CITATION: Lamarche v. Brown (Re), 2024 ONSC 1991
COURT FILE NO.: CV-18-7927
DATE: 2024-04-05

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Chanelle Lamarche	)	T. Lehman and H. Schmid, for the Plaintiff
Plaintiff	)	
– and –	)	
	)	
The Estate of Roger Brown and Edward J. Brown	)	S. Stringer, for the Defendants
Defendants	)	
	)	
Anthony Andreopoulos and Grillo Barristers	)	J. Van Allen
	)	
Intervenors	)	
	)	**HEARD:** March 28, 2024

DECISION ON MOTION FOR SUMMARY JUDGMENT

R.D. GORDON J.

Overview

[1] On June 20, 2013 the plaintiff was struck by a pick-up truck while walking across a street. She was 14 years old at the time. On October 25, 2018, 2 years and 73 days after her 18th birthday, this action was commenced. The defendants have brought a motion for summary judgment seeking dismissal of the action. They say it is statute-barred by the *Limitations Act, 2002.* The plaintiff's position is that the action is not statute-barred because the claim was not discoverable until after October 25, 2016.

The Applicable Law

Rule 20 Considerations

[2] Rule 20 provides that a defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. If the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

[3] In determining whether there is a genuine issue requiring a trial, I may, unless it is in the interests of justice for such powers to be exercised only at trial, weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence.

[4] When deciding whether a case requires a trial or is amenable to summary judgment, I must ask whether a full appreciation of the evidence and issues required to make a dispositive finding can be achieved by way of summary judgment, or can this full appreciation only be achieved by way of trial. This "full appreciation" test may be met in cases with limited contentious factual issues. In cases where there are a number of witnesses, potentially conflicting evidence and a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. [See *Combined Air Mechanical Services Inc. v. Felsch*, 2010 ONCA 633].

Limitations and Discoverability

[5] In the recent case of *Sanei v. Debarros*, 2024 ONCA 104, the Court of Appeal for Ontario provided a helpful summary of the general principles and statutory provisions at play in a case such as this:

> [10] The limitation period in an action for personal injuries arising out of a motor vehicle accident starts to run when the claimant knows, or reasonably ought to have known, that their injuries meet the statutory deductible and threshold of serious and permanent impairment under s. 267.5 of the *Insurance Act*: *Everding v. Skrijel*, 2010 ONCA 437, 100 O.R. (3d) 641, at paras. 9-11; *Fennell v. Deol*, 2016 ONCA 249, at para. 28.
>
> [11] Section 5 of the *Limitations Act* defines discoverability as follows:
>
> > 5(1) A claim is discovered on the earlier of,
> >
> > (a) The day on which the person with the claim first knew,
> > (i) That the injury, loss or damage had occurred,
> > (ii) That the injury, loss or damage was caused by or contributed to by an act or omission,
> > (iii) That the act or omission was that of the person against whom the claim is made, and
> > (iv) That, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

> (b) The day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause 1(a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.
>
> [12] To overcome the presumption in s. 5(2) of the *Limitations Act*, a person with a claim need only prove that they did not know of their permanent and serious impairment on the date of the accident, not that they exercised due diligence: *Fennell*, at para. 26. Where this presumption is rebutted, the limitation period begins to run on the earlier of the two dates contemplated in s. 5(1)(a) and (b): *Fennell*, at paras. 20-21. Unlike s. 5(2), s. 5(1)(b) imports that "reasonable person" standard and requires consideration of whether the claimant exercised due diligence: *Fennell*, at paras. 22-24.

[6] The threshold of "serious and permanent impairment" under s. 267.5 of the *Insurance Act* requires a viable personal injury claim from a motor vehicle accident to meet three requirements: (1) the injury must amount to a serious impairment of an important physical, mental, or psychological function; (2) the impairment must be permanent; and (3) the injury must be caused by the accident. In *Everding v. Skrijel*, 2010 ONCA 437, the Court of Appeal for Ontario held that a person is not required to commence an action before they know that they have a substantial chance to succeed in recovering a judgment for damages.

[7] Accordingly, in a claim for damages arising out of a motor vehicle accident that is subject to the statutory threshold, the claim is not discovered until there is a sufficient body of medical evidence to satisfy a court on the balance of probabilities that the plaintiff has sustained an injury that will be meet the requirements of s. 267.5 of the *Insurance Act.* [See *Zhu v. Matadar*, 2015 ONSC 178 at para. 21].

Background Facts

[8] On the day of the accident, the plaintiff was taken by ambulance to what was then the Sudbury Regional Hospital. She was discharged from hospital that same day. She did not suffer any fractures, brain injury or any other obviously significant injury. In the month following the accident she underwent physiotherapy for symptoms consistent with a left rib contusion and a sprain/strain of her thoracic spine and ribs. She was discharged from active treatment a little more than a month later, after reporting that "her symptoms had resolved, and she had returned to all pre-accident activities".

[9] She returned to high school in the fall of 2013 and completed grades 10 and 11 largely without incident. Although she recalls having a fear of being hit by a car and being worried and anxious at times, she worked part-time during the summers, and completed both school years with grades over 80%. She did not seek medical treatment related to any mental health issues during this time.

[10] It was not until she was in grade 12 that more serious mental health issues began to surface. In December of 2015 she started to have panic attacks, difficulty sleeping and trouble concentrating. She sought medical assistance in early 2016. She was diagnosed with panic attacks and prescribed medications to deal with them. She received regular counselling and was referred for a psychiatric assessment. She had periods of improvement, continued to work part-time and had continued success at school, eventually graduating as an Ontario Scholar and gaining acceptance to the Forensic Science and Chemistry program at Laurentian University.

[11] The plaintiff's father was understandably concerned for his daughter. On April 8, 2016 he wrote to his daughter's lawyer expressing his belief that the accident contributed to her anxiety to some degree because simple things like crossing the street triggered anxiety for her, she was delayed in acquiring her G2 driver's licence because the thought of driving and the fear of hitting a pedestrian caused her severe anxiety, and she was having hip and back discomfort that was keeping her from training for the Track North running club which, in turn, was causing her anxiety.

[12] By the end of the school year the plaintiff was suffering panic attacks/episodes daily and they seemed to be getting worse. In July of 2016 she was hospitalized twice, first from the 5th to the 15th and next from the 29th to August 5th due to anxiety and panic episodes. On both occasions she stabilized with the assistance of the psychiatrists she saw and adjustments to her medications.

[13] On July 27, 2016 the plaintiff's father again wrote her legal counsel advising that her anxiety had worsened since April and that her accident could be a factor.

[14] The plaintiff began her university studies in September of 2016 and at the outset was doing quite well. She was not suffering any panic episodes and by October her physicians began to reduce the dosage of medication she was receiving. However, as exams approached in December of 2016, she became more anxious and started to have panic episodes once again. In the months and years that followed, the plaintiff's condition deteriorated, eventually causing her to drop out of university.

Analysis

[15] The issue before me is whether there is a genuine issue requiring a trial to determine if the plaintiff's claim is statute-barred because the limitation period had expired. More specifically, the issue is whether, as of October 25, 2016, there existed a sufficient body of medical evidence to satisfy a court on the balance of probabilities, that the plaintiff had sustained a serious and permanent impairment from an injury that was caused by the accident.

[16] This is an appropriate case for summary judgment. For the most part, it requires the consideration of medical records which are not contentious or conflicting and to which little would be added by calling the authors now, some seven or eight years after the fact. There is unlikely to be other evidence come to light on the issue before me and the parties were given ample opportunity to lead me through those parts of the record that are of importance.

[17] Although plaintiff's counsel and the intervenor argued that the medical evidence did not, on October 25, 2016, establish that the plaintiff's impairments were serious and permanent, in my view it is the issue of causation that is fatal to the defendant's motion.

[18] The severe anxiety and panic episodes affecting the plaintiff did not arise until later in 2015, more than two years after the accident. The medical records pertaining to the treatment she sought and received prior to October 25, 2016 reference the causes of her anxiety and panic episodes as her tendency towards perfection, her fear of failure and stress caused by her mother's mental illness. In those records the only reference to the accident is when, on October 7, 2016, she related the following to Dr. Ajueze: "She reported that the anxiety over the past one week has not been responsive to coping and she has needed pm Ativan. She indicated that the most stressful event is around when she is driving. She has not had any accidents. She said that 4 years ago she had an accident and now when she drives, sometimes she is triggered." The psychiatrist concluded as follows: "Chanelle LeMarche is doing well. Her Conversion Disorder with attacks is in remission. She is responding well to medication without any side effects. She seems to have had a one-week episode of very mild hypomanic symptoms." He did not link any of her symptoms to the accident.

[19] Based on the medical records as they existed on October 25, 2016, there was little, if any, indication that the anxiety and panic episodes suffered by the plaintiff were related to the accident.

[20] The defendant argues, however, that given the plaintiff's father's belief that the accident may have been a contributing factor to her condition, further due diligence by her or her counsel was required. Counsel argued that the plaintiff and her former counsel were not entitled to wait for certainty of liability or "perfect knowledge" of causation and that former counsel failed to exercise due diligence when he neglected to conduct a full review of the plaintiff's file to attempt to determine the status of her injuries and complaints, and whether there was sufficient medical evidence to establish a threshold impairment.

[21] As was made clear in *Fennell v. Deol* [2016] O.J. No. 1745, a lack of due diligence is not a separate and independent reason for dismissing a plaintiff's claim as statute barred. Rather, it is a factor that informs the analysis of when a claim ought to have been reasonably discovered.

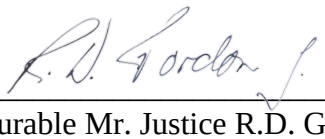
[22] It cannot be said that the plaintiff lacked diligence in seeking treatment for her mental health issues. When those issues proved more than she could handle on her own, she sought appropriate medical assistance and counselling. She was diligent in seeking psychiatric care and cannot be faulted for the wait-time involved. She was entitled to rely upon her caregivers to determine the cause of her issues and treat her accordingly.

[23] Although it might be argued that the plaintiff's former counsel was not diligent in his review of the medical records pertaining to the plaintiff or in having her claim issued within 2 years of her 18th birthday, that lack of diligence is only of concern to the extent it informs the issue of discoverability. It is my view that even if counsel had, by October 25, 2016, received and reviewed all medical evidence pertaining to the plaintiff's condition, there was insufficient evidence to satisfy a court, on a balance of probabilities, that the mental health issues she was facing were caused in whole or in part by the motor vehicle accident in 2013. In these circumstances, it cannot be said that her claim was discoverable by October 25, 2016. It was not; and if it was not discoverable until after October 25, 2016, the issuance of her claim on October 25, 2018 was timely.

Conclusion

[24] I am satisfied that there is no genuine issue requiring a trial about whether the plaintiff's action is statute-barred. It is not. Notwithstanding the absence of a cross-motion for summary judgment, the plaintiff is entitled to partial summary judgment against the defendants on this issue.

[25] If the parties are unable to agree on costs, they may make written submissions to me, not to exceed three pages plus attachments each, within 45 days.



The Honourable Mr. Justice R.D. Gordon

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