COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Birrell v. Providence Health Care Society,*** 2009 BCCA 109

Date: 20090313

Docket: CA035140; CA035145

Between:

Margaret Birrell

Respondent
(Plaintiff)

And

Providence Health Care Society dba Providence Health Care and dba St. Paul's Hospital and dba The B.C. Ear Bank, and Vancouver Coastal Health Authority dba Vancouver General Hospital and dba Vancouver Hospital and dba The B.C. Ear Bank, and The University of British Columbia dba The B.C. Ear Bank, and John Doe

Appellants
(Defendants)

Before: The Honourable Mr. Justice Donald
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Neilson

C. L. Woods, Q.C.	Counsel for the Appellant, Providence Health Care Society
J. G. Dives	Counsel for the Appellant, Vancouver Coastal Health Authority
D. Klein and N. C. Hartigan	Counsel for the Respondent
Place and Date of Hearing:	Vancouver, British Columbia February 17, 2009
Place and Date of Judgment:	Vancouver, British Columbia March 13, 2009

Written Reasons by:
The Honourable Mr. Justice Lowry

Concurred in by:
The Honourable Mr. Justice Donald
The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Mr. Justice Lowry:

[1] An appeal is taken from the order of Madam Justice Russell made 11 May 2007 allowing an application to add plaintiffs, which raises, in the main, a question of whether the time limited by statute for them to commence an action has passed.

[2] This is as yet an uncertified class action for personal injury commenced almost two years after Health Canada issued a public warning in 2003 advising the recipients of bone or tissue from the British Columbia Ear Bank of a risk of infection associated with inadequate records of donor screening. The warning, which apparently received broad media coverage, recommended precautionary testing for various diseases including HIV, Hepatitis B and Hepatitis C. Subsequently, over a considerable period of time, letters were sent by physicians to those who were believed to have been recipients of bone or tissue drawn from the Ear Bank. No one is known to have suffered any infection. Margaret Birrell, the named plaintiff, underwent surgery that involved tissue replacement to repair an eardrum in 1994. She sues what are alleged to be the organizations in the provincial health system responsible, claiming, in particular, "damages for nervous shock, stress and anxiety after being informed of the risk of infection and the need for medical testing and monitoring".

[3] The Ear Bank was operated from 1974 to 2002 under the auspices of the Department of Medicine of the University of British Columbia, first by Vancouver Coastal Authority at Vancouver Hospital (and later Shaughnessy Hospital) until 1995 and then by Providence Health Care Society at St. Paul's Hospital (the "hospitals").

[4] After the action was commenced, Ms. Birrell learned the procedure used during her operation was autologous and she had received no tissue from the Ear Bank. She could not maintain an action. However, in August 2006, she initiated an application to add Robert Corfield and Thomas Little as plaintiffs. They received tissue from the Ear Bank in transplant surgeries performed in 1991 and 1996 respectively. The hospitals then initiated an application to have Ms. Birrell's action against them dismissed.

[5] The two applications were heard in April 2007. Ms. Birrell took the position she would withdraw from the action if Mr. Corfield and Mr. Little were added as plaintiffs. The hospitals maintained that any action the proposed plaintiffs had was subject to the ultimate time limitation prescribed by statute of six years from the time the surgeries were performed, which had long expired, such that their addition as plaintiffs could not be justified. The University of British Columbia took no position.

[6] The judge rejected the hospitals' contention. In reasons indexed as 2007 BCSC 668, 72 B.C.L.R. (4th) 126, she held the ultimate time limit did not start to run until at least 2003, when the proposed plaintiffs could first have learned of the risk of infection, because she considered that was the earliest it could be said the injury was suffered and the cause of action arose. The judge then proceeded to exercise the discretion afforded under the *Rules of Court* to add Mr. Corfield and Mr. Little as plaintiffs. She ordered Ms. Birrell be removed as a party to the action.

[7] The hospitals appeal the judge's order, contending she erred in her determination of the time when any cause of action Mr. Corfield and Mr. Little have arose, and maintain the action against the hospitals should be dismissed. I first consider the limitation period and then the disposition of the applications.

The Limitation

[8] Section 8 of the *Limitation Act,* R.S.B.C. 1996, c. 266, provides:

> **Ultimate limitation**
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> 8 (1) Subject to section 3 (4) and subsection (2) of this section but despite a confirmation made under section 5, a postponement or suspension of the running of time under section 6 or 11 (2) or a postponement or suspension of the running of time under section 7 in respect of a person who is not a minor, no action to which this Act applies may be brought
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> (a) against a hospital, as defined in section 1 of the *Hospital Act*, or against a hospital employee acting in the course of employment as a hospital employee, based on negligence, after the expiration of 6 years from the date on which the right to do so arose,
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> (b) ...
>
> (c) in any other case, after the expiration of 30 years from the date on which the right to do so arose.
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> (2) Subject to section 7 (6), the running of time with respect to the limitation periods set by subsection (1) for an action referred to in subsection (1) is postponed and time does not begin to run against a plaintiff until the plaintiff reaches the age of majority.

[9] The Supreme Court of Canada considered this legislation in *Novak v. Bond*, [1999] 1 S.C.R. 808, 63 B.C.L.R. (3d) 41, and, with respect to s. 8, McLachlin J., for the majority, said:

> [70] Certainty and diligence, however, remain important goals. The running of time cannot be postponed indefinitely. Therefore, s. 8 of the Act sets forth a series of ultimate limitation periods, the length of which depends on the particular type of action in issue. Generally, regardless of whether the running of time has been postponed or the cause of action confirmed by the defendant, no action can be brought after the expiration of – depending on the classification of the action – six or thirty years after the date on which the right to bring the action arose. Where the plaintiff is a minor, the running of time for the purposes of the ultimate limitation period is postponed until he or she reaches the age of majority: see s. 8(2). Only upon the expiration of the relevant ultimate limitation period can the potential defendant truly be assured that no plaintiff may bring an action against him or her. At that time, any cause of action that was once available to the plaintiff is extinguished: see s. 9(1). See generally Law Reform Commission of British Columbia, *Report on the Ultimate Limitation Period: Limitation Act, Section 8* (1990), especially at pp. 21-23. With respect to the case on appeal, the appellant is protected by a six-year ultimate limitation period: see s. 8(1)(b).

[10] The section was considered by this Court in *Clover v. Hurley* (1993), 23 B.C.A.C. 155, leave to appeal to the Supreme Court of Canada refused, where, speaking for the Court, Southin J.A. said:

> [2] The effect of the section is that any action for medical negligence must be brought within 6 years from the date that cause of action arose. There are no exceptions in law to that rule. It is not the business of this Court to say whether that is the law that ought to be or not. The Legislature of British Columbia has enacted it and we are obliged to

apply it.

[11] Thus, discoverability is not a relevant consideration, and the question the judge had to decide in considering whether an action brought by either Mr. Corfield or Mr. Little would be time-barred was when, on their proposed pleadings, their causes of action arose: 1991 and 1996, or 2003 at the earliest. They may not have actually learned of the risk until some time later, when each received a letter from his physician, but, if they learned of the warning through the media coverage, 2003 was the year they would have known there was a risk of infection and the need to be tested, which is alleged to have caused the stress and anxiety it is said they suffered.

[12] The judge undertook a review of several authorities. She recognized the date on which a limitation period began to run can only be the date on which all of the elements of a cause of action came into existence, quoting Esson J.A. in *Bera v. Marr* (1986), 27 D.L.R. (4th) 161, 1 B.C.L.R. (2d) 1 at 27 (C.A.). She essentially accepted that, if it had been determined on testing the proposed plaintiffs had actually been infected and contracted a disease, their actions would accordingly be time-barred because the elements of an action in negligence would have been complete – the injury would have been suffered – at the time of the surgery when they were infected. While she acknowledged holding their action would not be time-barred if they were not infected and suffered no injury until they learned of the risk would work an absurdity, she considered that, in the absence of their having been infected, the cause of action was not complete until they learned of the risk and suffered the "nervous shock" or stress and anxiety they allege. She concluded:

> [47] In an action for negligence, there is no cause of action and, consequently, no right to bring an action until after the plaintiff suffers damages. In the case of a plaintiff who suffers no physical injuries, there is no right to sue until harm causing nervous shock creates damages. If the nervous shock never occurs, the plaintiff has not suffered any damages and, consequently, never has a right to bring an action.
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> [48] While I find this interpretation to result in an absurdity that is irreconcilable with the scheme and object of the *Limitation Act*, not to mention unjust for those who have actually suffered physical harm, I cannot see that the right to bring an action for uninfected persons arose at any time before the nervous shock was suffered. Consequently, the ultimate six-year limitation period has not expired against the Hospital Defendants if, as counsel agree, the plaintiff and Proposed Plaintiffs suffered not physical harm, but only nervous shock, as a result of the alleged negligence on the part of the defendants.

[13] The recent decision of the Supreme Court of Canada in *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27, [2008] 2 S.C.R. 114, may undermine a claim for "nervous shock" if, as appears to be alleged here, it amounts to no more than transient emotional distress in the absence of any bodily injury. But the plaintiff seeks to have the judge's conclusion upheld on the basis no injury was suffered by recipients of tissue or bone, where none were infected with disease, until the testing was undertaken (blood samples were drawn) and stress and anxiety associated with that was experienced.

[14] Support is said to be found in the recent decision of this Court in *Kruk v. Ho,* 2008 BCCA 201, 81 B.C.L.R. (4th) 88. That was a case of a medical misdiagnosis resulting in an alleged failure to detect a treatable disease where the substantive issue was whether the misdiagnosis had deprived the plaintiff of the opportunity of treatment before the disease became untreatable. In

summary proceedings, the judge at first instance had wrongly held the beginning of the ultimate limitation period to be the date of the negligent conduct, without considering when injury had been suffered. This Court found no determination could be made on the pleadings and evidence adduced as to when the disease became untreatable and concluded it was then not possible to say when the elements of the cause of action were complete. That required a trial. Apart from the discussion of the governing principles, I find the decision to be of no real assistance here.

[15] In my view, on the allegations made, the injury the proposed plaintiffs are said to have suffered occurred at the time of their surgeries because it was then they were put at risk and the need for a medical assessment arose. They may not have known they had been injured in that way until many years later, and they may have suffered stress and anxiety when they learned, but, had they been told they were at risk soon after the surgery, I can see no reason they could not have sued in negligence then for what they had suffered. The elements of the cause of action were complete – injury had been suffered. They were as much at risk then as they were in 2003, and they were then, in the words of the pleadings, in need of medical testing and monitoring, all of which would have been at least to some degree compensable. They had been medically compromised.

[16] The fact that was not known until years later is a matter of discoverability which, as I have said, is not a consideration where an ultimate limitation period arises. The fact the risk may have been minimal and not found to be manifest in the form of disease, or that greater injury in the form of stress and anxiety was suffered when recipients of the suspect tissue and bone learned of the risk, does not detract from there having been an injury suffered at the time the surgeries were performed. The causes of action were then complete: for Mr. Corfield in 1991 and for Mr. Little in 1996, and the ultimate time limit the Legislature has seen fit to set by statute began in each instance to run. It expired before 2003, so no cause of action is available to either that is not time-barred.

The Applications

[17] It is accepted a representative plaintiff who proves to have no claim against any defendant may be replaced by another who does, particularly where the plaintiff's lack of a cause of action was not apparent to the plaintiff when the action was commenced: *Giuliano v. Allstate Insurance Co.* (2003), 66 O.R. (3d) 238, 40 C.P.C. (5th) 140 (Ont. S.C.J.) at paras. 18-19. But it becomes necessary to consider whether, in light of the expiry of the ultimate limitation period, the judge's disposition of the two applications should stand, having particular regard for this being a class action where the interests of the putative class as a whole are not to be overlooked: *MacKinnon v. National Money Mart Co.*, 2004 BCCA 472, 33 B.C.L.R. (4th) 21.

[18] The *Rules of Court* provide for the application to add Mr. Corfield and Mr. Little as follows:

> Rule 15 – Change of Parties
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> Removing, adding or substituting a party
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> (5) (a) At any stage of a proceeding, the court on application by any person may
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> (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
>
> (A) with any relief claimed in the proceeding, or

(B) with the subject matter of the proceeding,

which in the opinion of the court it would be just and convenient to determine as between the person and that party.

[19] The *Limitation Act* provides:

> 4 (1) If an action to which this or any other Act applies has been commenced, the lapse of time limited for bringing an action is no bar to
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> (d) adding or substituting a new party as plaintiff or defendant,
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> under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action.

[20] Thus, while the expiry of a limitation period is recognized to be a factor to be considered in the exercise of the discretion afforded under the Rule, it is not a bar to the addition of a party to an action where, having regard for the questions in issue, it is, in the opinion of the court, just and convenient the party should be added. The considerations are generally regarded to be those identified in *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282, 46 C.P.C. (3d) 183 (C.A.), although the concern there was with an application to amend pleadings to allege a cause of action that was time-barred. Mr. Justice Finch (now Chief Justice) said the discretion to permit amendments was intended to be completely unfettered subject only to the rule that such discretion is to be exercised judicially (para. 45). He identified the factors to be considered as the length and reasons for the delay, the expiry of a limitation period, the presence or absence of prejudice, and the extent of the connection, if any, between the existing claims and those proposed to be added (para. 67).

[21] In his concurring reasons, McEachern C.J.B.C. said:

> [74] Applying the same principles regardless of whether the application is to add new defendants, as in [*Bank of Montreal v. Ricketts* (1990), 44 B.C.L.R. (2d) 95 (C.A.)] or new causes of action, as in [*Med Finance Co. S.A. v. Bank of Montreal* (1993), 79 B.C.L.R. (2d) 222 (C.A.)], I believe the most important considerations, not necessarily in the following order, are the length of the delay, prejudice to the respondents, and the overriding question of what is just and convenient.

[22] Under the heading “Analysis – Joinder of Parties Pursuant to Rule 15(5)(a)”, the judge undertook a comprehensive and useful review of the authorities governing the considerations she saw as bearing on the exercise of her discretion in adding parties to an action (paras. 53-105). She then considered each of the factors identified in *Teal* in turn as they apply to the plaintiff’s application. While she had rejected the expiry of the ultimate limitation period, she assumed, for the purposes of disposing of the applications, the conventional time period of two years would have begun to run against Mr. Corfield and Mr. Little when Health Canada’s warning was issued in 2003, such that by August 2006 when the application to add them was initiated it was 18 months out of time.

[23] After recognizing the claim of the proposed plaintiffs and the relief sought were the same as that of the existing plaintiff and the members of the putative class, rendering the key issue to be whether it would be just and convenient that the addition be allowed, the judge turned to the factors

to be weighed. She appears to have considered both the 18 month delay and the absence of any positive reason for it as neutral factors. She recognized there was a time limitation she assumed had expired but said it could not be conclusively determined now. She found there was no actual prejudice but, because the delay exceeded one year from the expiry of the assumed limitation period, some prejudice was to be presumed. She then said:

> [119] In this case, the presumption of prejudice against the defendants is somewhat weakened by the fact that the plaintiff's action was commenced as a class proceeding. This did give the defendants notice of the claims against them prior to the expiration of the limitation period (within the time for service of the writ). In this regard, the defendants had notice of both the nature of the claims, specifically negligence, and the total scope of the claim, being a potential class action.
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> [120] The fact that the plaintiff did not have a cause of action against the defendants, while not known to her at the time the writ was filed, was raised within the space of a few months and, shortly thereafter, the plaintiff brought a motion to add further plaintiffs. While I accept that the Hospital Defendants should legitimately expect to be free from claims after six years based on the scheme of the *Limitation Act*, as I have explained, the current language of section 8 leaves them open to claims such as the present one for an indefinite period of time.
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> [121] Further, on the basis of *MacKinnon v. National Money Mart Co.*, *supra*, a court is left with more limited scope to strike out class proceedings, prior to the certification hearing, because the cause of action nexus is between class members and the defendants and not simply the proposed representative plaintiff and the defendants. Therefore, upon being served with the plaintiff's writ of summons, the defendants could not reasonably have expected to be free from the claims of the Proposed Plaintiffs and other putative class members, on the basis of the expiration of the limitation period, even if they quickly realized that the proposed representative plaintiff had no personal cause of action against them.
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> [122] Had I concluded that the six-year ultimate limitation period had expired against the Hospital Defendants, I would have concluded that the presumption of prejudice was extremely strong in this case, due to the significant emphasis placed on finality for such defendants by the Legislature (see also *Letvad v. Fenwick*, [2000 BCCA 630, 82 B.C.L.R. (3d) 296], at para. 48).

[24] With respect to the prejudice to putative class members she said:

> [124] As I explained at 2006 BCSC 1814 at ¶ 17, the expiration of a limitation period has been relied on by some courts as a factor in granting certification because of the risk of prejudice to prospective class members if the proceedings are not certified. The loss of a right to bring a claim, even a weak one, could cause prejudice to many class members, although I agree that many of them would not be relying on, or even aware of, Ms. Birrell's action.

[25] After commenting on the connection between the existing and proposed claims she concluded:

> [126] Overall, considering all of the factors enumerated in *Teal Cedar*, *supra*, and

> related cases, it would be just and convenient to add the Proposed Plaintiffs to the present action. While it does seem unfair that the hospitals are facing claims for which more than six years have elapsed from the date of the original negligent conduct, as I have stated, the law compels the conclusion that the ultimate limitation period has not expired. Likewise, the Court of Appeal jurisprudence favours the addition of parties having independent causes of action after the expiration of the limitation period, on the basis of Rule 15(5)(a)(iii), provided the test of interrelatedness is met and there are no overriding factors that would preclude joinder.
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> [127] In the case at bar, the presumed prejudice to the Hospital Defendants by reason of the expiration of the limitation period, in view of the fact that they had notice of the claims against them by all potential class members, is outweighed by the extent of connection between the claims. Further, as explained in *MacKinnon v. National Money Mart Co.*, *supra*, the fact that a proposed class proceeding is something more than just an ordinary action also favours joinder in these circumstances. Consequently, the plaintiff's motion to add Mr. Little and Mr. Corfield as plaintiffs is granted.

[26] It is, in my view, clear the judge's conclusion was predicated on the absurd result to which she considered she was driven by the provisions of the *Limitation Act*. Had she determined the ultimate limitation period had expired, she would, in her words, have found the presumption of prejudice against the hospitals to be "extremely strong". Having regard for the relative strength of the other factors considered, it appears to me apparent she would not have allowed the plaintiff's application. Indeed, no case has been drawn to our attention where an application to add a party in the face of an ultimate limitation period having expired succeeded. The legislated expiry of the ultimate time in which an action can be commenced against a hospital must weigh heavily against adding a plaintiff when assessing what is just and convenient. Here, it may be convenient to allow the plaintiff's application to add Mr. Corfield and Mr. Little to pursue the action against the hospitals for their own benefit, but it would not be just.

[27] However, the plaintiff insists the prejudice to members of the putative class resident in this province and elsewhere will be extreme if Mr. Corfield and Mr. Little are not added as plaintiffs. It is alleged that over 6,000 surgeries using donor tissue or bone were performed during the years the Ear Bank operated. The plaintiff says it is likely there are young people who had surgery well before the age of majority and people outside the province who, by virtue of the workings of the provincial limitation and class proceedings legislation, may have actions against the hospitals that are not time-barred.

[28] The plaintiff maintains the application is properly allowed against the University of British Columbia, which does not have the benefit of the hospitals' ultimate limitation defence, and that is said to be sufficient to preserve the action against the hospitals for the benefit of the putative class by adding the proposed plaintiffs. It is only necessary they have a cause of action against one of the named defendants. Reliance is placed on *MacKinnon.* There, this Court declined to strike out a class action against some of the named defendants where the representative plaintiff had a cause of action against only one of them because it was evident members of the putative class may together have had actions against all of the defendants.

[29] I am inclined to the view the proposed plaintiffs should be added as parties to the class action against the university and the hospitals in order to preserve any cause of action members of the putative class may have that is not time-barred against the hospitals in particular. Mr. Corfield

and Mr. Little may have a cause of action against one of the defendants, the university, although they have no cause of action themselves against the hospitals; it is time-barred.

Disposition

[30] I would allow the appeal to the extent of varying the order to declare Mr. Corfield and Mr. Little have no cause of action against the hospitals.

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Madam Justice Neilson"