

Corkhill et al., Administrators of the
Estate of Corkhill v. Public Trustee

[Indexed as: Corkhill Estate v. Public Trustee]

30 O.R. (3d) 30
[1996] O.J. No. 2606
Court File No. 2716/93

Ontario Court (General Division),
Sheard J.
July 15, 1996

Limitations -- Practice -- Adding parties -- Plaintiffs' father becoming mentally incompetent in 1982 -- Public Trustee appointed as his committee -- Father dismissed by employer in 1982 -- Father dying in 1993 -- Plaintiffs suing Public Trustee for negligence in failing to inquire as to employee benefits to which father entitled -- Plaintiffs not discovering until 1995 that employer knew of father's mental disability before dismissing him -- Plaintiffs seeking to add employer as defendant and to sue employer for failure to assist father to make claim for long-term disability benefits -- Employer added as defendant despite expiry of two-year limitation period in Trustee Act -- Discoverability rule applying -- Trustee Act, R.S.O. 1990, c. T.23, s. 38.

Limitations -- Persons under disability -- Appointment of committee not affecting suspension under s. 47 of Limitations Act of running of limitation period -- Limitations Act, R.S.O. 1990, c. L.15, s. 47.

The deceased became mentally incompetent in 1982, and the Public Trustee was appointed as his committee. The deceased was dismissed by his employer, F Co., in 1982. He died in 1993. The plaintiffs, the deceased's children, commenced an action

against the Public Trustee in 1993 alleging mismanagement and negligence in the handling of the deceased's affairs, and particularly in failing to make any inquiry or application on behalf of the deceased for employee benefits. In 1995, when F Co. provided the plaintiffs with a copy of the deceased's employee file, the plaintiffs learned that F Co. had been aware of the deceased's mental disability prior to the end of his employment. The plaintiffs moved for an order adding F Co. as a defendant and to amend the statement of claim to assert a claim against F Co. for not having assisted the deceased to make a claim for long-term disability benefits. F Co. argued that the motion should be dismissed because the limitation periods in the Limitations Act and the Trustee Act had expired.

Held, the motion should be granted.

The appointment of a committee does not stop the suspension under s. 47 of the Limitations Act of the running of the limitation period.

The limitation period in the Trustee Act was not a bar to action being taken against F Co. The plaintiffs' solicitor first requested a copy of the deceased's medical file in 1993. The file was not provided until 1995. The plaintiffs did not discover that they had a right of action against F Co. until 1995 when they learned that F Co. knew that the deceased was suffering from a mental disorder that entitled him to compensation while he was still an employee. The plaintiffs exercised due diligence. If F Co. had responded to the first request, the action against F Co. could have been asserted within two years of the deceased's death. It was therefore particularly inappropriate for F Co. to be raising the limitation argument. In any event, the discoverability rule applied.

MacKinlay v. Matthews (1993), 12 O.R. (3d) 700, 61 O.A.C. 233, 14 M.P.L.R. (2d) 224, 44 M.V.R. (2d) 100, 18 C.P.C. (3d) 43 (Div. Ct.); Peixeiro v. Haberman (1995), 25 O.R. (3d) 1, 127 D.L.R. (4th) 475, 42 C.P.C. (3d) 37, 16 M.V.R. (3d) 46 (C.A.), apld

Other cases referred to

Deaville v. Boegeman (1984), 48 O.R. (2d) 725, 47 C.P.C. 285,
14 D.L.R. (4th) 81, 6 O.A.C. 297, 30 M.V.R. 227 (C.A.); Tarailo
v. Allied Chemical Canada Ltd. (1989), 68 O.R. (2d) 288, 26
C.C.E.L. 209, [1989] I.L.R. 1-2427, 89 C.L.L.C. 14,040
(H.C.J.)

Statutes referred to

Limitations Act, R.S.O. 1990, c. L.15, ss. 45(1), 47
Trustee Act, R.S.O. 1990, c. T.23, s. 38(1), (3)

MOTION for an order adding a defendant.

Michael W. Kelly, for plaintiffs.

Jerry Levitan, for defendant.

R.S.M. Woods, for Ford Motor Co. of Canada, Limited.

SHEARD J.: -- This is a motion by the plaintiffs to add as a
defendant the Ford Motor Company of Canada, Limited ("Ford") and
to amend the statement of claim accordingly.

The plaintiffs are the children of Martin Corkhill, who died
a widower on January 31, 1993. The plaintiffs describe
themselves as the sole beneficiaries of his estate according to
his last will and testament dated "March 16, 1993"; if the date
of Martin Corkhill's death is stated correctly (I will proceed
on that assumption) the date of the will is obviously dated
incorrectly.

In the supporting affidavit and statement of claim, Martin
Corkhill is stated to have been an employee of Ford Canada from
May 25, 1971 to August 31, 1982. A letter from Ford's "Hourly
Personnel Department" to Mr. Corkhill, dated November 4, 1982,
informs him that "your seniority with the Company has been
terminated under section 15.26 of the Collective Agreement".
This section provides that seniority rights of an employee
shall cease for the following reason: "if the employee fails to

report for duty for 5 consecutive working days".

This letter is included in the material filed by the plaintiffs on this motion as having been among a quantity of Ford's records sent to the plaintiff's solicitor. Ford did not file a responding motion record, although its solicitors did file a factum and a book of authorities. The factum includes that in November 1982, Ford dismissed Corkhill after he failed to report for work. That is what the November 4, 1982 letter seems to be saying.

In 1982, the Public Trustee began to manage the affairs of Martin Corkhill due to his mental incompetency and continued to do so until Corkhill's death some ten years later. In July 1993, the plaintiffs commenced this action against the Public Trustee, alleging mismanagement and negligence in general and specifically alleging that the Public Trustee "failed to make any effort, inquiry, or application on behalf of Martin Corkhill for the benefits to which he was entitled" as a long-time employee of Ford. The statement of claim alleges that by virtue of his employment, Martin Corkhill was entitled to certain benefits, including disability insurance, OHIP, drugs, dental and vision coverage.

The purpose of the requested amendments, which include four new paragraphs in the statement of claim, is to enable the plaintiffs to add a claim that Ford was negligent by its failing to process an application on behalf of Martin Corkhill for disability benefits.

The position asserted on behalf of the plaintiffs is that they learned after their father's death that he had not received any disability benefits (hence, their action against the Public Trustee) but that it was not until Ford provided their solicitor with a copy of their father's medical file with Ford that they learned that Ford had been aware of Martin Corkhill's significant health problems, including his mental disability, prior to the end of his employment with Ford.

With that knowledge, the plaintiffs now seek to sue Ford on the basis of the judgment in *Tarailo v. Allied Chemical Canada*

Ltd. (1989), 68 O.R. (2d) 288, 26 C.C.E.L. 209 (H.C.J.). There, R.E. Holland J. found the employer liable for not having assisted a mentally ill employee to make a claim for long-term disability benefits.

It is argued on behalf of Ford that the motion should be dismissed because applicable limitation periods have expired. In *Deaville v. Boegeman* (1984), 48 O.R. (2d) 725, 47 C.P.C. 285 (C.A.), MacKinnon A.C.J.O., who delivered the judgment of the court, expressed the view that before a claim or party can be added after a limitation period has run, there must be special circumstances.

The first question to be decided is whether a limitation period has expired. This requires consideration of the provisions of the Limitations Act, R.S.O. 1990, c. L.15, and of the Trustee Act, R.S.O. 1990, c. T.23.

Section 45(1) of the Limitations Act requires that the plaintiffs' claim be brought within six years after the cause of action arose. That time limit, Mr. Woods submits, expired, at the latest, six years after November 1982, the month Martin Corkhill was discharged by Ford.

Mr. Kelly's response is that the limitation period ceased to run against Mr. Corkhill because of the provisions of s. 47 of the Limitations Act, which states:

47. Where a person entitled to bring an action mentioned in section 45 or 46 is at the time the cause of action accrues a minor, mental defective, mental incompetent or of unsound mind, the period within which the action may be brought shall be reckoned from the date when such person became of full age or sound mind.

Mr. Woods submits that s. 47 is not applicable because at the time that the alleged cause of action against Ford arose, Martin Corkhill was not a mental defective or mental incompetent. He supports this assertion by referring to reports of Dr. S.A. Dziurdzy, a psychiatrist who treated Mr. Corkhill, dated July 8 and July 23, 1982. These reports are among the

records contained in Ford's medical file on Mr. Corkhill.

On July 8, 1982, Dr. Dziurdzy wrote to Dr. A.W. Karr, medical division, Ontario Car Plant, Ford Motor Company, a letter that included the following:

Mr. Corkhill has been away from Ford due to illness. The depression and paranoia are now well controlled. He is less anxious about the possibility of Huntingtons and more accepting of the possibilities.

There are no neurological manifestations that would interfere with his work.

(Mr. Woods puts emphasis on that paragraph in Dr. Dziurdzy's letter.)

This letter is to clarify the situation because apparently his employer may have felt he was in England on a holiday but he was ill -- depressed and paranoid plus agitated and running away because of his delusions at the time.

Dr. Dziurdzy's letter to Dr. Karr of July 23, 1982, is brief and optimistic:

Mr. Corkhill who has been under my care is now improved and able to return to work at the Ford Motor Company as of Monday, July 26 -- Light work would be appreciated at the present time.

However, Ford's medical file on Corkhill includes references earlier in 1982 to his mental disorders. Under the date of February 19, 1982, a notation on his file reads, "He is not mentally sound at this time. He laughs inappropriately. Appears to be slightly hypomanic. Not taking any medications since his discharge from psychiatric hospital a couple of weeks ago. He was in hospital for 2 weeks with a 'nervous breakdown'."

A patient clinical report from Dr. Dziurdzy, stamped as received by Ford's Dr. Karr July 15, 1982, gives a detailed history of Martin Corkhill's reported behaviour prior to his

admittance to the Joseph Brant Memorial Hospital in Burlington on May 30, 1982. This report includes:

This man had been previously admitted to psychiatry with agitation, much paranoid thinking in terms of his family being clones and not being real, with him threatening the son and daughter with homicide . . . He was also very paranoid about his former place of employment with Ford Motor Co., where he felt that people were plotting for him to get into an accident . . . This man has been followed by neurology regarding possibly having Huntington's chorea . . . So far, no neurological evidence has been seen. However, he does have tics or mannerisms which he tries to cover up . . . it appears that the degree of agitation, anxiety, paranoid aggression, etc. appeared to be, perhaps, the psychological beginning of the disease. It is well-known that many paranoid schizophrenics have been misdiagnosed and are really suffering from Huntington's chorea . . .

It would appear from Ford's medical file that Martin Corkhill was of unsound mind at least some nine months before Ford terminated his employment.

Thus, pursuant to the provisions of s. 47, it would appear that the period from February 1982 until Martin Corkhill's death should not be included in calculating the six-year limitation under the Limitations Act, unless the clock begins to run again after the Public Trustee took over the management of Mr. Corkhill's affairs. The judgment of the Divisional Court in MacKinlay v. Matthews (1993), 12 O.R. (3d) 700, 61 O.A.C. 233, is to the contrary. There, the order of Master Peppiatt was upheld, adding the City of Toronto as a party defendant two and one-half years after a motor accident which left the plaintiff unconscious. She never regained consciousness. Her litigation guardian applied for leave to add the city as a defendant. The limitation period under the applicable section of the Municipal Act was three months and had long since elapsed when Master Peppiatt granted the order adding the city.

In his factum, Mr. Woods put the matter very fairly, saying that it is an open question in Ontario as to whether the

appointment of a committee stops s. 47's suspension of the running of the limitation period where the plaintiff is a person with a continuing mental disability. Mr. Woods refers to cases in which the question has been considered. In my opinion, the recent authority of MacKinlay v. Matthews now states the law and the appointment of the Public Trustee did not affect the operation of s. 47.

With the death of Martin Corkhill, s. 47 of the Limitations Act ceased to be relevant. The new question then arises as to whether the limitation period found in the Trustee Act operates to now block action being taken against Ford. The relevant section is s. 38:

38(1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do . . .

.

(3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.

The period of two years from the date of death expired on January 30, 1995. Is it now too late to commence a claim against Ford?

Mr. Kelly's answer to that question is that it is not, because the plaintiffs did not discover that they had a right of action against Ford until Ford provided Mr. Kelly with their medical file on their father, which disclosed that Ford knew he was suffering from a mental disorder that entitled him to compensation while he was still an employee of Ford.

On November 24, 1993, Mr. Kelly wrote to Ford requesting a photocopy of the contents of Mr. Corkhill's personnel file, including attendance and medical records enclosing an authorizing letter from Stephen Corkhill. This letter was not

answered. Subsequent to the examination for discovery in March 1995, Mr. Kelly again wrote to Ford to request copies of Mr. Corkhill's personnel file. This time, Ford provided a copy of Mr. Corkhill's medical records in a letter to Mr. Kelly dated April 21, 1995. It is only on receipt of the information contained in those records, Mr. Kelly says, that the plaintiffs became aware that Ford knew of Corkhill's significant health problems, including his mental disability, prior to the end of his employment. Therefore, Mr. Kelly argues, the two-year limitation period under the Trustee Act should be computed from the date of receipt of Ford's April 21, 1995, letter and not from the date of Martin Corkhill's death.

In support of that proposition, Mr. Kelly relies on the judgment of the Ontario Court of Appeal in *Peixeiro v. Haberman* (1995), 25 O.R. (3d) 1, 127 D.L.R. (4th) 475, in which Carthy J.A., delivering the judgment of the Court of Appeal, affirmed the rule that a limitation statute commences to run when the material facts upon which the action is based have been discovered or ought to have been discovered by the exercise of reasonable diligence.

In my opinion, the request to Ford for its medical records for Martin Corkhill shows the exercise of reasonable diligence on the part of the plaintiffs. This request was made less than a year after Mr. Corkhill's death, but Ford did not respond, until a second request was made.

If Ford had responded to the first request that would have provided the plaintiffs within less than a year of the death with the information on which the plaintiffs base the claim they now seek to pursue. That would have left the plaintiffs ample time to bring this motion without having to encounter the limitation provision of the Trustee Act. It therefore is particularly inappropriate for Ford to be raising this limitation argument, but in any event the discoverability rule answers the argument.

I bear in mind that the material obtained from Ford, and now part of the plaintiffs' motion record, includes reference, dated February 23, 1982, to a Ford medical person (initials

indecipherable) speaking to Mr. Corkhill's son about Corkhill's behaviour at home -- "paranoid" -- and the reference, in Dr. Dziurdzy's aforementioned patient clinical report, to Corkhill going to England and leaving his daughter (aged 15 on his return in 1982) to be put in care of the Children's Aid. The son is referred to in that report as "approximately 19 years of age".

It is clear that it must have been apparent to the children in 1982 that their father had a mental disorder. However, it does not follow from that they had sufficient basis to assert their claim against Ford before receiving the medical records that Ford finally provided in 1995.

The motion is granted as asked. The parties shall have three weeks from the date of the release of these reasons within which to make written submissions as to costs. If no submissions are made, the plaintiffs shall have their costs fixed in the sum of \$3,000 and the Public Guardian and Trustee her costs, fixed in the sum of \$500, both from Ford.

Motion granted.

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