
CANADA / JUDGMENT

Brooks v. Jackson

2009 BCCA 150

COURT

British Columbia Court of Appeal

DECIDED

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2009 BCCA 150 Brooks v. Jackson

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Brooks v. Jackson,

2009 BCCA 150

Date: 20090403

Docket: CA035314

Between:

Tina Marie Brooks

Respondent

(Plaintiff)

And

Dr. Gary C. Jackson

Appellant

(Defendant)

Before:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Tysoe

J.M. Lepp, Q.C. and B.W. Stock

Counsel for the Appellant

M.R. Steven

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

February 4, 2009

Place and Date of Judgment:

Vancouver, British Columbia

April 3, 2009

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

- [1] This appeal raises the question of whether the running of time in the limitation period under the Limitation Act, R.S.B.C. 1996, c. 266, is postponed during the period in which the plaintiff was aware that she suffered a transient injury as a result of the defendant's alleged negligence but was not aware that the transient injury caused another injury of a permanent nature.
- [2] The chambers judge held that the running of time in the limitation period was postponed, with the result that the action was not statute-barred. Her oral reasons for judgment are indexed as 2007 BCSC 1575.
- [3] For the following reasons, which are somewhat different from those of the chambers judge, I agree that the running of time in the limitation period was postponed, and I would dismiss the appeal.

Background

- [4] The plaintiff, Ms. Brooks, gave birth to a child on November 16, 1997, at Peace Arch Hospital. The defendant, Dr. Jackson, was the treating obstetrician and gynaecologist.

- [5] Prior to the birth, Dr. Jackson determined that the fetus was engaged in the pelvis. He applied Kielland's forceps to the head but abandoned the attempt when he met with difficulty. He then applied Tucker-McLean forceps and carried out a rotation that enabled him to deliver the head of the fetus with a moderately strong pull on the forceps. He employed a manoeuvre to free an impacted shoulder, and the baby was delivered. Dr. Jackson then repaired a fourth degree episiotomy Ms. Brooks had been given during the delivery.
- [6] The placenta did not deliver on its own, and Dr. Jackson manually removed it about 50 minutes after the birth. Approximately 90 minutes after the birth, Ms. Brooks reported that she was feeling faint; her blood pressure was low. Dr. Jackson examined her and removed a large amount of clot from her vagina. He noted a tear inside the vagina, which appears to have been caused by the forceps coming in contact with Ms. Brooks' fairly sharp ischial spine. Surgery was then performed to repair this paravault tear.
- [7] Ms. Brooks lost approximately 1 to 1.5 litres of blood during the delivery, postpartum haemorrhaging and the subsequent surgery. When her haemoglobin was reported to be low several hours after the surgery, Dr. Jackson ordered her to be given a transfusion of two units of packed red blood cells.
- [8] Ms. Brooks was transferred to Vancouver General Hospital later in the day because Dr. Jackson was concerned about the possibility of ongoing concealed pelvic bleeding. She was returned to Peace Arch Hospital on the following day after a pelvic angiogram did not disclose a collection of blood in the pelvis. Ms. Brooks remained at Peace Arch Hospital for another six days before she was discharged.
- [9] At some point before Ms. Brooks was discharged from Peace Arch Hospital, she was advised by Dr. Jackson that she had "bled in" during the delivery. She was also told by Dr. Jackson and the referring doctor that she should expect to be unwell for approximately two years, the length of time it would take to get her blood back and recover from the delivery.
- [10] Ms. Brooks had a follow-up visit with Dr. Jackson on January 19, 1998. In his report to Ms. Brooks' family practitioner, Dr. Jackson wrote that he told her she was doing well and had no physical sequela from her delivery. Ms. Brooks deposed in an affidavit that she asked him questions about the birth and surgery and that he answered all her questions to her satisfaction. She also deposed that before she spoke to Dr. Jackson at the follow-up visit, she had an inkling of concern about the treatment she received during her child's birth but never thought there was any actual negligence on the part of the doctors or hospital staff.
- [11] Ms. Brooks gave the following evidence during her examination for discovery:
- Q What were your concerns about the care [Dr. Jackson] provided?

A My concerns were why did it take so long from the time that the delivery -- the placenta was delivered to realize that I had such traumatic blood loss. My concerns were that I was ripped up inside by him. My concerns were that if he couldn't even recognize that, in my opinion, I needed a C-section, how good of a doctor was he? I had felt completely confident in his ability and I felt like it was like a shock; like, how could this happen.

Q Is it fair to say that you associate what was a difficult and traumatic experience for you with him because he was involved with you at that time?

A Well, yeah, that's an obvious reaction, but it's -- the nurses were also there and I don't associate them with any negative

* * *

Q When -- and I'll ask you this: when did you first consider that the care you'd received from Dr. Jackson was deficient? I gather that that was as of January 19th, 1998, at the latest?

A Yes.

Q Had you considered that before January 19th? Were you of the view that his care was deficient as of the date of your discharge from hospital on November 24th?

A I didn't understand what had happened. So no, until I was -- I would say January is there's an inkling of concern, but I didn't seriously question until January.

Q Until after you had spoken to him on the 19th of January, '98?

A Yes.

[12] Ms. Brooks continued to feel tired and have other symptoms. She conducted research on her own in an attempt to find out the reason. In 2000, she suspected that she might have a condition called Sheehan's Syndrome but was told after testing that "everything was within normal range". However, she was eventually referred to two other doctors who, in May 2002, confirmed a diagnosis of Sheehan's Syndrome, which the parties agreed before the chambers judge is "hypopituitarism arising from a severe circulatory collapse postpartum", resulting in pituitary necrosis. There is no evidence before the Court as to when the necrosis occurred.

[13] Ms. Brooks did further research and, by September 2002, learned that Sheehan's Syndrome is caused by a significant postpartum haemorrhage, at which time she sought legal advice. She met with counsel in December 2002 and commenced the action against Dr. Jackson on September 22, 2003.

- [14] Dr. Jackson brought on an application under Rule 18A to have the action dismissed on the basis that it was statute-barred. The chambers judge dismissed the application because she could not conclude that, at any point in time more than two years prior to the commencement of the action, "a reasonable person knowing those facts and having taken appropriate advice would regard the facts as showing that an action would have a reasonable prospect of success" (para. 12).

Discussion

- [15] Under s. 3(2) of the Act, the limitation period for damages in respect of injury to person is two years from the date on which the plaintiff had the right to bring action. The law is clear that, in general terms, a plaintiff has the right to bring action when the cause of action arises, which, in the case of a negligence claim, is when (i) there has been a breach of a duty of care owed to the plaintiff, and (ii) the plaintiff has suffered damages as a result of the breach of duty.
- [16] Sections 6 to 8 of the Act contain provisions relating to the postponement of the running of time in the limitation period. The principal provisions are subsections (4), (5) and (6) of s. 6, which apply to actions in respect of, among others, personal injury and professional negligence:
- (4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
 - (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
 - (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
 - (5) For the purpose of subsection (4),
 - (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
 - (b) "facts" include
 - (i) the existence of a duty owed to the plaintiff by the defendant, and
 - (ii) that a breach of a duty caused injury, damage or loss to the plaintiff,

- (c) if a person claims through a predecessor in right, title or interest, the knowledge or means of knowledge of the predecessor before the right, title or interest passed is that of the first mentioned person, and
- (d) if a question arises about the knowledge or means of knowledge of a deceased person, the court may have regard to the conduct and statements of the deceased person.
- (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

Section 8 provides an ultimate limitation period of six years for actions against, among others, medical practitioners for professional negligence or malpractice despite any postponement in the running of time (in other words, the running of time cannot be postponed for more than four years).

[17] The wording of s. 6(4), which was described by Chief Justice McEachern (dissenting) in *Karsanjii Estate v. Roque*, [1990] 3 W.W.R. 612 at 616, 43 B.C.L.R. (2d) 234 (C.A.), as "mysterious, obscure and inartistic", has been broken down into the following four components:

- (i) the identity of the defendant is known to the plaintiff;
- (ii) the plaintiff has certain facts (including the facts set out in s. 6(5)(b)) within her means of knowledge;
- (iii) a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success; and
- (iv) a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interests and taking her circumstances into account, to be able to bring an action.

See *Vance v. Peglar* (1996), 138 D.L.R. (4th) 711, 22 B.C.L.R. (3d) 251 (C.A.), and *Ounjian v. St. Paul's Hospital*, 2002 BCSC 104, [2002] B.C.T.C. 104.

[18] Each of the first, third and fourth of these components is a condition precedent to the commencement of running of time in the limitation period. If any of these three components has not been satisfied, the running of time will not have commenced. The second component is not a condition precedent to the commencement of running of time, and it deals with the facts known to, or within the means of knowledge of, the plaintiff for the purposes of the third and fourth components. In accordance with s. 6(6), the burden is on the plaintiff to prove that one of the three conditions precedent has not been satisfied before the critical date (which is the date determined by subtracting the length of the applicable limitation period from the date on which the action is commenced).

- [19] In the present case, Ms. Brooks was aware of the identity of Dr. Jackson at all material times, and there is no doubt that the first component was satisfied more than two years prior to the commencement of the action. Ms. Brooks also conceded before the chambers judge that the fourth component was not applicable to this case because the circumstances were not like those in *Novak v. Bond*, [1999] 1 S.C.R. 808, 63 B.C.L.R. (3d) 41, such that she could not, in her own interests and taking her circumstances into account, have been able to bring an action. We are advised the reason for the concession was because, unlike the situation in *Novak v. Bond*, Ms. Brooks did not make a conscious decision not to sue Dr. Jackson. Hence, although we heard some argument on behalf of Dr. Jackson with respect to the fourth component, most of the submissions focused on the third component.
- [20] Dr. Jackson says the third component requires an assumption that Ms. Brooks obtained notional advice from a notional advisor as of January 19, 1998, the time the facts were known to her or were within her means of knowledge. She knew the decision to perform a forceps delivery of her child resulted in a paravault tear and the failure to detect the tear for a period of time resulted in blood loss. Accordingly, says Dr. Jackson, the notional advisor would have advised Ms. Brooks as of January 19, 1998, that there was a reasonable prospect that a claim of negligence against Dr. Jackson in respect of the blood loss and its consequences would succeed.
- [21] Dr. Jackson also submits that the diagnosis of Sheehan's Syndrome did not give rise to a new cause of action or result in the running of time in the limitation period being postponed until the diagnosis. He argues the discovery that the injuries are more serious than initially believed does not postpone the running of time, citing *Grayson v. Canada Safeway Limited*, [1981] 2 W.W.R. 321 (B.C.C.A.); *Hughes v. Proline Management Ltd.*, [1996] B.C.J. No. 1669 (S.C.); *Craig v. Insurance Corporation of British Columbia*, 2005 BCCA 275, 41 B.C.L.R. (4th) 17; *Landels v. Interior Health Authority*, 2005 BCSC 1182; and *Taylor v. Paulson*, 2005 BCSC 1249.
- [22] In *Grayson*, the plaintiff slipped in a store in March 1976. She had bruising, swelling and discomfort in her knees and some soreness in the area of her tailbone. She continued to have some symptoms and she was advised in June 1978 that there was degenerative arthritic change as a result of the injury. Relying on comments of Lord Denning M.R. in *Goodchild v. Greatness Timber Co. Ltd.*, [1968] 2 Q.B. 372, [1968] 2 All E.R. 255 (C.A.), this Court held that the running of time had not been postponed. Mr. Justice Seaton noted that it was not a case of a trifling injury that turned out later to be very serious. Mr. Justice Anderson emphasized that the injury diagnosed in June 1978 was the same injury as suffered in March 1976.
- [23] In *Hughes*, the plaintiff fell when she stepped into an elevator without realizing that it had stopped four inches below the level of the hallway. She realized her back had been injured and thought it was a muscle pull. Tests conducted approximately six months later disclosed the possibility of a bulging disc in her spine. Madam Justice Quijano held that the running of time of the limitation period began at the time of the fall and had not been postponed.

- [24] The other three authorities cited by Dr. Jackson on this point were all decided after *Novak v. Bond* and, like that case, involved a consideration of the fourth component of s. 6(4). In each case, the plaintiff suffered injuries at the time of the allegedly tortious conduct but did not learn the full extent or seriousness of the injuries until a subsequent point in time. The courts held that the running of time in the limitation period started when the plaintiff suffered compensable injury from the allegedly tortious conduct and that the plaintiff, in his or her own interests and taking the circumstances into account, ought to have been able to bring an action at that time. Hence, in each case, there was no postponement of the running of time in the limitation period.
- [25] One decision not cited to us is *K.L.B. v. British Columbia*, 2001 BCCA 221, 197 D.L.R. (4th) 431. The case involved sexual and non-sexual abuse. There is no limitation period in respect of causes of action based on sexual abuse, but this Court was required to consider when the limitation period began to run in respect of the non-sexual abuse. This Court held the claim of non-sexual abuse was statute-barred because the plaintiffs had knowledge more than two years prior to the commencement of the action that they had sustained harm that was sufficiently serious to be actionable. In reaching its conclusion, this Court applied the following passage of Mr. Justice Hall from *Gray v. Reeves* (1992), 89 D.L.R. (4th) 315 at 350, 64 B.C.L.R. (2d) 275 (S.C.):

it seems to me that the hypothetical reasonable person in the shoes of the plaintiff here would not have been acting sensibly in commencing an action until such a person came to appreciate that a wrong or wrongs that had occasioned significant harm to her well-being could be established.

In *K.L.B.*, this Court noted this passage was endorsed by Mr. Justice La Forest, on behalf of the majority, in *M.(K.) v. M.(H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4th) 289.

- [26] *Gray v. Reeves* involved a claim of sexual assault before the Act was amended to provide that no limitation period applies to such claims. It was held the running of time in the limitation period did not begin until the plaintiff discovered the harm caused by the sexual assaults when she was diagnosed with a mental condition. In making the above comments, Mr. Justice Hall appears to have been considering the fourth component of s. 6(4). However, at 349, in the paragraph preceding the above passage, he also commented on the topic of obtaining professional advice:

I believe that the plaintiff took reasonable steps in 1987 and thereafter to address her mental upset and that she, therefore, met the requirements of the provisions of our Limitation Act. I do not consider that she had any particular reason to seek out professional assistance or advice prior to her lapse into a depressed mental state in early 1987.

These comments are germane to the third component of s. 6(4).

- [27] Dr. Jackson's submission attributes to Ms. Brooks advice by medical and legal advisors at a point in time shortly after the delivery of her child. Contrary to the view implicitly expressed by the chambers judge in her conclusion, I consider that a competent legal advisor would have told Ms. Brooks at that time that an action against Dr. Jackson would have a reasonable prospect of success on the basis that the additional loss of blood resulting from the delay in detecting the paravault tear represented a compensable injury. The legal advisor may also have told Ms. Brooks that an action would not have been worthwhile in view of the minor nature of the injury known at the time, but that is a matter for consideration under the fourth component of s. 6(4).
- [28] In my view, Dr. Jackson's submission overlooks part of the wording of s. 6(4). It does not take into account that the advice to be taken into account is restricted to "the appropriate advice a reasonable person would seek on those facts". This phrase does not appear to have received judicial consideration in British Columbia other than the above comments of Hall J. However, a comparable phrase was considered in a somewhat similar situation in *Royal North Shore Hospital v. Henderson* (1986), 7 N.S.W.L.R. 283 (C.A.), a case discussed in *Novak v. Bond* and approved in *Evans v. Vancouver Port Corp.* (1989), 65 D.L.R. (4th) 521, 42 B.C.L.R. (2d) 174 (C.A.).
- [29] In *Royal North Shore Hospital v. Henderson*, the plaintiff was given radiation therapy because he was suffering from Hodgkin's disease. He received an overdose of radiation that caused injury to the skin on his upper arms, which led to scarring and to susceptibility of problems arising from sunburn and other injuries. It also caused him some pain and stiffness in his neck and shoulders. Approximately eleven years later, he learned that the overdose of radiation had resulted in a grave disease called radicular myelopathy, which could possibly lead to quadriplegia. He sued the hospital after receiving medical advice about this condition.
- [30] The majority of the New South Wales Court of Appeal held that the limitation period had been extended until one year after the plaintiff learned he was suffering from radicular myelopathy. Justice Mahoney concluded that the limitation period had been extended under each counterpart of the New South Wales legislation corresponding to the third and fourth components of s. 6(4) of the British Columbia statute. In *Novak v. Bond*, in dealing with the fourth component, Madam Justice McLachlin expressed the view that the *Henderson* case is of assistance in identifying some of the interests that may arise when deciding to commence a lawsuit, but cautioned to have regard to the difference in the wording of the New South Wales Limitation Act 1969 (i.e., s. 57(1)(c)(ii), "ought, in his own interests, and taking his circumstances into account, to bring an action") and the wording of s. 6(4)(b) (i.e., "ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action" [emphasis added]).

[31] What I wish to focus upon, however, are the comments of Mahoney J.A. with respect to the counterpart of the third component. The wording of the New South Wales counterpart was "a reasonable man, knowing those facts and having taken the appropriate advice on those facts, would regard ". In my view, those words are equivalent to the corresponding wording in s. 6(4). The comments of Mahoney J.A. were, in part, as follows (at p. 299):

In my opinion, having regard to what the plaintiff knew in November-December 1982 and the circumstances in which he knew it, I do not think that it would have been reasonable to expect that he should have taken the steps necessary to ascertain whether the Hospital had, in 1972, failed to exercise the appropriate care. At that time the question whether what had happened had been due to lack of care, and such lack of care as would constitute legal negligence, had not arisen .

In this regard, it is, I think, to be noted that, in determining what is "reasonable" for this purpose, the Act does not require that it be assumed that the plaintiff would have taken advice. Whether it would have been reasonable to take advice and what steps thereafter would have reasonably been taken must be determined by reference to the particular plaintiff or, possibly, by reference to him as a reasonable person.

[32] In my opinion, a reasonable person in the position of Ms. Brooks would not have sought legal advice or further medical advice prior to the diagnosis of Sheehan's Syndrome. She was advised in January 1998 she had no physical sequela from the delivery and she was satisfied with the answers Dr. Jackson gave to her questions. A reasonable person, in those circumstances, would not seek legal advice to determine whether there was a cause of action against Dr. Jackson. Ms. Brooks had no reason to believe that the temporary loss of blood had caused a permanent injury of a qualitatively different nature. It is my view that a reasonable person would not have sought legal advice until realizing the damage was more than transient in nature. Accordingly, the running of time in the limitation period was postponed until Ms. Brooks was diagnosed with Sheehan's Syndrome, and the limitation period had not expired prior to the commencement of the action.

[33] As a result, this appeal can be determined on the basis of the third component of s. 6(4), and it is not necessary to consider the fourth component. As the fourth component was not fully argued before us in view of Ms. Brooks' concession, it is my view that consideration of it should be left to another case. I only observe that, in the decision of N. (J.) v. Kozens, 2004 ABCA 394 at para. 15, 248 D.L.R. (4th) 245, the Alberta Court of Appeal has interpreted the comments of McLachlin J. in *Novak v. Bond* as indicating that one of the circumstances in which a plaintiff may not reasonably be regarded as being able to bring an action in his or her own interests is where "the possible damages recoverable would be minimal or speculative at best".

Conclusion

[34] I would dismiss the appeal.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Ryan"

I agree:

"The Honourable Madam Justice Saunders"

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