

CITATION: Joseph v. Paramount Canada's Wonderland, 2008 ONCA 469

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COURT OF APPEAL FOR ONTARIO

FELDMAN, MACFARLAND and WATT JJ.A.

BETWEEN:

INNEZ JOSEPH

Plaintiff (Respondent)

and

PARAMOUNT CANADA'S WONDERLAND

Defendant (Appellant)

Todd J. McCarthy and Colleen E. Arsenault for the appellant

Tony Afecto for the respondent

Heard: February 7, 2008

On appeal from the judgment of Justice Gerald F. Day of the Superior Court of Justice, dated August 28, 2007, with reasons reported at 87 O.R. (3d) 473.

**FELDMAN J.A.:**

[1] This case, released concurrently with this court's decision in *Meady v. Greyhound Canada Transportation Corporation*, deals with the application of the special circumstances doctrine under the new *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B (the "new Act").

[2] Through inadvertence, plaintiff's counsel failed to issue a statement of claim within the limitation period provided under the new Act. On a motion to determine as a question of law whether the claim was statute-barred, the motion judge applied the

common law doctrine of special circumstances, and to exercise his discretion to extend the limitation period. The issue raised by this appeal is whether that doctrine continues to apply under the new Act.

## FACTS

[3] The facts of this case are relatively simple. The claim arose out of an incident in which the plaintiff suffered injuries at the defendant amusement park on September 5, 2004. There was no dispute that the new Act applied to this claim, and that the claim was discovered the day the injury occurred. As a result, the two-year limitation period prescribed by the new Act began running on September 5, 2004. The defendant was notified of the claim on September 24, 2004, and obtained both a written statement from the plaintiff as well as substantial medical documentation concerning the injuries, long before the second anniversary of the incident.

[4] The plaintiff's lawyer used a tickler system to record upcoming limitation periods and correctly diarized this action. The lawyer drafted the claim and left instructions for his assistant to have the claim issued before September 5, 2006. The assistant was away on vacation the week of September 4, 2006. The lawyer believed the claim had been issued, but the assistant, believing the six-year limitation period prescribed by the former *Limitations Act*, R.S.O. 1990, c. L.15 (the "former Act"), continued to apply, did not issue the claim before going on vacation.

[5] When the lawyer later learned of the error, he forwarded the draft claim to the defendant on October 31, 2006 and issued the claim the same day. He advised the defendant on November 2, 2006 that, through inadvertence, the claim had not been issued until October 31, 2006. A copy of the issued claim was sent to the defendant on November 28, 2006 and formally served on January 30, 2007.

[6] The defendant moved under rule 21.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to determine, as a question of law, whether the action was statute barred. The motion judge concluded that the action was barred by the two-year limitation period provided by s. 4 of the new Act. Although this was not a situation where an action had been commenced in time and the plaintiff was seeking to add another cause of action or party, the motion judge followed a recent line of cases in the Superior Court<sup>1</sup> and held that he had a discretion under the doctrine of special circumstances to extend the time to commence an action where no action had been commenced within the limitation period. The motion judge found that special circumstances existed where there was inadvertence on the part of the plaintiff's lawyer and no prejudice to the defendant.

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<sup>1</sup> These cases are: *St Denis v. TD Insurance Home and Auto liberty Insurance Co of Canada* (2005), 80 O.R. (3d) 76 (S.C.J.); *Doyley v. York Condominium Corp. No. 487* (2006), 82 O.R. (3d) 629 (S.C.J.); *Munshaw v. Economical Mutual Insurance Co.* (2007), 84 O.R. (3d) 785 (S.C.J.).

## ISSUE

[7] The issue raised by this appeal is whether courts continue to have a discretion under the new Act to extend a limitation period and allow a claim to be commenced after the period has expired by applying the doctrine of special circumstances.

## ANALYSIS

### *The New Act*

[8] The new Act came into effect on January 1, 2004. It represents a revised, comprehensive approach to the limitation of actions. As Weiler J. A. stated in *York Condominium Corp. No. 382 v. Jay-M Holdings Ltd.* (2007), 84 O.R. (3d) 414 at para. 2 (C.A.), the aim of the new Act is “to balance the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs.” The new Act introduced several important reforms in order to maintain that balance. For example, it protects the right to sue by incorporating the common law doctrine of discoverability into the process for determining the commencement date of the relevant limitation period. It creates greater certainty by consolidating limitation periods. Section 19 eliminates limitation periods contained in other statutes, except those specifically referred to in the new Act or the Schedule to it. It also sets out a list of claims to which no limitation period applies in s. 16. For all other claims, the new act establishes a basic two-year limitation period and an ultimate limitation period of 15 years, subject to certain adjustments. Section 4 establishes the basic limitation period as follows:

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[9] In accordance with s. 4, the basic limitation period is subject to some suspensions and extensions that are specified in the Act. For example, ss. 6 and 7 suspend the running of the basic limitation period against an unrepresented minor or incapable person. It is also subject to suspension or extension by other statutes under s. 20, which provides:

20. This Act does not affect the extension, suspension or other variation of a limitation period or other time limit by or under another Act.

### *The Special Circumstances Doctrine*

[10] The special circumstances doctrine originated in Canadian jurisprudence in *Basarsky v. Quinlan*, [1972] S.C.R. 380. In that case, the plaintiff brought a claim within the applicable limitation period, but later sought to add a new claim after the period had

expired. The Supreme Court adopted the rule in *Weldon v. Neal* (1887), 19 Q.B.D. 394, that an amendment cannot be made that would prejudice the other party by taking away the existing right of the time bar, except in peculiar or special circumstances that warrant the amendment. The Supreme Court concluded that the defendant was not prejudiced and exercised its power to allow the amendment on the basis of special circumstances.

[11] This common law doctrine gradually came to be applied to motions brought under Rule 26 and Rule 5 of the *Rules of Civil Procedure* to amend pleadings or add parties after the expiry of a limitation period. The relevant subsections of these rules read as follows:

5.04(2) At any stage of a proceeding the court may by order add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

26.01 On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

[12] Neither of these rules refers specifically to the expiry of a limitation period or to the doctrine of special circumstances. However, following the line of cases that began with *Basarsky v. Quinlan*, these rules have been interpreted to allow a court to add or substitute a party or to add a cause of action after the expiry of a limitation period where special circumstances exist, unless the change would cause prejudice that could not be compensated for with either costs or an adjournment: see e.g. *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768 (C.A.).

#### *Application of Special Circumstances under the New Act*

[13] The question to be answered now is whether the legislature intended to preserve the court's common law discretion to extend limitation periods under the new Act by applying the doctrine of special circumstances. As a matter of statutory interpretation, I have concluded that the answer must be no.

[14] The motion judge in this case did not refer to s. 20 of the new Act, but instead, relied on the special circumstances doctrine developed at common law and applied under Rule 26.01 and Rule 5.04(2). In fairness to the motion judge, the parties did not address the effect of the new Act on the special circumstances doctrine and appeared to assume that it was applicable. Instead, the parties focussed on whether the doctrine could be

applied to relieve against the expiry of a limitation period where no action had been commenced in time, in contrast to cases where a new claim or a new party is sought to be added to an existing action that was commenced in time.

[15] Because s. 4 of the new Act mandates a two-year limitation period “[u]nless this Act provides otherwise”, the court must look in the Act for the authority to derogate from the application of the two-year limitation period. These opening words compel the conclusion that the new Act is intended to be comprehensive.

[16] No specific provision in the new Act refers to the doctrine of special circumstances, or specifically allows a court to extend or suspend the running of the limitation period based on special circumstances. To the contrary, s. 21 of the Act precludes the addition of parties to an existing action after the expiry of a limitation period. The late addition of parties to an existing action was one of the main situations where the doctrine of special circumstances was traditionally applied at common law and under Rule 5.04(2).

[17] Section 20, however, preserves the extension, suspension or other variation of a limitation period “by or under another Act.” The question that therefore arises is whether the special circumstances doctrine that courts have applied at common law and in conjunction with the *Rules of Civil Procedure* constitutes “the extension, suspension or other variation of a limitation period or other time limit *by or under another Act.*” [Emphasis added.]

[18] This court recently considered the interpretation and effect of s. 20 in *Guillemette v. Doucet* (2007), 88 O.R. (3d) 90, a case that involved the assessment of a solicitor’s account under the *Solicitors Act*, R.S.O. 1990, c. S.15. Section 4 of the *Solicitors Act* provides that a client cannot refer an account for assessment more than 12 months after the account was delivered, “except under special circumstances to be proved to the satisfaction of the court”. This provision was not altered or repealed by the new Act. The client applied to assess the solicitor’s accounts more than 33 months after the last account was paid. However, the application judge allowed the account to be referred for assessment based on the special circumstances exception contained in s. 4.

[19] After noting that any limitation periods in the *Solicitors Act* no longer applied by virtue of s. 19 of the new Act, Doherty J.A. explained the effect of s. 20 at paras. 25-33 as follows:

Section 20 retains in force any “extension, suspension or other variation” of a limitation period found in another statute even if the limitation period in that statute is itself no longer applicable to the claim by virtue of s. 19(1) of the *Limitations Act*. ...

Section 20 of the *Limitations Act* places a further qualification on the application of the limitations periods set out in the Act. Section 20 provides that nothing in the *Limitations Act* will affect a provision in another act which extends, suspends or otherwise varies the limitation period found in another Act. Section 20 recognizes that individual statutes may provide for situations or conditions in which the limitation provisions in those statutes should be extended or modified. Those provisions may well be particularly apt for the limitation period addressed in that specific statute. The *Limitations Act* does not seek to standardize the circumstances in which limitation periods can be extended, suspended or otherwise varied by statute.

I think the “special circumstance” qualifier in s. 4 of the Solicitors Act falls within s. 20 of the Limitations Act. The twelve month time period in s. 4 has repeatedly been described as a limitation period: see e.g. *Enterprise Rent-a-Car Co. v. Shapiro, Andrews, Finlayson* [(1998), 38 O.R. (3d) 257 (C.A.)] at 260-61. Where “special circumstances” exist, the court will order an assessment beyond twelve months after delivery of the account, thereby effectively extending, suspending or otherwise varying the twelve month time limit set out in s. 4.

Consequently, while by virtue of s. 19 of the *Limitations Act*, the two year limitation period in that Act trumps the twelve month limitation period in s. 4, s. 20 of the *Limitations Act* preserves the “special circumstances” exception set out in s. 4 of the *Solicitors Act*.

[20] Doherty J.A. acknowledged that the effect of his interpretation of the interaction of the two acts in accordance with ss. 19 and 20 of the new Act was that there is no absolute time bar against the assessment of solicitors’ accounts, and that that result may seem inconsistent with the purpose of the new Act, which is to provide certainty in the area of limitations. However, he justified that inconsistency on the basis that solicitors’ accounts have always been treated differently from other debts or professional accounts, including

the fact that the Superior Court has inherent jurisdiction to review those accounts without any time restrictions.<sup>2</sup>

[21] Turning to the interpretation of s. 20 in the context of the common law doctrine of special circumstances, the requirement in s. 20 that the extension must be “by or under another Act” clearly precludes any extension that may be granted at common law as opposed to statute.

[22] However, the extension need not be provided only “by” an Act but can also be provided “under” an Act. The *Rules of Civil Procedure* are enacted by the Civil Rules Committee under the authority of s. 66 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. Although the Rules are permitted to alter the substantive law in matters relating to practice and procedure, s. 66(3) provides that the Rules may not conflict with an Act.

[23] In accordance with s. 66(3), rules 5.04 and 26.01 must not conflict with the new Act, or with the former Act. These rules apply to the amendment of pleadings and the addition of parties at any stage of proceedings. They do not by their terms apply to extend the statutory limitation periods provided in the new Act, nor could they. But they have been used for that purpose through the application of the common law doctrine of special circumstances.

[24] Because the Rules themselves are authorized to be made by the *Courts of Justice Act*, they are arguably made “under another Act”. However, it is only the interpretation of the Rules by application of the common law that has incorporated the doctrine of special circumstances to extend limitation periods by adding parties or claims after the expiry of a limitation period. The Rules themselves do not do this. In my view, it would be extending the meaning of “under another Act” too far to interpret it as including the application of common law principles used to apply the Rules, even though the Rules themselves are made by regulation “under another Act”.

[25] I am reinforced in my view by s. 21 of the new Act, which specifically prohibits the addition of parties to an existing action after the expiry of the limitation period. Section 20 would conflict with s. 21 if it were interpreted to extend to the incorporation of the common law special circumstances doctrine, thereby allowing the possible addition of parties after the expiry of the limitation period where special circumstances exist, in conflict with s. 21.

[26] This interpretation is also responsive to the concern raised by Doherty J.A. in *Guillemette* that interpreting the new Act to always allow for the possibility of extensions

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<sup>2</sup> In contrast to *Guillemette*, in *Iroquois Falls Power Corp. v. Jacobs Canada Inc.*, 2008 ONCA 320, the statutory provision in the *Professional Engineers’ Act* that contained the limitation period and that permitted the discretionary extension of the limitation period was repealed by the new Act, thereby removing any statutory extension provision for s. 20 to operate on.

in special circumstances would effectively remove the time bar for adding claims after the expiry of the limitation period. Doherty J.A. addressed this concern in the context of that case by pointing to the unique and special nature of solicitors' accounts. However, if s. 20 were interpreted to include the extension of limitation periods generally by the common law doctrine of special circumstances under the Rules, the effect would be contrary to the purpose of the new Act by removing the certainty of its limitation scheme. Instead, we would continue with the procedure that developed under the former Act where courts were asked to consider in detail the actions of solicitors who missed limitation periods by neglecting to add parties or claims, and to assess in each case whether there should be relief. Because an extension is a matter of discretion, there was always uncertainty and the perception of a degree of unfairness in the application of limitation periods. In my view, to the extent that there may be any ambiguity in s. 20, it should be interpreted in a manner that addresses these concerns and implements the purpose of the new Act.

## CONCLUSION

[27] I conclude that s. 20 does not refer to the extension of a limitation period under the new Act through the application of the common law doctrine of special circumstances to the *Rules of Civil Procedure*. Rules 5.04(2) and 26.01 must now be applied giving effect to the new Act.

[28] In that regard, I add for the sake of completeness that the decision of the motion judge, which followed a line of cases in the Superior Court where extensions were granted that did not involve any amendment of or addition to an existing action, was an error of law even had the doctrine of special circumstances applied. Both the common law doctrine from *Basarsky v. Quinlan* and the *Rules of Civil Procedure* contemplate only the power to amend or add a claim or party to an existing action. They did not give the court the authority to allow an action to be commenced after the expiry of a limitation period.

[29] For these reasons, I would allow the appeal and make an order declaring the action statute barred, with costs of the motion and of the appeal to the appellant, fixed in the amount of \$5,000, inclusive of G.S.T. and disbursements.

Signed: "K. Feldman J.A."  
"I agree J. MacFarland J.A."  
"I agree David Watt J.A."

RELEASED: "KNF" June 12, 2008