

CANADA / JUDGMENT

Heck v. Strathcona Park Lodge Ltd.

2022 BCSC 912

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 912 Heck v. Strathcona Park Lodge Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Heck v. Strathcona Park Lodge Ltd.,

2022 BCSC 912

Date: 20220602

Docket: S174075

Registry: Vancouver

Between:

Alina Heck

Plaintiff

And

Central Island Inland Independent School Society o/a Aspengrove School,

Strathcona Park Lodge Ltd., Kristie Amadio and Alex Champoux

Defendants

Before: The Honourable Mr. Justice Stephens

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

A. Sayn-Wittgenstein;

M. Van Nostrand

Counsel for the Defendants

Strathcona Part Lodge Ltd., Kristie Amadio and Alex Champoux:

M. Gianacopoulos

Counsel for the Proposed Third Party Dr. Douglas Cohen:

H.A. Bromley

The Proposed Third Parties Brian Heck and Camilla Stephan:

B. Heck appearing on his own behalf and on behalf of C. Stephan

Place and Dates of Hearing:

Vancouver, B.C.

March 28-29, 2022

Supplemental written submissions:

April 4 and April 8, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 2, 2022

Table of Contents

Overview... 4

Factual Background.. 5

Application to File Third Party Notice - General Principles.. 6

Application of the Relevant Principles.. 7

Merits of proposed third party claim.. 7

Limitation period. 11

Prejudice to the parties. 15

Any delay in proceedings. 16

Timeliness of the application.. 16

Is it just and convenient to grant or dismiss the application?. 17

Order Granted.. 18

Overview

- [1] In this personal injury action, the defendant Strathcona Park Lodge Ltd. ("SPL") and the two personal defendants (collectively, the "SPL Defendants") apply pursuant to Supreme Court Civil Rules 3-5(4)(a) for leave to file a third party claim against the plaintiff's parents, as well as a psychologist who assessed the plaintiff (and is also an expert witness for the plaintiff).
- [2] This is a complex action with multiple expert reports, where discovery is advanced but no trial date is currently scheduled. The application is brought approximately 42 months after close of pleadings and is supported by a paralegal's affidavit. In this context, the question is whether a third party claim for contribution and indemnity against an assessing psychologist and the plaintiff's parents should be permitted.
- [3] The plaintiff was injured on a hiking excursion in October 2012. She commenced this action on May 2, 2017. The notice of civil claim was amended on September 5, 2017 and a response to civil claim was filed by the SPL Defendants on October 13, 2017. On March 19, 2021, a notice of discontinuance was filed, discontinuing proceedings against Central Island Inland Independent School Society o/a Aspengrove School.
- [4] In March 2021, the SPL Defendants advised the plaintiff that they were likely to apply to file a third party claim against the plaintiff's parents, Mr. Heck and Ms. Stephan, and a psychologist, Dr. D. Cohen, who had assessed the plaintiff in 2013 and 2014 and provided recommendations. The essence of the proposed third party proceeding is a contribution and indemnity claim for alleged conduct and failures of Dr. Cohen and the plaintiff's parents which caused or contributed to the plaintiff's injuries. The initial notice of application was filed on April 9, 2021 and was amended on January 20, 2022.
- [5] The application is opposed by the plaintiff and the proposed third parties. They contend that: 1) the proposed third party claim lacks merit and is indeed bound to fail; 2) the limitation period for the third party claim has expired; 3) there would be prejudice to the plaintiff and proposed third parties if leave were granted, changing the dynamics of the trial and expanding its scope; and 4) there has been unexplained and inexcusable delay in seeking to commence a third party claim. I have been referred to several expert reports and related evidence with respect to the plaintiff's medical circumstances on this interlocutory application.
- [6] For the reasons which follow I order that the application shall be granted on condition that the third parties' limitation defence be preserved and determined on its merits as part of the third party action.

Factual Background

- [7] The plaintiff's claim is for damages for, among other things, physical and psychological injuries as a result of the hiking incident which occurred on October 4, 2012. She was 14 years old at the time.

- [8] Document production in this action commenced in January 2018, and a discovery of one defendant occurred in June 2018. Further discoveries of the personal defendants occurred in June 2020, the plaintiff was discovered on November 25, 2020, and the defendant SPL was discovered on March 24, 2021.
- [9] There are a considerable number of expert witnesses currently anticipated to testify at trial. According to the trial briefs filed in 2021, there is a total of 16 experts, including Dr. Cohen as an expert witness for the plaintiff, and 18 expert reports, several of which were included in the evidentiary record before me.
- [10] Dr. Cohen is a psychologist who conducted a neuropsychological assessment of the plaintiff in 2013 and 2014, and prepared a draft report with recommendations dated February 28, 2014 and final report with recommendations dated April 29, 2014. This was not done as part of an expert engagement in the context of litigation. He did later assume the role of expert for the plaintiff and has prepared a report dated December 6, 2020 which was served on the defendants in January 2021.
- [11] A 20-day trial had previously been scheduled to commence on April 26, 2021 but was adjourned.
- [12] At the March 23, 2021 trial management conference ("TMC"), the SPL Defendants advised that it anticipated likely bringing a third party proceeding against Dr. Cohen and the plaintiff's parents. At the TMC, Master Elwood (as he then was) directed any third party application be filed by April 9, 2021.

Application to File Third Party Notice - General Principles

- [13] A third party claim for contribution and indemnity is a contingent claim. The purpose is to remedy the defendant's loss in paying too much of the plaintiff's judgment as a result of an act or omission of a co-defendant or other third party in failing to pay its proper share, thereby being unjustly enriched: *Sohal v. Lezama*, 2021 BCCA 40 at paras. 10, 79 [Sohal CA]; *aff'd* 2019 BCSC 1709 [Sohal SC].
- [14] Procedurally, third party claims "function as a special type of civil claim" and have two primary purposes: to avoid a multiplicity of proceedings and to avoid inconsistent findings being made on the same issue between the same parties: *The Owners, Strata Plan KAS 3410 v. Meritage Lofts Inc.*, 2022 BCCA 109 at para. 22 [Meritage]; see also *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17 (C.A.) [McNaughton]; *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2013 BCSC 1741 at paras. 40, 53 [Tyson SC], *aff'd* 2014 BCCA 17 [Tyson CA]. A third party claim also allows "the third party to defend the plaintiff's claim and ensure that the third party claim is decided before the defendant in the existing action is required to pay the full amount of the judgment being sought": *Meritage* at para. 22.
- [15] A defendant may file a third party claim without leave within 42 days of service of a notice of civil claim. Thereafter, leave of the court is required: R. 3-5(4)(a).

[16] In considering whether to exercise discretion to grant leave, consideration is given to the following factors:

- a) prejudice to the parties;
- b) expiration of the limitation period;
- c) the merits of the proposed claim;
- d) any delay in proceedings; and
- e) the timeliness of the application.

Meritage at para. 23; Canfor Pulp Limited Partnership v. Siemens Building Technologies Ltd., 2016 BCSC 2089 at para. 36 [Canfor].

[17] The fundamental question on an application to file a late third party notice is "whether greater injustice and inconvenience would arise from allowing the claim for contribution to be advanced as a third party proceeding, or from striking the claim and leaving it to be pursued in a separate future action": Meritage at para. 25, citing The Owners, Strata Plan LMS 1751 v. Scott Management Ltd., 2010 BCCA 192 at para. 90; Tyson SC at para. 43; The Owners, Strata Plan EPS 677 v. ASPAC Developments Ltd., 2021 BCSC 2294 [ASPAC] at para. 25; Canfor at para. 10.

[18] Under the new Limitation Act, S.B.C. 2012, c. 13 [Limitation Act], the expiration of a limitation period is not simply a factor to be weighed in the balance, but can and must be dispositive against the filing of any third party claim which is sought to be filed outside the two year limitation period: Sohal CA at paras. 115-116.

Application of the Relevant Principles

Merits of proposed third party claim

[19] The test for the merits factor is the same as under a motion to strike a notice of civil claim under R. 9-5(1). Accordingly, "leave to file a third party notice will only be denied because the proposed claim lacks merit if it is plain and obvious that the pleadings disclose no reasonable cause of action and that the claim is bound to fail": Meritage at paras. 24, 39.

[20] An imperfectly pleaded proposed third party claim will be allowed to proceed if it pleads all the essential elements of the legal basis for the claim to be advanced: Meritage at paras. 39-40.

[21] In the merits assessment the court assumes the truth of the facts pleaded in the proposed third party notice: Meritage at paras. 39-40. The court is limited in assessing the merits of a proposed third party claim "because evidence is neither required, nor to be considered" on such an application: Stephenson v. Bridges, 2018 BCSC 1155 at para. 15 [Stephenson]. I note this in particular since on this application, the respondents' submissions at times resembled what might be heard on a summary trial or summary judgment application, with reference

to evidence in support of a submission that the proposed third party claim is bound to fail. However, the merits inquiry on this application is limited to the pleadings--it is not an evidentiary assessment.

- [22] In addition, courts must be "cautious" when striking a claim and "err on the side of permitting a novel but arguable claim to proceed to trial": *Aubichon v. Grafton*, 2022 BCCA 77 at para. 26 [Aubichon]. A pleading which includes a "fit question to be tried, where the claim is not 'certain to fail' or where there are serious questions of law" should be permitted to proceed to trial: *Aubichon* at para. 26.
- [23] The proposed third party claim before me relates to that part of the amended notice of civil claim which pleads that the plaintiff suffered a psychological injury (as well as a mild traumatic brain injury, among others) as a result of the defendants' negligence. The proposed third party claim pleads that Dr. Cohen and the plaintiff's parents "contributed to the somatization of the plaintiff's injuries". It pleads that if the plaintiff suffered the injuries from the incident as alleged, it was as a result of the negligence of Dr. Cohen and of the plaintiff's parents, including "repeatedly communicating to the plaintiff that she is brain injured and suffers from cognitive impairment" and "convincing the plaintiff that she suffers from a condition she does not have and in any event, aggravating her symptoms".
- [24] The proposed third parties referred me to expert reports and other evidence in support of their arguments that the proposed third party claim is without any merit and should not be permitted to proceed. Dr. Cohen points to his 2014 report and recommendations and contends his professional conduct is inconsistent with any act of negligence. Mr. Heck and Ms. Stephan submit that as parents they at all times acted responsibly and proactively to care for the plaintiff including having an assessment done at the Mayo Clinic. The plaintiff and Mr. Heck further refer to *Newton v. Newton*, 2002 BCSC 789 at para. 37 (a decision made on a summary trial), rev'd on other grounds 2003 BCCA 389, as authority for the proposition that mere errors of judgment alone do not constitute negligence.
- [25] However, at the preliminary stage of considering whether to permit a third party claim, the court does not assess the evidence and weigh the merits of a proposed claim in what might functionally resemble, as it did at times on this application, a summary judgment or summary trial application.
- [26] I was referred by the proposed third parties to *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCSC 813 at paras. 29-32 [Soprema SC], rev'd on other grounds 2016 BCCA 471, and invited to consider on the evidence before me whether it is "perfectly clear" the proposed third party claim would fail. In that case, it was stated that evidence cannot be used to determine what is otherwise an arguable third party claim: para. 31. I add that Soprema SC pre-dates *Meritage*, which confirms that the merits assessment on a R. 3-5(4) application is the same as under R. 9-5 and assumes the truth of the facts pleaded (paras. 24, 39; see also *McNaughton* at para. 34). In *Meritage*, the Court of Appeal squarely addressed the test on an application to start a third party claim, and the merits branch of that test in particular, and

did not indicate that weighing evidence to assess the strength of a proposed claim forms any part of the court's consideration of the merits on such an application. I therefore follow the approach set out in *Meritage* on this application. In any event, I cannot say, at this stage of the proposed third party claim in this complex action, that it is "perfectly clear" the claims advanced are bound to fail.

- [27] The proposed third parties contend the proposed third party claim violates the Adams principle, in that it is a claim the plaintiff failed to mitigate, which is not permitted to be advanced by way of third party proceeding: *Adams v. Thompson, Berwick, Pratt & Partners* (1987), 39 D.L.R. (4th) 314 (B.C.C.A.) [Adams]. However, the third party claim sought does not include an assertion of failure to mitigate. It pleads that the proposed third parties--a psychologist and her parents--each owed a duty of care to the plaintiff and were negligent, and the conduct of the proposed third parties caused, contributed, or aggravated the psychological injuries the plaintiff alleges in her amended notice of civil claim. The cases relied on by the proposed third parties are not on point to and dispositive of the claims here in their favour: *Adams* (third party claim against solicitors dismissed); *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2012 BCCA 22 (same circumstances as *Adams*); *Bingham v. BMO Nesbitt Burns Inc. et al*, 2006 BCSC 304 (third party claim against investment dealer and stockbroker dismissed); *Owners of Strata Plan BCS 2077 v. Polygon Glenlloyd Park Ltd.*, 2012 BCSC 945 [Polygon] (third party claim against entity remediating damage to plaintiff's building dismissed); *Sun Life Assurance Company of Canada v. 482147 B.C. Ltd.*, 2013 BCSC 1187 (third party claim against building contractors dismissed at a summary trial).
- [28] In *Adams*, McLachlin J.A. (as she then was) stated at para. 16: "where the pleadings and the alleged facts raise the possibility of a claim against the third party for which the plaintiff may not be responsible, the third party claim should be allowed to stand." Here, the proposed third party claim raises allegations against third parties for which the plaintiff is not responsible.
- [29] It is further argued by Mr. Heck and Ms. Stephan that the proposed third party claim concerns a clearly consecutive tort, which cannot be pursued in this action, relying on *Polygon*. With respect, in the context of this action, this argument requires an assessment of expert evidence at a depth not permissible on a R. 3-5(4)(a) application.
- [30] Finally, it is argued by Dr. Cohen that the claim against him is without precedent. In supplemental written submissions he submits the applicant can point to no prior decision of this court allowing a third party claim to be brought against an assessing doctor.
- [31] I find the proposed third party claim nevertheless satisfies the merits branch of the test. The plaintiff pleads in this action that she suffered a psychological injury caused by the SPL Defendants, and the SPL Defendants' proposed third party claim in turn alleges that, if so, any somatization injury was caused or contributed to by the conduct of the proposed third parties. This is a logical position which is the foundation of an arguable third party claim. In *Aubichon*, the Court of Appeal has recently confirmed that novel, but arguable, claims ought

not be struck out at the pleadings phase, and in my view this principle applies to assessing a proposed third party claim. While, as Dr. Cohen submits, the claim against him as an "assessing" (as opposed to "treating") doctor may well be novel, I find it is not bound to fail.

- [32] As to the proposed third party claim against Mr. Heck and Ms. Stephan, I have been referred to case law which, on a full trial, dismissed a claim against a plaintiff's parents: e.g. *Sammartino v. Hiebert*, 1996 CanLII 2959 (B.C.S.C.) at para. 99. Mr. Heck's submission that the proposed claim against him and Ms. Stephan as the plaintiff's parents is offensive and objectionable is understandable, but on this preliminary application it cannot be said to be bound to fail, assuming, as the court must, the truth of the assertions of fact in the proposed third party claim and permitting novel but arguable claims to proceed. Mr. Heck's submissions are more suited to an application in which evidence can be used to challenge a third party claim (see, e.g., R. 9-6 (application for summary judgment) or R. 9-7 (application for summary trial)) or a conventional trial.

Limitation period

- [33] While the incident occurred before the new Limitation Act came into force on June 1, 2013, the new Act nevertheless applies to a proposed third party claim for contribution and indemnity including the determination of whether such a claim is time-barred: *Sohal CA* at paras. 25-33, 65-67 and 113-114. Under s. 16 of the Act, a court proceeding in respect of a claim must not be commenced more than two years after the day on which the claim is discovered, and a claim for contribution and indemnity is deemed to be discovered on the later of:
- (a) the day on which the claimant for contribution or indemnity is served with a pleading in respect of a claim on which the claim for contribution or indemnity is based; or
 - (b) the first day on which the claimant knew or reasonably ought to have known that a claim for contribution or indemnity may be made.
- [34] Under the new Limitation Act, a proposed third party proceeding cannot proceed--there is no discretion for the court to permit it--in the face of an expired limitation period: that is, if the application is brought more than two years after the claim for contribution and indemnity was discovered: Limitation Act ss. 16, 22(1)(b) and *Sohal CA*, paras. 115, 116. This requires an assessment of whether the limitation period for claiming contribution and indemnity has expired as of the date the application to commence the third party claim has been brought: *Sohal CA*, paras. 20, 114; see also, for example, *Verrier Estate v. The Manufacturers Life Insurance Company*, 2022 BCSC 348 at para. 70 [Verrier]. In this case, the application to file a third party claim was filed April 9, 2021.
- [35] The Court of Appeal has cautioned against deciding whether a limitations defence is available on an application to strike brought under R. 9-5(1): *Aubichon* at para. 41. The principles that govern the merits assessment of an application for leave to start a third party claim are the same as the test for a strike-out application under R. 9-5(1): *Canfor* at para. 20.

In addition, Aubichon at para. 42 confirms that a limitations issue is "inherently a factual exercise" which cannot be resolved in an evidentiary vacuum and requires a "full evidentiary foundation".

- [36] The basic relevant sequence of events is as follows.
- [37] Dr. Cohen's draft report dated February 14, 2014 was disclosed to the SPL Defendants on January 30, 2018. In the course of the litigation, the defendants jointly retained a psychiatrist, Dr. A. Howard, and obtained reports from him dated May 29, 2019 and May 7, 2020 (although the SPL Defendants did not receive a written copy of the May 7 report until September 29, 2020). These reports addressed the topic of somatization. The SPL Defendants further retained Dr. J. Leblanc, a psychologist, who issued a report dated June 17, 2020 and addressed the issue of cognitive impairments. Dr. Leblanc then issued an addendum report dated March 24, 2021 which addressed the issue of a connection between the plaintiff's development of somatic symptom disorder and responses to her physical injury including an ongoing message of deficit and inability.
- [38] In support of this application, the SPL Defendants filed an affidavit from a paralegal at the law firm of their solicitors. That affidavit states that in the "days and weeks" prior to the March 24, 2021 report, Dr. Leblanc had telephone conversations with counsel for the SPL Defendants, and that in those conversations Dr. Leblanc informed them "of the role Dr. Cohen and the [plaintiff's] parents may have played in aggravating the plaintiff's somatoform disorder symptoms".
- [39] The SPL Defendants and proposed third parties disagree on whether the limitation period expired prior to the commencement of this application to bring a third party claim. The SPL Defendants submit that the limitation period for a claim of contribution and indemnity began March 24, 2021, which is the date of Dr. LeBlanc's addendum report, and so the limitation period did not expire by the time the application to add third parties was filed on April 9, 2021.
- [40] Dr. Cohen and Mr. Heck submitted that the limitation period started to run upon disclosure of Dr. Cohen's draft 2014 report on January 30, 2018, meaning the limitation period expired on January 30, 2020, over one year before the April 9, 2021 application.
- [41] On a R. 3-5(4) application, "if the parties disagree as to whether the limitation period has expired, and the court is unable to determine this issue on the leave application, the court should consider the factors for the exercise of its discretion under R. 3-5(4), and if it is otherwise inclined to grant leave, direct that the merits of the limitation defence be decided in the third party proceedings on a more fulsome evidentiary platform": Sohal SC at paras. 58, 74; see also Dhanda v. Gill, 2019 BCSC 1500. The Court of Appeal in Sohal CA at para. 36 referred to this approach and did not disapprove of this manner of addressing the matter of doubt over a limitation period. This form of order has been granted in: Verrier at para. 103; and Interior Savings and Credit Union v. Theoret, 2022 BCSC 52 at para. 32 [Interior Savings].

- [42] There is not a "full evidentiary foundation" before me with respect to the application of the limitation period. Evidence relied on by the SPL Defendants on this application as to why this application was filed is comprised of a paralegal's affidavit, which is vague in some respects, and the addendum report of Dr. Leblanc dated March 24, 2021. In my view, the paralegal's affidavit is not good evidence as to the first day the SPL Defendants "knew or reasonably ought to have known that a claim for contribution or indemnity may be made" against the proposed third parties. I am concerned that the paralegal does not have full knowledge of the facts related to the application of the limitation period, and it is not clear to me that the paralegal can speak to the state of knowledge of the SPL Defendants: *Jack v. Kendrick*, 2015 BCSC 1872 at para. 23 [Jack]. While the paralegal's affidavit does address counsel for the SPL Defendants' interactions with Dr. LeBlanc in the "days and weeks" before March 24, 2021, the evidence falls short of providing evidence of the SPL Defendants' understanding at other relevant points in time in the litigation and does not fully answer the question of when they first became aware that a contribution and indemnity claim was possible against Dr. Cohen and the plaintiff's parents: *Jack* at para. 23; and *Verrier* at para. 73. For this reason, I decline to decide the limitation period issue on this application.
- [43] Mr. Heck and counsel for Dr. Cohen asserted that the SPL Defendants had not made full disclosure on this application of their discussions with their expert Dr. Howard, and invited an adverse inference to be drawn against the SPL Defendants. In reply, counsel for the SPL Defendants submitted that the matters pertinent to the investigations by their lawyers relevant to this application engage legal privilege. That may be so, but the 2021 trial briefs indicate there are at least two defendants' experts anticipated to be cross-examined at trial-- Dr. Howard and Dr. Leblanc--who have provided reports which deal with matters relating to the proposed third party claim. Upon being tendered as experts to testify at trial, privilege to a certain extent is lost and certain material in the expert's file related to the preparation of their opinion must be produced before trial pursuant to R. 11-6(8)(b): see generally *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia (Education)*, 2014 BCSC 741 at paras. 27-29, and 42-44. There is no evidence in the record on this application to suggest such R. 11-6(8)(b) disclosure by the SPL Defendants has yet taken place. Since R. 11-6(8)(b) disclosure from the files of Dr. Howard and Dr. LeBlanc may yet be forthcoming, for this additional reason it would be premature to make a final assessment on the limitation period for a contribution and indemnity claim on this application.
- [44] In summary, I do not have the necessary evidence to determine the limitation issue on this leave application. I will therefore go on to consider the other factors on the leave application.

Prejudice to the parties

- [45] The plaintiff asserts there would be prejudice to the plaintiff if the third party claim were issued since that would compromise Dr. Cohen's ability to serve as an expert witness at trial. However, retaining an expert who has had a prior factual involvement in the subject matter

of the action carries with it a risk of potential complications. It was the plaintiff's decision to engage, as an expert witness, a psychologist who had previously assessed and provided recommendations for the plaintiff several years earlier. I do not place much weight on this consideration.

- [46] The plaintiff also contends there would be prejudice in that the trial would be augmented to include a professional negligence trial, and consequently, an already complex case will become more complex. These submissions are echoed by the proposed third parties. I accept that the trial will be lengthened by the addition of the third parties and this constitutes some prejudice.

Any delay in proceedings

- [47] There is currently no trial date set. Notably, in *Tyson CA*, the court stated that even in the absence of an excuse for delay, had there not been an imminent trial date in place, "the appellant's third party application almost certainly would have been allowed": para. 35. The existence of a pending trial date which is in jeopardy by the application is a salient factor in the analysis, and can weigh heavily against granting leave: *Tyson SC*, paras. 55-56. Consequently, the fact that the granting of this application will not inevitably lead to the adjournment of a pending trial is a factor militating toward granting leave.

Timeliness of the application

- [48] Rule 3-5(4) does not require the indiscriminate issuance of third party proceedings prior to the 42-day deadline. It does, however, force a defendant to give early consideration to the question of adding additional parties: *Tyson SC* at para. 61. This Court has stated that effectively this places an "onus on the parties to actively consider whether a third party claim for contribution and indemnity should be pursued early in the action": *Stephenson* at para. 25.
- [49] In this case, the application was initially filed on April 9, 2021, approximately 42 months after the SPL Defendants' response to civil claim was filed. However, this action has not been prosecuted expeditiously. Discovery of the personal defendants did not occur until June 2020 and SPL was not discovered until March 2021. Disclosure of Dr. Cohen's 2020 letters (which predate his expert report engagement) and other file materials occurred in November 2020 and September 2021, respectively. Other records regarding the plaintiff's treatment were disclosed to the SPL Defendants in September 2021.
- [50] While 42 months is a significant time, it must be viewed in the context of this complex action, and the pace at which it has been litigated: *Canfor* at para. 58. The action was commenced in 2017, over four years after the October 2012 incident. The complexity of the action is also a consideration: *ASPAC* at para. 23. In addition, where this court does not have sufficient evidence to determine the limitation period, it should be cautious when assessing the timeliness of the application (*Verrier* at para. 91).

- [51] I do not endorse inappropriate delay. Under R. 3-5, third party claims should be pursued with reasonable dispatch: *Canfor* at para. 59. In all the circumstances, while I consider the time which has elapsed since the filing of the SPL Defendants' response to civil claim to be long, in the context of this action with 16 experts referenced in the trial briefs, I do not consider it to be so inordinate as to be fatal to this application.
- [52] The proposed third parties relied on the previously cited 2015 BCSC case of *Jack* in support of their argument that leave to file a third party claim should be denied. In that case, this Court dismissed an application to file a late third party notice against the plaintiff's family physician (also an expert at trial) brought approximately 10 days before a 24-day jury trial. The court found that the timeliness factor was significant in the analysis. The application was refused: paras 25-26. Here, unlike in *Jack*, there is no imminent trial date which will inevitably be adjourned if leave is granted. In addition, the other cases relied on by the proposed third parties--*Hadland v. Reems*, 2015 BCSC 115 and *Stephenson*--were not attended by the same degree of complexity as the case before me.

Is it just and convenient to grant or dismiss the application?

- [53] Questions arising on an application for leave were put by Lambert J.A. in *Lui v. West Granville Manor Ltd.* (1985), 61 B.C.L.R. 315 (C.A.) at p. 405 in this way:

What is the fair thing to do? Who suffers prejudice if the discretion is exercised? How much prejudice? Who suffers prejudice if the discretion is not exercised? How much prejudice? Have the parties acted properly and reasonably in their own interests? If a party has not acted properly and reasonably, should he be relieved from the consequences of his own behavior? Is there another course available to one or other of the parties? Where does the balance of convenience lie? This list is illustrative, but not exhaustive, of the questions that should be asked with respect to the parties for the court. But part of the purpose of the Rule is to avoid multiplicity of proceedings for the benefit of other litigants, so that congestion in the courts is avoided. So it is proper to ask questions in that area as well.

- [54] I have considered the questions posed by Lambert J.A. above, and the other factors as discussed above set out in the applicable case law, and conclude it is fair in all the circumstances to grant leave to file the third party claim. These considerations in particular militate in favour of allowing the third party proceeding to be commenced: (a) the dominant purpose of the rule is to avoid multiplicity of proceedings and inconsistent findings, with regard to the best use of court resources (*Interior Savings* at paras. 19-20); and (b) the fact that the granting of leave will not result in an adjournment of the trial. I accordingly grant the application, but direct that the merits of the limitation defence be decided in the third party proceedings on a more fulsome evidentiary platform.
- [55] In closing, I must address the argument, made by the respondent plaintiff and proposed third parties, that the applicants' third party claim is strategic or tactical, merely designed to impugn or disqualify one of the plaintiff's expert witnesses, and for this reason leave to commence a third party proceeding should be denied. The respondents' assertion as to the

applicants' true motivations for bringing a third party proceeding is challenging for the court to address on an interlocutory application where, as here, it is made with no evidence. I did not give any weight to this argument in my analysis.

- [56] The plaintiff asks that if the third party claim proceeds, it be severed from the main action. I decline to do so at this time. I leave the consideration of severance for a further application, if one of the parties chooses to seek such relief.

Order Granted

- [57] The relief sought in paragraphs 1 and 2 of the applicant SPL Defendants' amended notice of application filed January 20, 2022 to commence a third party claim against Dr. Cohen, Mr. Heck and Ms. Stephan is granted, with a direction that the merits of the limitation defence of the third parties be determined in the third party proceedings.

- [58] I was not provided sufficient evidence on this application by the applicants to assess the limitation period issue. Costs of this application shall therefore be in the cause.

"Stephens J."

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