Federal Court  Cour fédérale

Date: 20210925

Docket: T-787-07

Citation: 2012 FC 1123

Ottawa, Ontario, September 25, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

PAUL DAVID REASHORE,
FPS 971207D

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

REASONS FOR ORDER AND ORDER

Background

[1] The relevant and material facts in this case are undisputed. The plaintiff is currently incarcerated at the Dorchester Penitentiary in New Brunswick. On March 23, 2001, while incarcerated at the Atlantic Institution in Renous, New Brunswick, the plaintiff was wounded during an altercation with another inmate. He suffered stab wounds to the face and back inflicted by the other inmate's handmade knife. He was looked after at the health care unit of the Atlantic Institution in Renous. While awaiting transfer to the Miramichi Regional Hospital, he exhibited symptoms that

were later determined to evidence a stroke. After experiencing the stroke symptoms, the plaintiff was transferred by ambulance to the Miramichi Regional Hospital, and then to the Moncton Hospital on the same day. He remained hospitalized until June 18, 2001 (Plaintiff's motion record, p 2). The stroke caused a paralysis to the plaintiff's right side, although his condition has since improved.

[2] The plaintiff requested his medical records from the Moncton Hospital on January 14, 2003, and received them on February 5, 2003. The plaintiff decided to sue for negligence, alleging the prison staff's shortcomings in preventing the altercation and in his care afterwards. The plaintiff's Statement of Claim was filed on May 9, 2007.

The Motion

[3] Pursuant to the present motion, the defendant seeks from the Court an order for summary judgment dismissing the plaintiff's entire claim on the basis that the claim was commenced beyond the statutorily permitted time limitation. The defendant submits that, as a result, there is no genuine issue for trial as per Rule 215 of the *Federal Courts Rules*, SOR/98-106 [Rules].

Issue

[4] The main issue raised by the defendant's motion is the following: Is the plaintiff's claim statute-barred?

Legislative Framework

[5] The applicable six (6) year statutory limitation period is not in dispute in the present case. Subsection 39(1) of the *Federal Courts Act*, RSC 1985, c F-7, states as follows:

SUBSTANTIVE PROVISIONS	DISPOSITIONS DE FOND
…	[…]
Prescription and limitation on proceedings	Prescription – Fait survenu dans une province
39. (1) Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.	**39.** (1) Sauf disposition contraire d'une autre loi, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale dont le fait générateur est survenu dans cette province.
…	[…]

[6] Section 32 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50, states the following:

PRESCRIPTION AND LIMITATION	PRESCRIPTION
Provincial laws applicable	Règles applicables
32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of any cause of action arising in that province, and proceedings by or	**32.** Sauf disposition contraire de la présente loi ou de toute autre loi fédérale, les règles de droit en matière de prescription qui, dans une province, régissent les rapports entre particuliers s'appliquent lors des poursuites auxquelles l'État est partie pour tout fait générateur survenu dans la province. Lorsque ce dernier

against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.	survient ailleurs que dans une province, la procédure se prescrit par six ans.

[7] The provincial legislation enacted at the relevant time was section 9 of the *Limitation of Actions Act*, RSNB 1973, c L-8 (the *Limitation of Actions Act*), as repealed by SNB 2009, c L-8.5:

PART I	PARTIE I
LIMITATION PERIODS	DÉLAIS DE PRESCRIPTION
…	[…]
9. No other action shall be commenced but within six years after the cause of action arose.	**9.** Toute autre action se prescrit par six ans à compter de la naissance de la cause d'action.

Arguments

[8] The defendant submits that the plaintiff's claim is statute-barred because the cause of action arose at the latest on March 25, 2001, when the plaintiff became alert in hospital and knew he had been wounded by a knife and was partially paralyzed. At that time, he would have been aware of the damage sustained and would have had the material facts necessary to give rise to a cause of action in negligence, giving him until March 26, 2007 to file his lawsuit pursuant to section 9 of the *Limitation of Actions Act*. Because the Statement of Claim was filed on May 9, 2007, the defendant argues that the plaintiff's claim is out of time.

[9] The defendant further argues that the discoverability principle applies only to the facts, not the law, and the question of whether or not the plaintiff understood the legal ramifications of his

injuries are irrelevant (citing *Ermineskin Indian Band and Nations v Canada*, 2006 FCA 415 at paras 333-34, [2007] 3 FCR 245).

[10] In response, the plaintiff maintains that prior to his discharge from the Moncton Hospital on June 18, 2001, he had been told by his doctors that the stroke he had suffered on March 23, 2001, was unrelated to the knife wounds he had also suffered that day (Plaintiff's affidavit, Plaintiff's motion record, p 12) – in other words, he would have suffered a stroke whether or not he had been stabbed.

[11] The plaintiff submits that it is not until he received his entire medical record in February 2003 that he became aware that there was a possible causal link between the knife wounds and his stroke. He submits that on March 25, 2001, he was not aware of a possible causal relationship between the stroke he had suffered and the defendant's alleged negligence. The plaintiff contends that only upon reviewing his entire medical record did he have all the material facts giving rise to a cause of action in negligence. He submits that at the earliest point as of which he could reasonably be expected to have known the material facts giving rise to a cause of action was upon his dismissal from the Moncton Hospital on June 18, 2001, which would still place him within the six (6) year limitation period.

Analysis

[12] From the outset, the Court recalls that with respect to limitation periods for an action filed in the Federal Court against the Federal Crown, the law of the province where the incident occurred is to be applied (subsection 39(1) of the *Federal Courts Act*, above, and section 32 of the *Crown*

Liability and Proceedings Act, above). The Court further recalls that the burden of proving that there is no genuine issue for trial rests on the moving party, in this case the defendant.

[13] The defendant's motion raised the issue of whether the plaintiff's Statement of Claim, which was filed on May 9, 2007, is statute-barred. This issue, in turn, raises the question of when the plaintiff's cause of action arose. The plaintiff essentially argues that his cause of action arose when he became aware of the possible causal relation between the stabbing and his stroke. At hearing before this Court, the plaintiff relied heavily on *Foley v Greene* (1990), 74 DLR (4^{th}) 280, 85 Nfld & PEIR 156 [*Foley*]. However, the circumstances of the *Foley* case, which the judge labelled as an "exceptional case", are distinguishable from those of the present case.

[14] In *Foley*, above, the plaintiff's child was hit by the defendant's car. The plaintiff's child was treated and discharged for what was thought to be a minor injury. Only later the child developed a serious condition called ankylosis of the temporomandibular joint, a fusion of the jaw joint caused by facial trauma. In considering the evidence on the rareness on the onset of ankylosis, the Newfoundland Supreme Court found that the cause of action did not arise in negligence until the ankylosis was discovered. The judge explicitly mentioned that this case was not a case where a particular injury was known from the beginning but just turned out to be more serious than anticipated.

[15] For similar reasons, the case of *Thompson v Sehgal*, 2012 ONSC 3258, 2012 CarswellOnt 6821 [*Thompson*], also distinguishes itself from the present case. In *Thompson*, the plaintiff's cancer had gone into remission for a significant period of time after treatment and negligent diagnostic

procedures. During this time, Mrs. Thompson simply had no damages on which to ground a claim in negligence.

[16] However, and unlike the *Foley* case, above, the present case is not one of latent injuries given that the plaintiff's injuries were immediately apparent. Nor is this a case where the injuries suffered by the plaintiff are trivial at first and gradually develop into a serious condition. Much to the contrary, there were injuries from the outset: the plaintiff suffered stab wounds on March 23, 2001, and according to the progress/clinical notes of the Moncton Hospital between March 23, 2001 and March 27, 2001, the plaintiff became aware of his injuries on March 25, 2001 (Defendant's motion record, Affidavit of Annette Caines, Exhibit C, p 4 and pp 29- 30).

[17] With respect to the issue of discoverability, Justice Layden-Stevenson in *Horton v Canada (Attorney General)*, 2004 FC 793 at para 24, 255 FTR 145 explained the following:

> The discoverability principle was developed in the context of tort law and has been legislated in most Canadian jurisdictions in relation to limitation periods. Normally, it applies to tort victims who are incapacitated (legally or personally) during a portion of the limitation period, or who suffer harm that is not immediately apparent at the time of the tort: *K.E.G. v. G.R.* (1992), 64 B.C.L.R. (2d) 275 (S.C.). Its effect may be to extend a limitation period, but its purpose is to prevent a person, who did not or could no have known of his or her injury, from being deprived of a cause of action. Put another way, it is to temper the effect of harsh limitation periods for those who would otherwise have a legitimate cause of action.

[18] The comments of Justice Rouleau for the Ontario Court of Appeal with respect to the principle of discoverability in *Lawless v Anderson*, 2011 ONCA 102, [2011] OJ No 519 at paras 22 and 23 [*Lawless*] are apposite:

> [22] The principle of discoverability provides that "a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered, or ought to have been discovered, by the plaintiff by the exercise of reasonable diligence. This principle conforms with the generally accepted definition of the term 'cause of action' – the fact or facts which give a person a right to judicial redress or relief against another": *Aguonie v Galion Solid Waste Material Inc*. (1998), 38 O.R. (3d) 161 (C.A.), at p. 170.
>
> [23] Determining whether a person has discovered a claim is a fact-based analysis. The question to be posed is whether the prospective plaintiff knows enough facts on which to base an allegation of negligence against the defendant. If the plaintiff does, then the claim has been "discovered", and the limitation begins to run: see *Soper v. Southcott* (1998), 39 O.R. (3d) 737 (C.A.), and *McSween v. Louis* (2000), 132 O.A.C. 304 (C.A.). [Emphasis added]

[19] The Court recalls that the plaintiff claims that the defendant was negligent in ensuring his safety and providing him with proper and necessary medical care following the assault by another inmate. The Court finds that a reasonable person would have viewed the alleged negligence of the defendant leading to stab wounds by another inmate as warranting legal action against the defendant. Further, in the case at bar, the medical records were not necessary to know whether or not an action could be filed as the stabbing (a material fact on which the plaintiff's allegation is based) was well-known regardless of the medical records sought by the plaintiff eighteen (18) months later (*Soper v Southcott* (1998), 39 OR (3d) 737, 111 OAC 339 (ONCA), *Lawless*, above, at para 36).

[20] The Court cannot accept the plaintiff's position as it would amount to accepting that, despite having been stabbed by an inmate, the plaintiff would not have had a cause of action prior to receiving the medical records and suspecting a causal link between the stab wounds and the stroke. Yet, the stabbing resulted in immediate injuries, and the plaintiff "discovered" these injuries on

March 25, 2001, when he became alert in hospital and realized he had been wounded and was partially paralyzed. Given the injuries suffered by the plaintiff as of the stabbing, the Court cannot accept that the plaintiff only acquired sufficient knowledge to base his claim upon receipt of the medical records. Thus, in the present case, the medical records were not required given the plaintiff's knowledge of the material facts.

[21] As Justice Major of the Supreme Court of Canada stated in *Peixeiro v Haberman*, [1997] 3 SCR 549 at para 18, 151 DLR (4th) 429:

> It was conceded that at common law ignorance of or mistake as to the extent of damages does not delay time under a limitation period. The authorities are clear that the exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor, the cause of action has accrued. Neither the extent of damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.
>
> [Citations omitted; Emphasis added]

[22] In the present case, although the plaintiff might not have known the full extent of his injuries on March 25, 2001 – namely, that the stroke and its consequences might also possibly constitute injuries flowing from the stabbing – he undoubtedly knew that "some damage" had occurred and had identified the alleged tortfeasor; therefore, the cause of action arose at that time and the grounding for the cause of action against the defendant was known as of March 25, 2001 (*Gratton v Shaw*, [2010] ABQB 299, [2010] AJ No 514 (QL)).

[23] On the issue of the date of filing, the evidence demonstrates that the plaintiff's Statement of Claim was sent to the Department of Justice Canada, not the Federal Court. The envelope is marked

"Received" by the Department of Justice Canada stamp dated March 27, 2007. A letter was sent to the plaintiff by the Registry Officer of the Federal Court on March 30, 2007 acknowledging receipt of his Statement of Claim and a cheque in the amount of $100.00 for the filing fee instead of $2.00. Accordingly, the plaintiff's Statement of Claim was received by the Federal Court between March 27, 2001 and March 30, 2001. The Registry Officer returned the cheque in the amount of $100.00 and asked the plaintiff to send another cheque in the correct amount of $2.00. In the meantime, the Registry Officer retained the Statement of Claim unfiled until receipt of the appropriate filing fee – i.e. on May 9, 2007. The plaintiff's argument that the Registry Officer should have referred the statement of claim without delay to a judge or prothonotary pursuant to Rule 72 of the *Federal Courts Rules* is of no material consequence in the case at bar.

[24] A motion for summary judgment will be granted only if the Court is satisfied that there is no genuine issue for trial (Rule 215(1) and *Guccio Gucci SpA v Mazzei*, 2012 FC 404, 101 CPR (4th) 219 [*Guccio Gucci*]). In this case, the Court is satisfied that, given its finding that the claim is statute-barred, there is no genuine issue for trial with respect to the claim of defence. Indeed, the issues are well-defined; the facts are clearly set out in the evidence and are undisputed; the evidence is not controversial and there are no issues as to credibility; the question of law raised in this case – i.e., the plaintiff's filing of his action on time – is a matter that can be dealt with as easily now as it could be after a full trial (*Guccio Gucci*, above).

[25] There is no discretion for the Court to extend the six (6) year limitation period enacted by Parliament or a legislature.

[26] In conclusion, the Court agrees with the defendant that the plaintiff's cause of action arose on March 25, 2001 and the plaintiff's Statement of Claim had to be filed at the latest on March 26, 2007. Based on the evidence, the plaintiff's claim was filed on May 9, 2007 – i.e. more than (6) six years after the cause of action arose. It is therefore statute-barred.

ORDER

THIS COURT ORDERS that

1. The summary judgment be granted;

2. The plaintiff's Statement of Claim in this matter be dismissed on the basis that the claim was filed beyond the statutory time limitation and is thus statute-barred;

3. With costs.

"Richard Boivin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-787-07
STYLE OF CAUSE:	Paul David Reashore v Her Majesty the Queen
PLACE OF HEARING:	Fredericton, New Brunswick
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