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Indexed as:

M.M. v. Roman Catholic Church of Canada

Between

M.M., plaintiff, and

**The Roman Catholic Church of Canada, the Attorney General of
Canada, Les Oblats de Marie Immaculee du Manitoba, Oblate
Sisters de Saint Boniface, Archdiocese of St. Boniface, Father
Beaulieu, Father Ruest, Father John Doe and Sister Jane Doe,
defendants**

[1999] M.J. No. 488

Docket: CI 98-01-07593

Manitoba Court of Queen's Bench
Winnipeg Centre

Schulman J.

November 12, 1999.

(24 paras.)

*Practice -- Pleadings -- Striking out pleadings -- Grounds, action prescribed or barred by limitation period --
Limitation of actions -- Equitable relief -- When time begins to run.*

Motion by the defendants, Les Oblats de Marie Immaculee du Manitoba and Oblate Sisters de Saint Boniface, to strike the statement of claim against them on the ground of an expired limitation period. The plaintiff, MM, was a treaty Indian who attended a residential school operated by the moving defendants from 1930 to 1942. She alleged that while

she attended the school she was subject to mandatory indoctrination of worship, education, corporal punishment, deprivation, assault and abuse, which caused her physical and emotional harm and deprived her of her identity and culture. The allegation against the moving defendants was that they breached a fiduciary duty owed to her. The defendants argued that an action for injuries to the person founded on any breach of duty had a limitation period of two years, that any other equitable ground of relief not specifically dealt with by statute had a limitation period of six years, and that, in any case, there was an ultimate limitation period of 30 years.

HELD: Motion dismissed. The 30-year cap was intended to cover a plaintiff who had been suffering from a disability from the time the cause of action arose, and being a minor did not qualify as a disability. MM's claim was not characterized as being for injuries to the person, so the two-year limitation did not apply. Her claim was based on an equitable ground of relief, with a limitation of six years from the date of discovery of her cause of action. Evidence was required to establish the date of discovery, and hence to determine if the statement of claim had been issued in time.

Statutes, Regulations and Rules Cited:

Limitation Act, 1939, s. 2(1)(a).

Limitation of Actions Act, R.S.M. 1987, c. L150, ss. 1, 2(1)(e), 2(1)(k), 7(1), 7(2), 7(5).

Counsel:

Victor S. Savino, Michael Jerch and Viola McKay, for the plaintiff.

Kent Paterson and Peter Halamandaris, for the defendants Les Oblats de Marie Immaculée du Manitoba and Oblat Sisters de Saint Boniface.

Antoine G. Frechette, (on a watching brief), for the defendant Attorney General.

Rocky L. Pollack, Q.C., (on a watching brief), for the defendant Archdiocese.

[Ed. note: A Memorandum was released by the Court December 9, 1999; the correction has been made to the text and the Memorandum is appended to this judgment.]

1 SCHULMAN J.:-- This is a motion to strike out a statement of claim. The plaintiff sued for damages for injuries alleged to be suffered by her at an Indian residential school between 1930 and 1942. The plaintiff sued all of the above-named defendants in September 1998. The motion has been brought by the defendants Les Oblats de Marie Immaculée du Manitoba and Oblate Sisters de Saint Boniface ("the Orders"). They have not filed a statement of defence. They seek to have the action against them struck out on the basis that it is barred by s. 2(1)(e) or s. 7(5) of the Limitation of Actions Act, R.S.M. 1987, c. L150. Counsel have agreed that if this court finds that these sections do not apply, the motion should be dismissed.

2 On a motion of this kind, the court does not consider evidence. It considers the pleadings. All facts recited in the pleadings are assumed to be true. The plaintiff, in her statement of claim, alleges that she was a treaty Indian, that she resided on a reserve in Manitoba, and that she attended the Pine Creek Indian Residential School from the age of three years to 15 years of age, between 1930 and 1942. She is now 70 years old. She alleges that:

- the federal government, exercising its powers under the Indian Act, retained the Roman Catholic Church ("the Church"), which in turn directed the Orders to run the residential school in question;
- the residential school was established by the federal government, the Church and the Orders to assimilate aboriginal children registered under the Indian Act into non-aboriginal society;

- the Orders and other defendants undertook an obligation and fiduciary duty to take care of and educate aboriginal children, including the plaintiff;
- the defendants, including the Orders, agreed to and strove to deprive the plaintiff of her culture and way of life by means of mandatory indoctrination of worship, education, corporal punishment, deprivation, assault and abuse;
- the federal government, the Church and the Orders recruited priests, brothers, nuns and employees to carry out their policies;
- these persons, with the encouragement of the federal government, the Church and the Orders, abused the plaintiff in a variety of ways, including sexual abuse, over a period of years until she left the school;
- the abuse caused her physical and emotional harm and loss of her identity and culture;
- in so conducting itself, the Orders breached their fiduciary duty to the plaintiff, causing her loss and damage.

3 The plaintiff's claim, in a nutshell, is that the Orders owed her a fiduciary duty and, in breach of it, the Orders deprived her of her identity and her culture. This is the essence of the cause of action.

4 The relevant provisions of the Limitation of Actions Act are:

1 In this Act, "injuries to the person" includes any disease and any impairment of the physical or mental condition of a person;

PART I
LIMITATION PERIODS

2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

. . . . (e) actions for malicious prosecution, seduction, false imprisonment, trespass to the person, assault, battery, wounding or other injuries to the person, whether caused by misfeasance or non-feasance, and whether the action be founded on a tort or on a breach of contract or on any breach of duty, within two years after the cause of action arose;

- (k) actions grounded on accident, mistake or other equitable ground of relief not hereinbefore specifically dealt with, within six years from the discovery of the cause of action;

7(1) For the purposes of this section, a person is under a disability

- (a) while he is a minor; or
- (b) while he is in fact incapable of the management of his affairs because of disease or impairment of his physical or mental condition.

7(2) . . . any period during which a person entitled to bring an action is under a disability shall not be included in calculating the time within which the action is required to be

brought

- (a) whether that time is limited under this or any other Act of the Legislature; and
- (b) whether the person was under the disability at the time the cause of action arose or the disability commenced after the cause of action arose.

7(5) Notwithstanding anything in this section, no action to which this section applies shall be brought by a person who is or has been under a disability or for or on his behalf by another after the expiration of 30 years after the occurrence of the act or omission that gave rise to the cause of action.

Under s. 2(1)(e), an action is barred if the plaintiff has not sued within two years of the cause of action arising. Under s. 2(1)(k), it is barred if the plaintiff does not sue within six years from the discovery of the cause of action. Because of the passage of decades, the important question in this motion is not whether the limitation period is two years under s. 2(1)(e) or six years under s. 2(1)(k), but rather, whether time starts running from accrual of the cause of action under s. 2(1)(e) or from the discovery of the cause of action under s. 2(1)(k).

5 The issues in this case are:

- (i) whether the cause of action pleaded in the statement of claim ([paragraph]2 hereof) is barred by s. 7(5), (the 30-year cap);
- (ii) whether the cause of action is barred under s. 2(1)(e) of the Limitation of Actions Act as a cause for "other injuries to the person, whether caused by misfeasance or non-feasance, and whether the action be founded on . . . any breach of duty" (within two years after the cause of action arose, the discoverability rule having no application); and
- (iii) whether it is governed by s. 2(1)(k), being an "other equitable ground of relief not hereinbefore specifically dealt with" (six years from the discovery of the cause of action).

6 Counsel for the Orders argued that the claim is barred by s. 2(1)(e) and, in any event, by s. 7(5). He argued that the statement of claim really amounted to a claim based on assault and battery and that it contained no link of facts between the alleged wrongs and such fiduciary duty as existed. He also argued that what is alleged against the Orders is an action for an "other injury to the person founded on breach of a duty known as breach of fiduciary duty". He asked the court to apply the provision literally and, in any event, to apply s. 7(5) literally.

7 Counsel for the plaintiff argued that the statement of claim disclosed a genuine allegation of breach of fiduciary duty, that s. 2(1)(e) had no application whatever, that s. 2(1)(k) was the applicable section, and that s. 7(5) had no application.

8 I deal first with the issue of whether the action is barred by S. 7(5) (the 30-year cap). I find that the 30-year cap provided in s. 7(5) has no application to a claim brought by a person whose disability at the time the claim arose was that she was a minor. For such a person as the plaintiff, there is closure to the claim when she turns 18 and the applicable limitation period elapses. The 30-year cap is intended to cover the case of a plaintiff who, from the time the cause of action arose, has been suffering from a single disability or several disabilities, such as a mental incapacity. For such a case, closure is provided after the passage of 30 years. Such conclusion is supported by the judgment of MacInnes J. in *Woolett v. Matheis* (1998), 125 Man.R.(2d) 228, where he held that s. (7)(5) does not apply to a minor who has come of age. In *Hydro Electric Board (Man.) v. Inglis (John) Co. et al* (1996), 110 Man.R.(2d) 62, our Court of Appeal rejected a literal interpretation of the 30-year cap set out in s. 15(4) in favour one which is consistent with the

legislative scheme of which it forms part.

9 The second and third issues give rise to a question of whether this claim is governed by s. 2(1)(e) or 2(1)(k) of the Act.

10 In the case of *C.(C.D.) v. Starzecki*, [1996] 2 W.W.R. 317 (Man. Q.B.), my colleague Duval J. held that an action for breach of fiduciary duty causing injury to the person is governed by s. 2(1)(k). She made that ruling on a motion for summary judgment in an action brought by a patient against her former doctor, who had been convicted in a criminal court of sexually assaulting her. She stated at pp. 321-322:

9 The second statutory limitation period raised by the defendant is based on s. 2(1)(e) of The Limitation of Actions Act, R.S.M. 1987, c. L150, which provides that actions for "malicious prosecution, seduction, false imprisonment, trespass to the person, assault, battery . . . whether the action be founded on a tort or on a breach of contract or on any breach of duty [must be commenced] within two years after the cause of action arose". Counsel for the defendant submits that this action is encompassed within the meaning of "any breach of duty" in s. 2(1)(e).

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11 The plaintiff argues that breach of fiduciary duty can constitute a head of liability independent of that in tort or contract and that her action is encompassed within The Limitation of Actions Act, s. 2(1)(k), as being an action for "other equitable ground of relief not hereinbefore specifically dealt with" for which an action must be commenced within six years from the discovery of the cause of action.

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13 The plaintiff submits that a cause of action based upon breach of fiduciary duty is not dealt with in s. 2(1)(e), but is governed by s. 2(1)(k). She argues that breach of fiduciary duty has not been "hereinbefore specifically dealt with" because the words "whether the action be founded on a tort or on a breach of contract or on any breach of duty" within s. 2(1)(e) only qualify the specific torts mentioned in that section. I agree.

11 I would defer to the decision of my colleague unless first persuaded by counsel for the Orders that her decision was plainly wrong. Counsel for the Orders argued that her decision was plainly wrong.

12 There is one difference between the *Starzecki* case and the instant case. In *Starzecki*, Duval J. considered s. 2(1)(e) from the perspective of the limitation period for "malicious prosecution, seduction, false imprisonment, trespass to the person, assault, battery . . . whether the action be founded on a tort or on breach of contract or any breach of duty". It appears that she found that the pleading before her did not give rise to consideration of "other injuries to the person". However, she did interpret the last three lines of the provision to qualify the first portion of subsection (e), and such interpretation, if correct, would have equal application to a case such as this one, which engages an allegation of "or other injuries to the person, whether caused by misfeasance or non-feasance".

13 The matter is complicated to an extent by the fact that in the *Woolett* case, MacInnes J. stated that an action for breach of fiduciary relations causing injury falls under s. 2(1)(e). However, both counsel agreed that the statement on the point by MacInnes J. is obiter, and he did not either refer to the *Starzecki* case or give reasons for his statement.

14 One case has applied *Starzecki*. In *Fairford First Nation v. Canada (Attorney General)* (1998), 156 F.T.R. 1 at 79, Rothstein J. relied on the *Starzecki* decision to support his finding that, "Manitoba courts have held that paragraph 2(1)(k) applies to a breach of fiduciary duty (see *C. (C.D.) v. Starzecki*)".

15 Section 2(1)(e) can be broken down into two parts:

- (1) malicious prosecution, seduction and false imprisonment; and
- (2) trespass to the person, assault, battery, wounding or other injuries to the person, whether caused by misfeasance or non-feasance, and whether the action be founded on a tort or on a breach of contract or on any breach of duty.

16 The Manitoba Legislature enacted its first statute of limitations governing matters other than real property in 1931, when a proposal of the Uniformity Commissioners was adopted. Previously, the 1623 U.K. statute applied in Manitoba. The 1931 Manitoba statute provided:

3(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

. . . . (d) actions for trespass to the person, assault, battery, wounding or other injury to the person, whether arising from an unlawful act or from negligence, or for false imprisonment, or for malicious prosecution or for seduction within two years after the cause of action arose;

It will be noticed that in the 1931 version, the same two categories of actions were recited as in the present legislation. The category dealing with other injuries read, "or other injury to the person, whether arising from an unlawful act or from negligence," and it appeared before the category that dealt with malicious prosecution, seduction and false imprisonment. The 1931 statute did contain s. 2(1)(k) in its present form, although it was numbered 3(1)(l). It had no definition of the words "injury to the person".

17 In 1967, the 1931 Manitoba statute was amended, firstly, to provide the present definition of "injuries to the person" (see s. 1); secondly, to reword s. 3(1)(e) to create s. 2(1)(e) in its present form, by making the word "injury" plural, by deleting the words "whether arising from an unlawful act or from negligence" and by replacing them with the words "whether caused by misfeasance or non-feasance"; thirdly, by adding the provision, "whether the action be founded on a tort or on a breach of contract or any breach of duty"; fourthly, by moving the malicious prosecution category to the beginning of the provision; and fifthly, by adding a part entitled "Extension of Limitation Period," empowering the court to grant extensions.

18 The background of the 1967 amendment can be found by brief reference to developments in the U.K. In 1939, the U.K. Parliament enacted the Limitation Act, 1939. That legislation provided:

2. Limitation of actions of contract and tort, and certain other actions.
 - (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action occurred, that is to say:--
 - (a) actions founded on simple contract or on tort;

It contained no provision like s. 2(1)(k) of the Manitoba Act. However, In 1954, the U.K. statute was amended to add to s. 2(1)(a) the following:

[Provided that, in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this section shall have effect as if for the reference to six years there were substituted a reference to three years.]

19 In 1963, the U.K. statute was amended to empower a court in certain circumstances to extend the limitation period. It provided a definition of "personal injuries," namely:

"Personal injuries" includes any disease and any impairment of a person's physical or mental condition;

When he introduced the 1967 Manitoba statute in the Legislature, The Honourable Sterling Lyon (now Lyon J.A.) made it clear that substantial reliance was being placed on the 1939 U.K. statute, at least with respect to the empowering of the court to extend the limitation period (Hansard, April 13, 1967, pp. 2553-2555). In addition, the Manitoba amendment reproduced the 1963 U.K. definition of "injuries of the person".

20 In at least two cases Manitoba courts have interpreted s. 3(1)(d), the predecessor of s. 2(1)(e) of The Limitation of Actions Act. In *Puls v Bulman Brothers Ltd.* (1933), 41 Man.R. 474 at p. 476, Prendergast C.J.M. stated that the phrase "whether arising from an unlawful act or from negligence"

qualifies the word "actions" and broadens it so as to include the actions arising from negligence.

(emphasis added)

Dickson J. appears to have given the same interpretation to the provision in the case of *Homenick v. Wiebe* (1964) 48 D.L.R.(2d) 187. He stated at p. 192:

Plaintiff's cause of action, if any, is one for injury to the person . . . arising from . . . negligence', within s. 3(1)(d) of the Limitation of Actions Act.

21 It might be argued from these cases that, when the 1967 amending statute deleted the words "whether arising from an unlawful act or from negligence" and replaced them with the words "whether caused by misfeasance or non-feasance, and whether the action be founded on a tort or on a breach of contract or any breach of duty," the intention was that the latter words should also be interpreted as qualifying and also broadening the scope of s. 2(1)a. The cases of *Puls v. Bulman* and *Homenick v. Wiebe* were not cited to this court by counsel, nor does it appear, after review of the court file in the *Starzecki* case, that they were cited to Duval J. I need not determine whether, in light of these cases, the *Starzecki* interpretation was correct, because I have reached the conclusion on another basis that the plaintiff's claim is governed by s. 2(1)(k).

22 If the plaintiff had commenced her action prior to 1967, her claim would have been governed by the provisions of the 1931 Manitoba Statute. Under s. 3(1)(d), the predecessor of s. 2(1)(e), the limitation of two years after the cause of action arose was applicable to actions in the nature of trespass to the person, assault, battery, wounding or other injury to the person. There being no definition of the words injury to the person, I would interpret the words to mean physical harm and not to include a claim for loss of identity and culture. Moreover, because of the operation of the limited class rule as explained by Driedger on the Construction of Statutes, 3rd ed. (Toronto: Butterworths, 1983) by Ruth Sullivan, at p. 203, the words "or other injuries to the person" took on a meaning from the words which preceded them, i.e., "trespass to the person, assault, battery, wounding." Such words do not include a breach of fiduciary duty. If the plaintiff had sued the Orders for damages for loss of identity and culture suffered in breach of a fiduciary duty prior to the enactment of the 1967 Manitoba statute and if the Orders had moved to strike out the claim, the motion would have failed because a court would have held that s. 3(1)(d), now 2(1)(e), does not apply, but that s. 3(1)(l), now 2(1)(k), does apply, as the action is grounded on an "equitable ground of relief," i.e., breach of fiduciary duty.

23 Have any of the changes made in the 1967 Manitoba Statute affected the defendant's right to succeed on this

motion? In [paragraph]17 I reviewed the changes which were brought about by the 1967 Manitoba statute. I have stated that without a definition of the words "injuries to the person" I would have defined "personal injuries" as physical harm. The 1967 amendment broadened the meaning of the words "personal injuries" to include any disease and any impairment, which I take to mean lessening, of a person's physical or mental condition. There is nothing contained in the amendment to the definition to suggest that the new s. 2(1)(e) would deal with a loss of identity or culture. Moreover, even if it could be said that the addition, in 1967, of the phrase "whether the action be found on any breach of duty" does more than qualify, but also expands, the scope of s. 2(1)(e) beyond actions for assault, battery or wounding, the 1967 statute made no change to s. 2(1)(k), which had, since 1931, provided the operative limitation period for breach of fiduciary duty causing loss of identity and culture. If there is a conflict in the provisions or ambiguity or doubt as to the applicable provision, I would apply the provision more favourable to the plaintiff's claim. I conclude, therefore, that there is nothing contained in the 1967 Manitoba Statute which enhances the defendant's position on this motion.

24 For the above-mentioned reasons I find that:

- (i) the plaintiff's claim is not barred by s. 7(5) (the 30-year cap);
- (ii) her cause of action is not barred under s 2(1)(e) as a cause of action for "other injuries to the person" whether the action be founded on any breach of duty; and
- (iii) the plaintiff's action is governed by s 2(1)(k) being an "other equitable ground of relief".

Therefore, the limitation period which applies is six years from the date of discovery. I stated in [paragraph]1 that counsel agreed that if the claim is not barred by s. 2(1)(e) or s. 7(5), the motion should be dismissed. That is because this court cannot, at this stage, determine whether the statement of claim was filed within six years of discovery. The question of date of discovery cannot be determined at this time, that is, based on the pleadings alone. Evidence would have to be led on this issue, either at the trial of the action or at a trial of the issue. The motion is therefore dismissed without prejudice to the right of the Orders to plead, if they are so advised, that the claim against them is barred on the basis that it was not filed within six years of discovery of the cause of action.

SCHULMAN J.

* * * * *

MEMORANDUM: CORRECTION NOTICE

Released: December 9, 1999

Paragraph 20 of the above-noted judgment has been amended to correct the wording of the second sentence thereof. The words "I refer to the cases of" have been deleted and replaced with the word "In" and, immediately following the citation of the Puls case, the word "where" has been deleted. The structure of the lead-in to the quote, and the quote itself, has also been altered.

Attached hereto are copies of:

1. page 1 of the judgment, for identification purposes only; and
2. the corrected p. 11 of the judgment.

Please replace the existing p. 11 with the attached corrected version.

cp/qi/i/qljpn