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COMMON LAW DOCTRINE OF SPECIAL CIRCUMSTANCES ABOLISHED BY NEW LIMITATIONS ACT

Caroline Mostyn

In two recent decisions of the Court of Appeal released concurrently, *Meady v Greyhound Canada Transportation Corp.* ("*Meady*") and *Joseph v Paramount Canada's Wonderland* ("*Joseph*"), the Court held that the common law doctrine of special circumstances does not apply to the *Limitations Act, 2002,* S.O. 2002, c. 24, Sch. B (the "new Act"), which Act came into effect on January 1, 2004.

Before the new Act came into force, the common law doctrine of special circumstances allowed courts to exercise their discretion to grant an amendment to a pleading to add or substitute a party or to add a new cause of action after a limitation period had expired where special circumstances existed, unless the amendment caused prejudice that could not be compensated by costs or an adjournment. Whether special circumstances existed was within the discretion of the court. Generally speaking, the factors considered by a court as to whether special circumstances existed were (a) the reason why the plaintiff failed to add a party or cause of action within the limitation period; (b) whether a defendant had early notice of the plaintiff's claim or had already been involved in the proceeding; and (c) the disadvantage to the party being added as opposed to the disadvantage to the plaintiff if the party was not added.

The new Act came into force on January 1, 2004 and sets out a basic 2 year limitation period for causes of actions arising after that date. The new Act eliminates various limitation periods contained in other statutes, except those specifically set out in the new Act. It is silent on the issue of whether the doctrine of special circumstances may still be used to extend limitation periods.

In *Joseph,* the Court of Appeal addressed the issue of whether the doctrine of special circumstances applied to extend a limitation period for causes of action that arose after January 1, 2004. The Court stated that because section 4 of the new Act mandates a 2 year limitation period "unless this Act provides otherwise", the court was required to look to the provisions of the new Act for the authority to deviate from strictly applying the limitation period. The Court held that there was no such authority in the new Act. To the contrary, section 21 of the new Act clearly prohibits the addition of parties to an existing action after a limitation period expires.

The Court then reviewed section 20 of the new Act, which section allows the extension, suspension or variation of a limitation period "by or under another Act". The Court then analyzed whether the *Rules of Civil Procedure*, which provides a Court with authority to amend pleadings and to add new parties to an action, could be considered "another Act". The Court held that the *Rules of Civil Procedure* did not constitute such an Act. As such, the doctrine of special circumstances cannot be used to extend the 2 year limitation period for causes of action that arise after January 1, 2004.

In *Meady,* the Court dealt with the more compli-

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cated issue of whether the doctrine of special circumstances is still available in cases where the cause of action arose prior to the new Act coming into force, the former limitation period has expired, but the amendment to add a new party is being made after the new Act was in force.

The new Act contains transition provisions between the *Limitations Act,* R.S.O. 1990, c. C. 43 (the "old Act") and the new Act to determine how limitation periods are to be treated in transitional cases. In this regard, section 24(3) of the new Act states that if a former limitation period has expired before the effective date (January 1, 2004), no proceeding shall be commenced in respect of the claim. The court commented that the transition provisions of the new Act specifically deal with the former limitation period and not the new one. The court also noted that under the old Act, courts were at liberty to apply the doctrine of special circumstances to add parties or new causes of action after the expiration of a limitation period.

The Court concluded that the common law doctrine of special circumstances was not repealed by the new Act and, therefore, continues to form part of the analysis when a court is deciding whether to grant an amendment to add a party after the expiration of a former limitation period.

In summary, the Court of Appeal decisions in *Meady* and *Joseph* clearly state that where the cause of action arises after the new Act has come into force and is subject to the limitation period set out in the new Act, the doctrine of special circumstances is not available to allow a new cause of action or a party to be added to an action where the limitation period has expired. However, if the cause of action arose prior to the new Act and a former limitation period has expired, then the doctrine of special circumstances can still be used and applied by the courts to extend, vary or suspend the former limitation period. ■

SCC DISMISSES DEAD FLY IN A BOTTLE CASE

Alva Orlando

In a unanimous ruling, the Supreme Court of Canada decided that the psychological injury sustained by a plaintiff who discovered a dead fly in an unopened bottle of water was too remote to be reasonably foreseeable or compensable by the defendant bottled water supplier.

In 2005, the trial judge had awarded the plaintiff, Waddah Mustapha, in excess of $340,000 in damages after accepting medical evidence that Mustapha suffered major depressive disorder, with associated phobia and anxiety, as a result of seeing the fly in the bottled water. The trial decision was overturned in a unanimous decision of the Ontario Court of Appeal in 2006. In its May 22, 2008 ruling, the SCC reviewed the elements of negligence and upheld the Court of Appeal's dismissal of Mustapha's claims as too remote to allow recovery.

Chief Justice Beverly McLachlin examined the four elements for a negligence action, and con-

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cluded that Mustapha had met only the first three elements:

(1) as a manufacturer of a consumable good, Culligan owed the plaintiff a duty of care;

(2) Culligan breached the standard of care by supplying contaminated water; and

(3) Mustapha demonstrated that he suffered damages in the form of serious psychiatric harm.

However, Mustapha failed to prove the fourth element, namely, that Culligan **caused** Mustapha's injury both in fact and in law. While the trial judge found causation *in fact,* the SCC found that Culligan had not caused Mustapha's injury *in law*. The SCC emphasized that a plaintiff must be considered objectively rather than subjectively, noting that "the law expects reasonable fortitude and robustness of its citizens and will not impose liability for the exceptional frailty of certain individuals." Mustapha failed to show that it was foreseeable that a person of ordinary fortitude would suffer serious injury as a result of seeing a fly in a bottle of water. His only evidence at trial was about his own reactions which the medical experts described as "highly unusual" and "very individual".

The SCC went on to say that while unusual or extreme reactions to events caused by negligence are *imaginable*, they are not *reasonably foreseeable*. The standard for reasonable foreseeability is that the harm must be probable. This is a higher standard that mere "possibility" which can be easily established by the mere fact that the injury occurred. The Chief Justice was careful to point out that the Court's intent was not to penalize those particularly vulnerable to mental injury:

> "It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of **reasonable** foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damages, not at perfection, but at reasonable foreseeability." (at para. 16)

The Court also emphasized that focusing on the person of ordinary fortitude for the purposes of determining foreseeability should not be confused with the "thin skull" test where, as a result of breach of duty, the damage caused proves to be more serious than expected, but rather, "*it is a threshold test for establishing compensability of damages at law.*"

Finally, to "muddy" the water, the SCC did not completely close the door to other cases of psychological harm without physical injury. First, where a defendant has actual knowledge of a plaintiff's particular sensibilities, the Court suggests that the ordinary fortitude requirement need not be applied strictly. In other words, if Culligan had known that Mustapha was of less than ordinary fortitude, Mustapha's injury may have been reasonably foreseeable and, therefore, his damages recoverable at law. Second, the Court states that for psychological disturbance to be compensable, "*it must be serious and prolonged and rise above the ordinary annoyances, anxieties and*

fears that people living in society, routinely, if sometimes reluctantly, accept." Minor and transient upsets do not constitute personal injury. This reasoning leaves the door open for trial judges to determine just how "serious" psychological harm must be in order to qualify as psychological injury. ■

NOTA BENE: SUPREME COURT OF CANADA RULES THAT THE PRIVACY COMMISSIONER HAS NO AUTHORITY TO REVIEW CLAIMS OF SOLICITOR-CLIENT PRIVILEGE

Giovanna Asaro

The Supreme Court of Canada has rejected the Privacy Commissioner's bid for power under the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA*") to review documents for which solicitor-client privilege is claimed to determine whether the claim is justified.

In its July decision, *Blood Tribe Department of Health v. Canada Privacy Commissioner*, the Court rejected the argument that section 12 of *PIPEDA* empowered the Privacy Commission to make such a determination. Section 12 gives the Privacy Commissioner express statutory authority to compel a person to produce any records that the Commissioner considers necessary to investigate a complaint "in the same manner and to the same extent as a superior court of record" and to "receive and accept any evidence and other information ... whether or not it is or would be admissible in a court of law".

The Court held that, while the language contained in section 12 of *PIPEDA* was broad, it did not confer a right to access solicitor-client documents, even for the limited purpose of determining whether the privilege is properly claimed. Rather, express words are necessary to permit a regulator or other statutory official, such as the Privacy Commissioner, to "pierce" solicitor-client privilege. The Court found that such clear and explicit language does not appear in *PIPEDA*. As such, the role of determining solicitor-client privilege was reserved to the courts. ■

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