFN general account during the material period. Despite that fact, the initial pleadings repeatedly referred to a claim for damages in the amount of \$3,620,990.12.

[30] Given the heightened requirements applicable to pleadings of fraud and breaches of trust, they submit it is reasonable to require the appellants to identify which funds are subject to allegations of misappropriation. They argue the appellants did that by pleading: "Due to the breach of trust by the Fiduciary Defendants, and failure to comply with their responsibilities and obligations pursuant to common law and equity, the Plaintiffs have suffered damages in the amount of \$3,620,990.12".

[31] By now claiming that all funds transferred to the BRFN general account were misappropriated, the respondents submit, the appellants are necessarily expanding the claim to include new and other transactions. They say (at paras. 41-2 of their Factum):

41. To increase this amount to over \$10 million dollars after the limitation period has expired would be to allow a claim which alleges that all transfers of funds from the Blueberry Trust to the BFRN General Account were suspect. The Further Amended NoCC, in an unclear fashion, effectively says that the Respondent as Band Administrator of BFRN had actual knowledge, was reckless, or was wilfully blind to the fact that there was an intention to fraudulently drain the Blueberry Trust, and that none of these funds were properly used for activities directly related to the operations of the BFRN.

42. This is different in nature than an allegation that some transactions were misused while others were not, and greatly increases the case that the Respondent is required to meet.

[Emphasis in original]

[32] The difficulty with that submission is that there was no identification of specific transactions in the initial pleading. As a result, neither the appellant nor the respondent can identify specific transactions underlying the claim for knowing assistance that are permitted or transactions that are barred by a limitation pursuant to the judge's order. The respondents themselves appear to acknowledge this when they say, at para. 22 of their factum: "While it is unclear how exactly the Appellants arrived at the original \$3,620,990.12 figure, it appears eleven times in the [notice of civil claim]".

[33] In response to the appellants' argument that a limitation does not have the effect of capping the damages that may be claimed, the respondent says:

Peixeiro concerns a personal injury claim founded in negligence. A breach of trust claim, and the pleading requirements which apply in this case, are distinct. Peixeiro has no application.

[34] I do not regard the principles addressed in Peixeiro as being so narrowly confined. In the passage relied upon by the appellants, Major J., writing for the Court, held that a cause of action in tort can accrue before the full extent of damages is known:

18 It was conceded that at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period. The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (), the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.

[35] The corollary of that rule is that, generally speaking, the commencement of a tort claim before the expiry of the applicable limitation preserves the cause of action, even in respect of damages unknown at the time of the filing of a notice of civil claim. Both that corollary and the general approach taken to claims arising out of the facts as pleaded before a limitation date are addressed by Hall J. in *Cahoon v. Franks*, [1967] S.C.R. 455 at 458-9, as follows:

The cause of action or, to use the expression of Diplock, L.J., "the factual situation" which entitles the plaintiff here to recover damages from the defendant is the tort of negligence, a breach by the defendant of the duty which he owed to the plaintiff at common law which resulted in damage to the plaintiff. The injury to the person and the injury to the goods, and perhaps the injury to the plaintiff's real property and the injury to such modern rights as the right to privacy flowing from negligence serve only as yardsticks useful in measuring the damages which the breach caused.

[36] In my view, while the last amendment to the notice of civil claim clearly substantially increases the quantum of the claim, it is impossible to discern a qualitative change in the claim advanced by the appellants. It will fall to the appellants at trial to establish that the losses they claimed to have suffered were injury consequent to the defendants' misconduct as described in the pleadings but, in my opinion, insofar as they can do so, the claim should not be limited.

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Mr. Justice Groberman"

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Prepared on 27 October 2026 · Esheria