Federal Court of Appeal  Cour d'appel fédérale

Date: 20160831

Docket: A-233-15

Citation: 2016 FCA 213

CORAM: **PELLETIER J.A.**
DE MONTIGNY J.A.
GLEASON J.A.

BETWEEN:

MICHAEL NEWMAN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on January 28, 2016.

Judgment delivered at Ottawa, Ontario, on August 31, 2016.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: DE MONTIGNY J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

[1] Mr. Michael Newman was assaulted and seriously injured while he was in the custody of the Correctional Service of Canada. Mr. Newman sued the Crown, alleging that the latter had breached his rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the *Charter*) by not assuring his personal safety while he was in custody. Mr. Newman's statement

of claim was issued more than three years after he was assaulted. After the pleadings closed, the Crown moved for summary judgment on the basis that Mr. Newman's claim was statute barred. The Crown claimed that it was an action "in respect of injury to person or property … whether based on contract, tort or statutory duty" and therefore caught by the 2 year limitation in paragraph 3(2)(*a*) of British Columbia's *Limitation Act*, R.S.B.C. 1996, c. 266 (the *Limitation Act*). Mr. Newman argued that his action was an action for *Charter* damages and was therefore not caught by the limitation for actions for personal injury. Rather, it came within subsection 3(5) of the *Limitation Act* which applies to "any other action not specifically provided for." Further, Mr. Newman argued that, in any event, time did not begin to run at the date of his injury because of subsection 6(4) which suspends the commencement of a limitation period in certain circumstances.

[2] The Federal Court accepted the Crown's argument as to the nature of Mr. Newman's claim and rejected Mr. Newman's argument that time did not begin to run on or about the date he was assaulted. As a result, the Federal Court granted the motion for summary judgment and dismissed Mr. Newman's claim. Mr. Newman appeals the Federal Court's decision to this Court.

I. FACTS

[3] In November 2010, Mr. Newman, a gang member who was serving a sentence for drug related offences and awaiting trial on a first-degree murder charge at the Matsqui Institution in Abbotsford, was transferred to the Kent Institution (Kent). He was placed in administrative segregation, otherwise known as solitary confinement. In May 2011, correctional officials indicated that he was a candidate for placement in the general population. Mr. Newman objected

to being released into the general population unless it was to an area where he would be safe from attack by a leading member of a rival gang, Mr. Bacon, who was also incarcerated at Kent. On July 19, 2011, correctional officials transferred Mr. Newman, over his objection, to the orientation range. He was severely beaten the very next day by two inmates, at the behest, he believes, of Mr. Bacon. Mr. Newman suffered a broken nose, a fractured cheekbone, and fractured vertebrae in his neck. As a result, he also suffered from post-traumatic stress disorder, seizures and urinary difficulties.

[4] In the period of time following his beating until February 2013, Mr. Newman was engaged in preparing for and attending at his trial for first degree murder, which ended in his conviction. Mr. Newman began serving his sentence and started looking for a lawyer to act for him against the Correctional Service of Canada. In the summer of 2013, he learned of his current counsel, a lawyer willing to act on behalf of prisoners on a contingency basis. He consulted her in September 2013, more than 2 years after the date of his assault. She agreed to accept him as a client and to work on his case when time permitted. The pleadings were prepared and finalized following receipt of the necessary information from correctional officials, including the fact that they considered Mr. Bacon as responsible for the attack on Mr. Newman. In counsel's view, this increased the likelihood of a successful claim. The record discloses that Mr. Newman's statement of claim was filed on October 17, 2014.

[5] The statement of claim framed Mr. Newman's cause of action exclusively as a breach of his rights under sections 7 and 12 of the *Charter* and sought *Charter* damages from the Crown.

The latter defended the claim on various grounds but brought its application for summary judgment on the ground that Mr. Newman's claim was barred by the *Limitation Act*.

II. THE DECISION UNDER APPEAL

[6] In an unreported decision (Reasons), Mr. Justice Mosley of the Federal Court (the Federal Court Judge) allowed the Crown's motion for summary judgment and dismissed Mr. Newman's claim.

[7] It was not contested that Mr. Newman's claim was subject to the *Limitation Act*. The issues of relevance to this appeal are (a) whether his claim was subject to the 2 year limitation imposed by paragraph 3(2)(*a*) which applies to actions seeking damages for personal injury and (b) whether, in any event, the running of time did not commence until sometime in 2013 by reason of the postponement of the running of time pursuant to subsection 6(4).

[8] The Federal Court Judge found that, properly characterized, Mr. Newman's claim was an action for "damages in respect of injury to person" as provided in paragraph 3(2)(*a*), which "would have been advanced as a tort claim or claims for breaches of CSC's [Correction Service of Canada] statutory duties to prisoners in its care but for the limitation issue": Reasons at 7. The Federal Court Judge cited the Supreme Court of Canada's decision in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 at para. 43 (*Ward*), as authority for the proposition that subsection 24(1) of the *Charter* "operates concurrently with and does not replace the general law, including the applicable limitation periods."

[9] The Federal Court Judge then addressed the four criteria which determine the commencement of the running of time against a plaintiff. He quoted from the British Columbia Supreme Court's decision in *Ounjian v. St Paul's Hospital*, 2002 BCSC 104, [2002] B.C.J. No. 99 (QL) (*Ounjian*), as follows:

1. The identity of the defendant is known to the plaintiff.
2. The plaintiff has certain facts (including the facts set out in s. 6(5)(b)) within her means of knowledge.
3. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success.
4. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interests and taking her circumstances into account, to be able to bring an action.

Ouinjan, cited above, at para. 21.

[10] These four criteria are intended to reproduce the statutory criteria found in subsection 6(4) of the *Limitation Act*, reproduced below:

> (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> > (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
> >
> > (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

[11] The Federal Court Judge found that Mr. Newman knew the identity of the Crown's servants "and had the facts within his knowledge about the existence of a duty owed to him by those servants and that an alleged breach by them had caused him injury": Reasons at 8. The Federal Court Judge went on to find that a reasonable person, knowing the facts which Mr. Newman knew and having taken the appropriate legal advice, would have concluded that an action would have a reasonable prospect of success. In coming to that conclusion, the Federal Court Judge did not give effect to Mr. Newman's arguments that those advising him before he was assaulted had not alerted him to his rights. Nor did the Federal Court Judge think that the information that correctional officials had accused the rival gang member of orchestrating Mr. Newman's beating significantly altered the chances of an action succeeding.

[12] Finally, the Federal Court Judge found that "a reasonable person would have taken the appropriate advice and would regard the facts as showing that Mr. Newman ought, in his own interests and taking his circumstances into account, to have been able to bring an action within the limitation period": Reasons at 8-9.

[13] The Federal Court Judge acknowledged Mr. Newman's involvement in the defence of the murder charges brought against him but did not consider this as such a compelling circumstance that he could not have sought a referral to a civil lawyer from his defence lawyer. He was aware of all the facts and could have acted in his own best interests.

[14] Mr. Newman also argued that the questions before the Court were not properly the subject of an application for summary judgment because they raised issues of credibility. The

Federal Court Judge found that "[t]here is no genuine issue for trial if the Defendant can establish that the claim does not fall within the appropriate limitation period": Reasons at 4. To paraphrase, an action which was commenced outside the 2 year period allowed for actions claiming damages for personal injury would be statute barred and could therefore be dismissed on a motion for summary judgment.

[15] The Federal Court Judge held that Mr. Newman's affidavit evidence did not raise any issue of credibility with regard to the facts that established the limitation defence. He also found that there was no genuine issue for trial "regarding postponement or suspension of the operation of the limitation period": Reasons at 9.

III. STATEMENT OF ISSUES

[16] Mr. Newman raises the following issues in his appeal:

- Did the Federal Court Judge err in determining that the applicable limitation period for an action for damages brought pursuant to section 24(1) of the Charter is two years as falling under section 3(2)(a) of the Limitation Act rather than falling under section 3(5) of the Limitation Act?
- Did the Federal Court Judge err in finding that there was no genuine issue for trial with respect to the issue of postponement or suspension of the applicable limitation period?

[17] Mr. Newman's statement of the first issue is overly broad in the sense that the only action which is in issue in these proceedings is one which could be pursued either as an action for bodily injury or as an action for *Charter* damages. As a result, I would restate the first issue as follows:

> -Did the Federal Court Judge err in determining that the limitation period applicable to actions for damages for personal injury applies to an action brought for damages pursuant to section 24(1) of the *Charter* when the facts giving rise to the claim would be actionable either in tort arising from bodily injury or as a breach of the plaintiff's rights under the *Charter*?

[18] Given that this is an appeal from a decision of a trial judge sitting as such, the standard of review is that set out by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The characterization of a cause of action for the purposes of the application of limitations legislation is a question of law, reviewable on a standard of correctness: see *Canaccord Capital Corporation v. Roscoe*, 2013 ONCA 378, 115 O.R. (3d) 641. The question of whether there is a genuine issue for trial under the rules governing summary judgment applications is, absent an error of law, a question of mixed fact and law, reviewable on a standard of palpable and overriding error: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at para. 81.

[19] Turning to the first issue, Mr. Newman argues that a claim for relief under subsection 24(1) of the *Charter* cannot be reduced to a claim for damages arising from bodily injury because damages as remedy for a breach of an individual's constitutional rights serve a different function than do damages for tortious conduct. While common law damages serve to provide compensation, damages as a remedy pursuant to subsection 24(1) advance additional interests:

> For damages to be awarded [pursuant to subsection 24(1)], they must further the general objects of the *Charter*. This reflects itself in three interrelated functions that damages may serve. The function of *compensation*, usually the most prominent function, recognizes that breach of an individual's *Charter* rights may cause personal loss which should be remedied. The function of *vindication* recognizes that *Charter* rights must be maintained, and cannot be allowed to be whittled away by attrition. Finally, the function of *deterrence* recognizes that damages may serve to deter future breaches by state actors.

Ward, cited above, at para. 25 [emphasis in original].

[20] Mr. Newman further argues that since *Charter* damages are a distinct and separate cause of action, they must, in the absence of a specific reference to them in the *Limitation Act*, be treated as a claim for which no other provision is made.

[21] The jurisprudence supports the conclusions that (a) limitation periods apply to personal claims for *Charter* remedies and (b) that paragraph 3(2)(*a*) is the applicable limitation period.

[22] In *Ravndahl v. Saskatchewan*, 2009 SCC 7, [2009] 1 S.C.R. 181 at paras. 16-17, the Supreme Court confirmed that claims for personal constitutional relief were subject to limitation periods. In *Ravndahl*, the limitation period was one applicable to cases not otherwise provided for as the claim arose from damages suffered as a result of the passage of legislation inconsistent with section 15 of the *Charter*.

[23] In *St-Onge v. Canada*, 1999 CanLII 8991 (FC), [1999] F.C.J. No. 1842 (T.D.), affirmed by the Court of Appeal, 2001 FCA 308, [2001] F.C.J. No. 1569, the plaintiff alleged that his equality and language rights had been infringed. In dismissing his claim as being statute barred, Hugessen J., at paras. 4-5 of his reasons, held that:

> In my view, there is absolutely no doubt that an action in tort based on delicts which are at the same time infringements of rights guaranteed by the Charter is subject to the prescription generally applicable to any action of a delictual nature. The Charter was adopted in a context which already included two well-developed systems of civil law with sophisticated rules of procedure and the appropriate courts to give effect to them. The Charter contains no purely procedural provisions and no rule governing prescription.

> Clearly, it does not follow from this that the Charter has completely destroyed existing systems and created a system in which no procedure or prescription exists. On the contrary, existing legislation and procedures continued to apply except where they were clearly inconsistent with the Charter itself. A prescription deadline which generally applies to all actions of the same nature and does not in any way discriminate against certain groups of litigants does not in any way contravene the Charter.

[24] In taking this position, Hugessen J. was giving effect to the comments in McIntyre J.'s concurring reasons in *R. v. Mills*, [1986] 1 S.C.R. 863 at 953, 1986 CanLII 17 (SCC) as to the integration of *Charter* remedies into the framework of the existing legal system. McIntyre J.'s comments were taken up with approval by McLachlin C.J.C., speaking for the Court, in *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 at para. 24.

[25] In *Nagy v. Phillips*, 1996 ABCA 280, 187 A.R. 97, the Alberta Court of Appeal held that a claim for damages alleging that the plaintiff's rights under section 8 of the *Charter* were violated by a strip search conducted by the defendants was subject to section 51 of the *Alberta Limitation of Actions Act*, R.S.A. 1980, c. L-15 which deals with "injury to the person, whether arising from an unlawful act … or from breach of a statutory duty." The Alberta Court of Appeal rejected the argument that *Charter* claims were *sui generis* and therefore fell within the limitation with respect to claims for which no other provision was made. The Alberta limitation provision is substantially the same as the British Columbia provision at issue in Mr. Newman's claim.

[26] The courts of British Columbia have come to the same conclusion. In *Bush v. Vancouver (City)*, 2006 BCSC 1207, [2006] B.C.J. No. 1816 (QL), the Court held that the plaintiff's claim for damages arising from the violation of his *Charter* rights when he was arrested and detained

was subject to the limitation period applicable to injury to the person. The same result was arrived at in *Fidler v. Burns Lake (Village)*, 2013 BCSC 921, [2013] B.C.J. No. 1088 (QL) at para. 27, and *Foote v. Canada (Attorney General)*, 2012 BCSC 177, [2012] B.C.J. No. 225 (QL) at para. 31, affirmed at 2013 BCCA 135, [2013] B.C.J. No. 691 (QL).

[27] Mr. Newman acknowledges this jurisprudence but says that it does not take account of the Supreme Court's decision in *Ward*, in particular, the specific nature of a claim for *Charter* damages, the purpose of an award of damages in a *Charter* case, and the unique analytical framework for claims for *Charter* damages. This framework was elaborated in *Ward*:

> I conclude that damages may be awarded for *Charter* breach under s. 24(1) where appropriate and just. The first step in the inquiry is to establish that a *Charter* right has been breached. The second step is to show why damages are a just and appropriate remedy, having regard to whether they would fulfill one or more of the related functions of compensation, vindication of the right, and/or deterrence of future breaches. At the third step, the state has the opportunity to demonstrate, if it can, that countervailing factors defeat the functional considerations that support a damage award and render damages inappropriate or unjust. The final step is to assess the quantum of the damages.
>
> *Ward*, cited above, at para. 4.

[28] While the cases which preceded *Ward* recognized that claims for *Charter* damages were distinct, they also held that *Charter* damage claims which would have been actionable as torts arising from bodily injury were subject to the limitation applicable to actions "for damages in respect of injury to person or property…whether based on contract, tort or statutory duty": see, for example, *Nagy v. Phillips*, cited above, at paras. 10-11.

[29] The Supreme Court dealt with the role of *Charter* remedies in the context of existing legal remedies in *Ward*:

> The *Charter* entered an existent remedial arena which already housed tools to correct violative state conduct. Section 24(1) operates concurrently with, and does not replace, these areas of law. Alternative remedies include private law remedies for actions for personal injury, other *Charter* remedies like declarations under s. 24(1), and remedies for actions covered by legislation permitting proceedings against the Crown.
>
> *Ward*, cited above, at para. 34.

[30] As a result, the weight of authority supports the proposition that personal *Charter* remedies are subject to provincial limitation statutes. Furthermore, the jurisprudence is to the effect that *Charter* damages claims arising from bodily injury are subject to the limitation periods governing actions seeking private law remedies for bodily injury.

[31] I am persuaded that the following policy considerations support these conclusions.

[32] The application of a limitation period to the bringing of an action for Charter damages does not preclude the application of the unique analytical framework described in *Ward*. It simply means that the action must be commenced within the prescribed period. Once the action is commenced, the plaintiff is free to invoke the Charter damages analysis.

[33] A 2 year limitation period for claims for *Charter* damages arising from "injury to the person" can be justified, in cases of bodily injury, by the same considerations which justify shorter limitation period for bodily injuries generally. Those considerations include the need for timely investigation which may be more acute in the case of bodily injury because of the importance of eyewitness evidence, which deteriorates rapidly over time, and because of the more limited role of documentary evidence in bodily injury cases, at least with respect to the

liability portion of the claim. These factors reflect the evidentiary concerns which apply to all limitation periods: see *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, [1997] S.C.J. No. 31 (QL) at para. 34. I would venture to add that short limitation periods are not exclusively a function of the premium placed on those statutes as statutes of repose, as the Supreme Court suggested in *Peixeiro v. Haberman*. See for example *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, [2015] 3 S.C.R. 801 at paras. 57-58. For these reasons, it is appropriate that a *Charter* damages claim based on a bodily injury should be subject to the same limitation period which would apply to a tort claim arising out of the same injury.

[34] Furthermore, it is not desirable, as a matter of policy, that claims for bodily injury should have different limitation periods depending upon the identity of the defendant. *Charter* damages claims can only be made against state actors. The position advocated by Mr. Newman would result in a longer limitation period for bodily injury claims against state actors while non-state actors would have the benefit of a shorter limitation period. Public entities have the same need for finality and protection from stale claims as individual or corporate tortfeasors, perhaps more so, given their size and the scope of their operations: see *Des Champs v. Conseil des écoles séparées catholiques de langue française de Prescott-Russell*, [1999] 3 S.C.R. 281, [1999] S.C.J. No. 53 (QL) at para. 1. As a result, I am of the view that the Federal Court Judge was correct in concluding that Mr. Newman's claim for *Charter* damages was subject to the 2 year limitation in paragraph 3(2)(*a*).

[35] The next issue is whether the Federal Court Judge erred in finding that there was no genuine issue for trial with respect to the issue of postponement or suspension of the applicable

limitation period. Mr. Newman raises as a separate issue the question of whether the Crown's limitation defence was an appropriate subject-matter for a summary judgment application as it required the Court to consider issues of credibility and/or disputed questions of fact. In fact, both grounds arise from the same allegations namely that Mr. Newman's affidavit evidence raised issues which the Federal Court Judge ought not to have resolved on affidavit evidence. Mr. Newman argues that, as a result, the Crown's limitation defence and his suspension or postponement arguments were not appropriately decided on a motion for summary judgement.

[36] I note that the Federal Court Judge held that the onus was on the Crown to establish the facts which would give rise to its limitation defence. Thereafter it was up to Mr. Newman to establish the facts which would support his claim that the running of the limitation period was postponed or suspended: *Limitation Act*, subsection 6(6).

[37] As I read the Federal Court Judge's reasons, he found that there were no contested facts relative to the question of when the limitation period in paragraph 3(2)(*a*) began to run, subject to issues of postponement or suspension of that limitation period. Mr. Newman's own affidavit establishes that he was assaulted while in the custody of correctional officials in circumstances where they knew of the risk of harm to him. The date of the assault is not disputed. On the basis that a claim for bodily injury, however characterized, comes within paragraph 3(2)(a) of the *Limitation Act*, these facts are sufficient to establish that the date on which Mr. Newman's right to commence an action seeking damages for personal injury arose on July 20, 2011, subject always to the possible postponement or suspension of the limitation period.

[38] This leaves the question of whether the Federal Court Judge could find as he did on the issue of the suspension of postponement of the limitation period without impermissibly resolving disputed questions of fact or credibility.

[39] The test for the suspension or postponement of a limitation period set out in subsection 6(4) of the *Limitation Act* has been described as "mysterious, obscure, and inartistic" (*Edgeworth Construction*, cited below), with good reason. However, a careful reading of subsection 6(4) permits one to observe that it contains both objective and subjective elements. The subjective elements are knowledge of the identity of the defendant and knowledge of other facts material to the cause of action, including the fact that one has suffered harm as a result of the actions of the proposed defendant.

[40] This apparently straightforward proposition is made more complex by subsection 6(5) which defines what appear, at first blush, to be legal issues as questions of fact. This is material to Mr. Newman's circumstances because one of the contested factual issues is when he knew of these particular facts. Subsection 6(5) provides as follows:

> 6(5) For the purpose of subsection (4),
>
> …
>
> (b) **"facts"** include
>
> (i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and
>
> (ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,

[41] On its face, subsection 6(5) requires a plaintiff to have actual knowledge of the existence of a duty and of the breach of that duty by the defendant. But the existence of a duty and the characterization of certain acts as constituting a breach of that duty are conclusions of law. In *Edgeworth Construction Ltd. v. Thurber Consultants Ltd*., 2000 BCCA 453, [2000] B.C.J. No. 1609 (QL) (*Edgeworth Construction*), the British Columbia Court of Appeal examined the language and operation of subsections 6(4) and 6(5) in a case where the parties argued that a change in the law revived a cause of action which would have been statute barred on the law as it stood before the change. This raised the question of the meaning to be given to subsection 6(5) since the existence of a duty and the characterization of certain acts as a breach of that duty are, *prima facie*, questions of law.

[42] After reviewing the history of “discoverability” provisions in England, Australia and Canada, the Court rejected the notion of a revival of a cause of action following a change in the law. It went on to comment on subsection 6(5) as follows:

> Nor, in my view, does the definition of "facts" in sub-paragraph (b) of s. 6(5) turn matters of law (such as whether a duty of care is owed to a particular plaintiff) into matters of fact. Rather, one sets aside the issues of law raised by the case or assumes they will be decided in the plaintiff's favour, and asks when the plaintiff became aware, or should reasonably have become aware, that he might sue for damages. At this point, the period begins running.

[43] The effect of the assumption that the facts described in subsection 6(5) will be decided in the plaintiff’s favour is perhaps clarified by the following passage from *Vance v. Peglar*, 1996 CanLII 1834 (BCCA), 138 D.L.R. (4th) 711, quoted with approval in *Edgeworth Construction* at para. 30 of its reasons:

> The question of whether there was a breach of duty usually has a legal component but the Act treats that question as a factual one because, for the purposes of any

> relevant limitation issue there must be an assumption of an ultimate finding of liability against the defendant for breach of duty to the plaintiff, and so the limitation issue assumes the breach of duty and concentrates on when the assumed breach was known to the plaintiff or could have become known to the plaintiff if he or she had taken the steps that he or she could reasonably have taken in the circumstances. So, for the purposes of the limitation issue, the relevant question is one of fact [emphasis removed].

[44] While the matter is not free from doubt, I take the British Columbia Court of Appeal to have decided that the existence of a legal duty and of a breach of that duty are subsumed into an inquiry as to the facts which would support such a legal conclusion. The characterization of those facts is a matter for the inquiry in paragraph 6(4)(*a*) with the effect of the legal advice which the plaintiff obtained or ought to have obtained.

[45] In this case, the Federal Court Judge appears to have treated the questions of the existence of a duty and the breach of that duty as facts which had to be proved:

> The first and second requirement set out in *Ouijian*, above, are clearly met as the plaintiff knew of the identity of the Defendant's servants and had the fact within his knowledge about the existence of a duty owed to him by those servants and that an alleged breach by them had caused him injury.
>
> Reasons, at 8.

[46] To the extent that the Federal Court Judge came to this conclusion by deciding a contested question of fact, namely what advice Mr. Newman received (or did not receive) from a legal "advocate" - a non-lawyer who advocated for prisoner's rights within the correctional system - his decision is not to be set aside on that ground because his conclusion on this issue would stand in any event. The relevant knowledge is the knowledge of the facts which would support the conclusion that there existed a duty and that the duty was breached. Mr. Newman had

knowledge of the material facts. The Federal Court Judge's conclusion on this branch of the test is correct.

[47] Returning now to the subjective/objective dichotomy, it appears to me that the objective elements are whether a reasonable person, knowing the facts that the plaintiff knows, and having taken the advice that a reasonable person would take on those facts, would regard those same facts as showing that:

> (1) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and
>
> (2) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.

[48] Points (1) and (2) above are essentially paragraphs 6(4)(*a*) and (*b*) of the *Limitation Act* respectively.

[49] Paragraph 6(4)(*a*) asks a purely objective question. Would a reasonable person, armed with the plaintiff's knowledge of the facts and having taken appropriate advice consider that an action based on those facts would have a reasonable prospect of success? The Federal Court Judge found that a reasonable person in those circumstances would come to that conclusion. The test is objective; Mr. Newman's evidence as to his state of mind is not relevant.

[50] On the other hand, paragraph 6(4)(*b*) has a different complexion. It was considered by the Supreme Court of Canada in *Novak v. Bond*, [1999] 1 S.C.R. 808, 1999 CanLII 685, where a

bare majority of the Supreme Court held that paragraph 6(4)(*b*) requires a subjective/objective approach. At para. 81 of the decision, McLachlin J. (as she then was) wrote, for the majority:

> On this approach, s. 6(4)(b) may be read as denoting a time at which a reasonable person would consider that someone in the plaintiff's position, acting reasonably in light of his or her own circumstances and interests, could – not necessarily should – bring an action. This approach is neither purely subjective nor purely objective. The question becomes: "in light of his or her own circumstances and interests, at what point could the plaintiff reasonably have brought an action?" The reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling. Purely tactical considerations have no place in this analysis.

[51] The subjective element, in this perspective, consists of treating the question of whether a plaintiff "ought to be able to bring an action" as asking when a plaintiff, in light of his own her own circumstances and interests, could bring an action. The objective element is satisfied by stipulating that a reasonable person would only consider that a plaintiff could not bring an action if the plaintiff's own circumstances were "serious, significant and compelling."

[52] The Federal Court Judge considered Mr. Newman's circumstances and found that they were not so compelling that it could not be reasonably said that he could not have brought an action within the limitation period.

[53] Mr. Newman's criticisms of the Federal Court Judge are largely based on the argument that he did not give sufficient weight to the various factors which Mr. Newman enumerated as weighing upon him following his assault. A related argument is that a summary judgment motion is not the appropriate forum for dealing with issues such as those which Mr. Newman raised in his plea that the commencement of the limitation period was suspended or postponed.

[54] After having carefully reviewed the evidence, I am of the view that there is merit to Mr. Newman's submissions. Mr. Newman's affidavit evidence is to the effect that he suffered serious sequelae following his assault, including post-traumatic stress disorder as evidenced by nightmares, panic attacks, elevated heart rates, such that it was unbearable for him to think about what had happened to him: see Appeal Book at p. 136, para. 40. Mr. Newman's affidavit also shows that during the period that he was incarcerated at the Surrey Pre-Trial Center (roughly December 2011 to February 2013), he acted on the advice which he received from inmates and staff to the effect that he ought not commence an action because this would create or increase a risk of retaliation: see Appeal Book, at p. 136, para.37.

[55] These two elements are material to the question at the heart of the paragraph 6(4)(b) analysis: "in light of his or her own circumstances and interests, at what point could the plaintiff reasonably have brought an action?" It is, I believe, reasonably clear that, from Mr. Newman's perspective, the earliest time that he could have pursued his rights was upon his return to Kent Institution in February 2013.

[56] The next step in the analysis is to ask whether the circumstances which Mr. Newman identified were "significant serious and compelling". The Federal Court Judge found that they were not. With respect, I believe that this question was not one which should have been decided in summary judgment proceedings. Taken at face value, Mr. Newman's allegations are sufficient to meet the "significant, serious and compelling" threshold as it is not, prima facie, reasonable to ask the victim of a serious physical assault to pursue his remedies at the risk of provoking another serious physical assault.

[57] The question as to whether Mr. Newman's allegations are substantiated necessarily calls Mr. Newman's credibility into question. That is not a question which should be resolved on an application for summary judgment: *MacNeil Estate v. Canada (Indian and Northern Affairs Department)*, 2004 FCA 50, [2004] 3 F.C.R. 3, at 32; *Trojan Technologies, Inc. v. Suntec Environmental Inc.*, 2004 FCA 140, [2004] F.C.J. No. 636, at 20, 28-29. The Federal Court Judge's decision to resolve this question of credibility on a summary judgement application amounts to an error which justifies our intervention.

[58] In my view, there is a genuine issue for trial as to whether the running of the limitation period against Mr. Newman was suspended by operation of subsection 6(4) or the *Limitations Act*.

[59] As a result, I would allow the appeal with costs, set aside the Federal Court's order, and dismiss the respondent's motion for summary judgment.

"J.D. Denis Pelletier"
J.A.

"I agree.
Yves de Montigny J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 28, 2016
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	DE MONTIGNY J.A. GLEASON J.A.
DATED:	AUGUST 31, 2016

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