

CANADA / JUDGMENT

Callan v. Cooke

2020 BCSC 290

COURT

Supreme Court of British Columbia

DECIDED

3 March 2020

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2020 BCSC 290 Callan v. Cooke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Callan v. Cooke,

2020 BCSC 290

Date: 20200303

Docket: S114724

Registry: Vancouver

Between:

Robert Callan

Plaintiff

And

Donald Cooke and the Attorney General of Canada

Defendants

- and -

Docket: S153859

Registry: Vancouver

Between:

Thomas Thiessen

Plaintiff

And

Donald Cooke and the Attorney General of Canada

Defendants

- and -

Docket: S195374

Registry: Vancouver

Between:

Travis Piers

Plaintiff

And

Donald Cooke and the Attorney General of Canada

Defendants

Corrected Judgment: The text of the judgment was corrected on page 2 on March 5, 2020

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiffs:

R.W. Mostar

J. Chung, Articling Student

Counsel for the Defendant Cooke:

R.S. Anderson Q.C.

T. Miller

Counsel for the Attorney General of Canada

T. Bean

L. Bell

Place and Date of Hearing:

Vancouver, B.C.

January 21, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 3, 2020

- [1] The plaintiffs in these actions each allege that in or about the years 1982 to 1985, they were sexually assaulted by the defendant, Donald Cooke.
- [2] The defendant Cooke denies the allegations against him.
- [3] The plaintiffs also allege that the defendant Attorney General of Canada is vicariously and statutorily liable for the actions of the defendant Cooke, as he was a member of the Royal Canadian Mounted Police ("RCMP") at the time of the alleged assaults.
- [4] The defendant Attorney General of Canada both denies the allegations with respect to the defendant Cooke, and disputes the allegations of vicarious or statutory liability for the alleged conduct of the defendant Cooke.
- [5] The defendant Cooke applies for an order dismissing the actions against him by Robert Callan and Thomas Thiessen, two of the plaintiffs, for want of prosecution. He also applied for an order dismissing an action commenced against him by one Graeme Wilson, but adjourned that application, as there is a concern that Mr. Wilson has passed away.
- [6] The plaintiffs apply for orders that the trials of their actions be consolidated, or alternatively tried and heard at the same time, but abandoned their applications to consolidate the three actions, proceeding only with respect to the applications that the three actions be tried and heard at the same time.
- [7] The defendant Cooke contends that if his application is successful, I need not determine the plaintiffs' applications, however I heard the applications together, in order to gain a greater appreciation of the merits of both.
- [8] The Attorney General for Canada takes no position on any of the applications before me.

Background

- [9] The defendant Cooke graduated from the RCMP Academy in Regina, Saskatchewan on February 15, 1982.
- [10] From February 1982 to 1986, Mr. Cooke was stationed with the RCMP in Abbotsford, British Columbia, serving as an undercover officer. During that time, he coached minor hockey. It was also during this period that the alleged sexual assaults took place.
- [11] The plaintiffs were all minors at the time of the alleged assaults. Robert Callan and Travis Piers were players on a hockey team coached by the defendant Cooke whom they allege cultivated a relationship with them for the purpose of promoting and realizing his intention to sexually assault them.

- [12] The plaintiff Thiessen was not involved in hockey. He alleges that he met the defendant Cooke by chance, and that thereafter, the defendant Cooke cultivated a relationship with him and his parents for the purpose of promoting and realizing his intention to sexually assault him.
- [13] The plaintiff Callan alleges that the defendant Cooke sexually assaulted him between the years 1982 and 1984.
- [14] The plaintiff Thiessen alleges that the defendant Cooke sexually assaulted him between the years 1982 and 1985.
- [15] Travis Piers alleges that the defendant Cooke sexually assaulted him between the years 1982 and 1985.
- [16] The plaintiffs allege that they were sexually assaulted by the defendant Cooke in his police vehicle and in other locations.
- [17] During the 1985/86 hockey year, when the defendant Cooke was the head coach of a Midget AAA team, he removed several players from the team for theft of equipment, including Callan and Piers.
- [18] In May of 1986, after what he asserts to be almost two years of planning efforts, the defendant Cooke was transferred to the east coast of Canada, for medical reasons.
- [19] From 2004 to 2009, a police investigation of allegations of sexual misconduct by the defendant Cooke was carried out, although the defendant Cooke was unaware of the investigation until May 2005.
- [20] On May 28, 2005, the defendant Cooke was arrested by the RCMP while at a golf course. During his arrest, he learned of the allegations of sexual assault from 1982 to 1985.
- [21] Shortly after his arrest, the RCMP suspended the defendant Cooke and provided notice that his pay was to be discontinued.
- [22] After his arrest, the defendant Cooke took a lie detector test relating to Mr. Wilson's allegations. The defendant Cooke swore that he passed the lie detector test, and in the result, the RCMP reinstated his pay.
- [23] On July 29, 2005, a writ of summons and statement of claim was filed on behalf of Mr. Wilson in the British Columbia Supreme Court in Action No. S054259, Vancouver Registry ("the Wilson action"), by Mr. Mostar, who is counsel for the plaintiffs before me.
- [24] On November 14, 2005, the Attorney General of British Columbia and the Attorney General of Canada filed appearances and statements of defence in the Wilson action.
- [25] On June 1, 2006, the defendant Cooke filed an appearance in the Wilson action.

- [26] In the spring of 2006, the defendant Cooke took another lie detector test relating to the Callan allegations, which he swore that he passed.
- [27] On September 5, 2006, the defendant Cooke filed his statement of defence in the Wilson action.
- [28] On July 27, 2007, Mr. Mostar filed a notice of withdrawal of solicitor in the Wilson action.
- [29] In April 2009, the Regional Crown Counsel in New Westminster advised the defendant Cooke's counsel that the police investigation into the sexual assault allegations against the defendant Cooke was over and that no charges would be laid.
- [30] On July 13, 2011, a notice of civil claim was filed by Mr. Mostar, on behalf of the plaintiff Callan, in the British Columbia Supreme Court in Action No. S114724, Vancouver Registry ("the Callan action").
- [31] On October 7, 2011, a response to civil claim was filed by the Attorney General of Canada for and on Behalf of Her Majesty the Queen in Right of Canada in the Callan action.
- [32] On January 19, 2012, a response to the notice of civil claim was filed by the defendant Cooke in the Callan action.
- [33] On June 1, 2012, a notice of application was filed by the Attorney General of Canada in the Callan action seeking to strike parts of the notice of civil claim.
- [34] On July 10, 2012, a notice of application was filed by the plaintiff Callan seeking the production of documents by the RCMP in his action.
- [35] On July 19, 2012, the Attorney General of Canada filed a response to the notice of application for production of the RCMP documents.
- [36] On October 9, 2012, Master Tokarek granted an order in the Callan action for the production of the Abbotsford Police Department file.
- [37] On October 23, 2012, the defendant Cooke filed a notice of appeal from Master Tokarek's order.
- [38] On October 29, 2012, Madam Justice Arnold-Bailey granted an order striking out parts of the notice of civil claim in the Callan action.
- [39] On January 31, 2013, Mr. Justice Masuhara released reasons for judgment indexed at 2013 BCSC 142, for the production of the file of the Abbotsford Police Department in the Callan action.
- [40] On July 16, 2013, Mr. Mostar wrote to counsel for the defendant Cooke, Mr. Anderson, and to others enclosing a CD-Rom containing the file of the Abbotsford Police Department in the Callan action, with some enclosures excluded.

- [41] On February 20, 2014, Mr. Anderson, counsel for the defendant Cooke, conducted an examination for discovery of the plaintiff Callan.
- [42] On February 21, 2014, Mr. Mostar conducted an examination for discovery of the defendant Cooke in the Callan action.
- [43] On February 27, 2014, Mr. Mostar filed an amended notice of civil claim in the Callan action.
- [44] On July 22, 2014, the Attorney General of Canada filed an amended response to civil claim in the Callan action.
- [45] On July 22, 2014, the Attorney General of Canada filed a list of documents in the Callan action.
- [46] On March 4, 2015, Mr. Mostar wrote to Mr. Anderson and others regarding the scheduling of a trial in the Callan action.
- [47] Admitting no wrongdoing, the defendant Cooke reached a settlement with the RCMP in May 2015, which provided that he would be paid a lump sum and would be eligible for an RCMP pension.
- [48] On May 11, 2015, Mr. Mostar filed a notice of civil claim in British Columbia Supreme Court in Action No. S153859, Vancouver Registry, between Thomas Thiessen, Donald Cooke and others ("the Thiessen action").
- [49] On February 3, 2016, Mr. Mostar filed a notice of application on behalf of Mr. Thiessen for substituted service of the defendant Cooke in his action.
- [50] On February 17, 2016, the Attorney General of Canada filed a response to the notice of application for substituted service in the Thiessen action.
- [51] On April 19, 2016, Mr. Mostar wrote to Mr. Anderson about joining the Callan and Thiessen actions.
- [52] On July 28, 2016, the defendant Cooke filed a response to civil claim in the Thiessen action.
- [53] On May 14, 2018, Mr. Mostar filed notices of intention to proceed in both the Callan and Thiessen actions.
- [54] On October 12, 2018, Mr. Anderson wrote to a paralegal at the office of the plaintiffs' counsel advising that he would pursue an application for dismissal of the Callan and Thiessen actions for want of prosecution or alternatively security for costs.
- [55] On October 15, 2018, Mr. Mostar wrote to Mr. Anderson regarding the scheduling of a trial, joining the Callan and Thiessen actions explaining his clients' delay in proceeding earlier being due to "challenges Mr. Thiessen has encountered psychologically".

- [56] On November 28, 2018, Ms. Melody Robens-Paradise, counsel for the Attorney General of Canada, wrote to Mr. Mostar and Mr. Anderson regarding future applications in the Callan and Thiessen actions. She advised that her colleague, Thomas Bean, would assume conduct of the file going forward.
- [57] On November 28, 2018, Mr. Mostar wrote to Mr. Anderson and Mr. Bean regarding the delay and joining the Callan and Thiessen actions, stating that "Mr. Thiessen has been struggling with some issues with cancer over the last many months".
- [58] On May 7, 2019, Mr. Mostar filed a notice of civil claim in British Columbia Supreme Court in Action No. S195374 between Travis Piers and the defendant Cooke ("the Piers action").
- [59] The notice of civil claim by Mr. Piers has not yet been served on the defendant Cooke.
- [60] On May 16, 2019, Mr. Mostar wrote to Mr. Anderson and Mr. Bean enclosing a notice of application to join the Callan action, the Thiessen action and the Piers action in the Thiessen action only.
- [61] On June 6, 2019, Mr. Mostar filed a requisition adjourning the consolidation application scheduled for June 12, 2019.
- [62] On July 12, 2019, Mr. Mostar, filed a notice of application on behalf of the plaintiff Thiessen to consolidate the Callan, Thiessen, and the Piers actions.
- [63] On January 13, 2020, Mr. Mostar filed corresponding applications on behalf of the plaintiffs Callan and Piers respectively.

Discussion

The Applicable Rules of Court

- [64] The plaintiffs or the defendant Cooke rely upon the following Supreme Court Civil Rules, B.C. Reg. 168/2009:

1-3(1) The object of these Supreme Court Civil Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits.

22-5(8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

22-7(7) If, on application by a party, it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed.

- [65] Rule 22-4(2), and 22-7(1) are also to be considered. They provide that:

22-4(2) The court may extend or shorten any period of time provided for in these Supreme Court Civil Rules or in an order of the court, even though the application for the extension or the order granting the extension is made after the period of time has expired.

22-7(1) Unless the court otherwise orders, a failure to comply with these Supreme Court Civil Rules must be treated as an irregularity and does not nullify

- (a) a proceeding,
- (b) a step taken in the proceeding, or
- (c) any document or order made in the proceeding.

The Timeliness of the Plaintiffs' Applications

- [66] The defendant Cooke argues that the plaintiffs' applications cannot be heard because they have been brought one year and two days after the notices of intention to proceed were filed. He relies on Rule 22-4(4) in support of his position.
- [67] Unless I find for the defendant Cooke on his application, I see nothing to be gained by any party if I accede to that technical objection, dismiss the applications with liberty to the plaintiffs to reapply after further notices of intention to proceed are filed, and have the applications then renewed.
- [68] I will therefore abridge the time for the filing of the plaintiffs' notices of application before me until May 18, 2019, pursuant to Rule 22-4(2), with the result that the technical objection to their applications fail.
- [69] If the defendant Cooke succeeds on his application, the plaintiffs' applications need not be resolved, so I will address the defendant Cooke's application first.

The Defendant Cooke's Application to Dismiss Actions for Want of Prosecution

- [70] While considerations of delay, excuse and prejudice are all important on an application to dismiss a case for want of prosecution, the overriding concern is that justice must be done.
- [71] In concurring reasons in *Rhyolite Resources Inc. v. CanQuest Resource Corp.*, 1999 BCCA 36 at para. 26, Mr. Justice Lambert explained that:

The dominant test on an application to dismiss an action for want of prosecution is the overall balancing of the interests of justice as that balancing affects all the parties. The first three tests are simply the conditions precedent to a consideration of the dominant test, though they raise some of the circumstances which constitute an important aspect of the prejudice to the defendant.

- [72] The tests discussed in the above passage were revisited in *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 [Country West]. In that case, Mr. Justice Low set out the factors to be considered on an application to dismiss a civil claim for want of prosecution at para. 27 as follows:

- (1) the length of the delay and whether it was inordinate;

- (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
- (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
- (4) whether, on balance, justice requires dismissal of the action.

[73] I now turn to a consideration of each of those factors.

(i) The Length of the Delay in the Prosecution of the Actions against the Defendant Cooke

[74] An inordinate delay is one that is uncontrolled, immoderate or excessive: *Azeri v. Esmati-Seifabad*, 2009 BCCA 133 at para. 9. Silence or absence of encouragement to proceed from a defendant should not weigh in the plaintiffs' favour: *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52 at para. 67 [Ed Bulley].

[75] The delay to be considered is the delay in prosecuting an action from the time that it was commenced: *Ed Bulley* at para. 38.

[76] In *Scurfield v. Air Canada*, 2017 BCSC 1437, Madam Justice Hyslop allowed an application for dismissal for want of prosecution where an action had been commenced in 2010 for damages for false imprisonment, arbitrary detention and Charter breaches as a result of a 2008 incident. Hyslop J. found that in the absence of reasons for the delay, as no reasons had been put forward for the delay so as to assess as to whether it was excusable, the delay was inordinate.

[77] At para. 18, Hyslop J. accepted the submissions of the defendants, in part, as follows:

- 43. The nature of the allegations is also relevant to the consideration of the degree of prejudice that the defendant is considered to suffer by delay. In actions involving serious allegations reflecting on a defendant's character, it is even more important that reliable evidence be conveyed to the court, and the plaintiff has a particular onus to proceed with appropriate expediency and diligence in these cases: *Lindholm* at para. 17; *Vic Van Isle Construction* at para. 19; *Extra Gift Exchange v. Accurate Effective Bailiffs*, 2015 BCSC 915 at para. 42.
- 44. The presumption of prejudice will be afforded "much more" weight in a case where the allegations are serious: *Matheny v. British Columbia Transit Corp.*, 1997 CanLII 4184 (B.C.S.C.) at para. 41; *Sampson v. Scaletta*, Vancouver Registry no. S107065, 11 November 2016 at paras. 42-43. In *Vic Van Isle Construction*, the court stated that in a case where the limitation period has expired and the allegations are serious (in that case, fraud), the presumption "will not be easily displaced" (at para. 27).

45. The allegations against the Defendants are serious. Among other things, all of the Defendants are accused of assault and false imprisonment. The Applicants are also accused of knowingly or recklessly making untrue statements to police, and the RCMP are accused of false arrest. These allegations clearly impugn the character of the Defendants.

[Emphasis added]

- [78] In assessing delay with respect to Messrs. Callan and Thiessen, the period begins for Mr. Callan on July 13, 2011 when he filed his statement of claim, and for Mr. Thiessen on May 11, 2015, when he filed his notice of civil claim.
- [79] There is no question that there has been a clear intention and effort on behalf of the plaintiffs to coordinate their actions. The plaintiff Callan did not proceed with his action as quickly as he might have otherwise done, in order to wait for the plaintiff Thiessen to proceed with his action and Mr. Piers to proceed with his.
- [80] I find that the delay in this case can fairly be described as both tactical and inordinate. This factor must then be considered in light of the nature of the allegations of the plaintiffs and the other factors listed by Low J.A.

(ii) Reasons for the Delay

- [81] Counsel for the plaintiffs has contended that the three cases should be joined and heard together, since at least April of 2016. He submits the delay is excusable for "the reasonable need to conjoin the presently known claims for purposes of trial, interconnected as they are."
- [82] I am not persuaded that the plaintiffs could not have sought to adduce each other's evidence as similar fact evidence before all three actions were commenced. They could have been called, and if necessary been subpoenaed, in actions in which they were not plaintiffs.
- [83] Counsel for the plaintiffs further submits the delay is excusable because of the unique character of civil actions for historical sexual assault. His stated reason for the delay in moving matters forward was the plaintiff Thiessen's own psychological challenges, and later some issues the plaintiff Thiessen was experiencing with cancer.
- [84] Each of Messrs. Thiessen, Callan and Piers swore affidavits in support of the application for the consolidation of their actions on May 16, 2019.
- [85] In his affidavit, the plaintiff Thiessen swore, in part, that:
7. I had a great deal of difficulty bringing myself to a decision to finally initiate and permit the filing of the action.
 8. I suffer significant psychological stress and anxiety which I assert is a consequence of the assaults committed upon me by the defendant Cooke.

9. I have attended counselling and consider myself significantly psychologically impacted by the assaults committed upon me by the defendant Cooke.
11. Following service of the proceedings upon the defendant Cooke, I instructed my solicitor to pause on the process of the lawsuit as my psychological state would not permit me to address the issues and I did not feel psychologically strong enough to move forward with court procedures.

[86] In his affidavit, the plaintiff Callan has sworn, in part, that:

12. After becoming acquainted with Thomas Thiessen, I became aware that he was extremely depressed and exhibited, to my lay observation through conversations, significant depression and anxiety. For significant periods of time he was uncommunicative.
13. I was made aware that my counsel thought it prudent and appropriate that when Thomas Thiessen was ready to proceed with his action the court be approached for an order consolidating or otherwise ordering that the actions be heard at the same time given that certain of the facts and circumstances of the assaults were similar.
14. Given that Thomas Thiessen was uncommunicative and not prepared to proceed, I allowed my solicitor to simply pause my action pending the readiness of Thomas Thiessen to proceed with his court action, which I now understand he is prepared to do and has so instructed his lawyer.

[87] While the defendant Cooke argued that paras. 13 and 14 of Mr. Callan's affidavit were inadmissible as hearsay, those paragraphs are not relied upon for truth of the statements attributed to Mr. Thiessen, but instead are relied upon for the admissible purpose of the fact that the statements were made to him.

[88] In his affidavit, the plaintiff Piers has sworn, in part, that:

2. Although my action is just in the process of being commenced, I have been represented by my present counsel for some years. I have struggled with the decision to commence an action, as the psychological stress of relating the narrative of the events surrounding my involvement with the defendant Cooke has made it difficult to talk about them and to become involved in the court process, which I find daunting.

[89] In *Brown v. Wawanesa Mutual Insurance Company*, 2013 SKQB 443, an initial claim was commenced in 1993 and was tried in 1995. The trial judge found in favour of the defendant. As a result of an appeal by the plaintiffs, a new trial was ordered in 2000. In 2013, the defendant insurer applied to strike the plaintiffs' claim for want of prosecution. The Browns attested that because of their depression they were unable to provide the necessary information and instructions to advance their claim until early 2011. Their depression was alleged to be a significant factor in the delay.

[90] At para. 40, Ryan-Froslic J.A., sitting as a Queen's Bench Justice ex officio, found a portion of delay in that case was inexcusable, but nonetheless held that an illness could constitute a reasonable excuse for a failure to pursue a legal remedy.

[91] In *Gray v. Reeves* (1992), 64 B.C.L.R. (2d) 275 at para. 76, Mr. Justice Hall commented:

In the traditional type of personal injury case, if someone receives a vigorous punch to the nose or is struck by a motor vehicle, they cannot fail to appreciate forthwith that they have suffered a harmful effect from the conduct of a potential defendant. There is usually a quite dramatic cause and effect. Cases of sexual assault such as the instant case are often quite a different matter. Here, the injuries suffered by the plaintiff (as in a great many of these cases) were not recognized and could perhaps not be recognized until long after the actual assaults had occurred. The reasons for this are not difficult to appreciate. Typically, an abused child, by reason of family dynamics will be reluctant to "go public" while remaining an integral member of the family unit. Later, the victim may suffer from depression, behavioural problems or difficulty in forming a stable monogamous relationship but it is (and certainly until the recent past was) often not an easy task for a victim of past sexual abuse to discern any nexus between his or her present problems and the past wrongful conduct of a potential defendant. The simple fact is that limitation statutes were not drawn with the childhood sexual assault victim in mind and as a result they are not in all respects satisfactory. This class of case presents the courts with new factual patterns that must, however, be addressed in the context of the existing legislative regime.

[92] In *R. v. D.D.*, [2000] 2 S.C.R. 275, Mr. Justice Major, writing for the majority, considered the effect of the delay in reporting sexual assault by children. At paras. 62 - 63, he explained that:

62 Today and for some time, the rationale in *Kribs* has been repeatedly subjected to criticism, is not followed, and has been overruled. The Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982), at p. 301, as cited by Sopinka, Lederman and Bryant, *supra*, at p. 322, states:

The expectations of medieval England as to the reaction of an innocent victim of a sexual attack are no longer relevant. A victim may have a genuine complaint but delay making it because of such legitimate concerns as the prospect of embarrassment and humiliation, or the destruction of domestic or personal relationships. The delay may also be attributable to the youth or lack of knowledge of the complainant or to threats of reprisal from the accused. In contemporary society, there is no longer a logical connection between the genuineness of a complaint and the promptness with which it is made.

In response to this criticism, Parliament chose to abrogate the authority of *Kribs* and *Timm* by statute (see s. 275 of the Criminal Code, R.S.C., 1985, c. C-46).

63 Application of the mistake reflected in the early common law now constitutes reversible error. See *R. v. W. (R.)*, [1992] 2 S.C.R. 122, per McLachlin J. (as she then was) at p. 136:

Finally, the Court of Appeal relied on the fact that neither of the older children was "aware or concerned that anything untoward occurred which is really the best test of the quality of the acts." This reference reveals reliance on the stereotypical but suspect view that the victims of sexual aggression are likely to report the acts, a stereotype which found expression in the now discounted doctrine of recent complaint. In fact, the literature suggests the converse may be true; victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed.

The significance of the complainant's failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how persons (particularly children) react to acts of sexual abuse: *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at pp. 408-9; *R. v. T.E.M.* (1996), 187 A.R. 273 (C.A.).

[93] In *S.A.D. v. E.E.P. Estate*, 2003 BCSC 1535 at para. 22, Madam Justice Boyd commented:

22 While there was indeed some delay in this matter, the delay between the dates the wrongful conduct was committed and the date the action was commenced against the defendant C.A.H. cannot be taken into account in determining whether there has been an inordinate delay on the part of the plaintiffs in prosecuting their action. In both *K.E.G. v. G.R.* (1992) B.C.J. No. 256 and *M.K. v. M.(H.)* (1992) S.C.J. No. 85, the British Columbia Supreme Court and the Supreme Court of Canada recognized that delay on the part of adult survivors of childhood sexual abuse was justifiable. Falling on the heels of those decisions, the British Columbia legislature amended the Limitation Act, R.S.B.C. 1996. Chapter 266, to remove any limitation period for the commencement of civil suits for childhood sexual abuse. That legislation is retrospective in its application (*J.P. v. Sinclair* (1997) B.C.J. No. 1327).

[94] Like the courts in the above authorities, I accept it is daunting for a victim of sexual abuse as a minor, if that is in fact what the plaintiffs are, to pursue a claim against an adult who perpetrated the assault.

[95] I accept that even once a victim of sexual assault has made a complaint about the assault, he or she cannot be expected to act with the same dispatch that is expected of those making complaints with respect to more commonly experienced traumas.

[96] I accept that if the plaintiffs were indeed sexually assaulted as minors, at least a part of the reason for the delay in pursuing their claims is due to the nature of the assaults that they experienced. On the evidence before me, I am unable to determine just how much of the delay can be attributed to the nature of these assaults.

(iii) Prejudice to the Defendant Cooke

[97] At para. 45 in *Country West, Low J.A.* applied the comments of Mr. Justice Esson in *Tundra Helicopters et al. v. Allison Gas Turbine et. al.*, 2002 BCCA 145 [*Tundra Helicopters*] at para. 37, in describing the onus of proof for prejudice:

...It matters not who puts forward the evidence. The question remains whether, on a balance of probabilities, absence of prejudice has been established.

[98] In *Irving v. Irving et al*, [1982] B.C.J. No. 970 [Irving], the Court of Appeal allowed an appeal from a refusal to dismiss a case for want of prosecution in circumstances where the delay was inexcusable because it was intentional and likely to prejudice the defendants. At para. 11, Mr. Justice Seaton stated:

A delay as a means of gaining tactical advantage is not to be compared to a delay forced on the plaintiff by negligent solicitors, impecuniosity, or illness. The delay was intentional, calculated to help the plaintiff and therefore hurt the defendants. None of the questions that arise on an application such as this can be considered in isolation. That which would make a short delay excusable might not be sufficient to make a long delay excusable. Some delays may be so long and the prejudice to the defendant so great that no reason would excuse the delay. The question is whether this delay is excusable in the light of the reason for it and the other circumstances.

[99] Although I have found that Mr. Callan's delay and, to a lesser extent that of Mr. Thiessen, in pursuing their claims was at least in part tactical, I also found that their delays were in part due to the nature of the assaults that they allege, and the difficulties that the courts have accepted are associated with such experiences. In the result, I find that a strict application of the comments of Seaton J.A. above would be inapt.

[100] I will therefore consider the third factor identified by Low J.A. in *Country West* on the basis that the delays in the cases of the plaintiffs Callan and Thiessen were not entirely tactical.

[101] Although the defendant Cooke contended that there was a motivation, which, if true, would demonstrate some animus against him on the part of the plaintiffs Callan and Piers, but not on the part of the plaintiff Thiessen, I am unable to resolve that contention on this application.

[102] This leads me to the defendant Cooke's contention that the delay in these actions has caused memory to fade and that potential witnesses have died.

[103] The delays in these cases may have created a risk that a fair trial of the issues in the litigation will be difficult, due to the lapses in memories, and the death of at least one potential similar fact witness, but that is a sword that cuts both for and against the parties.

[104] The evidence before me differs from that in *Irving*, as discussed by Seaton J.A. at para. 16 where he noted:

This is not a case in which the defendant alleges prejudice at large. This defendant has listed the key witnesses, not now available, that would have been available had the action proceeded in a timely fashion. The plaintiff's counsel said that he was instructed to admit some of the facts which the defendant's affidavit said could have been proven at a trial eight or ten years ago. For example, the manager of the bank with whom the defendants dealt could have verified that it was the defendant and the late partner who were authorized to do business on behalf of the company.

The bank manager died in 1974. The plaintiff will admit that she had no authority at the bank.

[105] The plaintiffs argue that at a minimum, they will each give evidence, either as parties or as proposed similar fact witnesses in the other actions if their actions are not tried and heard at the same time. They contend that trying and hearing the three actions at the same time will economize the judicial time required to deal with the three actions, avoid the need for the plaintiffs and the defendant to address the unpleasant details in three separate proceedings, and avoid the potential for inconsistent findings.

[106] The defendant Cooke contends that the evidence of the three plaintiffs cannot be received as similar fact evidence.

[107] While I have some reservations about the admissibility of the opinions of Drs. Klarreich and Stokl that are relied upon by the defendant Cooke on his application, I accept that the spectre of the plaintiffs' claims against him has had a role in and a significant adverse effect on his emotional well-being.

[108] I accept that the plaintiffs' allegations have hung over the defendant Cooke, like the sword of Damocles, since he was first made aware of them in 2005 until at least February of 2014.

[109] I am prepared to presume that the delay in the prosecution of their claims by the plaintiffs Callan and Thiessen may cause the defendant Cooke some challenges in defending against their claims. However, in the absence of more specific identification of these challenges, I am unable to afford this factor a great amount of weight.

(iv) Essential Justice

[110] I find that the defendant Cooke's application must stand or fall mainly on the application of this fourth factor.

[111] Essential justice is an all-encompassing factor that affords the court the latitude to exercise a discretion in a principled way.

[112] The allegations of sexual assault against the defendant Cooke are serious and impugn his character. He contends that not only has the delay in this case been intentional, it has also been tactical, and an attempt by the plaintiffs to adduce similar fact evidence at trial by waiting until other actions against him were commenced or proceeded upon, to the sole advantage of the plaintiffs.

[113] In his affidavit sworn December 23, 2019, the defendant Cooke swore, in part, that after he was examined for discovery on February 21, 2014:

38. I believed that all the civil matters had been abandoned and I felt that space was increasingly being created for me to repair old relationships, build new relations, and move on with my life more generally.

39. Only after reading Callan's affidavit of April 24, 2019, that was filed May 16, 2019 and Thiessen's affidavit of April 30, 2019, filed May 16, 2019 did I learn that Mr. Mostar advised Callan and Thiessen to "pause".

[114] In the same affidavit, the defendant Cooke swore that he has undergone experimental treatment to help him with the trauma he contends that he has suffered as a result of his arrest and the subsequent civil actions against him.

[115] Life for the defendant Cooke has not been easy since his arrest on May 28, 2005. Dr. Stephen Stokl is a psychiatrist, and he has treated the defendant Cooke for approximately 15 years. Dr. Stokl listed a litany of difficulties that the defendant Cooke has faced since that date, including four sinus surgeries in 2008, 2010, 2012, and 2013 respectively, repair surgery on his right shoulder in 2010, and similar surgery on his left shoulder in 2017. The defendant Cooke also underwent a surgical repair of his right elbow in 2014, and more minor procedures at various times since May 28, 2005.

[116] In addition to his health difficulties, Dr. Stokl described that the defendant Cooke has experienced the loss of three of his former co-workers, described as his very best and supportive friends, in the last nine years. In his report of December 6, 2019, Dr. Stokl described the defendant Cooke in the following terms:

he no longer has friends, is not in any relationship whatsoever, and he has been marginalized by family members and lost any support from them except for two of his oldest siblings, although there are still seven family members still living. None of his family members have really ever supported him for being gay in his sexual orientation. He has lost a significant amount of interest in socializing, as he is afraid of any questions that people might ask or his name being on the Internet for some reason about a sex-related incident causing almost phobic behaviour in his environment. This has intensified his withdrawal and isolation and depression. In the past couple of weeks he knows he has lost weight due to the loss of appetite and the abdominal complaints that he is currently still suffering.

[117] As unfortunate as all of these difficulties are for the defendant Cooke, few have any causal relationship to the actions he has applied to dismiss.

[118] If the allegations against the defendant Cooke are dismissed without their determination on their merits, a great injustice may be done to the plaintiffs. As Mr. Justice Esson observed in *Tundra Helicopters*, at para. 37:

it must be borne in mind that in all contested law suits there is likely to be sufficient passage of time that memories erode to some extent, records may be lost, witnesses may disappear. It is no light matter to dismiss an action for want of prosecution. As Diplock L.J. said in *Allen v. Sir Alfred McAlpine & Sons Ltd.*, at p. 259:

The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is

satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue.

[119] Even if I were to dismiss the actions commenced by the plaintiffs Callan and Thiessen, that would not assist the defendant Cooke, as there is no application before me and no basis upon which it is suggested that the plaintiff Piers' action cannot proceed.

[120] If the plaintiff Piers were to go to trial in his case, and the evidence of the plaintiffs Callan and Thiessen were found to be admissible in that proceeding as similar fact evidence, the defendant Cooke would still have to face all three plaintiffs Callan, Thiessen, and Piers.

[121] Weighing these factors in an effort to determine essential justice in this case, I find that the fourth factor identified by Low J.A. in *Country West* favours the plaintiffs Callan and Thiessen, and that the defendant Cooke's application must therefore be dismissed.

Plaintiffs' Applications to Consolidate or Hear Actions Together

[122] An order under Rule 22-5(8) engages the discretion of the court. The order is discretionary and regard must be given to the administration of justice when considering an application to consolidate actions.

[123] The law to be applied in applications under Rule 22-5(8) is well-settled, and ably set out by Master Kirkpatrick in *Merritt v. Imasco Enterprises Inc.*, (1992) 2 C.P.C. (3d) 275. There are two questions that must be addressed. The first question is: do common claims, disputes and relationships exist between the parties? That determination is made on a review of the pleadings. The second question is: are the actions so interwoven that separate trials at different times before different judges would be undesirable and fraught with problems and expense? This question involves a consideration of factors beyond the pleadings.

[124] The factors to consider when making a determination on consolidation or ordering that actions be heard together include whether the consolidation will:

- 1) create a saving in pre-trial procedures;
- 2) reduce the number of trial days taken up by the actions heard together;
- 3) avoid serious inconvenience to a party being required to attend a trial in which they only have a marginal interest;
- 4) save the time and witness fees of experts;
- 5) dispose of all actions at the same time due to common issues of fact or law;
- 6) avoid a multiplicity of proceedings; and

- 7) whether the degree of commonality and intertwining of issues outweighs the prejudicial factors raised by the party opposing consolidation;

bearing in mind:

- 8) the relative stages of the actions;
- 9) whether the trial will be delayed and prejudice one or some of the parties; and
- 10) whether the refusal to consolidate risks inconsistent results.

(See: *Merritt; Insurance Corporation of British Columbia v. Sam* (1998), 24 C.P.C. (4th) 338; *Liu v. Tsai*, 2017 BCSC 221 (Master))

[125] The defendant Cooke contends that in a case of sexual assault allegations, determination of issues in one action will not necessarily determine the outcome of the other, as each individual allegation of sexual battery and assault is factually separate from every other allegation and the determination of one plaintiff's allegations will have no bearing on the determination of another instance of alleged battery.

[126] Relying on *R. v. Handy*, 2002 SCC 56, the defendant Cooke submits that adducing the proposed "similar fact" evidence is an effort to lead general propensity evidence and inadmissible at law. In attempting to obtain an order that all actions be heard at the same time, it is the defendant Cooke's submission that the plaintiffs are, in effect, seeking to avoid the similar fact evidence rule and usurping the function of the trial judge to rule on the admissibility of the evidence in each case.

[127] The defendant Cooke contends that there is no evidence that hearing the actions together will save money and no suggestion that a single expert will speak to the psychological damage of each of the plaintiffs, nor an allegation that each of the plaintiffs or other witnesses that might be called can speak to common issues.

[128] In his response, counsel for the defendant Cooke made the helpful suggestion, with which counsel for the plaintiffs agreed, that if I were to accede to the plaintiffs' application, rather than ordering the actions to be heard at the same time, I should simply order that they be set for hearing at the same time, leaving it to the trial judge to decide if he or she would hear them together after a voir dire to determine whether the evidence of the plaintiffs should be admitted as similar fact evidence.

[129] As I am not in a position at this juncture to determine whether the evidence of the plaintiffs Callan, Thiessen and Piers will be admissible as similar fact evidence, I will adopt the suggestion of counsel for the defendant Cooke and order that the trials in the three actions commenced by these plaintiffs be set for hearing at the same time. I leave it to the trial judge hearing the cases to determine whether they should be heard together.

Conclusion

[130] The defendant Cooke's application for the dismissal of the actions of the plaintiffs Callan and Thiessen for want of prosecution is dismissed.

[131] The applications of the plaintiffs Callan, Thiessen and Piers are allowed in part. I order that their cases be set for hearing at the same time before the same judge. The hearing judge may choose to conduct a voir dire into the admissibility of the evidence of one of these three plaintiffs in one or more of the cases of the other plaintiffs as similar fact evidence.

"The Honourable Chief Justice Hinkson"

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