IN THE COURT OF APPEAL OF NEW ZEALAND

CA236/2016
[2017] NZCA 236

BETWEEN	THE ATTORNEY-GENERAL Appellant
AND	TANIA JOY LAMB Respondent

Hearing: 9 March 2017

Court: Kós P, French and Williams JJ

Counsel: S J Leslie for Appellant
Respondent in person

Judgment: 7 June 2017 at 10.30am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The respondent's claim is struck out.

C The respondent must pay the appellant's costs on an ordinary appeal, and usual disbursements.

REASONS OF THE COURT

(Given by Kós P)

[1] Does the filing of a statutory Accident Compensation appeal in the District Court stop time running against the plaintiff under the Limitation Act 1950 in later High Court proceedings against hospital authorities for alleged negligent non-treatment?

[2] In 1977 Ms Lamb was injured in a car accident. She was 11 years old at the time. She was treated at Palmerston North Hospital. She says that the treatment was inadequate by reason of a failure by medical staff to arrange a CAT scan or refer her for neurological assessment. As a result, she says, she developed partial paralysis in her left side that could have been avoided had she been properly treated. Ms Lamb says she did not apprehend this treatment omission had occurred until October or November 2008 when she first saw medical records dating back to the accident in 1977.

[3] Ms Lamb had accident compensation cover for personal injury by accident. She sought cover also for treatment injury in order, apparently, to hold the hospital further to account. It made no difference to the level of compensation given the cover already extended to her.

[4] In February 2009 the Accident Compensation Corporation (ACC) declined cover for treatment injury. Its decision was upheld in a review decision in January 2010. Ms Lamb appealed to the District Court in February 2010. The appeal was heard in April 2011 and dismissed, inter alia on the basis the appeal was moot given she had cover anyway.[1]

These proceedings

[5] In September 2014 Ms Lamb filed High Court proceedings against Mid Central District Health Board in respect of the care she had received at the Palmerston North Hospital in 1977. Her claim was for breach of contract, negligence and breach of fiduciary duty, and sought exemplary damages. In February 2015 she amended the proceeding to substitute the Attorney-General as defendant. That was pursuant to a direction made earlier that month, because the District Health Board did not exist in 1977.

[6] Ms Lamb's claim was struck out by Associate Judge Smith in August 2015.[2] The Judge said it had no prospect of success. First, he held that all claims sought damages in respect of bodily injury and that therefore s 4(7) of the Limitation Act

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1 *Lamb v Attorney-General* [2011] NZACC 156.
2 *Lamb v Attorney-General* [2015] NZHC 2066.

applied. That required the cause of action to be brought within two years of the date on which the cause of action accrued. That was in October or November 2008 at the latest.[3] Secondly, the Judge said the statement of claim did not allege facts on which a claim of exemplary damages could be based. That is, it did not allege intentional misconduct or subjective recklessness.[4]

[7] Ms Lamb then sought to review the Associate Judge's decision. Her application for review was filed nine weeks out of time. That is a short delay. It was non-prejudicial. And it was the product of an earlier incorrect decision by Ms Lamb to lodge an appeal in the Court of Appeal rather than an application for review in the High Court. But the consequence of Ms Lamb being out of time is that she needed leave. A Court assessing leave in such a case is obliged to consider whether there is substance or merit in the proposed review (or appeal, if the matter concerns an appeal).[5]

[8] In short, Ms Lamb's mistake necessitated an early merits review by the High Court. And, again on appeal, by this Court.

[9] Before Mallon J Ms Lamb argued that she had brought her claim within two years of the cause of action accruing by bringing her District Court appeal (in respect of the ACC's decision to decline her cover for treatment injury). That appeal, brought in February 2010, was within two years of October or November 2008 when the alleged cause of action arguably accrued.

[10] As to that argument, Mallon J held:[6]

> [16] The two year time period applies to an "action" which means "any proceeding in a court of law other than a criminal proceeding". Counsel for the respondent submits that the appeal was not the same "action" as the present one because it was a separate claim in a separate court against a separate defendant. Counsel for the respondent may well be correct about this. However, I consider the issue warrants full consideration at a review

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3 It may be noted that while there is a proviso to s 4(7) permitting an action within a longer period of six years, by consent or by leave, that was found to be inapplicable in the present case because the application for leave was not made within time: see *Lamb v Attorney-General*, above n 1, at [32]. The Associate Judge's finding to that effect was not challenged before us.

4 At [81].

5 *Ratnam v Cumarasamy* [1964] 3 All ER 933 (JCPC) at 935.

6 *Lamb v Attorney-General* [2016] NZHC 849.

> hearing. As Ms Lamb argues, the essence of her claim (that is, to hold the Palmerston North Public Hospital to account for what Ms Lamb regarded to be its negligent care of her) is unchanged. I am not convinced, on the basis of the limited argument on this issue in the context of an application for extension of time, that the present proceeding is a fresh (and different) action simply because it is brought in the High Court rather than the District Court as counsel for the respondent contends. It may well be a different "action", however, because there are materially different legal consequences arising in the present claim.
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> [17] Ms Lamb's argument is somewhat novel. While Ms Lamb's argument appears to have difficulties, I consider it is better to allow this argument to be fully considered in a review hearing rather than declining to allow the review to proceed because Ms Lamb was late in filing her application for review for reasons she has explained.

[11] On the alternative ground for striking out, Ms Lamb had indicated an intention to now amend her pleading to assert conscious appreciation of risk by omission and a deliberate or reckless decision not to treat notwithstanding. Although Mallon J noted that the Crown asserted such pleading was doomed to fail, her view was that the argument was better considered once an amended pleading was before the Court.

[12] For those reasons, Ms Lamb's application for leave to extend time for filing her review application was allowed.

[13] That decision the Crown now appeals.

Approach on appeal

[14] Jurisdiction exists under s 66 of the Judicature Act 1908 to hear an appeal from a determination to grant or refuse to grant an extension of time to appeal or bring review. In *Simes v Tennant* this Court held:[7]

> We should not be taken as encouraging appeals against decisions of High Court Judges refusing extensions of time to appeal and even less so appeals against decisions granting extensions of time. The decisions are discretionary, and the threshold for success on an appeal against such a discretion is high. As this Court noted in *Harris v McIntosh* … it will be necessary to show that the High Court judge acted on a wrong principle, failed to take into account some relevant matter, took account of some irrelevant matter or was plainly wrong.

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7 *Simes v Tennant* (2005) 17 PRNZ 684 (CA) at [48].

[15] The Crown submits that there was a complete absence of material before the High Court Judge on which she could exercise her discretion in Ms Lamb's favour. So the Crown says the decision below was plain wrong.

Discussion

[16] Mallon J did not have, as she expressly noted, full argument as to the limitation points. That deficiency was rectified before us. Having heard full argument, it is plain that Ms Lamb's proceeding against the Attorney-General is statute-barred.

[17] The Limitation Act offers an absolute defence to an "action" if filed out of time. Ms Lamb accepts, as she must, that the defence will avail the Crown in this case unless it can be said that the appeal she filed in the District Court against the ACC in February 2010 is the same "action" she now pursues against the Crown.

[18] Ms Lamb's proposition cannot responsibly be adopted. There is a scarcity of direct authority on the meaning of the word "action" in s 4(7), particularly in relation to the submission Ms Lamb makes that two distinct proceedings amount to one action, such that time is held in abeyance for limitation purposes.

[19] The High Court decision of *J v J* is of some assistance on this question.[8] There the plaintiff initially filed her claim in the District Court, but then re-issued it (for a greater sum) in the High Court. Chisholm J held the District Court proceeding could not count for limitation purposes because it was not pursued.[9] He was apparently satisfied filing the claim in the District Court did not constitute the same "action", time still running, despite the underlying cause of action remaining precisely the same.

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8 *J v J* [2013] NZHC 1512.
9 At [192].

[20] If *J v J* is correct, one might think then that a claim with a fundamentally different cause of action against a different defendant in a different court cannot amount to a single "action".[10]

[21] In the absence of more direct authority on the meaning of "action" under the Limitation Act, we consider the principles of res judicata assist. They deal with the related issue of whether the resolution of one action precludes the issue of a second. A decision concluded by a judicial or other tribunal competent to decide over that cause of action and the parties is final for all "fundamental matters decided", so that those matters cannot be re-litigated between the parties other than on appeal.[11] In *Thoday v Thoday* Diplock LJ stated:[12]

> … "cause of action estoppel" … prevents a party from asserting or denying as against the other party, the existence of a particular cause of action, the existence or non-existence of which has been determined by a court of competent jurisdiction in previous litigation between the same parties.

The identity of causes of action under res judicata principles is one of substance.[13]

[22] To put the matter plainly, the improbability of a res judicata plea being able to be made out here, none having been advanced, suggests strongly that the District Court appeal and the High Court proceedings are not one and the same "action" for limitation purposes.

[23] We consider the qualifying characteristics of an "action" for limitation purposes are the identity of: (1) parties, (2) cause of action (and the relevant right giving rise to it), and (3) the tribunal. We apply these to the present appeal:

(a) *Party identity*: The defendant in the 2010 proceeding was the ACC. In the 2014 proceeding the defendant was the District Health Board (and subsequently, by substitution, the Crown). The ACC is a Crown

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10 See also the obiter conclusion of this Court in *T v H* [1995] 3 NZLR 37 (CA) that a pre-action directions application was not part of the "proceeding" later filed: at 58 per Tipping J.

11 KR Handley *Spencer Bower and Handley: Res Judicata* (4th ed, LexisNexis, United Kingdom, 2009) at [1.01].

12 *Thoday v Thoday* [1964] 2 WLR 371 at 384.

13 *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 36 FCR 406 at 418–419 and 422.

entity established by statute, with its own legal personality. It is not the Crown.[14] The defendants here are distinct, not identical.

(b) *Cause of action identity*: The cause of action (if it may so be described) in the 2010 appeal in the District Court concerned a claim pursuant to statute for cover of an alleged treatment injury for the purposes of the Accident Compensation Act 2001, a now completed proceeding. The 2014 proceeding was a claim for exemplary damages based on negligence, and breach of both contractual and fiduciary duties. There is some commonality inasmuch as each claim rests upon the same underlying factual substratum concerning treatment. But the matters in issue in each proceeding are fundamentally different. In one, entitlement according to statutory criteria; in the other, rights pursuant to contract and general principles of negligence and fiduciary duty. The causes of action are patently distinct.

(c) *Tribunal identity*: The proceedings being filed in different Courts, under entirely different action numbers, the Courts are clearly distinct. We reserve for further argument on another occasion where this third consideration, standing alone, would be a sufficient obstacle. We note that was the view expressed in *J v J*, discussed above.[15] In the present appeal, however, this consideration does not stand alone.

[24] It follows that Ms Lamb cannot bootstrap her way past the Limitation Act by relying on the distinct 2010 statutory appeal as an in-time forerunner to her 2014 common law action. The latter is statute-barred. It follows that leave extending time for review should not have been given. The original decision of the Associate Judge to strike out this claim must be reinstated.

[25] This outcome is unfortunate, and one cannot but have sympathy for Ms Lamb. Limitation periods are however imposed by Parliament for good policy

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14 Crown Entities Act 2004, s 15.
15 See above at [19].

reasons. In this case the events concerned occurred over 40 years ago. There would be considerable difficulty in both pursuing and defending a claim of this nature. That would also have been so, perhaps, if Ms Lamb had commenced her claim in 2010. The essential facts were apparent to Ms Lamb in 2008, and by statute she had only two more years to file this claim unless leave were obtained in time, which it was not. The statute admits no discretion in this matter. The limitation defence having been taken, its effect is absolute.

[26] In these circumstances it is unnecessary for us to express a view on the Crown's second ground of appeal concerning viability of the exemplary damages claim, absent limitations issues.

Result

[27] The appeal is allowed.

[28] The respondent's claim is struck out.

[29] The respondent must pay the appellant's costs on an ordinary appeal, and usual disbursements.

Solicitors:
Crown Law Office, Wellington for Appellant