
CANADA / JUDGMENT

Iezzi v. British Columbia

2012 BCCA 200

COURT

British Columbia Court of Appeal

DECIDED

10 May 2012

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2012 BCCA 200 Iezzi v. British Columbia

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Iezzi v. British Columbia,

2012 BCCA 200

Date: 20120510

Docket: CA039354

Between:

Teresita Iezzi

Respondent

(Plaintiff)

And

Her Majesty the Queen in right of the

Province of British Columbia

Appellant

(Defendant)

Before:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Lowry

The Honourable Madam Justice Neilson

On appeal from: Supreme Court of British Columbia, August 25, 2011

(Iezzi v. R., 2011 BCSC 1239, Docket S097276)

Counsel for the Appellant:

K. L. Johnston

Counsel for the Respondent:

A. P. S. Dosanjh

Place and Date of Hearing:

Vancouver, British Columbia

April 17, 2012

Place and Date of Judgment:

Vancouver, British Columbia

May 10, 2012

Written Reasons by:

The Honourable Mr. Justice Donald

Concurred in by:

The Honourable Mr. Justice Lowry

The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Mr. Justice Donald:

- [1] This appeal is taken from a judgment that the limitation period for a claim of negligence was postponed: 2011 BCSC 1239.
- [2] The judge found that the two-year period did not begin to run until the respondent obtained documents from the appellant that substantiated her claim; and he took into account that she was under "intense stress" and acted reasonably in not bringing an action while settlement negotiations were pending.
- [3] I would allow the appeal and dismiss the action. Nothing in the record explains why the respondent did not take steps leading to the substantiation of her claim within two years of being informed that the appellant may have breached its duty of care to her.
- [4] The finding that stress and settlement negotiations contributed to the delay in filing the suit is not supported by the evidence.

Facts

- [5] The respondent alleges that the appellant, represented by the Ministry of Children and Family Development, as the guardian of a foster child it placed in her care, failed to warn her that the child was Hepatitis C positive. In 2001, the respondent was stuck by a hypodermic needle during a scuffle with the child. The respondent was diagnosed with the disease in 2002 and underwent chemotherapy for nine months in 2003. This treatment produced the same suffering as that endured by cancer patients undergoing such treatment. The respondent complains of continuing after-effects.
- [6] The respondent did not connect the infection with the needle incident until one day in 2003 when she saw the child on the street.
- [7] In early 2006, the respondent confided in the social worker who placed foster children in her care and whom she trusted, that she had contracted Hepatitis C and she asked him to review Ministry records to determine whether the child was Hepatitis C positive. She asked him not to reveal her medical status to the Ministry so as not to interfere with her foster care work.
- [8] In either February or March 2006, the social worker told her the records confirmed that the child had Hepatitis C at the time of her placement in 2001.
- [9] In April 2006, the Ministry cancelled the respondent's foster care contract after more than 20 years service. It is not alleged this had anything to do with her health. On 2 August 2006, the respondent wrote to the Ministry's Deputy Minister, complaining of unfair treatment in cancelling the foster care contract on short notice, given her many years of service, and she revealed for the first time that she had contracted Hepatitis C in the course of that service.
- [10] The respondent met with local officials of the Ministry in the fall of 2006. They offered her some transition work but it was not acceptable to her.
- [11] Without foster care revenue, the respondent could no longer afford her house and she had to move into an apartment where she was not able to take in foster children.
- [12] Between 2007 and February 2008, the Ministry undertook a fact-finding process to look into the allegation regarding the respondent's infection.
- [13] In April of 2008, the respondent met with Ministry representatives who offered her ex gratia payments for inadequate notice of termination and for the Hepatitis C infection. They said if their offer was not acceptable, she should consult a lawyer. Although they did not give her the fact-finding report, one of the officials told her how to make a request under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 ("FOIPPA"). She rejected the offer.
- [14] At about the same time, the social worker mentioned earlier gave her a copy of a Ministry document that confirmed the Ministry knew the child was Hepatitis C positive before the placement in 2001. This "leak" occurred on the eve of the social worker's retirement.

[15] On 5 May 2008, the respondent made a FOIPPA request which in due course produced the documentary confirmation she was looking for.

[16] She filed a writ of summons on 5 October 2009.

Limitation Act

[17] The relevant provisions of the Limitation Act, R.S.B.C. 1996, c. 266, are:

3 (1) In subsections (4) and (6), "debtor" means a person who owes payment or other performance of an obligation secured, whether or not the person owns or has rights in the collateral.

(2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:

(a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;

* * *

6 ...

(3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):

(a) for personal injury;

* * *

(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

(a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and

(b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

(5) For the purpose of subsection (4),

(a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,

(b) "facts" include

(i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and

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

Decision under Appeal

- [18] Having considered these provisions and cases cited to him, the judge decided that the limitation period had not expired and he accordingly refused the appellant's application for dismissal. He reasoned as follows:
- [15] I am satisfied that there was a postponement of the limitation period to sometime between the Spring of 2008 and the Fall of 2008 as a result of a number of factors. There were negotiations with the Ministry during 2006 and until April 2008 regarding a possible settlement of damages flowing from the Hepatitis C infection and from the breach of contract. It would have been unwise to interrupt those by the commencement of an action. While negotiations were ongoing and while there was still a hope that a settlement could be reached, a reasonable person would believe that it was not necessary to commence an action for damages flowing from the Hepatitis C infection. It was not until the April 1, 2008 meeting with a Ministry representative that the final position of the Ministry regarding a possible settlement was received. Even then, Ms. Iezzi advised the Ministry that she had "no desire to go to a lawyer" although she also did advise that "I have been left with no other choice". It was only at that point that negotiations came to a conclusion and that Ms. Iezzi was left with no other alternative.
- [16] It was not until sometime between April 2008 and September 2008 that Ms. Iezzi obtained the actual documentation relating to the Hepatitis C status of MW. Before commencing an action, a reasonable person would first ascertain the exact knowledge the Ministry had about the Hepatitis C status of MW when she was placed as a foster child. A reasonable person would not want to rely on the unsubstantiated information that was available from an employee of the Ministry. A reasonable person would first wish to see the actual documentation before proceeding. That documentation was not available to Ms. Iezzi until she ascertained in a document that was made available to her that the Ministry was aware that MW had Hepatitis C when MW was placed with her because the Ministry was in possession of the records available from the Juvenile Detention Centre.

- [17] Until that information was available, it would have been foolhardy and unreasonable for a person to conclude that an action should be commenced and that there was a reasonable or any possibility of success. Until the actual documentation was available to her, Ms. Iezzi had only the hearsay statements from her resource worker. It was reasonable not to proceed until a determination could be made that there was a reasonable prospect of success and that there was a reasonable prospect of there being sufficient funds available if an action was successful to justify the action being commenced in the first place.
- [18] I also consider that Ms. Iezzi was under intense stress. I am satisfied that I should take into account a number of circumstances in dealing with whether the running of the limitation period should be postponed. First, she had lost her house. Second, she had lost her health as a result of the Hepatitis C infection. Third, she had lost her livelihood because she could no longer take foster children. At the same time to require her to face the intense stresses and strains involved in suing the Province is unrealistic.
- [19] Taking into account all of the circumstances surrounding the commencement of this action in October 2009, I am satisfied that the application of the Defendant should be dismissed.

Issues

- [19] The appellant frames the issues on appeal in this way:
- [a.] The learned Chambers Judge erred in interpreting section 6(4) of the Limitation Act by finding that the Plaintiff's claim was postponed while she and [the Ministry] discussed the possibility of compensation.
- [b.] The learned Chambers Judge erred in interpreting section 6(4) of the Limitation Act by finding that the limitation period was postponed until the Plaintiff received documentation from [the Ministry].
- [c.] The learned Chambers Judge erred in interpreting section 6(4) of the Limitation Act by finding that the Plaintiff's interests and circumstances were sufficiently compelling so as to postpone the limitation period.

Discussion

- [20] The appellant's position is that the time began to run when the respondent was told by the social worker that the Ministry knew the child was Hepatitis C positive and after sufficient time elapsed for her to take appropriate advice on whether she had a valid claim. The appellant puts that at August 2006 when the appellant wrote to the Ministry asserting that she contracted Hepatitis C in the course of providing foster care services. The appellant further submits that her personal circumstances did not satisfactorily explain her delay in proceeding with a suit.
- [21] With respect, I agree.

- [22] I approach the analysis by comparing the respondent's situation at the time she received the documentary proof she sought through the FOIPPA request in September 2008 and her circumstances in the preceding two years. On the evidence, there is no difference. The respondent was in as good a position to do in 2006 what she did in 2008 to confirm the social worker's information. Her financial stresses and medical problems were the same. She lost her house in 2006. There is no evidence her health changed over the period 2006-2008.
- [23] The judge mentions ongoing negotiations and a "hope" of settlement (para. 15) as a relevant factor. I cannot find any support for a belief that the appellant held out any prospect of a settlement over the two-year period. The appellant does not say in her evidence that she held back because of such a hope. The burden of her evidence is that she did not proceed earlier with an action because she had no concrete proof.
- [24] Furthermore, I am very doubtful that the fact of ongoing negotiations supplies a basis for postponement. If it were a factor operating in this case, it would likely fall into the category of a tactical concern and therefore not to be considered under s. 6(4)(b). In *Novak v. Bond*, [1999] 1 S.C.R. 808, 63 B.C.L.R. (3d) 41, Madam Justice McLachlin (as she then was) wrote:
- [86] Whether a particular circumstance or interest has the practical effect of preventing the plaintiff from being able to commence the action must be assessed in each individual case. Section 6(4)(b) requires that the circumstances and interests of the individual plaintiff be taken into account. What is a serious, substantial, and compelling interest in one case may not be so in another case. Purely tactical concerns play no role in this analysis because they do not relate to the practical ability of the plaintiff to bring an action, as assessed by a reasonable person who takes into account all his or her circumstances and interests. See *Trueman v. Ripley*, [1998] B.C.J. No. 2060 (QL) (S.C.).

[Underlining in original; italicized emphasis added.]

- [25] So it comes down to getting the documents from the Ministry. The judge thought it would have been "foolhardy" for the respondent to have commenced an action on the basis of the social worker's information in 2006. Assuming that to be so, there remains the question why she did not take advice on that information. She trusted the social worker and believed the information to be true. Section 6(4)(a) is worded in such a way as to postulate what a reasonable person would do, having taken "appropriate advice". That requires an analysis of what such notional advice would have been in the circumstances. In *Levitt v. Carr*, [1992] 4 W.W.R. 160, 66 B.C.L.R. (2d) 58 (C.A.), this Court said:
- [57] We think it clear that those who drafted the British Columbia statute rejected simple ignorance of the existence of a cause of action as sufficient to postpone the running of time. The solution adopted by the Law Reform Commission and by the legislature was to introduce another level of abstraction: notional advice by notional advisors. This advice is given the conceptual status of facts and, when added to those within the plaintiff's means of knowledge, forms the body of information upon which the reasonable man decides whether an action on the cause of action would have a reasonable prospect of success and whether

the plaintiff ought to be able to bring that action.

[26] I think competent advice would have been to do what the respondent did in 2008, namely, make a FOIPPA request. Had she done so in 2006 (and there is no evidence that she was impeded by stress or illness from taking advice), she would have allayed her concerns about a reasonable prospect of success.

[27] I conclude that the limitation period had expired when the respondent commenced this action and I would allow the appeal and dismiss the action.

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Neilson"

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Prepared on 26 October 2026 · Esheria