

CANADA / JUDGMENT

Sharma v. Mohammad

2022 BCSC 270

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 270 Sharma v. Mohammad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sharma v. Mohammad,

2022 BCSC 270

Date: 20220218

Docket: M175226

Registry: New Westminster

Between:

Sandeep Sharma

Plaintiff

And

Karim Aminullah Mohammad

Defendant

And

Danill Oleksand Polyakov

Third Party

Before: The Honourable Justice Kirchner

Reasons for Judgment

The Plaintiff:

No appearance at this hearing

Counsel for the Defendant, appearing via videoconference:

V.G. Critchley

Counsel for the Third Party, appearing via videoconference:

L.E. Miller

Place and Date of Hearing:

Vancouver, B.C.

February 7, 2022

Place and Date of Judgment:

New Westminster, B.C.

February 18, 2022

- [1] This is an appeal from an order of a Master granting leave to the defendant, Karim Aminullah Mohammad, to file a third party notice against, Daniil Oleksand Polyakov. Mr. Polyakov appeals that order. At issue is whether the time for filing the third party notice had expired under the Limitation Act, S.B.C. 2012, c. 13.

Background Facts

- [2] The plaintiff brings this action (the "First Action") against Mr. Mohammad for damages said to have arisen from a motor vehicle accident on November 30, 2013 (the "First Accident"). The notice of civil claim was filed on November 4, 2015 and served on Mr. Mohammad shortly thereafter. It alleges Mr. Mohammad is at fault for the accident and liable for the plaintiff's injuries.
- [3] On April 26, 2017, the plaintiff was in a second car accident (the "Second Accident") and suffered injuries for which Mr. Polyakov is alleged to be at fault.
- [4] By December 2017, during examinations for discovery in the First Action, Mr. Mohammad became fully aware of the Second Accident and that it may have impacted the plaintiff's injuries from the First Accident. Specifically, it is suggested that at least some of the injuries the plaintiff suffered in the two accidents are "indivisible". This means the injuries cannot be separated as between the two different tortious acts or have liability for the injury attributed to only one or the other of the two defendants. This results in joint liability in respect of that injury for the two defendants: *Bradly v. Groves*, 2010 BCCA 361 at paras. 20 and 24.
- [5] Mr. Mohammad concedes he knew or reasonably ought to have known by December 2017 that he had a claim for contribution or indemnity in the First Action against Mr. Polyakov who is said to be at fault for the second accident.

- [6] On January 24, 2019 the plaintiff commenced an action (the "Second Action") against Mr. Polyakov claiming for damages arising from the Second Accident. The plaintiff did not amend his notice of civil claim in the First Action to name Mr. Polyakov as a defendant based on the potential invisible injury, nor is he expected to. Nor did the plaintiff name Mr. Mohammad as a defendant in the Second Action and is not expected to.
- [7] On November 17, 2020, Mr. Polyakov was granted leave to file and serve a third-party notice against Mr. Mohammad in the Second Action. That notice was served on April 23, 2021.
- [8] On May 4, 2021, Mr. Mohammad applied for leave to add Mr. Polyakov as a third party in the First Action. Mr. Polyakov opposed that application on the basis that the limitation period for making the third party claim had expired under sections 6 and 16 of the Limitation Act. Those sections read:
6. (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.
16. A claim for contribution or indemnity is discovered on the later of the following:
- (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;
- (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.
- [9] It is common ground that Mr. Mohammad knew he had a claim for contribution or indemnity by December 2017 and, since the application to file third party notice was not made until May 4, 2021, time to bring a claim was expired under s. 16(b) of the Act. Thus, the sole question on the application before the Master, and on this appeal, is whether time had also expired under s. 16(a).

The Master's Decision and the Appeal

- [10] The Master granted Mr. Mohammad's application. Citing the Court of Appeal's decision in *Sohal v. Lezama*, 2021 BCCA 40 at paras. 109-111 [Sohal], she held that time does not start to run on a claim for contribution or indemnity under s. 16 unless and until a pleading that alleges damages caused by the fault of two or more persons is served on Mr. Mohammad. Since the notice of civil claim in the First Action does not allege damage caused by the fault of two or more persons, and could not have since the Second Accident had not yet occurred, she held that time had not yet started to run on Mr. Mohammad's third party claim.
- [11] The parties agree this appeal turns on a pure question of law, namely the correct interpretation of s. 16(a) of the Limitation Act. Thus, they agree the standard of review is correctness and this appeal is to take the form of a rehearing: *Sohal v. Lezama*, 2019 BCSC 1709 at para. 25-28 [Sohal BCSC], *aff'd* 2021 BCCA 40.

The Parties' Positions

- [12] The third party, Mr. Polyakov, argues the "pleading" that is referred to in s. 16(a) must be the original notice of civil claim in the First Action that was filed and served in November 2015. He argues the only pleading contemplated by s. 16(a) is the one that either commenced the underlying claim in which a claim for contribution or indemnity might be made or one that brought the person who may have a claim for contribution or indemnity into the action. He says this despite the fact the notice of civil claim makes no reference to a claim in which Mr. Mohammad might seek a contribution or indemnity (since the Second Accident had not yet happened). However, he argues that no other interpretation would further the objectives of the new Limitation Act as it applies to claims for a contribution or indemnity. He argues the fact that the notice of civil claim itself does not give rise to a claim for a contribution or indemnity is not prejudicial to Mr. Mohammad for the purposes of the limitation period because s. 16(b) preserves his right to make a claim for a contribution or indemnity within two years after learning of the Second Accident.
- [13] Mr. Mohammad argues the pleading contemplated by s. 16(a) must be one that specifically alleges damage that was caused by the fault of two or more persons. Since the notice of civil claim in the First Action only makes claims against Mr. Mohammad, and not Mr. Polyakov or any other person, he argues that it could not have triggered the running of time. He argues that unless or until the notice of civil claim is amended to name Mr. Polyakov as a defendant or otherwise gives notice of a claim that could give rise to a claim of contribution or indemnity, time under s. 16(a) does not start to run. He acknowledges that, under this interpretation, time may never start to run under s. 16(a) if, as expected, the plaintiff chooses not to name Mr. Polyakov as a defendant in the proceeding.
- [14] Mr. Polyakov argues Mr. Mohammad's position would lead to an absurd result and one that is inconsistent with the intention of the legislature in enacting s. 16, which was to limit the ability of claimants for a contribution or indemnity to bring their claims within two years. Mr. Polyakov also points out that since the ultimate 15-year limitation for a claim for contribution or indemnity under s. 21(2)(c) tracks the same language as found in s. 16(a), Mr. Mohammad's argument would result in there being no ultimate limitation period for a claim of contribution or indemnity in circumstances like the present one.
- [15] Mr. Mohammad argues this result is avoided if the notice of civil claim in the Second Action or a third party notice issued in that action is considered a "pleading" for the purposes of s. 16(a). He argues there is nothing in s. 16(a) to say the pleading must be one in the action in which the contribution or indemnity is claimed. The Master did not accept this argument, but, as noted, she did accept his argument that the pleading contemplated by s. 16(a) must be one that sets out a claim for damages caused by two or more persons as that is the result that necessarily follows from Sohal.
- [16] The plaintiff in this action has not taken a position in this appeal and did not appear either at the appeal or at the hearing before the Master.

Discussion

- [17] In 2012, the legislature enacted a new Limitation Act. One of the changes it made was to impose specific limitation periods on claims of contribution or indemnity. Those changes are found in sections 6 and 16 quoted above, as well in s. 21 which sets the 15-year ultimate limitation period for most claims, including claims for contribution or indemnity (s. 21(2)(c)).
- [18] These changes were explained by Master (now Justice) Elwood in *Dhanda v. Gill*, 2019 BCSC 1500 at para. 48:
- [48] The previous Limitation Act, R.S.B.C. 1996, c. 266, did not contain any discoverability rules specific to claims of contribution or indemnity. The limitation period for claims of contribution or indemnity did not begin to run under the previous Act until judgement in the action on which the claim was based was obtained. This was because, as the Court of Appeal explained in *Scott Management*, the cause of action of contribution or indemnity does not fully accrue until a plaintiff obtains judgment against a defendant, and the defendant becomes a judgment debtor and potential plaintiff with an independent cause of action.
- [19] As a result, as Master Elwood went on to explain at paras. 49-50, it was possible "to commence an action claiming contribution or indemnity many years after the events giving rise to the claim" and this is a mischief the new Limitation Act sought to address.
- [20] In *Sohal* at para. 13, Justice Grauer, speaking for the Court of Appeal, observed the new Limitation Act changed the starting point for the running of time for most claims, including for claims of contribution or indemnity, from the date on which the cause of action accrued to the date that the claim was discovered. As noted by Master Elwood in the above passage, the date of accrual for a claim of contribution or indemnity is when judgment is given in the action on which the claim is based. Thus, by moving start of the limitation period to the date on which claim is discovered rather than accrued, and by codifying when a claim for contribution or indemnity is discovered under s. 16, the new Act moved the commencement of the limitation period for claims of contribution or indemnity back to an earlier date.
- [21] There are two decisions that bear on the issue in this appeal. One is the Court of Appeal's decision in *Sohal* on which the Master relied, and the other is a more recent decision of this court in *0782484 B.C. Ltd. v. E-Pro Enterprises Inc.*, 2021 BCSC 1509 [0782484 B.C. Ltd.]. Both decisions support the respondent's position that the "pleading" as contemplated by s. 16(a) must be one that itself gives rise to a claim for a contribution or indemnity. That is, it must be a pleading that alleges damages caused by the fault of two or more persons such that one of those persons may then claim a contribution or indemnity from the other.

- [22] In *Sohal* the court upheld a decision of Justice Kent of this court setting aside a Master's order granting leave to file and serve third party notices beyond the limitation period specified in s. 16 of the new Act. The claim concerned a motor vehicle accident and the defendant sought to add the driver's employer as a third party. At issue was how the transition provisions of the new Act applied and whether, under those provisions, the third party claims were governed by the old Limitation Act, R.S.B.C. 1996, c. 266 or the new Act.
- [23] Speaking for the Court, Grauer J.A. noted at para. 30 that, under the new Act, the limitation period started to run, in that case, on September 15, 2015 when the Plaintiff filed an amended notice of civil claim that identified the defendant's employer as a new defendant. The employer had previously been identified only as John Doe in the original notice of civil claim. The plaintiff learned of the employer's identity from defence counsel in early September 2015 and made the amendment shortly thereafter. Justice Grauer said defence counsel's identification of the employer in early September triggered the running of the limitation under s. 16(b) of the new Act but the subsequent filing of the amended notice of civil claim is what started the clock running under s. 16(a) because that is the later of the two dates under which the limitation period began to run.
- [24] Thus, it was the amended notice of civil claim, and not the original notice of civil claim or the defendant's knowledge of the employer's identity, that Grauer J.A. found triggered the running of the limitation period under s. 16.
- [25] Near the close of his reasons, Grauer J.A. address a hypothetical "anomaly" that the appellant in that case said arose from Kent J.'s interpretation of the transition provisions. Grauer J.A. summarized that alleged anomaly as follows at para. 109:
- [109] The appellants then submit that the judge's interpretation leads to this further absurdity ("anomaly #3"): suppose a plaintiff commences action against defendant A, then 2½ years later, applies to add B as a defendant notwithstanding the expiry of a limitation, which is permissible according to section 22(1)(d). The court finds it is just and convenient to do so, and B is added. Defendant A then seeks to claim contribution from defendant B by third party notice. But, the appellants say, on the judge's interpretation, defendant A's claim for contribution from defendant B would be time-barred.
- [26] In dismissing this as an anomaly, Grauer J.A. relied expressly on s. 16(a) and the fact that the limitation period would not start to run until a pleading that alleged damages caused by the fault of two or more defendants had been served. He stated at para. 111:
- [111] As discussed above, a claim for contribution is based upon a finding of fault against two or more persons. A pleading alleging damage caused by the fault of two or more persons could not be served upon defendant A until the application to add defendant B. That is when time would begin to run in accordance with section 16(a). It follows that, consistent with the scheme of the new Act as a whole, a third party claim for contribution by defendant A against defendant B would not be time-barred.

[underlining is Grauer J.A.'s; bold emphasis added]

- [27] If this is applied to the present case, as the Master did, time for Mr. Mohammad to file a third party notice could not start to run until he was served with a pleading that added Mr. Polyakov as a defendant. Since that has not happened, time has not yet started to run. This is what the Master concluded.
- [28] Mr. Polyakov argues on this appeal that this passage from Sohal is obiter dicta and incorrect. His counsel urges me not to follow it.
- [29] The second case that contradicts the appellant's position is 0782484 B.C. Ltd. There, Madam Justice Power granted leave to the plaintiff to add two defendants to an existing claim. One of the existing defendants - Quantum - applied at the same time to name those two new defendants as third parties. That claim was resisted on several bases, including that the application was brought after the expiry of the limitation period under s. 16. In particular, the proposed third parties argued the facts giving rise to the proposed third party claim were known or ought to have been known to Quantum more than two years before the claim was brought and thus time had expired under s. 16(b). Further, they argued that since Quantum was served with the Plaintiffs' original notice of civil claim more than two years before the third party claim was made, time had also expired under s. 16(a).
- [30] In short, the respondents in 0782484 B.C. Ltd. made precisely the same argument Mr. Polyakov makes on in this appeal.
- [31] Madam Justice Power rejected the argument, largely relying in Grauer J.A.'s decision in Sohal. She stated at para. 109:
- [109] I am persuaded that Sohal supports Quantum's position. Examining the record as a whole and taking into account my findings in respect of the Plaintiffs' application, I find that Quantum discovered its contribution claim against Great Pacific and Accredited as early as September 2016 following 0848's document disclosure on the eve of trial. I agree with Quantum that, pursuant to s. 16(a), the latest Quantum discovered its claim for contribution and indemnity against Great Pacific and Accredited was when it was served with the Plaintiffs' joinder application on September 15, 2017. It brought its third party notice application 10 days later, well-within the two year limitation period.

[Emphasis added]

- [32] Counsel for the appellant concedes that if Power J.'s analysis is correct and binding on me, her client's position that s. 16(a) refers only to the original notice of civil claim that brought Mr. Mohammad into the action cannot also be correct. However, she urges me not to follow 0782484 B.C. Ltd. because, in her submission, it concerned an application to join additional defendants, was wrongly decided, and is not based on focused submissions on s. 16(a) like those to which I have been treated in this appeal.

- [33] Neither Sohal nor 0782484 B.C. Ltd. considered circumstances where, as here, there were two different consecutive tortious acts committed by two different tortfeasors in two separate incidents separated by several years, both of which (it is alleged) caused an indivisible injury to the same plaintiff.
- [34] In support of her client's position, counsel for Mr. Polyakov cites the Hansard debates from the B.C. Legislature concerning the new Limitation Act as well as a 2010 "White Paper on Limitation Act Reform" issued by the Ministry of Attorney General, and a document entitled "The New Limitation Act Explained". These same documents were cited by Kent J. in Sohal BCSC and the Court of Appeal confirmed he properly used them to assist in the interpretation of the Act without according them undue weight.
- [35] However, as with Sohal and 0782484 B.C. Ltd, none of these extraneous materials contemplate a circumstance where a purported indivisible injury is caused by two different tortious acts separated by several years. The examples given in all three sources describe a loss or injury that occurred through a single event. Thus, while they confirm the legislature's intent as described in Dhanda and Sohal, they are of limited assistance in this case and shed no more light on the legislature's intention than has already been found in Sohal.
- [36] Nevertheless, I find there is considerable merit in Mr. Polyakov's argument. It is clear that the legislature intended to put a time limit on claims for contribution and indemnity. There is no question the new Act sought to remove lengthy delays between the running of time from the filing of the original lawsuit and the date a third party notice claiming a contribution or indemnity is issued. That is a mischief the new Act sought to address: Sohal at para. 90. As Grauer J.A. stated in Sohal, perpetuating that problem "is a result to be avoided unless clear and unambiguous language compels otherwise."
- [37] Yet based on Sohal at para. 111 and 0782484 B.C. Ltd. at para. 109, in the unique circumstances of this case, time will never start to run on the limitation period for Mr. Mohammad's claim of contribution or indemnity because there is no expectation the plaintiff will amend the notice of civil claim in the First Action to name Mr. Polyakov as a defendant. Thus, the circumstance contemplated in Sohal at para. 111 and 0782484 B.C. Ltd. at para. 109 will never come to be here.
- [38] The problem becomes especially apparent when one considers that s. 21(2)(c) of the Act repeats the language of s. 16(a) for the purpose of the 15-year ultimate limitation. I agree it could not have been the legislature's intention to leave a gap by which certain claims for contribution or indemnity, like the claim in the present case, might be left with no limitation period, be it under s. 6 or s. 21.
- [39] I do not consider the pleadings in the Second Action to be a fix for this problem as urged by counsel for Mr. Mohammad. I agree with the Master that the pleading contemplated by s. 16(a) is not a pleading served in a separate action (here the Second Action). The notice of civil claim in the Second Action is not a pleading "in respect of" the claim on which Mr. Mohammad now seeks to claim for contribution or indemnity. Further, there is no

requirement that a notice of civil claim in the Second Action be "served" on Mr. Mohammad, and service of the pleading is the triggering event that starts time running under s. 16(a).

- [40] Mr. Mohammad argues the third party notice in the Second Action is a pleading that was served on him and relates to a claim for contribution or indemnity. He argues it may be considered the "pleading" under s. 16(a). However, it is not a pleading in respect of the claim (the First Action) on which his claim for contribution or indemnity might be made. Moreover, this would still leave a potential limitation gap in circumstances like this case since a defendant in Mr. Polyakov's position may not initiate third party proceedings.
- [41] On this basis, I would have been inclined find in favour of Mr. Polyakov and allow the appeal. Even though the pleading under s. 16(a) could not, in this case, allege damages caused by the fault of two or more persons, it is still a pleading in respect of the claim on which the defendant's claim for contribution or indemnity is (eventually) based. Counsel for Mr. Mohammad argues this cannot be the case because a limitation period cannot be triggered for a claim against a person who has not yet committed any wrong. However, that is not the effect of s. 16(a). Section 16 as a whole describes when time starts to run on a claim for contribution or indemnity. It is either when the pleading in the underlying claim is served or when the defendant becomes aware of the claim for contribution or indemnity, whichever is later. Thus, in this case, time did not start to run when the original notice of civil claim was served. It only started to run in or about December 2017 when Mr. Mohammad came to know about the claim. Under this interpretation, no injustice is worked against defendants who might have claims for contribution or indemnity. They will always have two years to bring their claim once they know or ought to know of it. They may be in a position where they must issue a third party notice before a plaintiff names the proposed third party as a defendant, but they will never be in a position of having less than two years from knowledge of the claim to bring that claim.
- [42] Mr. Mohammad argues this would make s. 16(a) superfluous because a limitation period will always start to run from the date of knowledge rather than the date a pleading is served, but this is not correct. A defendant may know they have a potential claim for a contribution or indemnity against another person before any action is filed against that defendant. For example, a defendant might know immediately after an accident that a mechanic could be responsible for faulty brakes on the defendant's vehicle. However, s. 16(a) gives that defendant two years from service of the pleading to file a claim for contribution or indemnity against that mechanic. Were it not for s. 16(a), the limitation period could expire much earlier.
- [43] While, I would have been inclined to accept Mr. Polyakov's submission and allow the appeal, I consider myself bound by the decisions in *Sohal* and 0782484 B.C. Ltd. and the doctrine of stare decisis compels me to follow them. I acknowledge that Grauer J.A.'s comments in para. 111 of *Sohal* appear to be obiter in that he was answering a hypothetical "anomaly" put forward by counsel for the appellant, but it is dicta that was intended to address a substantial point raised in the appeal. Regardless, Grauer J.A. found at para. 30 that service

of the amended notice of civil claim, which identified the driver's employer as a defendant, is what started time running under s. 16 of the Act, not the original notice of civil claim. That conclusion is not obiter.

- [44] Further, Grauer J.A.'s dicta at para. 111 has now been followed in 0782484 B.C. Ltd., and I consider myself bound the principle of horizontal stare decisis to follow that case. The authority of 0782484 B.C. Ltd. has not been undermined by subsequent decisions of a higher court, there is no binding authority that was not considered in that case, and there were no exigencies that required an immediate decision without the opportunity to fully consult authority: *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 at 592 (B.C.S.C.). Nor is 0782484 B.C. Ltd. a single isolated decision of this court or clearly wrong: Scott Kewin, "Stare Decisis in the B.C. Supreme Court: Revisiting Hansard Spruce Mills" (2004) 62:4 Advocate 541 at 545-546. Indeed it follows authority from the B.C. Court of Appeal.
- [45] Thus, while I am inclined to agree with Mr. Polyakov's submissions, I consider myself bound to follow these two authorities and I must therefore dismiss the appeal.
- [46] Given the unique circumstances of this case, I would order that the parties bear their own costs.

"Kirchner J."

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