**IN THE HIGH COURT OF NEW ZEALAND**
**WELLINGTON REGISTRY**

**CIV-2006-485-002017**

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| BETWEEN | KEVIN RAYMOND BANKS<br>Plaintiff |
| AND | THE ATTORNEY-GENERAL<br>Defendant |

Hearing: 11 November 2009 (at Auckland)

Counsel: E Orlov for Plaintiff
J C Holden and T Hallett-Hook for Defendant

Judgment: 3 December 2009

In accordance with r 11.5 I direct the Registrar to endorse this judgment with the delivery time of 3.00 pm on the 3rd day of December 2009.

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## RESERVED JUDGMENT OF GENDALL J

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[1] On 8 September 2006 the plaintiff issued these proceedings against the Attorney-General (representing the Ministry of Social Development). He sought general damages of $500,000, exemplary damages of $45,000 and special damages for pecuniary loss to be quantified at trial. The claim was based upon events alleged to have occurred whilst he was subject to preventive supervision at a Lower Hutt Home known as Epuni Boys' Home (Epuni). The plaintiff was resident there for four months from 27 August to 17 December 1973. At the relevant time, Epuni was administered by the Department of Social Welfare. The claim is, generally, that he was physically, sexually and psychologically abused.

[2] The plaintiff's Amended Statement of Claim was filed (through a new counsel) on 16 January 2008. It alleged six causes of action adding a claim for breach of fiduciary duty. The claims were:

1. **Negligence** (Director-General) – The plaintiff says that the Director-General of the Department of Social Development owed the plaintiff a duty of care and was in breach of that duty. Mr Orlov in the course of his oral submissions retreated somewhat from this saying that what was alleged was not negligence, but deliberate, knowingly wrongful acts. For the purpose of this application, I will not hold him to that concession.

2. **Negligence** (Vicarious Liability) – The plaintiff says that the staff/agents of the Director-General of the Department of Social Development owed the plaintiff a duty of care, and breached that duty of care, for which the Department is vicariously liable.

3. **Non-Delegable Duty of Care** (Director-General) – The plaintiff says that the Director-General owed the plaintiff a non-delegable duty of care.

4. **Assault and Battery** (Vicarious Liability) – The plaintiff says that the events which occurred during his time at Epuni amounted to the intentional torts of assault and battery, for which the Director-General is vicariously liable.

5. **False imprisonment** – The plaintiff says that the actions of the Director-General and its staff during the plaintiff's time at Epuni amounted to the arbitrary detention of the plaintiff. It is said that the Director-General's actions were contrary to the plaintiff's entitlement to freedom of movement and/or access to visitors and/or protection from arbitrary detention.

6. **Breach of Fiduciary Duty** (Director-General) – The plaintiff says that the Director-General owed the plaintiff a fiduciary duty, and that acts and conduct of the Director, or his agents, amounted to a breach of that fiduciary duty. This cause of action was not in the originally pleaded Statement of Claim filed on 8 September 2006, being added in the Amended Statement of Claim filed on 16 January 2008.

[3] The damages sought were substantially increased to comprise general damages of $500,000; aggravated damages $1,500,000 for mental injury not covered by ACC after 1 April 1974; exemplary damages $1,000,000; special damages for pecuniary loss $2,000,000. A declaration is also sought that "the government had breached its basic, essential and fundamental duties to a child ....".

[4] A Second Amended Statement of Claim which was also filed on 16 January 2008, is in identical terms to the Amended Statement of Claim except that it added a prayer for relief in damages to the sixth cause of action ("Breach of Fiduciary Duties") which had been omitted previously.

[5] At the time he issued the Statement of Claim the plaintiff was aged 47 and would have obtained his majority age in January 1979. On its face the claim was long out of time, the Statement of Claim being filed on 8 September 2006.

**Defence, and counter-contentions as to leave**

[6] In its Statement of Defence, apart from general denials, the defendant pleaded an affirmative defence to all causes of action, namely that the proceedings were barred by the Limitation Act 1950. The plaintiff accepted that leave to bring the proceedings was necessary. He filed an application for leave on 8 September 2006 contending that if leave was required then it should be granted on the grounds:

> "(a) That the proceeding is a proceeding in respect of various tort causes of action;
>
> (b) That the time within which the proceedings could have been brought without leave has or may have expired;

> (c) That if such time has expired, the delay in bringing the proceeding was occasioned by mistake or other reasonable cause, and the defendant has not been materially prejudiced in its defence or otherwise by the delay;
>
> (d) That it is just that leave be granted."

[7] Later, the plaintiff filed a further application dated 20 December 2007 seeking leave to bring or proceed with the proceedings based upon the Amended Statement of Claim. He there asserted grounds that:

> "(1) The plaintiff was, has been, and/or is under a disability as a result of the actions and/or omissions of the defendant."
>
> "(2) Said disability had, has, and/or continues to put him in a position unable to reasonably discover and/or identify claims and/or damages such that he may fully, fairly and properly prosecute his rightful cause(s) of actions against the defendant."
>
> "(3) The defendant would not be materially prejudiced by tolling [sic] the statute of limitations during the plaintiff's disability period."
>
> "(4) It is in the interests of justice."

[8] Ground (1) relates to the alleged "disability" issue. Ground (2) may relate to a "reasonable discovery" issue, but based upon alleged "disability".

[9] The plaintiff has filed affidavits of himself and Mr S J Green described as head of the New Zealand Chapter of the Citizens' Commission on Human Rights.

**Background**

*Relevant Chronology*

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| 21 January 1959 | Plaintiff was born |
| 13 February 1973 | Plaintiff, aged 14, placed under preventive supervision of Department of Social Welfare for six months |
| 21 March – 24 April 1973 | Plaintiff resided at Lake Alice Hospital as an informal patient |

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| 17 July 1973 | Plaintiff was placed under supervision of Social Welfare for a further six months, remaining at Lake Alice until 27 August 1973 |
| 27 August – 17 December 1973 | Plaintiff resided at Epuni Boys' Home, Lower Hutt |
| 17 December 1973 | Plaintiff returned to the care of his mother |
| 26 January 1974 – 25 January 1975 | Plaintiff placed under supervision to live and work where directed by Social Welfare |
| 20 February 1974 – December 1975 | Plaintiff resided at Lake Alice Hospital |
| 16 June 1977 | Plaintiff (then aged 18) interviewed by Director, Division of Mental Health, regarding complaints he made in relation to Lake Alice mistreatment |
| 1978 | Plaintiff left New Zealand to live in Australia |
| 1980 | Plaintiff went to reside in Britain for a short time then returned to live in Australia, married and had a family |
| 20 April 1999 | Plaintiff joined with 55 other persons and brought civil proceedings in the High Court at Wellington against The Attorney-General on behalf of the Minister of Health claiming damages for ill-treatment or mismanagement at Lake Alice Hospital |
| 10 July 2001 | Lake Alice High Court proceedings by settlement agreement |
| 13 February 2004 | Plaintiff returned to New Zealand and applied for ACC |
| 8 September 2006 | Present proceedings commenced |
| 16 January 2008 | Amended and Second Amended Statement of Claims filed, adding cause of action alleging breach of fiduciary duty and seeking declaration and increasing damages. |

**Issues**

[10] It seems to me the essential issues are:

(1) When did the plaintiff's causes of action arise? Did such causes of action not accrue earlier because of the plaintiff being unable to discover the existence of such claims through non-appreciation of the link between his later alleged mental suffering and earlier acts of 1973?

(2) Was the plaintiff disabled within the meaning of the Limitation Act from bringing his proceedings before 8 September 2006?

(3) Has the two year limitation period for bringing a claim for bodily injury expired?

(4) Has more than six years expired since the cause of action arose so as to remove jurisdiction to grant leave?

(5) If not, should leave be granted?

**Contentions on behalf of the plaintiff**

[11] Mr Orlov on behalf of the plaintiff advanced wide-ranging submissions, some of which merged or were refined or presented as alternatives, or they were abandoned in the course of argument. It was difficult therefore to identify precisely the eventual primary grounds put forward. But in the end they seemed to encompass the following:

(1) Counsel contended that the overriding principle is that a citizen is entitled to access to justice which envisaged a full hearing of a claim based upon evidence that he wished to adduce and on submissions then made;

(2) Because the allegations involve “torture” by the Government, it was proper for it to apply funds to meet the cost of a properly qualified psychiatrist examining the plaintiff and expressing an opinion about him for limitation considerations, and also as to the eventual merits;

(3) The Government was irresponsible in seeking to prevent the case proceeding, and the Courts have a duty to ensure that the law and practice in New Zealand conforms to International Human Rights, so that a Government must give a remedy for any breaches of human rights;

(4) The pleading invoking breach of fiduciary duty is based upon (to use counsel’s words) “deliberate acts and bad faith by the Government knowingly involved in torture of a child” and no limitation period can possibly arise in respect of such a pleaded cause of action which arises not only in equity but also in international law;

(5) The plaintiff was disabled from bringing these proceedings earlier because

- Whilst he said he could remember being at Epuni originally, he could not remember the detail of specific evidence;

- he was disabled by mental, psychological and emotional conditions which prevented him facing such memories

(6) The plaintiff cannot accurately say when his cause of action in tort arose because it involved “complex issues relating to mental health”. Counsel said the issue was, not when the plaintiff was “able” to bring his action, but whether he could bring himself to take such legal advice and pursue action because of a mental or emotional state arising through him being a victim of torture.

[12] Mr Orlov, in oral argument said that the allegations in the Second Amended Statement of Claim do not involve negligence, but were, as he put it, actions of deliberate knowing torture and misuse by incarceration of children by the State with actual knowledge by the Government of false imprisonment and mistreatment of a child. Nevertheless, for the purpose of this application I will treat the pleaded cause of action in negligence as extant.

[13] Mr Orlov said that the disability may continue to the present time and there is an arguable case which should allow the case to proceed to trial. This proposition was refined in reply by Mr Orlov when he submitted that it was not possible for the plaintiff to say whether or not he was under a disability at the time of issue of proceedings or now, but that it was arguable that he was. Counsel said that the plaintiff's position was that he could not face proceedings or face the "pain associated with memories".

[14] The plaintiff had originally contended he did not remember events at Epuni, but Mr Orlov in reply refined this, to say that the plaintiff *did not contend* that he could not remember events at Epuni, but rather he could not face them until he issued proceedings. His position was that the claim was not clearly statute-barred and the question, being one of fact to be determined after a full trial, was the point at which the plaintiff in fact sufficiently remembered the offending facts.

[15] Counsel submitted that the claim for false imprisonment was not a claim dependent upon bodily injury, so leave (within six years) was not required.

[16] In relation to the fiduciary duty cause of action, Mr Orlov submitted that this was not a private law claim but rather a public law issue. He said it concerned violation of international law by the State, and was a matter that required to be addressed at a full hearing. He said the case was about the State placing the plaintiff in "a concentration camp type facility" knowingly breaching "its fiduciary duties in international law" – that is, the Government breached its obligations knowing that the facility was "a punishment prison". Counsel put it on the basis that there was a "fiduciary duty of care to a child which has been breached".

[17] Counsel for the defendant's position was that:

(1) On its face the claim is statute-barred by many years, and the plaintiff has failed to establish a prima facie case that it has been brought within time;

(2) The pleading in respect of breach of fiduciary duty is, by the doctrine of analogy, to be treated in the same way as the allied allegations in tort;

(3) As a matter of fact, and on the evidence before the Court, the plaintiff was a principal spokesman for Lake Alice patients prior to 1999, and was aware of and described allegations of wrongdoing at that institution as early as 1977. He had spent time and energy in pursuing justice against those who he saw at fault, which did not suggest absence of memories at any time. He was not disabled, as was shown by him being fully able to bring or join in proceedings, as he did, when he sued the Attorney-General in 1999. So, the defence argued, that no "disability" for Limitation Act proposals, could possibly arise;

(4) The memory skills of the plaintiff remain intact and he has not established that he was disabled in terms of the Limitation Act so as to prevent time running from the time of accrual of the cause of action;

(5) Questions of reasonable discoverability did not arise in a case such as this whether on the pleadings, evidence, or the law.

**Affidavit evidence**

[18] The plaintiff, in his affidavit, outlines in broad terms allegations as to what occurred in the four month period in 1973 at Epuni. He refers to becoming involved in litigation in 1999 for "abuses I had suffered during a different stay at Lake Alice

Hospital". He says the delay in bringing these proceedings was because he did not between 1999 and 2001 remember what had specifically happened to him at Epuni and it was only as a result of his case involving Lake Alice that "I have gotten the strength and courage to face my past". Essentially, he deposes that he "of course remembered I had been at Epuni, but did not remember specific events of what had happened there" and it was only when talking to prior counsel in 2004 that his memory was refreshed. He states his view that Electro-Convulsive Therapy (ECT) treatment administered to him at Lake Alice caused memory loss, which is "well established". Given the expert medical evidence as to competing views of the therapeutic value and effects of ECT described in ***J v Crown Health Financing Agency*** HC WN CIV-2000-485-000876 8 February 2008 Gendall J, I am not persuaded that in this case that belief is necessarily accurately based.

[19] Mr Banks annexed a number of psychologists and psychiatrists' reports prepared since 2004 for the purpose of his ACC claim. They had been prepared for that purpose. None deal with the issue of any disability to instruct lawyers, or inability to recall events, about Epuni. The plaintiff has not adduced evidence from a specialised psychiatrist directed at those issues for the purpose of these proceedings.

[20] There are opinions in the reports that Mr Banks suffers from post-traumatic stress syndrome and experiences anxiety and depressive symptoms. That is not in dispute. There are references to Mr Banks being able to actively pursue his complaints and challenges about events at Lake Alice and to confront a medical professional (Dr Leeks) who was there at the time. There is reference in the reports that:

- "he has challenged Selwyn Leeks on more than one occasion (once with reporters and also without, whilst wearing a hidden camera)...."
- "Kevin has been involved in media stories about Lake Alice since 1998. This was started because he found that people in Australia didn't believe what happened to him at Lake Alice."
- "[In the early 1980s] Kevin was attempting to forget his past and so he had not talked much to his wife about his past. However, a letter arrived from a New Zealand-based human rights group....and he also realised that his memories were having an adverse impact on his daily life, he began to feel the need to have his abuse experiences 'acknowledged'."

- "In the mid-1980s he phoned various places around the world in an attempt to locate the former head psychiatrist [from Lake Alice]."

- "Kevin did not come forward about these issues as he did not feel he would be supported or believed [concerning his Lake Alice allegations]. He did see a psychologist while living in Australia....he came back to New Zealand to confront his past and start a new life".

- "Kevin has had quite an understandable crusade for justice about the events in Lake Alice. He made contact with the psychiatrist in 1992 and confronted him. He has spent a lot of time publicising his experiences which involved involvement with the media and involvement with other patients. He then became involved in the Class Action in 2001 in terms of receiving some small compensation. He is still involved [in March 2006] with the Human Rights Commission and Medical Council of Australia in an attempt to have the psychiatrist involved in this case charged."

- "He has clear memories of all the abuse [at Lake Alice] on a very frequent basis. Some of these memories can be quite vivid and occur most days. He feels he lives in the past a lot."

- "Throughout his time in Australia Kevin experienced intermittent memories, dreams and flashbacks about his experience in Lake Alice and the Boys' Home. More recently he has become involved in litigation against Lake Alice Hospital along with a large number of other previous patients. He returned to New Zealand with his family in order to restart his life here."

[21] There is an affidavit of Mr S J Green supporting the plaintiff's application. That deponent is the head of the New Zealand Chapter of the Citizens' Organisation of Human Rights, described as a "public benefit organisation dedicated to investigating and exposing psychiatric values of human rights". Mr Green expresses his opinions, to which the Crown has objected because there is no evidence that the witness has any expert qualifications so as to be able to give opinion evidence. I accept that submission.

[22] Opinions as to effects of ECT and anecdotal material annexed to the affidavit do not provide cogent evidence to support Mr Green's belief that the plaintiff's mind has been impaired by "therapy" and so he would have "great difficulties on a day to day basis to instruct lawyers". The issue of ECT is the subject of considerable controversy debate which, as I have said, was apparent from the evidence given in ***J v Crown Health Financing Agency*** (supra). The lay views of Mr Green do not assist the Court in deciding this leave application.

**Discussion**

[23] The plaintiff's claim is "an action in respect of the bodily injury to any person". On the ordinary application of the Limitation Act, if two years has expired since the cause of action accrued, the plaintiff must apply for leave to bring proceedings within six years of the date on which such causes of action accrued. Section 4(7) provides:

> "An action in respect of the bodily injury to any person shall not be brought after the expiration of 2 years from the date on which the cause of action accrued unless the action is brought with the consent of the intended defendant before the expiration of 6 years from that date:
>
> Provided that if the intended defendant does not consent, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of l aw other than the provisions of this subsection or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay."

[24] The defendant says that the proceeding is barred by the Limitation Act there being no jurisdiction to grant leave because the six year period expired long before the proceedings were filed on 8 September 2006. The plaintiff's response was a little confused, but it appeared to raise issues of disability, Limitation Act, and non-discovery of damage (due to disability) so as to complete the ingredients of the cause of action.

[25] The plaintiff says that the action has been brought within the two year limitation period but if not then he pursues his application for leave on the basis that the total period of six years has not elapsed since the cause of action accrued and the Court has the discretion to allow the case to proceed. The question for the Court is whether the plaintiff has shown that he has an "arguable case" that his action is within time or leave should be granted because the six year period has not expired This is what the Supreme Court said in ***Murray v Morel*** [2007] 3 NZLR 721 (see further below) at [31] and [32]. That case involved a defendant's strike out application, but in ***Hurring v Attorney-General*** HC WN CIV 2006-405-001281,

Simon France J said that the "arguable case" threshold was equally applicable in the context of a plaintiff's application for leave at [7]. I agree. This is no different to what the Court of Appeal said in ***W v Attorney-General*** [1999] 2 NZLR 709, that leave should be granted when affidavit evidence indicates a "prima facie" case.

[26] The plaintiff is in effect seeking an extension or postponement of the Limitation Act limitation period. Before the Court can exercise its discretion to grant leave for these proceedings to continue it must be satisfied that the plaintiff has demonstrated that there is an "arguable case" that his claim has been brought within the six year timeframe.

**When does the cause of action arise?**

[27] For limitation purposes a cause of action accrues when all facts necessary to establish the claim are in existence. If damage is not a necessary element of a cause of action, such as in the deliberate torts of assault and battery, trespass, false imprisonment, then the cause of action accrues when the victim should have recognised that he or she had not given true consent to the deliberate torts. Where there is physical assault this will be almost invariably at the time the assault took place. Questions of "reasonable discoverability" do not arise so it is inapt to speak of later discovering what had been known at the outset; ***P v T*** [1998] 1 NZLR 257 (CA).

[28] But, there may be cases where a person may not come to understand that they did not consent until much later. In such cases, because lack of consent is an element of the cause of action, all necessary ingredients of the cause of action have not occurred until such time as the lack of consent is, or could have been reasonably discovered. Likewise, where damage *is* an element of the cause of action, there may be some cases where the link between the damage and the wrongful act is not made (such as ***S v G*** [1995] 3 NZLR 681 (CA)). In such cases, an inability to sue arises because the consequences of the wrongful act are not known. Whether it is a "reasonable discovery" or a "disability" situation (discussed below) may be a difficult question. The outcome may be the same.

[29] However "disability" and the existence of a cause of action are not to be confused, as may have occurred in counsel's mind. A cause of action may, and does, accrue to a person under a disability, but in certain cases, that cause (being a right of action) is deemed to have accrued on a later date. The disability did not mean that the cause of action had not accrued. The disability extends the limitation period by suspending the running of time. This can be contrasted to those cases where, for the reasons including those discussed above, the cause of action does not *accrue* until a later point in time.

[30] Here, I ascertain, counsel contends:

- The plaintiff was under a disability to the extent that he could not take action to sue the defendant; and

- Separately, such disability prevented him either from

  (a) remembering what had occurred; and/or

  (b) linking his psychological or mental damage to those events, so that the cause of action did not crystallise until he did so.

**Reasonable Discoverability**

[31] The concept of "reasonable discoverability", which emerged from historical sexual abuse cases remains under consideration by higher Courts. At the moment there does not appear to be a general doctrine of "reasonable discovery"; see ***Murray v Morel & Co Ltd*** (supra). The Supreme Court there held that there was no general principle that a cause of action did not accrue for limitation purposes until the elements were reasonably discoverable by a plaintiff. However, that decision did not overrule the earlier case of ***S v G*** (supra), a case involving sexual abuse by a health practitioner, or ***G D Searle & Co v Gunn*** [1996] 2 NZLR 129 (CA), a personal injury case. The Court recognised that the reasonable discoverability principle will be available in specific categories of cases.

[32] Notwithstanding the decision in ***Murray v Morel*** therefore, I consider the law, as it currently stands is, that in cases of alleged negligence such as the present where damage is an element of the cause of action, and where the damage alleged is mental or physical injury, then the cause of action may be said not to accrue, and the limitation period will not commence, *until such time as the damage is or reasonably should have been identified as being linked to the events which allegedly caused the damage*.

[33] But I note that there remains uncertainty as to whether in "abuse" type cases, this reasonable discoverability approach is available when psychological damage is alleged to arise from *physical* abuse, or whether it is confined to *sexual* abuse cases (see Miller J in ***White v Attorney-General*** HC WN CIV-2001-485-000864 28 November 2007 at [408]).

[34] However these difficult questions do not require further discussion because in this case there is simply no evidentiary foundation advanced by the plaintiff to support his claim that he could not, and did not identify the damage (his stress, psychological anxiety/depression and mental trauma), as being linked to events of 1973 – 1974 until such time as would bring his claim within the Limitation Act period. He filed no psychiatric evidence of recent assessment on that issue. Given the extraordinary lapse of time the onus falls on him to do so. As I have said, the plaintiff must establish an "arguable case" for the extension or postponement of the limitation period.

[35] The only psychological and psychiatric material put forward were reports annexed to the plaintiff's affidavit where opinions and a narrative was presented for the purpose of his ACC claim. They do not address the question of psychiatric disability, whether for the purpose of being disabled from suing or, in the context of "reasonable discovery" as to making a link as between his alleged events at Epuni and presented state.

[36] More significantly, and on the undisputed facts, the plaintiff was able to understand his mental anguish and pain in 1977 as it related to events at Lake Alice, contemporaneous with alleged events at Epuni. Over the period in question he was

at Lake Alice initially, then at Epuni for four months and then again at Lake Alice. Within four years, whilst still an "infant" he was able to articulate to the authorities his concern and distress at the Lake Alice events, making the clear connection.

[37] He too, was able to make the clear connection between his distress as caused by those events in the Lake Alice High Court proceedings brought in 1999. Those proceedings alleged mental harm arising from acts at Lake Alice, before and after the plaintiff's relatively short resident at Epuni. They alleged physical, sexual and verbal abuse by staff and also by patients. The Epuni proceedings allege physical assaults, sexual abuse and sexual assaults by staff and witnessing physical assaults upon other boys at the home. The Lake Alice proceedings allege being placed in solitary confinement as do the Epuni proceedings. The Lake Alice proceedings allege threats of violence or sexual abuse being in an environment of intense and continual fear and trepidation and witnessing or hearing others being subject to threats. So too do the Epuni proceedings allege threats of violence, being exposed to violence, and some psychological abuse from witnessing assaults upon others.

[38] The Lake Alice proceedings give as particulars of loss, wrongful detention, humiliation and loss of self-esteem, emotional stress and anxiety, loss of opportunity for education, inability to form or maintain relationships, and more. Particulars of loss or damage suffered at Epuni (as contained in paragraph 19 of the Second Amended Statement of Claims) refer to similar loss being suffered alleging:

> "(b) the plaintiff has had difficulties in trusting, relating and communicating with people and has difficulties forming and maintaining relationships.
>
> (c) the plaintiff has anti-social behavioural problems.
>
> (d) the plaintiff suffers from depression, is unable to work or function properly as a result of the depression.
>
> (e) the plaintiff has periods where he feels suicidal.
>
> (f) the plaintiff suffers from low-esteem and low confidence.
>
> (g) the plaintiff suffers from extreme feelings of anxiety and fear.
>
> (h) the plaintiff has had severe disruption to his life in terms of occupational, social and personal functioning.

(i) the plaintiff has suffered emotional instability as a result of the abuse he has suffered.

(j) the plaintiff has abused drugs to stop him thinking about the abuse he suffered."

[39] There is an obvious parallel, if not precise, but at least in a very substantial way, between the particulars or allegations contained in the Lake Alice proceedings Statement of Claim.

[40] In view of the following, and in the absence of any specialist psychiatric opinion to the effect that the plaintiff did not and could not reasonably discover or make the link between current psychological problems and mental injury with what happened at Epuni, there is simply no basis for finding that the date upon which the cause of action arose was postponed by reason of an inability to make the "link" between damage and its cause. Nor is there any evidence whatsoever that suggests that the plaintiff's appreciation of his lack of consent to the intentional torts was postponed.

[41] I am satisfied therefore that whether the case is founded in negligence or a deliberate tort, that "reasonable discoverability" issues do not arise. So the issue then turns to whether the plaintiff was under a disability for limitation purposes, which led to time not running so that when he filed his Statement of Claim on 8 September 2006, he was within the limitation period of six years required for the granting of leave.

**Disability**

[42] It is well known that pursuant to s 24 of the Limitation Act, the deemed date of accrual of a cause of action is extended while a plaintiff is under a disability. The cause of action may have existed, but time does not commence for limitation purposes until the date when a claimant is not under the disability. A person is deemed to be under a disability while an infant or of unsound mind. But there may be other disabling conditions. The question is whether a person *is unable to bring himself or herself to instruct a lawyer to initiate proceedings* because of psychiatric or psychological causes. They will be "of unsound mind" for limitation purposes,

while that condition lasts: ***T v H*** [1995] 3 NZLR 37 (CA). In ***P v T*** [1998] 1 NZLR 257, the Court of Appeal summarised the approach:

> "The judgments in *T v H* [1995] 3 NZLR 37 (Hardie Boys J at p 49 and Tipping J at p 61, Casey J and Gault J concurring) establish that a person claiming a disability by way of unsoundness of mind for Limitation Act purposes must show that the alleged unsoundness: (i) resulted from a demonstrable and recognised mental illness or disability; and (ii) sufficiently inhibited the capacity to sue as to preclude him or her from bringing proceedings, **rather than being just an inability to face up to the process of suing**." (emphasis added)

[43] So even if a person has some psychological, personality or mental limitations if these conditions did not *prevent the plaintiff from suing* then the Limitation Act period will not be extended by reason of disability. By way of example, in ***White*** (supra), Miller J concluded that the plaintiffs were not under a disability for limitation purposes because despite a cluster of psychological and psychiatric conditions, they still had the capacity to conduct litigation. That is always going to be a question of fact. A contrasting example, is ***S v Attorney-General*** [2003] 3 NZLR 450 (CA) where the Court concluded that the degree of post-traumatic stress that the plaintiff was suffering did serve as a significant and major barrier to instituting proceedings.

[44] Mr Orlov contended that the plaintiff was disabled – for Limitation Act purposes – he said because he could not instruct lawyers nor sue until close to (and within the six year period) when he issued proceedings.

[45] There is no independent evidence of a recognised psychiatric illness that the plaintiff is or was ever of unsound mind. His disability through infancy ended on 21 January 1979. He has adduced no evidence to demonstrate that he was at any time inhibited through mental trauma or otherwise in his capacity to sue, so as to preclude himself from bringing proceedings. As discussed in the foregoing section he may have had a post-traumatic shock syndrome, but he was able to pursue complaints, even in his late teens, in 1977 by meeting with the Director-General of Mental Health. And he was well able to institute those proceedings in 1999 which related to events which as pleaded were far more serious than those alleged at Epuni, and over a timeframe surrounding both before and after the four month period the

plaintiff was at Epuni. He could not have been under any disability from suing or instructing a solicitor in 1999 or in settling those proceedings in 2001 by way of an agreement with the Crown.

[46] There is no evidence that the plaintiff was in 1999 then labouring under any difficulties or had a guardian or litigation guardian. The simple fact is that, as Mr Orlov conceded in his oral submissions, the plaintiff had memory of the events about which he complained at Epuni but simply deferred bringing proceedings because he was not inclined to do so, or could not face doing so, or as counsel put it "could not face his memories". Indeed, it is a fair conclusion that he put thoughts of these to one side as he pursued his proceedings in respect of the Lake Alice matter. He has not shown any evidentiary basis that he was under a disability so as not able to bring proceedings earlier. The entire factual background discloses otherwise. Just as he was well able to ascertain any link between damage he suffered and matters about which he complained, so he was able to sue the State for the same type of damage arising from the similar types of allegations. There is some suggestion in the evidentiary narrative that he chose to bring these proceedings only when he learnt that others had done likewise in relation to Epuni. For completeness, I emphasise again that there needs to be an incapacity, and not just "an inability to face up to the process of suing" (paragraph [43] above).

[47] Mr Orlov argued that a person may be disabled for one purpose and not for another, and that of course is recognised in the authorities. So, he argued that the fact that Mr Banks was not disabled from suing in respect of Lake Alice in 1999 did not mean that he was not disabled from bringing these proceedings within the six year (with leave) period. But he was also capable of joining in a settlement of those proceedings in 2001. It is clear that he was not disabled from suing and settling. Once a period of disability (infancy or otherwise) ceases, time for limitation purposes commences to run, and even if there be a later intervening disability it does not lead to time ceasing to run; see ***Re Benzon Bower v Chetwynd*** [1914] 2 Ch 68 (CA) and ***C v J*** [2001] NZAR 375.

[48] It is beyond any possible argument that the plaintiff's causes of action arose far outside the limitation period and possibly as early as him attaining the age of

majority in 1979, given his actions in complaining about Lake Alice matters in a formal way to the Director-General of Health in 1977. But there can be no doubt that as from April 1999 he was fully capable of instructing solicitors and suing for mental damage arising out of 1973 – 1974 experiences whilst in the care of the Department of Social Welfare or other State agencies. On the best possible scenario, time ran at the very latest from April 1999, and any application for leave to bring proceedings, had to be made at the very latest by April 2005.

[49] So, I turn to deal with the added cause of action, alleging breach of fiduciary duty.

**The breach of fiduciary duty cause of action**

[50] It has become common for claims based upon liability for historical abuse (whether through assault and battery or sexual abuse or negligence) to be presented not only on the basis of the deliberate torts of assault, battery and false imprisonment and also the tort of negligence, but also by adding a cause of action alleging breach of fiduciary duty. This has been done, unashamedly, to avoid the periods provided in the Limitation Act because there is no limitation period in respect of claims for equitable relief. It is apparent that has been done in the present case, with the plaintiff's two Amended Statement of Claims adding equitable relief causes of action, so as to overcome the difficulty.

[51] Assuming for the moment that there was a fiduciary duty between the Department and the plaintiff, any breach of it would simply be for tortious actions whether for assault and battery or negligence.

[52] In ***Stratford v Phillips Shayle-George*** CA199/00 21 August 2001, the Court of Appeal emphasised that where a fiduciary was simply to breach duty of care the claim in reality was tortuous and the limitation issues were properly dealt with on that basis. The Limitation Act s 4(9) recognises the concept of analogy adopted by New Zealand. It applies where a claim seeks equitable compensation which in reality corresponds to common law damages, when the latter is dependent upon contract or tort claims which may be time barred. Section 4(9) provides:

> “This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, *except in so far as any provision thereof may be applied by the Court by analogy*...”

[53] The remarks of Gault J, when delivering the judgment of the Court of Appeal in ***S v G*** (supra) (at 688) – a case where claims were advanced in negligence, assault and battery and a claim for breach of fiduciary duty – are relevant:

> “...This [the claim for breach of fiduciary duty] is advanced as a separate equitable claim said by [counsel] to be ‘fundamentally different to the claims for negligence and assault and battery’. Of course the obligations imposed on a fiduciary depend upon the particular relationship involved and may be very different from obligations in contract and in tort. But in the circumstances of this case it is not easy to discern the differences between the pleaded fiduciary duty and the pleaded duty of care in negligence..... As already mentioned the pleaded breaches are of substantially the same conduct.
>
> It is of interest to note the views expressed in two recent judgments of Lord Browne-Wilkinson in the House of Lords. In *Henderson v Merrett Syndicates Ltd*, [1994] 3 All ER 506, 543 after referring to the common source of fiduciary duties and duties of care in negligence he said:
>
>> ‘This derivation from fiduciary duties of care of the principle of liability in negligence where a defendant has by his action assumed responsibility is illuminating in a number of ways. First, it demonstrates that the alternative claim put forward by the names based on breach of fiduciary duty, although understandable, was misconceived. The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act for or advise others. Although the historical development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed on ... others is the same duty: it arises from the circumstances in which the defendants were acting, not from their status or description. It is the fact that they have all assumed responsibility for the property or affairs of others which renders them liable for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold....’
>
> ....”

[54] Gault J went on to observe that where pleaded claims are alternatives in respect of essentially the same conduct, much is to be said for the long-established analogy whereby equity follows the law, such being preserved by s 4(9). If the analogy were not employed the result frequently would be no different because of the application of the equitable doctrine of laches. The Court of Appeal later

discussed this issue in ***S v Attorney-General*** (supra). Whilst proceeding on the basis that the Superintendent of Child Welfare was a fiduciary for a child placed in foster care, the breaches put to the Court as being failures by the Department were no more than alleged breaches of the duty of care and the Court said at [77]:

> "...Negligent conduct by a fiduciary will render the fiduciary liable in negligence but is not a breach qua fiduciary, notwithstanding that the fulfilment of the role of a fiduciary is the setting for the negligent act or omission...."

[55] I note that Mr Orlov sought to distinguish the force of these authorities by arguing that the Department acted in "bad faith and dishonestly" with its actions being deliberately and knowingly submitting the plaintiff into torture and were also breaches of a statutory duty and acts that were "a grievous and unconscionable violation of human rights" – so they comprised fundamental breaches of fiduciary duties.

[56] But it requires more than mere assertions or allegations in a statement of claim in a formulaic way to translate the tortuous actions of assault and battery, false imprisonment or negligence, so as to create a separate type of equitable fiduciary duty in order to avoid limitation considerations.

[57] This is precisely the type of case where a pleading seeking equitable compensation, even if described as exemplary or aggravated damages, in reality corresponds to a damages claim dependent upon torts which are time-barred. So too any claim pleaded in the form of breach of fiduciary duty seeking equitable compensation is also barred by way of analogy.

**General**

[58] Mr Orlov advanced wide-ranging submissions in a general way to the effect that because the allegations against the defendant were essentially that the plaintiff was tortured by the State then the State, pursuant to its international obligations under United Nations Treaties and Covenants, was obliged to afford to the plaintiff the remedy of him having his case and allegations determined and heard in the

New Zealand courts. He made a general submission to the effect that human rights and the justice of the situation determined that the plaintiff's case should be heard.

[59] Such considerations, expressed in strong terms, however, cannot deflect the courts from applying the domestic law as provided in the New Zealand statute of the Limitation Act. Those provisions cannot be ignored so as to permit claims to be brought in New Zealand Courts. The domestic statute must prevail over international covenants or considerations. If there has been "torture" or breaches of international covenants, remedies may lie elsewhere. But litigants cannot pursue civil claims in the courts of New Zealand, which are not permitted by the statutes of this country. This is precisely that sort of situation. The plaintiff cannot expect the courts to ignore the law of New Zealand so as to afford him the opportunity to present wide-ranging claims and contentions, based upon broad allegations of breach of human rights, when such are not permitted by the law of New Zealand.

**Conclusion**

[60] (1) The plaintiff's causes of action arose and existed at the very latest in April 1999, and probably as early as 1977.

(2) The plaintiff was under no disability which prevented him from obtaining legal advice or bringing proceedings against the defendant in this case at the very least from April 1999, and probably much earlier.

(3) Accordingly, the period in which the plaintiff was required to apply for leave to bring these proceedings expired, on the best interpretation available to him, in April 2005.

(4) Because these proceedings were not issued until 8 September 2006 they fall outside the six year time period, on the best analysis for the plaintiff, provided in the Limitation Act for the granting of leave.

(5) It is not a question of the Court having discretion to grant leave, but rather that there is no jurisdiction to do so. This is not a marginal case and it is clear beyond any possible doubt that the proceedings are statute-barred.

[61] It follows that the application for leave is dismissed. The proceedings cannot continue and are struck out.

[62] I am advised the plaintiff is not in receipt of legal aid. So as is usual, costs follow the event and the defendant is entitled to costs on a Category 2 B basis together with usual disbursements for the proceedings as well as this application. If there is any dispute as to quantum of costs or disbursements, then counsel may submit memoranda.

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**J W Gendall J**

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