

CANADA / JUDGMENT

Cameron v. British Columbia (Justice)

2016 BCSC 279

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 279 Cameron v. British Columbia (Justice)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cameron v. British Columbia (Justice),

2016 BCSC 279

Date: 20160222

Docket: S161422

Registry: New Westminster

Between:

Scott Cameron

Plaintiff

And

Her Majesty the Queen in Right of British Columbia

Defendant

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Appearing on his own behalf:

S. Cameron

Counsel for the Defendant:

P.D. Ameerali

Place and Date of Trial/Hearing:

Victoria, B.C.

January 28, 2016

Place and Date of Judgment:

New Westminster, B.C.

February 22, 2016

Introduction

- [1] The defendant seeks an order dismissing the plaintiff's negligence claim because it was not commenced within the two-year limitation period contemplated by s. 3(2)(a) of the Limitation Act, R.S.B.C. 1996, c. 266 (the "Act"), the act the parties agree applies to this case.
- [2] The plaintiff opposes the application on the basis that the commencement of the two-year limitation period was postponed. He relies on s. 6(4)(b) of the Act.
- [3] For the reasons that follow, the defendant's application is allowed and the plaintiff's claim is dismissed.

Previous Orders

- [4] This matter came on before Justice Bracken on November 17, 2015, who adjourned the matter to the Victoria registry for a full-day hearing to be heard not later than January 29, 2016. The adjournment was made peremptory on the plaintiff.

Background

- [5] The plaintiff is 39 years of age. He has spent the majority of his life in the drug underworld, associating with society's criminal element.
- [6] On December 20, 2010, he was arrested for various offences under the Criminal Code, R.S.C. 1985, c. C-46, and was remanded in custody to the North Fraser Pretrial Centre ("NFPC") in Port Coquitlam. NFPC is operated and staffed by the defendant.
- [7] On his arrival at NFPC, the plaintiff informed the classifications officer that he was a high-ranking member of the Empire street gang. He anticipated he would have conflicts with members of rival gangs who may be incarcerated at NFPC, including the Red Scorpions and Independent Soldiers gangs.
- [8] The plaintiff gave the classification officer the names of gang members he knew were or soon would be in custody at NFPC and asked to be separated from them.

- [9] On February 5, 2011, members of rival gangs who were incarcerated at NFPC swarmed, assaulted and stabbed the plaintiff (the "Assault"). The Assault took place in plain view of NFPC's security bubble and cameras; however, no employee of the NFPC intervened to stop the Assault or assist the plaintiff.
- [10] There is no debate that the plaintiff received significant and life-threatening injuries in the Assault.
- [11] He was released on bail the following day, February 6, 2011. For the next two years, he was free in the community under the terms of his bail. There is no evidence or suggestion that he breached any bail conditions.
- [12] On February 8, 2011, he spoke to the lawyer he had earlier retained on the criminal matters for which he was incarcerated. They discussed filing a lawsuit against the NFPC and its staff for negligence.

- [13] The plaintiff deposed in his affidavit that:

Shortly after my release, I spoke to my lawyer at the time, Alan Ip ("Mr. Ip"), about my desire to bring a lawsuit against [NFPC] in relation to the Assault. Among other things, we discussed the timing of filing the claim, and in particular, whether it would be a good idea to wait until I was completely free of [NFPC] before proceeding with the claim.

- [14] The plaintiff deposed that he was concerned that if returned to NFPC he would be a target for further violence from the inmates who had attacked him or their friends and/or their associates. The plaintiff and Mr. Ip discussed him having to rely on NFPC staff members to house him in a safe unit and ensure his safety more generally.
- [15] The plaintiff says he knew that at some point in the future he would likely be returning to NFPC. If so, he was concerned he would be placed into involuntary segregation or would be forced to assign himself into protective custody. If he was transferred to another provincial facility prior to being processed into the federal correctional system, he would be isolated from his friends, family and community support system. He was also seriously concerned that if he checked himself into protective custody at NFPC, he would be known by the inmate population at all institutions as a "hideout" and would become a target for further violence from other inmates.
- [16] The plaintiff deposed that Mr. Ip suggested he wait until he would not be returning to NFPC before proceeding with his claim against the defendant. The plaintiff thought that if he was returned to NFPC, it would be important for him to cultivate a good relationship with NFPC staff so they would be willing to make safe non-protective custody arrangements for him. If he were to be placed in NFPC with a lawsuit against it pending, he felt his personal safety would be in jeopardy.

- [17] The plaintiff's criminal charges proceeded to trial in August 2012. On January 28, 2013, the plaintiff was found guilty of a number of Criminal Code offences. Mr. Ip represented him throughout these proceedings. However, following the plaintiff's conviction, Mr. Ip informed him that he was closing his practice as a defence lawyer. Mr. Ip had accepted a job as Crown counsel and could no longer represent him.
- [18] As a result, the plaintiff sought new counsel for his sentencing hearing and his proposed lawsuit against the defendant.
- [19] Between his release on bail and when he returned to custody on February 15, 2013, the plaintiff was living in the community. During this time, he decided to withdraw from his life of crime, drugs and gang association.
- [20] He sought the assistance of Dr. Melamed, a family physician with a special interest in addiction medicine and pain management. Dr. Melamed began counselling the plaintiff on June 21, 2011, and became his drug addiction physician. She started him on heroin replacement therapy. The therapy ultimately proved successful and the plaintiff is no longer addicted to drugs. He remained in Dr. Melamed's care until he returned to custody on February 15, 2013.
- [21] On February 12, 2013, Dr. Melamed authored a letter of reference positively commenting on the plaintiff's successful rehabilitation from drugs. She stated in part:
- Scott is quiet, respectful and compliant with treatment in all respects. Based on my observations, I do not believe that Scott represents any danger to the community.
- [22] In addition to dealing with his drug addiction issues, the plaintiff made drastic changes in his previously violent, gang- and drug-related criminal lifestyle. He renounced that environment in favour of becoming a productive member of society. Leaving the drug world is not something that is well tolerated and he feared for his safety. He went from living a lavish lifestyle to sleeping on the floor. He also ended an extremely toxic relationship with a female drug addict. As a result of completely reprogramming and rethinking his life choices, he reconnected with his family and faith as a Jehovah's Witness.
- [23] As a result of losing his "source of income" from illegal drug activity, he was unable to pay lawyer's fees. After much effort, he managed to secure legal aid funding for his criminal trial.
- [24] After his conviction on January 28, 2013, the plaintiff retained Mr. Westell to represent him at a sentencing hearing. After Mr. Westell appeared for the plaintiff in court on a few occasions, he withdrew due to a conflict. The plaintiff then retained his third lawyer, Mr. Glouberman, who represented him at his sentencing.
- [25] The plaintiff was sentenced to seven years' incarceration.

[26] In June 2013, while incarcerated in the federal corrections system, the plaintiff and his father discussed bringing a claim against the defendant. In September 2013, he retained Ms. Tonia Grace to represent him. Ms. Grace filed the notice of civil claim in this action on May 27, 2014.

The Claim and Application to Dismiss

[27] The claim against the defendant is for damages for negligence. The allegation is that the defendant's staff at NFPC failed to take reasonable care to ensure that the plaintiff would be safe while in its custody.

[28] Initially, the plaintiff took the position that his claim was not for damages for personal injury but rather damages pursuant to s. 24 of the Canadian Charter of Rights and Freedoms (the "Charter"), seeking compensation, vindication and deterrence, which operates in a different fashion than personal injury damages. He alleged that because his claim was constitutional in nature, it was not tortious, contractual or a breach of statutory duty, within the meaning of s. 3(2)(a) of the Act.

[29] Although framed as an action under the Charter for breaches of ss. 7, 12 and 24(1), the plaintiff acknowledges that in reality his claim is for damages for personal injuries. The plaintiff seeks general damages, aggravated damages, exemplary damages and special damages.

[30] The plaintiff has now formally abandoned his Charter argument.

The Limitation Act

[31] The parties agree that the Act governs this claim. The plaintiff concedes that the limitation period is two years and that unless postponed under s. 6(4)(b) of the Act his claim against the defendant became statute barred on February 5, 2013.

The Law

[32] The relevant portions of section 6(4)(b) provide:

- (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant'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
- (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.

[33] *Novak v. Bond*, [1999] 1 S.C.R. 808, is the leading case on s. 6(4)(b) of the Act. There, the Supreme Court of Canada ruled that the question that must be asked under s. 6(4)(b) is, "in light of his or her own particular circumstances and interests, at what point could the plaintiff reasonably have brought an action?" (at para. 39 [emphasis added]).

[34] The Court emphasises the word "could" as opposed to "should". The test that the Supreme Court adopted is found in para. 81 of *Novak*:

81 [Section] 6(4)(b) may be read as denoting a time at which a reasonable person would consider that someone in the plaintiff's position, acting reasonably in light of his or her own circumstances and interests, could - not necessarily should - bring an action. This approach is neither purely subjective nor purely objective. The question becomes: "in light of his or her own circumstances and interests, at what point could the plaintiff reasonably have brought an action?" The reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling. Purely tactical considerations have no place in this analysis. In my view, this approach best accords with the purposes of modern limitations statutes, gives a sensible meaning to the terms of s. 6(4)(b), and is most likely to result in clear and fair results in the majority of cases.

[35] This test was considered in *Kemp v. Metzner* (1998), 56 B.C.L.R. (3d) 133 (S.C.); *Cowen v. Gray*, 2001 BCSC 487; and *Fidler v. Forensic Psychiatric Institute*, 2015 BCSC 1241.

[36] In *Kemp*, a dentist alleged negligence against another dentist who performed oral surgery on her. Her action was brought outside the two-year limitation period and sought to invoke the postponement provisions of s. 6(4)(b) of the Act on the basis of fear of jeopardizing her treatment if word got out that she was suing a fellow dentist. Justice Humphries did not accede to her argument, stating at paras. 19 and 20:

[19] The plaintiff's argument is based on the notion that, for fear of jeopardizing her treatment, she should not be required to commence an action against a professional practitioner while undergoing treatment from another practitioner who carries on business in another country. Even if the plaintiff thought there was some validity to the notion that all competent orthodontists in Washington and British Columbia will ignore their ethical obligations when faced with a law suit against one of their profession, she should, as a member of the dental profession herself, have made some investigation of this.

[20] To allow postponement of a limitation period in these circumstances would put an inordinate amount of power in the hands of a plaintiff and would be extremely prejudicial to the ability of potential defendants to mount a defence, as many years could go by without their having any knowledge that an action was pending against them. None of the cases referred to would go so far, the *Karsanjii* case dealing with an action against the treating physician himself, and the *Novak* case dealing with a woman who, having had her cancer misdiagnosed, reasonably, in the court's view, chose to devote herself to recovering her health while in remission, only suing when the cancer recurred.

- [37] Cowen involved a claim of medical negligence against the plaintiff's family doctor. The doctor prescribed the plaintiff Gravol, which she combined with alcohol, causing her to lose consciousness while driving. She suffered significant injuries as a result, including post-concussion syndrome, severe memory loss with black outs, chronic pain syndrome and major depression. Her action was also brought out of time. Justice Drost considered Novak and emphasised that the question is when "could" the plaintiff have brought the action, which is distinct from when "should" the plaintiff bring an action. At paras. 52 and 53 he stated:
- [52] Notwithstanding that Ms. Cowen suffered from a mental disability (loss of short term memory) as well as several physical illness, I am unable to find that her circumstances meet the requirements of s. 6(4)(b). While I accept that she suffered considerable pain and discomfort in the years following the accident, her interests and circumstances were not so "serious, significant, and compelling" as to warrant the postponement of the running of time until February 10, 1998.
- [53] At no time was her hold on life "tenuous", either physically or mentally. The costs and strains of litigation would likely have been difficult for her, but there is no evidence to suggest they would have been "overwhelming". Nor do I believe that her circumstances combined to make it "unfeasible" for her to initiate an action earlier than she did.
- [38] Fidler was also a medical negligence claim that was commenced outside the two-year limitation period. The plaintiff applied under s. 6(4)(b) for a postponement of time for the commencement of the limitation period. He applied on the basis that he was required to focus on conducting his own defence in unrelated but concurrent criminal proceedings, which limited his ability to initiate the claim. After reviewing Novak, Justice D.C. Harris found:
- [76] The plaintiff has not directly raised any factors or circumstances which could lead him to conclude that he ought not bring an action. In his submissions, he makes reference to the necessity of conducting his own defence in his concurrent criminal proceedings as a factor that limited his ability to initiate his claim. I consider this situation to be similar to the circumstances in Stewart, where the plaintiff sought postponement of a limitation period because he was engaged in pursuing a sentence appeal, in custody for significant periods, and did not fully understand the procedural nature of his case (at para. 135). In that case, Mr. Justice Walker held that "[n]one of the reasons or excuses [the plaintiff] has provided amount to serious, significant, and compelling circumstances' as described in Novak" (at para. 138).
- [77] I do not consider the plaintiff's involvement in his concurrent criminal proceedings to be serious, significant and compelling circumstances which would lead a reasonable person to conclude that he could not reasonably bring an action. The plaintiff was familiar with the legal system. He has consistently refused the assistance of counsel and conducts his own proceedings, evidently with some success. He was not under any misapprehension about his

right to bring his claim before the court, and he was aware of the actions that gave rise to his claim.

- [80] However, the facts of this case do not lead to the same conclusion as those in *Novak*. In *Novak*, the commencement of a malpractice lawsuit would have been directly contrary to the plaintiff's ongoing attempt to remain positive in her fight against cancer. In this case Mr. Fidler has not argued, nor does the evidence suggest, that avoiding his current action was a necessary component to his recovery from the alleged ill effects of his stays at the FPI. While Mr. Fidler may have decided, for health reasons, to leave British Columbia for a time following his release from the FPI in 2007, there is no evidence that suggests that initiating this claim would have been counterproductive to aim of restoring his health.

Discussion

- [39] The defendant brings this application under the summary judgment provisions of Rule 9-6(4) and (5) of the Supreme Court Civil Rules. The defendant argues that the plaintiff's claim is statute barred by the two-year limitation period set out in the Act.
- [40] Save for his argument that the commencement of the two-year limitation period was postponed until he had been transferred from the provincial corrections system to the federal corrections system, the plaintiff has abandoned all other arguments, including that the Act does not apply to his claim or that the limitation period is six years.
- [41] The basis of the plaintiff's claim that his own interests and circumstances were serious, significant, and compelling and therefore fall within the requirements of *Novak* are as follows:
- i. The plaintiff was assaulted while incarcerated as a provincial prisoner. Even though he was granted bail from February 6, 2011 to February 15, 2013, he knew it was very likely he would return to provincial custody before his sentencing. He felt it was important to his safety that he avoid signing into protective custody, given that the protective custody label would travel with him from institution to institution, making him a target of violence by inmates wherever he was. He also knew that he had to cultivate a good relationship with the corrections officers who were charged with keeping him safe. Therefore, it was not safe for him to file a claim until he was completely free of provincial custody, sentenced and transferred to federal custody.
 - ii. Given his high-profile gang status, assaults by inmates who were members of rival gangs, such as the Red Scorpions and Independent Soldiers, were of particular concern.
 - iii. The plaintiff followed Mr. Ip's February 8, 2011 advice that he should defer his suit against the defendant until he was free from the provincial corrections system, because starting the action earlier would put him at significant risk of violence from other inmates. Fear of being placed into the same area as rival gangs gave him real and genuine concern for his physical safety and he wanted to keep a low profile.

- iv. The plaintiff had never represented himself in civil court and did not have the educational background to adequately do so.
- v. It was very clear to the plaintiff that he would be returned to NFPC if his bail was revoked or if he was convicted of the charges against him. Requesting a transfer to another provincial institution while awaiting trial or sentencing was not an option because he would be removed from his family, friends and support network.
- [42] The plaintiff says that for these reasons, he had no choice but to wait until June 2013, when he was free from provincial custody, to commence these proceedings.
- [43] Relying on s. 6(4)(b) of the Act, the plaintiff urges the Court to postpone the commencement of the two-year limitation period to sometime after May 27, 2012. This would bring the commencement of the action within the two-year limitation period.
- [44] The burden of proving "serious, significant, and compelling" circumstances is on the plaintiff.
- [45] Section 6(4)(b) requires the court to adopt the perspective of a reasonable person who knows the facts that are within the plaintiff's knowledge and has taken the appropriate advice a reasonable person would seek on those facts: Novak at para. 81. Time does not begin to run until this reasonable person would conclude that someone in the plaintiff's position could, acting reasonably in light of his or her own circumstances and interests, bring an action.
- [46] The plaintiff agrees that he "could" have brought the action within two years of the Assault. Indeed, he discussed bringing the action with his lawyer two days after the Assault occurred. He argues, however, that his unique circumstances bring him within the "serious, significant, and compelling" test set out in Novak.
- [47] I do not agree.
- [48] As impressive and compelling the plaintiff's rebound from his previous criminal- and gang-related lifestyle is, he was nevertheless subject to the Act. He was required to commence this proceeding within two years of the Assault, namely by February 5, 2013.
- [49] In my view, the choices made by the plaintiff in this case were matters of his own personal priorities. He could have commenced this action at any time after the Assault on February 5, 2011.
- [50] Firstly, he was released on bail on February 6, 2011, and was in the community for the entire two-year limitation period. While I am persuaded that the plaintiff had significant stressors in his life following his release from custody, including his efforts to remove himself from his past life of crime and overcome his extreme drug addiction, I am not persuaded that he could not have engaged a lawyer to commence the action before February 5, 2013. He had a number of options, including filing the notice of civil claim and not serving it until June 2013, when he had been transferred to the federal correctional system. He could also have applied to have the names of the parties made anonymous, or been transferred to a

provincial facility other than NFPC while he awaited sentencing.

- [51] There is no medical evidence to suggest that the plaintiff's stressors or circumstances were overwhelming him to the point of meeting the Novak threshold.
- [52] He was under no misapprehension about his right to bring a claim. He could have brought the claim anytime between February 5, 2011 and February 5, 2013; however, he chose not to for his own personal and tactical reasons. It was a matter of choice to put this claim on hold.
- [53] In sum, the plaintiff has not satisfied me that his circumstances meet the Novak test, or that the two-year limitation period should be postponed. His claim against the defendant became statute barred on February 5, 2013.

Disposition

- [54] The defendant's application is allowed and the plaintiff's claim is dismissed with costs.

"G.P. Weatherill J."

The Honourable Mr. Justice G.P. Weatherill

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