IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Aubichon v. British Columbia (Attorney General),* 2021 BCSC 1183

Date: 20210617
Docket: S59124
Registry: Kamloops

Between:

Cuyler Richard Aubichon

Plaintiff

And

The Attorney General of Canada, The Minister of Public Safety and Solicitor General and Constable Joshua Grafton

Defendants

Before: The Honourable Madam Justice Matthews
(by telephone)

Reasons for Judgment

Counsel for Plaintiff:	M.A. Patterson (by telephone)
Counsel for Constable Joshua Grafton:	R.N.A. Hira, Q.C. (by telephone)
Counsel for The Attorney General of Canada and the Minister of Public Safety and Solicitor General:	K.L. Lakusta (by telephone)
Place and Date of Hearing:	Kamloops, B.C. June 3, 2021
Place and Date of Judgment:	Kamloops, B.C. June 17, 2021

Overview

[1] On February 18, 2016, Constable Joshua Grafton of the Prince George Royal Canadian Mounted Police used a police dog while arresting the plaintiff,

Cuyler Richard Aubichon. Mr. Aubichon alleges that he was on the ground after the police dog bit his arm. He alleges that Constable Grafton punched him, kicked him, repeatedly struck him in the head with his baton and urged the dog to continue to bite him. The Independent Investigations Office of British Columbia investigated Constable Grafton pertaining to Mr. Aubichon's arrest. The Crown approved criminal charges against Constable Grafton in July 2020.

[2] On July 23, 2020, Mr. Aubichon brought this claim alleging assault and intentional affliction of mental distress. Constable Grafton applies to dismiss the claim pursuant to Rule 9–5(1) or alternatively Rule 9–6 of the *British Columbia Supreme Court Civil Rules*, as being out of time. He also seeks to dismiss the claim of intentional infliction of mental distress as not disclosing a cause of action.

[3] The central issue on the application is whether Mr. Aubichon had knowledge of his claim, within the meaning of s. 8 of the *Limitation Act*, S.B.C. 2012, c.13, more than two years before July 23, 2020 such that the limitation period expired when he commenced the claim. Constable Grafton argues that Mr. Aubichon's amended notice of civil claim demonstrates that his claim is bound to fail because Mr. Aubichon pleads facts that demonstrate that he discovered his claim well in advance of two years prior to July 23, 2020. Mr. Aubichon submits that he did not have the knowledge called for by s. 8 of the *Limitation Act* until charges were laid against Constable Grafton in July 2020.

[4] Section 8(d) of the *Limitation Act* provides that the limitation period does not start running until a person knew or reasonably ought to have known that "a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage". On this application, the first question is whether the pleadings, taken to be true, can only mean that Mr. Aubichon knew or reasonably ought to have known that a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage such that the claim is bound to fail under Rule 9-5(1)(a) of the *Supreme Court Civil Rules*. Alternatively, the issue is whether the claim should be summarily dismissed under Rule 9-6 as not raising a trial issue because of an expired limitation period.

Knowledge of Court Proceedings as an Appropriate Means of Remedy

Discoverability Provisions of the *Limitation Act*

[5] Section 6 of the *Limitation Act* provides that a claim must not be commenced more than two years after the date on which the claim is discovered subject to the ultimate limitation period and certain exceptions, none of which apply. Section 8 of the *Limitation Act* provides the rules for discovery of a claim. It reads as follows:

> **General discovery rules**
>
> 8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
>
> (a) that injury, loss or damage had occurred;
>
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
>
> (c) that the act or omission was that of the person against whom the claim is or may be made;
>
> (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

Rule 9-5(1)(a) Analysis

[6] The test for striking pleadings under Rule 9-5(1)(a) is: assuming the material facts stated in the notice of civil claim can be proved and are true, it is plain and obvious the plaintiff's pleadings disclose no reasonable cause of action or have no reasonable prospect of success: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980.

[7] Limitation defences should generally not be the subject of Rule 9-5(1)(a) applications to strike absent exceptional circumstances; where the limitation defence is bound up in the facts it is not appropriate: *Jensen v. Ross*, 2014 BCCA 173 at para. 42-45; *Fuoco Estate v. Kamloops (City)*, 2001 BCCA 325 at para. 15.

[8] However, where the plaintiff's claim pleads all the facts necessary to determine the limitation period issue, a Rule 9-5(1)(a) application may be possible, see for example, *Dong v. Real Estate Board of Greater Vancouver*, 2020 BCSC 2018 at paras. 36-45. In *Ahamed v. The Great Canadian Landscaping Company Ltd.*, 2021 BCSC 197, Master Elwood provided a helpful summary of the law and concluded that "a claim may be struck out under Rule 9-5(1)(a) on grounds it is barred by the *Limitation Act*, but the expiry of the limitation period must be plain

and obvious on the face of the notice of civil claim and it must not be subject to an issue, such as discoverability or postponement, that should be decided on full pleadings and evidence". I agree with this with a caveat that if the pleadings contain material facts that, when assumed to be true, plainly and obviously dispose of the discoverability issue, then that can be addressed under Rule 9-5(1)(a). That will be rare. For the reasons that follow this is not such a rare cases.

[9] Mr. Aubichon pleaded that the limitation period did not start running until the Crown laid charges against Constable Grafton in connection with Mr. Aubichon's arrest in June 2020 because that is when he became aware that he had a right to complain and take legal action against Constable Grafton. He pleaded that he was advised by his criminal lawyers that he should wait until the Prosecution Services made a decision about laying charges before he made any attempts to file a civil action.

[10] Constable Grafton argues that assuming the facts pleaded by Mr. Aubichon are true, Mr. Aubichon discovered the claim before the charges were laid, and at least shortly after his arrest. Constable Grafton says this is the only inference that can be drawn from Mr. Aubichon's pleading that he was injured during his arrest and that injury occurred due to acts of Constable Grafton. Constable Grafton also argues that given that Mr. Aubichon has pleaded he was receiving advice from his lawyers shortly after his arrest, he knew or ought to have known by that time that he had a claim.

[11] There are two problems with this argument as it is advanced under Rule 9-5(1)(a).

[12] The first problem is that Mr. Aubichon did not plead that he was consulting his lawyers about the injuries that Constable Grafton inflicted upon him shortly after his arrest. The reference to "shortly after his arrest" in his pleadings is about when he was incarcerated. His pleading about the advice he received from his lawyers does not refer to a date or timeframe. Clearly it was before the charges were laid because he pleaded the advice was to wait until a decision was made by the Crown Prosecution Services on an investigation into Constable Grafton. Leaving aside whether advice to not commence a claim is knowledge of a claim, if he did not receive the advice he is referring to before July 22, 2018, Constable Grafton's argument that Mr. Aubichon's pleading discloses knowledge more than

two years before he commenced his claim cannot succeed. Since the date of the knowledge is not in the pleading, Rule 9-5(1)(a) cannot be used to determine this issue.

[13] Constable Grafton submits that this conclusion is not correct because it is plain and obvious, based on what was pleaded, that Mr. Aubichon should have had the knowledge. This argument requires me to conclude that because Mr. Aubichon consulted a lawyer and received advice to not proceed, he knew or ought to have known that a court proceeding was a reasonable avenue to seek redress. In other words, Mr. Aubichon's pleading about his subjective state of knowledge is irrelevant because s. 8 of the *Limitation Act* provides for a subjective or objective determination of knowledge, and s. 8(d) of the *Limitation Act* provides that the knowledge must be that a court proceeding is reasonable, not that it will be successful.

[14] The problem of the timing of when Mr. Aubichon allegedly demonstrated objective knowledge by seeking advice is still not addressed by this submission. Leaving that aside, this submission requires me to conclude that seeking legal advice leads irreducibly to the conclusion that the seeker of advice has or received knowledge that a legal proceeding is a reasonable avenue to pursue. It also requires me to conclude that the advice that Mr. Aubichon pleaded he received, to wait until charges were filed, was wrong, but notwithstanding that advice, Mr. Aubichon had the knowledge that a legal proceeding was a reasonable avenue to pursue.

[15] With regard to the first conclusion, Constable Grafton relies on a decision of Mr. Justice Funt in *Arbutus Environmental Services Ltd. v. South Island Aggregates Ltd.*, 2017 BCSC 1, in which Mr. Justice Funt dismissed the plaintiff's claim on the basis of an expired limitation period. The parties were negotiating the resolution of their dispute more than two years before the claim was brought. Mr. Justice Funt held that the negotiations were not a reason to disavow knowledge that a legal proceeding was a reasonable avenue. However, in that case, the plaintiff pleaded that, at the time the events that gave rise to the claim occurred, the plaintiff formed the view that the other defendant had wrongfully take possession of the plaintiff's excavator and consigned it to the other defendant. Given that the claim was brought in conversion, the plaintiff's pleading disclosed

knowledge that the plaintiff had a claim that could reasonably be pursued through a legal proceeding at the time the event occurred. In that case, the pleading could not stand an interpretation other than the plaintiff had knowledge that satisfied all of the s. 8 requirements at the time the events occurred.

[16] The important distinction between that case and this case is that in *Arbutus Environmental Services Ltd.*, the plaintiff pleaded that facts the demonstrated the legal implications of his knowledge. In interpreting similar legislation in Ontario, Justice Sharpe said that word “appropriate” means “legally appropriate”: *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218 at para. 34.

[17] The pleadings in this case are not similar in regard to timing or unequivocal assertion of knowledge of the legal implications of the loss or damage. Constable Grafton argues that given that the pleading demonstrates that Mr. Aubichon knew, on February 16, 2018, that he had been attacked by the police dog at Constable Grafton’s urging, that Constable Grafton had beaten him, and that he was injured by those actions, he knew he had a claim for which a court proceeding would be an appropriate means to seek a remedy. I do not accept that submissions, because it conflates the requirement in s. 8(d) with the requirements in s. 8 (a), (b) and (c), rendering s. 8(d) redundant. In my view, Markel and the outcome in *Arbutus Services* are such that weight of the authority is that s. 8(d) includes knowledge of the legal implications of the s. 8(a)-(c) facts and for that reason, the claim is not bound to fail.

[18] With regard to the second conclusion, that the legal advice was wrong but Mr. Aubichon still knew a legal claim was a reasonable avenue to pursue, I cannot reach it while assuming the facts pleaded are true. Mr. Aubichon pleads he did not have that knowledge. In addition, it is not open to me to conclude that legal advice given was wrong without some clear authority that it was wrong so that as matter of law, what Mr. Aubichon has pleaded is bound to fail. On this issue, Constable Grafton made submissions on Ontario authorities: *Winmill v. Woodstock (Police Services Board)*, 2017 ONCA 962; *Sosnowski v. MacEwen Petroleum Inc*., 2019 ONCA 1005; and *Kulyk v. Guastella*, 2021 ONSC 584. Constable Grafton submitted that this line of authorities includes cases considering a policy rationale to interpret discoverability provisions to not require a plaintiff to commence a civil

proceeding while the plaintiff is a defendant in a criminal proceeding as well as subsequent cases that have questioned it and narrowed it. Constable Grafton submits that this policy has not been adopted by the courts of British Columbia and therefore it is plain and obvious that the pleadings disclose objective knowledge. This submission is logically flawed. It may be that this Ontario line of authorities has not been adopted (or rejected) by British Columbia courts, but that begs the question as to whether, as a matter of law, the advice that Mr. Aubichon received was wrong.

[19] Finally, Constable Grafton argues, relying on *Arbutus Environmental Services Ltd.*, that because the pleading shows that the plaintiff had the s. 8(a), (b) and (c) knowledge more than two years before he commenced the claim, he reasonably knew that he had a claim unless he did not have the practical ability to bring the claim. I am not persuaded that in s. 8(d), by using the words "reasonably ought to have known that … a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage", the legislature intended to say that a person reasonably ought to know where that person knows the s. 8(a)-(c) matters but does not have the practical ability to bring a claim. Section 8(d) is worded more broadly than that. Although Funt J., at para. 23, said that the personal circumstances to be considered are not broader than practical inability, he also said at para. 25 of *Arbutus Environmental Services Ltd*., "[s]ection 8 of the *Limitation Act* is intended to protect persons who could not reasonably have known that a claim existed or may not have had the practical ability to bring the claim" [emphasis added]. It bears repeating that in *Arbutus Environmental Services Ltd.*, the plaintiff pleaded that he knew the legal implications of the defendants' actions at the time they occurred but did not commence the claim because they were negotiating resolution. That obviously informed Funt J.'s conclusion in that case and his interpretation of s. 8(d).

[20] I conclude that Constable Grafton has not met his burden to establish that, assuming the facts pleaded are true, the claim is bound to fail.

Rule 9-6 Analysis

[21] On a Rule 9-6 application, the court must determine if there is a genuine issue for trial. The court must assume that uncontested material facts as pleaded by the plaintiff are true, matters of fact cannot be weighed, and inferences from the

facts must be viewed in a light most favourable to the plaintiff: *Sandhu v. Sun Life Assurance Company of Canada*, 2016 BCSC 1077 at para. 12. If the court is satisfied that there is no genuine issue for trial, then it must dismiss the claim – Rule 9-6(5) is mandatory: *Drummond v. Moore*, 2012 BCSC 496 at para. 25.

[22] Constable Grafton urged the court to adopt a robust approach to the use of Rule 9-6, relying on the Supreme Court of Canada's decision in *Hryniak v. Mauldin*, 2014 SCC 7. In *Century Services Inc. v. LeRoy*, 2014 BCSC 702, Madam Justice Griffin, then of this court, explained that the Ontario summary judgment rule at issue in *Hyrniak*, unlike Rule 9-6, allows the court to weigh evidence. In that regard, it is similar to the British Columbia summary trial rule, Rule 9-7. Madam Justice Griffin did not find *Hyrniak* helpful in determining how and when to apply Rule 9-6.

[23] Constable Grafton submits that based on Mr. Aubichon's affidavit evidence, the Court can conclude that he had the knowledge well before the limitation period expired, or chose not to seek legal advice in time. The relevant paragraphs of the affidavit read as follows:

> 1. On February 18, 2016, I was charged with possession of stolen property over $5,000 and also with possession of drugs pursuant to s. 4(1) of the *Controlled Drugs and Substances Act*. I was held in custody until August 8, 2016, when I was released and granted 12 months probation.
> 2. I was back in jail towards the end of 2016 for different breaches of probation. I was released in 2017, then put back in jail between 2017 and 2018, as I was charged with other offences including breach of probation in relation to the lead file that I was granted the initial probation on, which was File No. 44300-1.
> 3. At the time of the arrest, Constable Joshua Grafton ("Grafton") used a police Dog ("Dog") to haul me out of the truck. I was bitten by the Dog and was beaten by Grafton while I was on the ground. While I was on the ground, I could hear Grafton instructing the Dog to attack me, to bite me, while he was constantly hitting me in the back of the head and my ribs.
> 4. Grafton, while he was hitting me, was cursing at me and calling me a "dirty Indian". Grafton was using expletives and derogatory names against me while I was on the ground. I'm sure Grafton could hear me screaming, begging him to stop punching me and to stop the Dog from biting me; however, he did not stop until he was satisfied.
> 5. I was taken into custody. I was never provided with any medical help. I was then taken to the Prince George Correctional Facility where I remained until the matter was disposed of in August 2016.

6. Whilst I was in custody in Prince George in 2016, I was visited by the IIO and an interview was conducted. This interview was conducted without counsel. I was advised by the IIO that I did not need counsel. I was advised by the IIO that the purpose of the interview was to gather evidence in relation to an internal review that they were conducting with regards to Grafton and the use of the Dog by Grafton. I was advised by the IIO that they were not conducting a criminal investigation; they were simply conducting an internal disciplinary review. I was advised by the IIO that if there was any action to be taken against Grafton, that I may hear from them again. I did not hear again from the IIO.

7. Upon my release from jail in August 2016, I was back in jail for various criminal charges until my release in 2019.

8. I did not know that Grafton's actions were illegal or that bringing a claim against Grafton was appropriate. In my experience, I have been beaten up by police and correctional staff many times. No action was taken against them; they were never arrested, charged or disciplined. In my mind, as an Aboriginal youth, I believed that being beaten by the police was part of the course of being arrested. Hence the reason why it did not clue to me that there was any prospect of taking action against Grafton.

9. While out of jail in 2019, I heard from my friends that Grafton was being investigated. I reached out to a criminal lawyer (not my original lawyer) to ask what does that mean for me, given that I already pled guilty to the charges and have served my sentence. I was advised by the criminal lawyer that if Grafton is charged, then I should bring an action against the RCMP and Grafton.

10. In June of 2020, Grafton was charged by indictment with the following:

    a) assault with a weapon

    b) assault; and

    c) wilful attempt to obstruct, pervert or defeat the course of justice by making false or misleading entries in his Dog Handler's report.

Attached and marked as **Exhibit "A"** is a copy of Grafton's charge sheet.

11. I then contacted a lawyer who advised me that I may have a claim against Grafton, given the charges and my account of what happened at the time of my arrest. This was the first time I became aware that bringing a claim against Grafton would be appropriate. My personal situation and background caused me to believe that Grafton's brutality towards me was part of the course of action and was legal.

12. At the time when I spoke to the criminal lawyer, I had no idea what facts I would need to bring a claim. My only knowledge was that Grafton was being investigated and charged for assault. In my mind, I had no idea what the material facts were that I would need to use to bring a claim against the RCMP and Grafton.

> 13. In 2020, the physical injuries that I had suffered in 2016 were healed. However, since 2019, I have developed serious issues of anxiety, suicidal ideations along with serious issues of insomnia. I am suffering from nightmares - having dreams of being chased through the night. I believe that the mental injuries that I am now suffering are as a result of the beating I got from Grafton in 2016. The post-traumatic stress is clearly linked to Grafton and his Dog. My anxiety is triggered by barking dogs.
> 14. I did not discover the material facts or that a civil proceeding would be the appropriate process to obtain a remedy for damages, both mental and physical, until 2020.

[24] Constable Grafton asserts that the plaintiff was wrong when he deposed, at paragraph 6, that the IIO was conducting an internal review, because the IIO only conducts external investigations. Constable Grafton may be right, but that is not a basis on which to find that Mr. Aubichon had knowledge different than what he asserts he had at that time.

[25] Constable Grafton submits that Mr. Aubichon's assertion that he did not know that he could hold Constable Grafton to account legally because of his experiences of violence at the hands of police and correctional staff as an Aboriginal youth is irrelevant to his knowledge of whether a legal claim could be brought. He asserts this is because of the subjective or objective requirement that Mr. Aubichon "knew or ought to have known" in s. 8. I do not accept this submission. In *Arbutus Environmental Services Ltd.*, Funt J. adopted the approach explained by McLachlin J. (then a justice of the Supreme Court of Canada) in *Novak v. Bond*, [1999] 1 S.C.R. 808 to interpret the postponement provision of the previous limitation legislation which had objective and subjective components about knowledge of the facts giving rise to a claim. As discussed above, Funt J. concluded that s. 8(d) required consideration of "certain subjective circumstances of the plaintiff" but he was of the view that s. 8(d) does not reflect a legislative intent to take into account personal circumstances that do not relate to the practical ability of the plaintiff to bring an action. Later in the judgment he concluded that s. 8 protects persons who could not have reasonably known a claim existed or may have not have had the practical ability to bring the claim.

[26] As set out above, in *Markel,* the Ontario Court of Appeal interpreted "appropriate" to mean "legally appropriate".

[27] Constable Grafton says that the *Markel* interpretation of the Ontario provision that is similar to s. 8(d) has never been adopted in British Columbia. That may be, but while not binding on me, it is persuasive authority. In the absence of binding authority that precludes such an interpretation, I conclude that Mr. Aubichon's claim raises a triable issue in this regard.

[28] Given that I cannot weigh evidence, may only infer facts favourable to Mr. Aubichon, and the test is whether his claim is bound to fail, I conclude that Mr. Aubichon's claim raises a triable question as to whether systemic racism and violence on arrest affects whether a person subjected to such racism and violence knows he can hold the police accountable for it.

[29] Finally, Constable Grafton argues that I should infer from Mr. Aubichon's affidavit that he chose to not seek legal advice until 2019, given that he had access to legal advice all along. If he chose to not seek legal advice, then he made a tactical decision to wait, and discoverability principles do not apply to tactical decisions, see, for example *Novak* at 849 and *Winmill* at para. 22. Similarly, Constable Grafton argues that the advice that Mr. Aubichon received, to not commence an action until charges were laid, was tactical.

[30] As I have stated, the law only permits to me to draw inferences that are the most favourable to Mr. Aubichon. His affidavit evidence allows for inferences other than those that Constable Grafton urges me to draw. There are other plausible explanations for him not seeking legal advice before 2019 other than he chose not to. One is that his experiences as an Aboriginal youth led him to believe that there was no point, but that changed when he learned, in September 2019, that Constable Grafton was being criminally investigated. The inference that the legal advice he received was tactical is not the only inference that can be drawn from Mr. Aubichon's evidence. It may be that, despite the criminal investigation, his lawyer did not have enough facts on which to give an opinion that a legal proceeding was an appropriate means of redressing the harm he suffered.

[31] I conclude that Constable Grafton has not met his burden to demonstrate that Mr. Aubichon's claim does not raise a triable issue and is bound to fail.

Whether the Pleadings Disclose a Cause of Action for Intentional Infliction of Mental Distress

[32] This portion of Constable Grafton's application is brought under Rule 9-5(1)(a). In between the delivery of the notice of application and submissions on the application, Mr. Aubichon amended his notice of civil claim. At the return of the application, Constable Grafton submitted that the claim is not appropriately particularized because it is not clear what mental injuries were suffered. He submitted that Mr. Aubichon be required to particularize his claim.

[33] While the failure to plead material facts is a ground to strike a pleading for failing to disclose a cause of action, the same is not necessarily true of the failure to provide particulars. A material fact is necessary to plead a complete cause of action. Particulars provide the defendant with details of the case he or she has to meet: Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice*, 3rd ed., vol. 1 (Markham, ON: LexisNexis Canada Inc., 2006) at 3-6, adopted in *Sahyoun v. Ho*, 2013 BCSC 1143 at para. 27.

[34] The requirements with regard to particulars are set out in Rule 3-7 (18)–(24) of the *Supreme Court Civil Rules* which identify causes of action that must be particularized, address the timing of the requirement to provide particulars and address the circumstances in which the particulars must be included in the pleading.

[35] Constable Grafton has not identified deficiencies in the pleadings and/or the appropriate remedy with reference to the *Supreme Court Civil Rules*.

[36] I dismiss the application to strike the claim of intentional infliction of mental distress.

Conclusion

[37] Constable Grafton's application is dismissed. Mr. Aubichon is entitled to costs in the cause.

"Matthews J."