Alberta Court of Queen's Bench
Wyant v. St. Arnault
Date: 1985-03-07

D. Reay, for third party.

(Grande Prairie No. 29722)

March 7, 1985.

[1] VEIT J.:— This is an appeal from the order of the master, entered 21st January 1985, in which the plaintiffs were given leave to take the next step in this action. Written reasons were issued by the master on 7th December 1984. The issue before the master, and the issue before me, is whether the defendant will be seriously prejudiced by the delay in bringing the action on for trial.

[2] With great respect, I disagree with the position taken by the master and am of the view that the defendant is seriously prejudiced by the delay and that the policy basis for the limitation period applicable here and for the rule requiring prompt action should be recognized. The appeal is allowed; the plaintiffs are denied leave to take the next step.

[3] There is a preliminary procedural issue which first arose. The plaintiffs indicated that the defendant was out of time in appealing the master's order as there was no compliance with R. 500. As earlier indicated, the master's order was entered on 21st January 1985; the notice of appeal was filed on 11th February 1985, returnable 4th March. On 4th March the motion was adjourned, by counsel, to today, 7th March. The appellants acknowledged that they had not complied with the requirements of R. 500 and asked for leave to amend their notice of appeal to request the enlargement of the time for serving the notice and making it returnable. The plaintiffs-respondent said they had no objection to an enlargement of the time if the defendant throughout had the intention to appeal or at least had the intention of appealing during the time established by R. 500; otherwise, the plaintiffs-respondent objected to an enlargement of the time for appeal.

[4] An enlargement of the time is granted. The deviation from the time limit set out in R. 500 is so slight and, as the prejudice is non-existent, there does not appear to be any good reason not to enlarge the time for appeal. The applicable jurisprudence can be found in connection with the interpretation of RR. 11, 243 and 244. A review of that jurisprudence indicates, as might be expected, that the facts are crucial to the decision in each case.

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[5] In this case, the cause of action is based on a motor vehicle accident which occurred in May 1973. The action was commenced in January 1974; a statement of defence was filed in February 1974. The plaintiff and the defendant were examined on discovery. The third party was ordered added in 1977. Nothing happened on the file from early 1978 to the plaintiff's application before the master on 11th June 1984. The master's reasons set out the cause for this lengthy delay: inexcusable conduct by a solicitor or solicitors in prosecuting the action. Among other evidence, the master sets out that after the final examination in early 1978, the plaintiff indicated that on a great many occasions (a half dozen times a year) until her solicitor left practice, i.e., from 1978 to 1980 or 1981, she asked her solicitor how the file was progressing and was consistently advised that it was proceeding normally.

[6] The master found that the reason for the lack of action on the file was that the solicitor was not doing anything. At p. 9 of his reasons, he states that the delay is 5 years and 8 months — or the period between January 1978 and August 1983 — which is undoubtedly a reference to August 1984. This is the first issue on which I disagree with the master. As has been pointed out on many occasions, it is appropriate to consider the total lapse of time and not only the lapse of time since the last step was taken: *Sweeney v. Sir Robert McAlpine & Sons Ltd.,* [1974] 1 W.L.R. 200, [1974] 1 All E.R. 474 (C.A.); *Fitzpatrick v. Batger & Co.,* [1967] 1 W.L.R. 706, [1967] 2 All E.R. 657 (C.A.). In the latter case, the English Court of Appeal was dealing with an application for dismissal for want of prosecution where the accident happened in 1961, the writ issued in 1963, negotiations for settlement occurred in February and March 1965, when negotiations ended, and in 1967 attempts were made to revive the action. Lord Denning M.R. (the same Lord Denning M.R. who was a member of the panel in *Allen v. McAlpine* and subsequently *Sweeney v. McAlpine* on which so much reliance has been placed in Canadian courts) said the following at p. 658:

> Just consider the times here. The accident was on Dec. 13, 1961. If we allowed this case to be set down now, it would not come on for trial until the end of this year [1967]. That would be some *six* years after the accident. It is impossible to have a fair trial after so long a time. [The italics are mine.]

It might be noted that Lord Denning M.R.'s comments can be read in the light of *Allen v. Sir Alfred McAlpine & Sons Ltd.; Bostic v. Bermondsey & Southwark Group Hosp. Mgmt. Committee; Sternberg v. Hammond,* [1968] 2 Q.B. 229, [1968] 2 W.L.R. 366, [1968] 1 All E.R. 543 (C.A.), and *Sweeney v. McAlpine,* supra, that a personal injury case is dependent on the infirmities of recollection and that in such cases an inference of serious prejudice to

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the defendant can be made out by the delay itself. It is also noteworthy that in the *Fitzpatrick* case from which the quote was taken the delay was entirely due, as here, to a solicitor's fault.

[7] In certain cases where the plaintiff was allowed to continue under one or the other rule, the delay involved was short, and the reasons for judgment — in those cases — should be read with that in mind. For example, in the case of *Miller v. Jones* (1962), 38 W.W.R. 237 (Alta. T.D.), Riley J. allowed a renewal where the statement of claim had been issued in October 1957 and renewed for three months in October 1958. An application for further renewal was made in *April 1959.* In *Marshall v. Fire Ins. Co. of Can.,* 71 W.W.R. 647, [1970] I.L.R. 1-322 (Alta. C.A.), leave to take the next step was granted where a statement of claim issued in March 1965, the last step was taken in April 1966, and the application to take the next step was made in April 1968. In *Lepofsky v. Continental Can. Co.* (1973), 1 O.R. (2d) 569 (H.C.), Goodman J. refused to dismiss a claim for want of prosecution made in July 1973 when the writ issued in 1968, a statement of claim issued in 1969, a statement of defence was filed in 1969 and the limitation period expired in June 1973. He stated that there was no undue delay after the period when the limitation period had passed such as to give rise to a presumption of prejudice.

[8] It is admitted that in this case the limitation has expired. The plaintiff could not now issue a new statement of claim. Although counsel for the respondent is of the view that this is not a pertinent fact, I am of the view that the jurisprudence weighs heavily against his position. In *Cook v. Szott* (1968), 65 W.W.R. 362, 68 D.L.R. (2d) 723 (Alta. C.A.), and in the seminal series of English cases in which Lord Denning was involved, it is indicated that while the rules give the court the power to prevent a statute of limitations from arbitrarily defeating a claim, the courts should recognize that in setting a limitation, in this case one of two years, the legislature is alerting the court that a case outside those limits is likely to be one that may result in substantial prejudice to the defendant, to use the words of Culliton C.J.S., quoted even in the dissenting judgment in *Cook v. Szott.* Speaking for the majority in that case, McDermid J.A. stated that legislated limitations manifested an intention that litigation should not be unduly delayed and, as the discretion to give the plaintiff leave to act outside the limitations would be running counter to that policy declared in the statute and in the rules, the power must be used sparingly.

[9] Conversely, a large number of cases have held that where the plaintiff applies for leave to take the next step and the plaintiff is still within the limitation period, even an extended limitation period, the court should be slow to refuse or to strike out for want of

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prosecution since the plaintiff can merely begin again: *Instrumatic Ltd. v. Supabrase Ltd.,* [1969] 1 W.L.R. 519, [1969] 2 All E.R. 131 (C.A.); *Tolley v. Morris,* [1979] 1 W.L.R. 592, [1979] 2 All E.R. 561 (H.L.) — which was a divided court because of the greatly extended limitation period.

[10] The master has concluded that it is not realistic to assume that the plaintiff can sue her counsel: p. 10 of his reasons. It appears that this is one major factor in his decision. With great respect, I disagree with him on this position. Even the majority judgment in *Tiesmaki v. Wilson,* [1972] 2 W.W.R. 214, 23 D.L.R. (3d) 179 (Alta. C.A.), quotes extensively and with approval from the English Court of Appeal decision in *Allen v. McAlpine,* supra. I have outlined above the development by the English Court of Appeal of the "Allen" rules in subsequent cases. In my view, the whole series of cases must be examined — up to and including *Biss v. Lambeth, Southwark and Lewisham Area Health Authority,* [1978] 1 W.L.R. 382, [1978] 2 All E.R. 125 (C.A.). Second, in that case (I refer to *Allen v. McAlpine)* Salmon L.J. and Diplock L.J. both stated that where the inordinate, inexcusable delay, as in this case, was caused by a solicitor, as in this case, and where the solicitor and his insurers are good for the damages, there is no reason why the action should not be dismissed, as would normally be the case, and leave the plaintiff to sue the solicitor. It will be remembered that in *Tiesmaki* itself the reasons issued in December 1971, approximately two years after the requirements of the law society concerning insurance of practitioners had come into effect — and that the action in that case arose in 1960 when there was no requirement on a practitioner to have negligence insurance and that the same situation prevailed in November 1964 when the last step was taken. The *Tiesmaki* majority did not specifically state that the onus was on the defendant to show that the plaintiff's solicitor was impecunious or not negligent, but it did allow the plaintiff to proceed. I am of the view that if the Court of Appeal had specifically considered the onus with respect to this issue, it would have held that because of the option of suing the solicitor, as mentioned in *Allen v. McAlpine* and *Fitzpatrick v. Batger,* the out of time applicant, otherwise statute-barred, had the onus of proving or establishing that a claim against the solicitor would not be viable. If the solicitor who was responsible for the 12 or 13 year delay in this case were the solicitor applying for leave to take the next step, would it be reasonable to require the defendant to show that the applying solicitor was impecunious? Does the principle change merely because, as in this case, the plaintiff has retained a new solicitor? Does not the reasoning of the master in *Potter v. Rozgo* (1982), 39 A.R. 509, apply to the plaintiff here? The *Tiesmaki* case and the English authorities referred to therein referred only to the impecuniosity of the negligent solicitor. The master

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referred also to the added burden on the plaintiff of making out two causes of action. Here again, I disagree with the master. First, on the facts as outlined in his reasons, there appears to be a reasonable basis for a cause of action based in negligence. Second, as the English authorities indicate, if negligence is shown, the burden is then on the solicitor to disprove the claim under the motor vehicle cause of action.

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[11] Finally, the master indicates that the defendant has not proved prejudice. Here again, I respectfully disagree. First, there is the impressive line of authority to the effect that in accident cases the mere passage of a long period of time will be presumed to have caused substantial prejudice to the defendant. The English cases say that specific prejudice can sometimes be directly proved. Second, therefore, is the fact that the defendant has shown that it is directly prejudiced by the delay. It cannot find the passenger Savard. As the learned authors of Stevenson & Cote's Annotated Rules of Court point out, it would be Kafkaesque to require the defendant to find the missing witness to prove that he is favourable to their position before agreeing with the defendant that the fact that the witness is missing is prejudicial to the defendant's case! Third, there is English authority to the effect that increased prejudice beyond the period of the plaintiff's delay is not necessary: *Biss v. Lambeth, etc., Health Authority,* supra, at p. 130. Fourth, while the master and the respondent here state that there was an onus on the defendant to do something actively to maintain his defence for 13 years, I can find no authority for such a proposition. This is not a case of a counterclaim, where the situation might be different. Although the House of Lords did speak of the possibility of the defendant to take action to dismiss, it did so in the context of an accident which happened to a 2 year old and of a rule which extended the limitation to the child's majority: *Tolley v. Morris,* supra. The much more usual situation, and the one which applies here, was referred to by Salmon L.J. in the *Fitzpatrick* case as follows at p. 659:

> [The defendants] no doubt, however, were relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves; whereas, if they were to take out a summons to dismiss the action, they would merely be waking the dog up for the purpose of killing it at great expense which they would have no chance of recovering. I am not surprised that they did not apply earlier, and I do not think that the plaintiff's advisers should be allowed to derive any advantage from that fact.

Fifth, there was evidence led by the defendant of the very type of evidence mentioned in the authorities such as *Knol v. Thompson* (1980), 119 D.L.R. (3d) 628, 27 A.R. 158 (C.A.); there is an affidavit stating that blood samples and police records have been destroyed.

The defendant requested leave to file an additional affidavit concerning these two matters; I have concluded that in the circumstances it is not necessary for it to do so, although I would have given leave to do so, and an adjournment to the plaintiff to consider this additional material, if I had not considered the defendant's position to be so strong on the existing material.

[12] I note that I have not had access to the 1981 decision of our Court of Appeal in *Miller v. Duwars,* Edmonton Appeal No. 14237, at the library here in Grande Prairie; Stevenson & Cote's supplement indicate that it is still unreported.

[13] The appeal is allowed.

Appeal allowed.

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