COURT OF APPEAL FOR ONTARIO

CITATION: Fennell v. Deol, 2016 ONCA 249
DATE: 20160405
DOCKET: C61000

MacPherson, van Rensburg and Miller JJ.A.

BETWEEN

Daniel Fennell

Plaintiff (Appellant)

and

Gurjinder Deol, Boota Shergill and Coachman Insurance Company

Defendants (Respondent and Appellant by way of cross-appeal)
(Respondent by way of cross-appeal)

William G. Scott, for the appellant

Agatha Dix, for the respondent and appellant by way of cross-appeal

Cary N. Schneider and Philip Pollack, for the respondent by way of cross-appeal

Heard: February 24, 2016

On appeal from the order of Justice Suhail A.Q. Akhtar of the Superior Court of Justice, dated August 12, 2015, with reasons reported at 2015 ONSC 4835.

van Rensburg J.A.:

A. INTRODUCTION

[1] Daniel Fennell was involved in a four vehicle accident on August 24, 2010. On August 16, 2012, he commenced a personal injury claim against one of the other drivers, Boota Shergill. On March 20, 2014, the statement of claim was

amended to add as a defendant Gurjinder Deol, the driver of another vehicle involved in the accident. On October 20, 2014, Shergill served a statement of defence and crossclaim, asserting a claim for contribution and indemnity against Deol.

[2] Deol moved for summary judgment to dismiss both the claim and the crossclaim against him on the basis of expired limitation periods. The motion judge dismissed the action against Deol as statute-barred. He refused to dismiss the crossclaim. These reasons address both Fennell's appeal of the dismissal of his claim against Deol and Deol's appeal of the refusal to dismiss Shergill's crossclaim.

B. FACTS

[3] The following facts are relevant to both appeals.

[4] At the time of the accident on August 24, 2010, Fennell's wife, who was a passenger in his vehicle, noted the details of Deol's driver's licence and vehicle registration, and she took photos of the vehicles. At the scene, Fennell was given page two only of the motor vehicle accident report (the "MVAR"), which named Shergill and another party (not Deol) as drivers involved in the accident.

[5] On April 24, 2012, Fennell's lawyer wrote to the police requesting the MVAR, a complete copy of which he received on August 15, 2012. The following

day he issued a statement of claim, but neglected to include Deol as a defendant.

[6] The statement of claim was served on Shergill on September 16, 2012. On January 29, 2013, Shergill received the MVAR from the police and Shergill's counsel provided Fennell's counsel with details of Deol's identity on March 3, 2013. Fennell amended his statement of claim to add Deol as a defendant on March 20, 2014. In the interim, his counsel wrote to the police and obtained the police notes. On October 20, 2014, Shergill crossclaimed against Deol.

C. DECISION OF THE MOTION JUDGE

[7] In response to the motion to dismiss his claim Fennell made two arguments. First, he asserted that he had not discovered the claim against Deol until he received the first page of the MVAR on August 15, 2012. The motion judge rejected this argument, based on Fennell's actual knowledge of Deol's identity on the day of the accident and his lack of due diligence in obtaining the first page of the MVAR. This argument is not renewed on appeal.

[8] Second, Fennell asserted that it was only when he received the report of Dr. Kwok, dated August 8, 2014, that he reasonably believed that he had sufficient medical information to meet the requirement of s. 267.5(5) of the *Insurance Act*, R.S.O. 1990, c. I.8 of having sustained a "permanent serious impairment of an important physical, mental or psychological function".

[9] The motion judge considered Fennell's assertion that he had only discovered his claim on receipt of Dr. Kwok's diagnosis. He noted that, according to Fennell's own discovery testimony, his back injuries were apparent and serious well before he was examined by Dr. Kwok. His injuries were serious enough that he stopped working within a week of the accident and his employment was terminated in November 2010. He was unable to work full-time for three years and unable to accomplish even light housekeeping duties until July 2012. He received physiotherapy treatments through to the end of 2010. An MRI scan in July 2012 disclosed a disc herniation, which was confirmed by a second MRI in May 2014.

[10] The motion judge stated that, for Fennell to rely on the discoverability principle to toll the start of the limitation period, he had to show that he exercised due diligence in discovering his claim. He concluded that Fennell failed to act with due diligence, and that his alleged failure to discover his permanent and serious impairment was due to the lackadaisical and indifferent approach of Fennell and his counsel.

[11] The motion judge, at para. 31 of his reasons, found that, if Fennell had fulfilled his due diligence obligations in the manner required, his permanent serious impairment would have been discovered no later than around the time he commenced his action against Shergill. He concluded at para. 32 that, "[a]ccordingly… Fennell knew or ought to have known of his claim against Deol

more than two years before he amended his Statement of Claim to add Deol as a party to the litigation", and he dismissed Fennell's claim against Deol.

[12] The motion judge refused to dismiss Shergill's crossclaim. The two-year limitation period presumptively ran from the date Shergill was served with the statement of claim, September 16, 2012. He concluded that Shergill ought to have discovered his claim for contribution and indemnity later in the month of October 2012 or early November 2012, and, therefore, his crossclaim for contribution and indemnity on October 20, 2014 was not statute-barred.

[13] The motion judge also stated that, although Shergill waited 19 months after receiving the MVAR on January 29, 2013 to claim contribution and indemnity from Deol, this was not contrary to his "duty of due diligence". It made sense for Shergill to wait for Deol to be added to the main action as a co-defendant so that he could crossclaim rather than bringing a third party claim for contribution and indemnity.

D. ANALYSIS

(1) Fennell's Appeal

[14] Fennell contends that the motion judge erred in his approach to the limitation issue: both in finding that he had not exercised due diligence to discover his permanent and serious impairment in the circumstances of the

various medical reports he had received, and in considering events that occurred within two years of Deol being added as a party.

[15] Deol contends that there was sufficient evidence for the motion judge to have concluded that Fennell's claim was reasonably discoverable well before two years before Deol was added to the action. Deol also relies on the motion judge's findings about due diligence – that the delay in discovering the claim was due to the lackadaisical and indifferent approach taken by both Fennell and his counsel.

[16] For the reasons that follow, I would allow Fennell's appeal.

[17] In my view, the motion judge's dismissal of Fennell's claim against Deol is inconsistent with the one finding he made about when the claim was reasonably discoverable, that is, no later than when he issued the claim against Shergill. This finding was driven almost entirely by his conclusion that Fennell and his lawyer did not exercise due diligence.

[18] While due diligence is a factor that informs the analysis of when a claim ought to have reasonably been discovered, lack of due diligence is not a separate and independent reason for dismissing a plaintiff's claim as statute-barred.

[19] The two-year limitation period and the principle of discoverability are codified in sections 4 and 5 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, as follows:

> 4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.
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> 5. (1) A claim is discovered on the earlier of,
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> (a) the day on which the person with the claim first knew,
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> (i) that the injury, loss or damage had occurred,
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> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
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> (iii) that the act or omission was that of the person against whom the claim is made, and
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> (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
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> (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).
>
> 5. (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

[20] The basic two-year limitation period begins to run on the day the claim was discovered. The date of discovery is the earlier of the two dates under s. 5(1) – when (a) the person with the claim had knowledge of, or (b) a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have had knowledge of, the matters referred to in s. 5(1)(a)(i) to (iv). If either of these dates is more than two years before the claim was issued, the claim is statute-barred.

[21] Section 5(1)(a) considers when the person with the claim had actual knowledge of the material facts underlying the claim. Unless the contrary is proved, under s. 5(2), the person is presumed to have known of the matters in s. 5(1)(a)(i) through (iv) on the date of the events giving rise to the claim.

[22] I pause here to note that, in the present case the key consideration was when Fennell knew or a reasonable person with his abilities and in his circumstances ought to have known that the impairments from his injuries sustained in the accident were permanent and serious.

[23] Due diligence is not referred to in the *Limitations Act, 2002*. It is, however, a principle that underlies and informs limitation periods, through s. 5(1)(b). As Hourigan J.A. noted in *Longo v. MacLaren Art Centre Inc.*, 2014 ONCA 526, 323 O.A.C. 246, at para. 42, a plaintiff is required to act with due diligence in determining if he has a claim, and a limitation period is not tolled while a plaintiff sits idle and takes no steps to investigate the matters referred to in s. 5(1)(a).

[24] Due diligence is part of the evaluation of s. 5(1)(b). In deciding when a person in the plaintiff's circumstances and with his abilities ought reasonably to have discovered the elements of the claim, it is relevant to consider what reasonable steps the plaintiff ought to have taken. Again, whether a party acts with due diligence is a relevant consideration, but it is not a separate basis for determining whether a limitation period has expired.

[25] The issue here was whether the two-year limitation period had run before Deol was joined as a defendant. The specific issue was the discoverability of the fact that Fennell's injuries resulted in permanent and serious impairment. If the permanent and serious impairment was known by Fennell (s. 5(1)(a)) or ought reasonably to have been known by a person with his abilities and in his circumstances (s. 5(1)(b)) at any point between August 24, 2010 (the date of the accident) and March 20, 2012 (two years before Deol was added as a defendant), the claim was statute-barred.

[26] The motion judge erred in focussing primarily on whether Fennell exercised due diligence, and in concluding that the onus was on Fennell to show due diligence to rebut the presumption in s. 5(2) of the *Limitations Act, 2002*. As discussed above, to overcome the presumption Fennell needed to prove only that he did not know of his permanent and serious impairment on the date of the accident, not that he exercised due diligence.

[27] Fennell claimed that he only discovered his claim in August 2014, when he received Dr. Kwok's opinion that his injuries were permanent. The motion judge considered this, but he did not make a specific finding as to when Fennell had actual knowledge of his permanent and serious impairment. He could not have known of his permanent and serious impairment when the accident happened. As such, Fennell successfully rebutted the presumption in s. 5(2) that he knew of all of the elements of his claim on the date of the occurrence.

[28] The next question under s. 5 was when a person with Fennell's abilities and in his circumstances, ought reasonably to have known of his claim, and in particular that he had suffered a permanent and serious impairment.

[29] After reviewing the evidence of Fennell's medical condition and restrictions, as well as the MRIs he received in 2012 and 2014, the motion judge stated, at para. 31:

> If Fennell had fulfilled his due diligence obligations in the manner required, his permanent serious impairment would have been discovered no later than around the time that he commenced his action against Shergill without joining Deol.

[30] This is the motion judge's only finding on the question of when the claim ought reasonably to have been discovered, and in my view is determinative of the appeal. The motion judge found that Fennell's claim was discovered "no later than" when he commenced his action against Shergill. The action was commenced against Shergill on August 16, 2012. Deol was added as a defendant within two years of that date (on March 20, 2014). As such, the motion judge's conclusion that Fennell's claim against Deol was statute-barred is inconsistent with his finding as to when the claim was reasonably discoverable.

[31] The motion judge's criticisms of Fennell and his lawyer's "lackadaisical and indifferent approach" may well be warranted. In the absence of a finding that Fennell's claim ought reasonably to have been discovered before March 20, 2012, however, the motion judge was wrong to dismiss his claim against Deol at

the summary judgment stage. The motion judge's finding that Fennell ought to have discovered his claim against Deol "no later than" August 16, 2012, left the limitation question open.

[32] Accordingly, I would allow Fennell's appeal, set aside the order of the motion judge, and direct the limitation defence in relation to the claim against Deol to proceed to trial. I would reverse the costs order on the motion so that Fennell shall have the costs of the motion originally awarded against him.

[33] I would grant costs of the appeal to the appellant fixed at $4,000, inclusive of applicable taxes and disbursements.

(2) Deol's Appeal

[34] Deol raises two arguments on appeal.

[35] First, he says that the motion judge misapprehended the facts and the applicable law in finding that Shergill ought to have discovered his claim for contribution and indemnity in late October or early November 2012. He submits that there were no discoverability issues that prevented Shergill from crossclaiming against Deol within the presumptive two-year limitation period, and that Shergill did not tender any evidence as to why, despite being present at the scene of the accident, he did not know or could not discover the identity of Deol.

[36] Deol also submits that the motion judge erred in finding that it made sense for Shergill to wait until Deol was added to the main action as a co-defendant before issuing his crossclaim.

[37] I would not give effect to these arguments.

[38] The presumptive two-year limitation period for Shergill's claim against Deol for contribution and indemnity ran from September 16, 2012 when Shergill, as defendant, was served with the statement of claim. The claim did not name Deol as a defendant.

[39] The motion judge rejected Shergill's argument that he discovered the facts necessary for his crossclaim only when he obtained the police records four and a half months later. However, he found, at para. 38 of his reasons, that Shergill ought to have discovered his claim for contribution and indemnity later in the month of October or early November, and that therefore his crossclaim on October 20, 2014 was timely. The motion judge's determination of when Shergill's claim for contribution and indemnity against Deol ought reasonably to have been discovered was founded on the evidence and is entitled to deference.

[40] As for the motion judge's view that Shergill acted reasonably after having the necessary information, in waiting 19 months to crossclaim against Deol, rather than commencing a third party claim, nothing turns on this finding. As I have already observed, whether a party acted with diligence is not a separate

question in determining whether a limitation period has run. Whether Shergill acted reasonably in waiting to crossclaim against Deol, while the limitation period continued to run, instead of bringing Deol in through a third party claim is not determinative. The issue here was when a person with Shergill's abilities and in his circumstances ought to have discovered his claim for contribution and indemnity.

[41] For these reasons, I would dismiss Deol's appeal. I would award costs to the respondent Shergill fixed at $2,600 inclusive of disbursements and applicable taxes.

Released: ("JCM") April 5, 2016

"K. van Rensburg J.A."
"I agree J.C. MacPherson J.A."
"I agree B.W. Miller J.A."