

CANADA / JUDGMENT

Borek v. Dr. Derek Stirling Hopkins

2020 BCSC 304

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 304 Borek v. Dr. Derek Stirling Hopkins

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Borek v. Dr. Derek Stirling Hopkins,

2020 BCSC 304

Date: 20200221

Docket: S162184

Registry: Victoria

Between:

Elizabeth Rose Borek

Plaintiff

And

Dr. Derek Stirling Hopkins and Dr. Derek Hopkins and Dr. Mark Hopkins Inc.

Defendants

Corrected Judgment: The text of the judgment was corrected at paragraph 49 on May 21, 2020

Before: The Honourable Madam Justice Marzari

Oral Reasons for Judgment

Counsel for Plaintiff:

C. Christie

Counsel for Defendants:

D. Richardson

Place and Date of Summary Trial:

Victoria, B.C.

February 19, 2020

Place and Date of Judgment:

Victoria, B.C.

February 21, 2020

Introduction

- [1] The defendant Dr. Hopkins, and his dental corporation (whom I will refer to together as "Dr. Hopkins") apply, by way of summary trial, to dismiss Ms. Borek's action against them on the basis that her action is statute barred pursuant to section 6(1) of the Limitation Act, S.B.C. 2012, c. 13.
- [2] Ms. Borek filed her notice of civil claim alleging negligence, breach of contract, and breach of fiduciary duty in relation to Dr. Hopkins' treatment of her on May 25, 2016.
- [3] Dr. Hopkins says that her claim, as pled, was known to her by the end of February 2014, and that her claim was not brought within the two-year limitation period, and should therefore be struck as statute barred.
- [4] Ms. Borek says that the limitation period did not begin to run until after May 25, 2014, and she therefore brought her claim within the limitation period.
- [5] The main question before me in this summary trial is at what point Ms. Borek's claim was "discovered" within the meaning of ss. 6 and 8 of the Limitation Act. As a preliminary question, I must also determine whether or not that issue is properly determinable by way of summary trial on the evidence before me.

Suitability for Summary Trial

- [6] Ms. Borek acknowledges that the question of whether a claim is statute barred as a result of a limitation period is a common type of application to be brought by way of summary trial. However, she rightly points out that this is a matter for the court's determination, and it cannot be determined simply by consent of the parties.
- [7] The leading authority on determining the suitability for summary trial remains *Inspiration management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. 2d 202. It requires consideration of two critical factors: whether there are sufficient facts before the court to make the necessary findings of fact, and whether it would be unjust to decide the case on the summary trial application.

[8] I have determined that this matter is amenable to determination by way of summary trial. I consider that the limitation defence is a distinct issue, that is capable of disposing of the case if found in the affirmative, thereby potentially saving both parties considerable expense. The defendant applicant Dr. Hopkins relies almost entirely on the discovery evidence of Ms. Borek herself. Although Ms. Borek's discovery evidence differs in some respects with her affidavit evidence on this summary trial, I find that I am able on the evidence before me to find the necessary facts to make the required factual determinations. Ultimately, I am satisfied that it would not be unjust to decide this issue on a summary trial basis.

Limitation Period

[9] I will move then to the primary question before me, which is at what point did Ms. Borek have, or ought she to have had, the requisite state of knowledge such that her claim was "discovered" pursuant to ss. 6 and 8 of the Limitation Act.

Legislative Provisions

[10] Section 6(1) of the Limitation Act provides that a two-year limitation period applies to all of the claims being advanced by Ms. Borek:

6(1) subject to this act, a court proceeding in respect of the claim must not be commenced more than two years after the day on which the claim is discovered.

[Emphasis added.]

[11] The legislation also tells us to determine when a claim was "discovered" for the purposes of s. 6 as follows:

8. Except for those special situations referred to in section 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
 - (a) that injury, loss or damage had occurred;
 - (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
 - (c) that the act or omission was that of the person against whom the claim is or may be made;
 - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

[12] As Ms. Borek commenced her claim on May 25, 2016, the issue that I must determine is whether her claim was discovered prior to May 25, 2014 such that it is statute barred. The parties have broken down that question in terms of each of the subsections of s. 8 of the Limitation Act and I will do the same.

- [13] Before doing so, I note that there was some dispute about the continued relevance of the Supreme Court of Canada's decision in *Novak v Bond*, [1999] 1 S.C.R. 808 to the Limitation Act brought into force in 2013. Despite their differences, the parties are agreed that that decision still provides general guidance to this court, although they point to different parts of that decision in this regard.
- [14] I approach this summary trial mindful that "almost all applications of limitation statute will seem harsh. But their finality should not obscure their value. They bring needed stability to society by enabling potential defendants to plan their affairs in a safe assumption that stale claims cannot be raised against them. They minimize the risk that evidence relevant to the claim will be lost. In addition, they are an incentive for the plaintiffs not to 'sleep on their rights'" as was stated at para. 8 of *Novak*.
- [15] Similarly, I recognize the important and continued balancing function of Limitation Acts and limitation periods noted at para. 66 of that decision, and relied upon by Ms. Borek, that these acts "seek to balance conventional rationales oriented towards the protection of the defendant - certainty, evidentiary, and diligence - with the need to treat plaintiffs fairly, having regard to their specific circumstances."
- [16] I agree with Justice Funt in *Arbutus Environmental Services Ltd. v. South Island Aggregates Ltd.*, 2017 BCSC 1 at para. 26 that the new Limitation Act, "with its shortened limitation period for many claims (from six years to two years) evinces a legislative intent that society has a particular interest in the timely resolution of disputes." Furthermore, I agree with the Dr. Hopkins that the new Act, in moving from an analysis of postponement to one of discovery, has attempted to simplify this analysis and remove some of the "denizens of the moors" related to the postponement provisions of the old Act as referenced by Justice Southin in *Vance v. Peglar*, 1996 CanLII 1834 (B.C.C.A.).
- [17] Although the burden in a summary trial is generally on the plaintiff, in this case the burden is on Dr. Hopkins to establish his defence under the Limitation Act, and specifically to establish that the two year limitation period began running before May 25, 2014.
- [18] I will now move on to consider the "first day" that Ms. Borek "knew or reasonably ought to have known" each of the following 4 things:
- (a) that the injury, loss or damage had occurred;
 - (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
 - (c) that the act or omission was that of the person against whom the claim is or may be made;
 - (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

A. Knowledge that the injury, loss or damage occurred

- [19] Dr. Hopkins says that Ms. Borek's affidavit evidence, her pleadings, and most notably her evidence on discovery, establish that she subjectively believed that she had been injured by Dr. Hopkins immediately upon the placement of the temporary crowns by Dr. Hopkins in January 2014. He says that it is not necessary to prove that she knew or believed that the work was inadequate or negligent at that time to address the requirement in subsection 8(a) of her knowledge of injury.
- [20] In her examination for discovery, Ms. Borek described the pain she experienced in June 2014 as "immediately after the treatment" and that it prevented her from being able to chew food. She was "concerned" about the treatment. She felt like "someone punched [her] in the jaw" and that "It was like he was trying to ram a tandem truck into the parking spot of a Volkswagen."
- [21] Ms. Borek says that the defendants need to establish that she knew, not only that the temporary crowns had caused her pain, but also that the pain that she was experiencing was, if not tortious, at least extraordinary. She says that this needs to be considered in the context of her existing mouth and jaw pain for which she was seeking treatment, the anticipated side effects of the treatment, and Dr. Hopkins repeated assurances to her that the pain was related to the latter and not to his work. Ms. Borek says that Dr. Hopkins has not established that the pain she was clearly aware of amounted to an "injury, damage or loss" because, she says, she could not have known that it was attributable to his wrongful actions, as opposed to the treatment itself or her underlying condition.
- [22] She specifically relies upon the written and oral communications from Dr. Hopkins during this period advising her that her pain, in his opinion, was due to her underlying condition, and not as a result of his placement of the temporary crowns. She says she also relied on his statement that the best way to address her pain was to proceed and complete the treatment that she had agreed to, and on the fact that he performed some remedial work that relieved that pain for a temporary period.
- [23] Ms. Borek also relies on the decision of *Bendall v. Goulart*, 2017 BCSC 599. In that case, this Court found that the limitation period did not begin to run until the plaintiff was aware of an injury that was distinct from the symptoms of his underlying cancer, or the recommended and appropriate radiation therapy he had consented to. Mr. Justice Johnston found that, although the plaintiff in that case was aware that his doctors had admitted their mistake in exposing him to an overdose of radiation, his doctors were also advising him that it was not possible to know whether his symptoms were related to that mistake, as opposed to his underlying condition, or the agreed-upon treatment. The court found in those circumstances that the plaintiff did not know and could not reasonably have known that he was "injured" by the mistake.

- [24] In this case, I find that the evidence establishes that Ms. Borek believed that the pain she was experiencing after the placement of the temporary crowns in January 2014 was extraordinary. She did not believe that it was the result of her underlying condition, and she was concerned that the amount of pain she was experiencing was beyond what she had anticipated as an ordinary result of the placement of the temporary crowns.
- [25] I agree with Dr. Hopkins that, pursuant to the language of s. 8 of the Act, he need only establish that Ms. Borek knew that she had suffered some kind of injury or damage, but that she did not need to know the extent or type of the injury, or that it was tortious.
- [26] I find that Dr. Hopkins has established that Ms. Borek knew that she was experiencing an extraordinary amount of pain and other symptoms, including an inability to chew before May 25, 2014. This is the primary injury and loss she claims in the action, and I find that Ms. Borek was aware of this loss as early as January 2014.

B. Knowledge that the injury was caused by an act or omission

- [27] With respect to the second criteria, the main difference between the parties is whether or not the language of causation and injury imports a notion of fault.
- [28] I consider that the issue of fault is properly addressed in the fourth element of s. 8, and I will address it there.
- [29] I am satisfied on the evidence that Ms. Borek believed in January and February 2014 that the temporary crowns installed by Dr. Hopkins were causing her pain and other losses.
- [30] I am also satisfied on the evidence before me for the purposes of this application that Ms. Borek did not know whether this pain was an unavoidable aspect of the treatment plan that she was pursuing and still wanted to pursue, or whether it was unnecessary and due to some departure from that plan, or from the standard of care expected of a prosthodontist.
- [31] I do not consider that Dr. Hopkins need establish the latter proposition for the purposes of s. 8(b). In my view, it is sufficient that Ms. Borek believed that the temporary crowns installed by Dr. Hopkins were the cause of her pain and losses.

C. Knowledge of the person against whom the claim is made

- [32] There is no issue on the evidence, or as between the parties, that Ms. Borek was aware that it was the defendants, through Dr. Hopkins, who had performed the acts (the installation of the temporary crowns) that are the subject of the claim.

D. Knowledge that a court proceeding would be an appropriate means to seek a remedy

- [33] I turn now to the final element of Ms. Borek's knowledge under s. 8(d) of the Limitation Act: whether she was knew, or ought to have known, that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.
- [34] It is on this final point that I consider the question of the extent of Ms. Borek's understanding of the reasons for her pain and her intentions with respect to completing her treatment with Dr. Hopkins come into play.

The Parties' Positions

- [35] Dr. Hopkins relies on Ms. Borek's evidence in discovery that by the end of February 2014 she was "not willing to accept [Dr. Hopkin's] explanation that nothing has gone wrong" because she "knew something had." She went so far as to say in discovery, that to go back to treatment with Dr. Hopkins without his acknowledgement of her pain and a plan to address it would have been "insane."
- [36] Dr. Hopkins says that while a reasonable person might well have been reassured by his statements that her pain was not the result of anything going wrong, but was more like the results of her underlying condition, the test under s. 8 is not just what was reasonably known to the plaintiff. Dr. Hopkins says that Ms. Borek's subjective belief in January and February 2015 that something had "gone wrong" is sufficient.
- [37] After February 2014, the evidence establishes that Ms. Borek did not pursue any of the further appointments that she had with Dr. Hopkins. She demanded a detailed list of the further steps required to complete the treatment and how that would resolve her immediate problems, but when that was provided, she did not follow up with any of those appointments. In addition, when one of the temporary crowns fell out at the end of February 2014 while she was in Vancouver, Ms. Borek saw another prosthodontist in Vancouver, and received some advice from him that her temporary crowns did not seem to be remedial in nature.
- [38] Dr. Hopkins says that this evidence establishes the final element of discoverability that she had all of the knowledge to determine that a court proceeding was "an appropriate" means to seek a remedy for her injury by the end of February 2014.
- [39] Dr. Hopkins relies on the case of *Olenga v. Royal Columbian Hospital*, 2017 BCSC 975, where this Court found that the plaintiff was aware of all four elements required to discover his claim when he checked himself out of a hospital against doctors' orders on the basis of his belief that his treatment there was inadequate and the cause of his pain and suffering, something he admitted directly in examination for discovery.

- [40] In her affidavit evidence, Ms. Borek agrees that she had "concerns about how the treatment was going" but that she also continued to rely upon the advice of Dr. Hopkins that the pain she was experiencing was best treated by pursuing her treatment plan. She had interviewed and searched for a qualified prosthodontist in Victoria prior to seeking treatment from Dr. Hopkins, and continued to believe that Dr. Hopkins was the most qualified prosthodontist available to assist her. She did not want to "alienate Dr. Hopkins" midway through an expensive and difficult treatment process, and she was "still hopeful that he could, with some prodding, develop a plan" for her that would address her pain.
- [41] Ms. Borek states that while she was "undoubtedly unhappy with the treatment, and experiencing significant pain," she was trying to maintain her relationship with Dr. Hopkins and find a way to continue her treatments all the way up until May 26, 2014 when she wrote to him to end her treatment program with him.
- [42] With respect to the advice that she received from the Vancouver prosthodontist at the end of February 2014, she says that while that prosthodontist raised a question about the shape of her temporary crowns, that prosthodontist also urged her to raise this question with Dr. Hopkins. She did so, and she received an answer from Dr. Hopkins' office that indicated to her that Dr. Hopkins had been following the agreed-upon treatment plan, and that the Vancouver prosthodontist's concerns were therefore unfounded.
- [43] On May 27, 2014, she visited yet another prosthodontist, Dr. Lowe. That prosthodontist provided her with a written letter in early June 2014 setting out a list of concerns regarding her temporary crowns and treatment by Dr. Hopkins. Ms. Borek says that she did not know that her symptoms were the result of a departure from the treatment plan she had consented to, or some other actionable wrong, until that point.
- [44] Ms. Borek argues that her statement in discovery that she knew something had "gone wrong" in January 2014 was made with the benefit of hindsight in relation to her subsequent treatments and the subsequent resolution of her pain and problems. She says that she was not aware until June 2014 with the benefit of Dr. Lowe's opinion that there was any identifiable thing that Dr. Hopkins had done "wrong."

Determination

- [45] To satisfy this fourth element of s. 8 of the Limitation Act, the parties are agreed that Dr. Hopkins must establish that Ms. Borek had the knowledge, or ought to have had the knowledge, of at least a potentially actionable wrong.
- [46] The case law suggests that the termination of a treatment relationship on the basis of such a concern, such as was done in *Olenga*, may provide that evidence. On the other hand, settlement negotiations are not evidence of a lack of knowledge of a potentially actionable wrong: *Arbutus Environmental*. To the contrary, settlement negotiations tend to indicate knowledge of an actionable wrong, and not the contrary.

- [47] I do not consider Ms. Borek's ongoing attempts to clarify her treatment plan and her demands for an explanation as to the cause of her pain, and how it would be addressed through the further pursuit of that plan are akin to "settlement negotiations." Rather, I consider them to be a continuation of the treatment relationship that indicate a continued reliance upon Dr. Hopkins, even if a strained one.
- [48] I disagree with Dr. Hopkins that the evidence establishes that she had lost faith in him by the end of February 2014 and that her treatment relationship ended with him at that point. I find that the evidence, including the discovery evidence upon which Dr. Hopkins relies, establishes that Ms. Borek continued to communicate with him for the purposes of pursuing treatment well past the end of February 2014. Dr. Hopkins also admits that Ms. Borek had an appointment scheduled with him as late as May 2014, though she cancelled that appointment a few days prior.
- [49] In March 2014, Ms. Borek wrote to Dr. Hopkins seeking the clarification recommended by the Vancouver prosthodontist. She received the response from Dr. Hopkins' office in April 2014. I also accept, for the purposes of this application, that she believed that response addressed the concern raised by the Vancouver prosthodontist, and that therefore her visit to the Vancouver prosthodontist was not sufficient to end her relationship with Dr. Hopkins or to indicate to her the potential for an error in Dr. Hopkins' care of her.
- [50] Taken as a whole, Ms. Borek's evidence in discovery not only indicates a concern that something had gone wrong with Dr. Hopkins' placement of her temporary crowns, but also an ongoing reliance upon Dr. Hopkins to address those concerns up until May 25, 2014. Even as she discusses her need for Dr. Hopkins to explain how the completion of her treatment would be different and address her pain, she states "I wanted to proceed. I wanted my teeth fixed." With respect to her concern that Dr. Hopkins said he would not have done anything differently she was also still asking "where do we go from here" and seeking his advice and his consideration. This continued well past the end of February 2014, and the only clear end to this reliance was when she decided to terminate her treatment relationship with Dr. Hopkins in late May 2014.
- [51] I find that Ms. Borek's evidence in discovery that she believed there had been something "wrong" about the installation of the temporary crowns that had led to her extraordinary pain does not establish, in the context of the whole of the evidence, that she knew that an error or departure from her treatment plan had occurred. That is, she was not aware that the pain she was experiencing was not pain that she had consented to as a result of Dr. Hopkins following a treatment plan she had agreed to, and she continued to believe (or at least hope) that the pain would be addressed or improved by completion of that plan, either in its current form or in a form that Dr. Hopkins would modify for her. Given Dr. Hopkins' reassurances to her that her pain would be resolved by completion of the plan, this was not unreasonable.

[52] I am also of the view that as long as Ms. Borek was reliant upon Dr. Hopkins for her treatment, that it would not have been appropriate or practical for her to contemplate a lawsuit against him.

Conclusion

[53] In conclusion, on this summary trial I find that the defendants have not established that Ms. Borek had the requisite knowledge to have discovered the claim before May 25, 2014.

[54] I find that the limitation period could not start running until May 26, 2014 at the earliest, when Ms. Borek terminated her treatment relationship with Dr. Hopkins. It was not until then that, in all the circumstances, having regard to the nature of her loss, that a court proceeding would have been an appropriate means to seek a remedy. I furthermore find that it was not until some point in June 2014 when she received the opinion of Dr. Lowe that she had knowledge of an apparent departure from her treatment plan that was potentially responsible for her pain, losses and injuries. Prior to that date, I find that Ms. Borek did not know, nor ought she have known, that a court proceeding would be "an appropriate means to remedy" her losses.

[55] Subject to the submissions of counsel, Ms. Borek is entitled to her costs of this summary trial.

"Marzari J."

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