

CANADA / JUDGMENT

McIndoe v. Henry

2006 BCSC 1983

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 1983 McIndoe v. Henry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McIndoe v. Henry,

2006 BCSC 1983

Date: 20061221

Docket: A990378

Registry: Vancouver

In The Matter Of

The Family Compensation Act, R.S.B.C. 1996, C. 126

Between:

Gary McIndoe and Linnea McIndoe

Plaintiffs

And:

David Henry

Defendant

Before: The Honourable Mr. Justice Groberman

Oral Reasons for Judgment

In Chambers

December 21, 2006

Counsel for the Plaintiffs

G. Orris, Q.C.

Counsel for the Defendant

appearing by teleconference

H.J. Rusk

Date and Place of Hearing:

November 23 & December 19, 2006

Vancouver, B.C.

- [1] THE COURT: On this summary trial application, the defendant seeks to have the action dismissed on the basis that it was commenced after the expiry of the limitation period. The plaintiffs contend that the running of the limitation period was postponed and that, as a result, the action was brought within time.
- [2] The plaintiffs' claim is for the wrongful death of their daughter, Sheila Louise Henry. It is brought pursuant to the provisions of the Family Compensation Act, R.S.B.C. 1996, c. 126. The plaintiffs allege that the defendant, who was Ms. Henry's husband, murdered her. Ms. Henry died on February 5, 1993. This action was not commenced until February 18, 1999.
- [3] Section 3(2)(g) of the Limitation Act, R.S.B.C. 1996, c. 266 provides that a person may not bring an action under the Family Compensation Act after expiration of two years from the date on which the right to do so arose. A cause of action for wrongful death arises when the deceased dies. Section 3(1) of the Family Compensation Act requires an action for wrongful death to be brought by the personal representative of the deceased, but s. 3(4) of the Act provides that others may bring the action where there is no personal representative or where there is a personal representative but he or she has not commenced an action within six months of the deceased's death.
- [4] In *Kitto v. Hanson* (1991), 83 D.L.R. (4th) 493, 58 B.C.L.R. (2d) 265 (C.A.) at D.L.R. 497, the scheme of the Act was described as creating a "plain ambiguity". It was held that, despite the apparent meaning of s. 3(4), in situations where there is no personal representative no action can be commenced until six months have elapsed from the date of the deceased's death. Therefore, for persons other than a personal representative, the limitation period for bringing an action does not start to run until that time. In the case at bar, I understand that no personal representative was appointed within the first six months after the deceased's death. Therefore, in the absence of any postponement under the Limitation Act, the limitation period would have expired in August of 1995.
- [5] The plaintiffs rely on s. 6(4) of the Limitation Act for the postponement of the running of the limitation period. That section states:

6(4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) [which includes an action under the Family Compensation Act] until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that

- (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
 - (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
- [6] By virtue of s-s. (6) of the Act, the plaintiffs bear the burden of showing the running of the limitation period is postponed.
- [7] The plaintiffs say that only after August of 1998, when they received a letter from Crown counsel explaining why the Crown was not going to proceed with criminal charges, did they have sufficient facts within their means of knowledge to appreciate that their action had a reasonable prospect of success.
- [8] In order to assess the plaintiffs' contention, an examination of the chronology of events must be undertaken. I should say at the outset that, for reasons that are not clear to me, neither party has referred in any detail to the facts surrounding the alleged murder, nor (except for a few minor details) what facts are known to the plaintiffs about the incident. This makes it difficult to determine when or even if ever the plaintiffs had within their means of knowledge such facts as show that the cause of action has a reasonable prospect of success.
- [9] Rather than focussing on what the plaintiffs knew or could reasonably have known, the parties have focussed on specific events that occurred. That leaves the court to infer what the plaintiffs' actual or potential state of knowledge was at relevant times.
- [10] I gather that on the date of her death Ms. Henry was found in her home. She had suffered strangulation and severe blows to the head. She was found on the floor of the residence with blood on her face. The defendant called the police, advising that on his return home he had found Ms. Henry dead. He was arrested and questioned with respect to the murder but released the next day and no charges were ever laid.
- [11] The police informed the plaintiffs of their daughter's death the day after it occurred. They indicated that the death appeared to be a homicide and that Mr. Henry was the only suspect at that time. It is not clear to me exactly what information the plaintiffs received from the police at that time. My understanding is that the police were not releasing too many details of their investigations to the plaintiffs, who in any event may not have been particularly anxious to hear all of the details of their daughter's death.

- [12] What is clear, however, is that the plaintiffs knew throughout that the death was considered to be a homicide and that Mr. Henry was the only suspect. It is reasonable to assume that the plaintiffs knew that the homicide occurred in the home occupied by Mr. Henry and their daughter, and that the circumstances were such as to point the police to the defendant. While the evidence is meagre on the point, the rational inference is that the plaintiffs knew that there were no signs of forced entry nor any other indications that pointed in the direction of someone other than the defendant being the person who committed the homicide.
- [13] In short, as early as February 6, 1993, the plaintiffs knew the identity of the defendant and knew that the death of their daughter was wrongful. They had, however, only limited evidence linking the defendant with the homicide.
- [14] In May 1994 a three-day inquest was held into the death. Linnea McIndoe gave some evidence at the inquest, and the plaintiffs were unable to attend the entirety of the inquest because of an order prohibiting witnesses or potential witnesses from attending. Again, while the facts before me are sparse, the plaintiffs do not appear to have spent any appreciable time watching the inquest or trying to determine the nature of the evidence presented at it.
- [15] At the end of the inquest the plaintiffs did speak to the presiding coroner, who apparently filled them in on the inquest verdict - which was homicide - and also advised them that the defendant was the prime suspect.
- [16] In 1996 and again in 1997 the plaintiffs made applications for and were granted criminal injuries compensation in connection with their daughter's death. The application form specifically adverted to the question of whether a civil action was going to be pursued. On the earlier forms the plaintiffs indicated that they were not sure whether they would bring a civil action and that they would be consulting a lawyer. On the later form they indicated that they were not pursuing a civil suit.
- [17] In fairness, I did not think that these forms are particularly helpful in deciding the case, but they do, at the very least, indicate that the possibility of a civil suit was brought to the plaintiffs' attention in 1996 and 1997.
- [18] In July of 1998 the plaintiffs became aware that the Crown was not going to approve charges against Mr. Henry. This was upsetting to them. They wrote a letter to Crown counsel on July 15, 1998, the body of which I will quote in full:

It is our understanding that you have reviewed the file on the Homicide of Sheila Henry and have decided that no charges will be laid at this time.

It was our hope that David Henry would have to face his peers in a Court of Law.

Could you please send a written explanation of your decision for our records so that we can decide whether we have the strength to pursue other avenues.

[19] I think in this context "other avenues" must have been intended to include a civil action. I also find that when the plaintiffs speak of "the strength to pursue" such avenues they are talking about their own strength of spirit rather than the strength of the evidence.

[20] The prosecutor who made the decision not to approve a charge against Mr. Henry wrote back to the plaintiffs on July 21, 1998. The plaintiffs say that only on receipt of this letter did the limitation period begin to run. I will quote the important passages in this letter:

Let me begin by saying that from the date of the killing an investigation was begun by the Vancouver City Police Department wherein David Henry was identified as the only person of interest. No charges were laid as a result of the Vancouver City Police Department investigation. In 1997 the matter was reinvestigated by members of the Provincial Homicide Unit. All of the evidence was re-examined and the police have made a tremendous effort in an attempt to gain any further evidence which could identify the perpetrator of this crime. Regrettably, the further investigation added little to the evidence that had been already discovered.

As in the majority of such cases, the evidence uncovered was largely circumstantial. Juries are instructed that they may only convict on the basis of circumstantial evidence when the circumstances are not only consistent with the accused having committed the act but inconsistent with any other rational conclusion. Further, they are instructed that mere suspicion is insufficient.

In this particular case there is no direct evidence linking David Henry to this crime nor can it be proved David Henry had exclusive opportunity to kill his wife. It must be remembered that on all of the evidence there need only be a reasonable doubt for a jury to be duty bound to acquit.

I understand from your letter that you are looking to me to assist you in your assessment whether to pursue civil litigation. A decision as to the strength of any civil case that could be brought is beyond my expertise and a decision that you should make after consultation with appropriate legal counsel who practise in the area of civil litigation.

[21] The plaintiffs did consult with civil counsel shortly after receiving the letter in September 1998.

[22] Despite the forceful submissions of Mr. Orris, I am unable to discern anything in the Crown counsel letter that would assist the plaintiffs in providing them with information to fill any factual lacuna. They knew or had means of knowledge that Mr. Henry was the only suspect. Indeed, their own letter identified him as the person who they hoped would be charged. They knew or ought to have known that the evidence against Mr. Henry was largely, if not wholly, circumstantial. At best, the letter of July 21, 1998, might have raised concerns for the plaintiffs as to whether a civil action might succeed. It certainly did not provide them with any new facts that might lead them to believe or even enhance their view that a civil action had a reasonable prospect of success.

- [23] Although I have not been provided with details of the evidence that came out of the three-day inquest into Ms. Henry's death, it is apparent to me that by the time of the inquest all of the important facts surrounding Ms. Henry's death that are now known had already been uncovered. There is no suggestion that the inquest itself was deficient.
- [24] An affidavit before me describes the plaintiffs' role in the inquest. Although the affidavit is of a hearsay nature and was initially objected to by counsel for the defendant, he withdrew the objection and the parties are content to have the affidavit form part of the evidence notwithstanding the defect. I have therefore considered it.
- [25] The affidavit indicates that the plaintiffs were contacted to testify at the inquest. There was an order for exclusion of witnesses. On the second day of the inquest, Mr. McIndoe became frustrated and went into the hearing room. He determined at that time that he was not, in fact, listed as a witness and I understand that he sat through the balance of the proceedings. Mrs. McIndoe was a witness; she testified on the third day of the hearing. I understand that only the defendant testified after her, and that she was therefore unable to hear most of the evidence at the inquest.
- [26] Had the plaintiffs made efforts to determine what evidence was led at the inquest I have no doubt that they would have had sufficient facts in their knowledge to fully assess whether or not their action had a reasonable prospect of success. I cannot detect any impediment that prevented the plaintiffs from determining what evidence was led at the inquest. While I acknowledge that they were prevented from attending parts of the inquest - in Mrs. McIndoe's case, most of the inquest - there is no suggestion that they were prevented from having someone sit in at the inquest on their behalves, from obtaining transcripts of the proceeding, or from obtaining details of the evidence from the presiding coroner. In the result, all of the essential facts were within their means of knowledge no later than the close of the inquest on May 6, 1994.
- [27] I find that the plaintiffs have not satisfied the burden upon them. That is, they have not shown that they lacked the means of knowledge of those facts that would show them that their cause of action had a reasonable prospect of success until the two year period immediately preceding the commencement of the action.
- [28] While the parties have concentrated their arguments in this case on s-s. 6(4)(a) of the Limitation Act and have not addressed s. 6(4)(b), I think it should also be considered. That section speaks of facts showing that it was in the plaintiffs' own interests, taking into account their situation, to bring an action.
- [29] Both the letter sent by the plaintiffs to Crown counsel and their evidence on examination for discovery convince me that their motivation in bringing this action is not, or at least not primarily, monetary. Rather, they believe that the defendant is responsible for the death of their daughter and they want him held to account for that. They would have been much more satisfied if a criminal charge had been laid. As one has not been, they have decided to commence and prosecute a civil action. From their standpoint and given their motivations,

it seems reasonable that they did not commence the civil action until they understood that no criminal prosecution would be pursued.

[30] Because no argument was addressed to the issue, and because it raises controversial questions I do not intend to analyze the legitimacy of bringing a civil action for the purposes of denunciation. I do say this, however, about s. 6(4)(b). The leading case on the interpretation of that section is *Novak v. Bond*, [1999] 1 S.C.R. 808. In that case the plaintiff, who suffered from cancer which the defendant had allegedly negligently failed to detect, commenced an action after the apparent expiry of the limitation period. She successfully argued that the limitation period was postponed because she reasonably concentrated on her own health and recovery following her diagnosis rather than on pursuing litigation. McLaughlin J., as she then was, for the majority of the court, summarized the interpretation of s. 6(4)(b) as follows, at para. 39:

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. 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. The question posed by s. 6(4)(b) therefore becomes: "in light of his or her own particular 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 concerns have no place in this analysis.

At para. 86, after a fuller analysis, she said:

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.

[31] In my view, the plaintiffs' delay in the case at bar was not a result of their circumstances but rather was, and I use this word in a non-pejorative sense, purely tactical. They delayed not because of anything preventing them from bringing or pursuing a civil action, but because their preference was to have the matter dealt with criminally. I do not find that that motivation qualifies as a circumstance of the individuals plaintiffs which would result in the postponement of a limitation period under s. 6(4)(b).

[32] I say this with considerable sympathy for the plaintiffs. If their allegations are true, it is understandable that they wish to pursue a civil action to obtain some degree of closure of this matter. It is also understandable that they chose to await the conclusion of the charge approval process before embarking on the civil action. To them, in the circumstances, applying the Limitation Act may seem harsh.

[33] In *Chisamore v. Stephens*, 2006 BCCA 557, at para. 16 the court cited with approval the following passage from the dissenting judgment of Iacobucci and Major JJ. in *Novak v. Bond* at para. 8:

Almost all applications of limitations statutes will seem harsh. But their finality should not obscure their value. They bring needed stability to society by enabling potential defendants to plan their affairs in the safe assumption that stale claims cannot be raised against them. They minimize the risk that evidence relevant to the claim will be lost. In addition, they are an incentive for plaintiffs not to "sleep on their rights."

[34] I find that the plaintiffs' action is statute-barred and I grant the defendant's application to dismiss it on that basis under Rule 18A. Unless there are important factors of which I am unaware the defendant is entitled to costs on Scale 3.

(SUBMISSIONS)

[35] THE COURT: I will give you some time in which to consider whether you wish to make additional submissions on costs. If you do, you can do so through a note in writing to Trial Division addressed to my attention. That note should indicate in very summary terms what the nature of the argument you propose to put will be. I will look at that and consider whether additional time should be devoted to a hearing on costs, and if necessary I will then have Trial Division set up a convenient date with you. In the event that I have not received such submissions by a date that we will set, then the order will go with costs on Scale 3.

(SUBMISSIONS)

[36] THE COURT: All right. If I do not hear from you, Mr. Orris, by February 15, 2007, then without any further order or hearing, the order will go with costs on Scale 3. If I do hear from you, I will proceed as I have outlined.

"H.M. Groberman, J."

The Honourable Mr. Justice H.M. Groberman

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