CITATION: Malik v. Nikbakht, 2019 ONSC 3118
COURT FILE NO.: CV-14-516027
DATE: 20190522

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: SARFRAZ MALIK, Plaintiff

AND:

AMIR NIKBAKHT, DEREK DA SILVA AND CONBORA FORMINGS INC., Defendants

BEFORE: Cavanagh J.

COUNSEL: *Joel Cormier* and *Walter Yoo*, for the Plaintiff

Theodore P. Charney, for the Defendants

HEARD: March 5, 2019

ENDORSEMENT

Introduction

[1] The appellant (defendant) Amir Nikbakht appeals the interlocutory order of Master Wiebe in which he granted leave to the respondent (plaintiff) Sarfraz Malik to amend the statement of claim to add a claim pursuant to s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*").

[2] The amendment was granted even though more than four years had passed from the date of the accident in question. The appellant submits that the *FLA* claim is a separate claim from other claims made by the respondent, and not a head of damages, and that the Master erred in holding otherwise and granting the amendment.

[3] The Master held that he was bound by the 2012 decision of Moore J. (sitting as a single judge of the Divisional Court) in *Bazkur v. Coore*, 2012 ONSC 3468 on an appeal from a master's final order. In *Bazkur*, the plaintiff had moved to amend the statement of claim (after expiry of the limitation period for a new claim) to include a claim under the *FLA*. The master dismissed the motion, holding that the proposed amendment was a claim based on a separate and new cause of action pursuant to the *FLA*, and not an alternative claim for relief or a different legal conclusion based upon facts already pleaded. The appeal judge allowed the appeal, holding that the amendments sought do not raise a new cause of action.

[4] For the following reasons, I conclude that the appeal decision in *Bazkur* was incorrect and, as a result, the Master incorrectly allowed the respondent's motion to amend his statement of claim to add a claim pursuant to s. 61 of the *FLA* after the expiry of the limitation period for a new claim. I allow the appeal and set aside the Master's decision.

Procedural Background

[5] This action arises out of a motor vehicle accident which took place on or about October 10, 2013. The respondent was driving one of the vehicles involved in the accident. The respondent's wife and three sons were passengers in his vehicle at the time of the accident.

[6] The respondent commenced this action by a statement of claim that was issued on November 12, 2014. In the respondent's statement of claim, he alleges that the appellant (the driver of a motor vehicle involved in the accident) and the defendant Derek Da Silva (the driver of another vehicle involved in the accident) caused the accident through their negligent acts and omissions. In his statement of claim, the respondent pleads and relies upon the *Highway Traffic Act*, the *Insurance Act* and the *Negligence Act*. The respondent did not originally plead the *FLA*.

[7] There are also two other actions in which claims are made arising from the same accident, one by the respondent's wife and the other by his three children. The respondent is a defendant in these other actions.

[8] In the action in which he is a plaintiff, the respondent brought a motion for an order for leave to amend the statement of claim to add a claim for damages pursuant to s. 61 of the *FLA*. The proposed additional claim is for damages for (a) out-of-pocket expenses incurred for the benefit of his three children, (b) a reasonable allowance for loss of income and the value of other services rendered to his three children, and (c) the loss of care, guidance and companionship reasonably expected to be received from his three children had the defendants' negligence not occurred.

[9] The motion was heard by the Master on April 30, 2018. The Master rendered his decision orally that he is bound by *Bazkur* as a matter of *stare decisis* and, therefore, he granted the respondent's motion with written reasons to follow. The Master released his written reasons for decision on May 2, 2018 and held:

a. The facts in *Bazkur* are very much the same as in the case before him.

b. The cases upon which the appellant relied did not conflict with the *Bazkur* decision and all had distinguishing features.

c. He is bound by the decision of the appeal judge in *Bazkur*.

The Master noted, incidentally, that he found the decision of the appeal judge in *Bazkur* persuasive on the facts of that case. The Master granted the motion to amend the statement of claim.

Analysis

[10] On this appeal, the appellant and the respondent agree that the issue to be decided is whether an amendment to a statement of claim to plead damages pursuant to s. 61 of the *FLA* is an amendment to plead a new statutory cause of action or an amendment to plead an additional remedy for a cause of action in negligence which was already pleaded.

[11] The appellant submits that the requested amendments to the statement of claim are to make a claim under a new statutory cause of action and that the amendments should not have been allowed because they were sought after the applicable two-year limitation period had expired.

[12] The respondent submits that the amendments are to claim an additional remedy in damages under s. 61 of the *FLA* for the tort of negligence in the operation of a motor vehicle, and not to plead a new statutory cause of action. The respondent submits that the Master made his decision in accordance with established jurisprudence which he was bound to follow, specifically, *Bazkur*.

[13] I begin my analysis with ss. 61(1) and (2) of the FLA which provide:

> **Right of dependents to sue in tort**
> 61(1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.
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> **Damages in case of recovery**
> (2) The damages recoverable in a claim under subsection (1) may include,
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> (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
> (b) actual funeral expenses reasonably incurred;
> (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
> (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
> (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred.

[14] Section 61(3) of the *FLA* refers to an action brought under subsection (1), and provides that the right to damages is subject to any apportionment of damages due to the contributory fault or neglect of the person who was injured or killed.

[15] A claimant under s. 61 of the *FLA* need not have her own direct claim in tort for damages (for injuries to her person or property) against the person by whose fault or neglect the related person was injured or killed. Whether a claimant does or does not have a direct claim in negligence against the alleged wrongdoer is irrelevant to whether a claim may be made under s. 61 of the *FLA*.

[16] In this regard, the appellant relies upon a decision of the Court of Appeal for Ontario in *Camarata v. Morgan*, [2009] O.J. No. 621. In *Camarata*, the issue was whether the limitation

period to bring an action by an estate for damages for injuries to the deceased arising from a motor vehicle accident runs from the date of the accident or from the date of his death. In its decision, the Court of Appeal was called on to address the limitation period for claims brought by the dependents of the deceased under s. 61 of the *FLA*. The Court of Appeal addressed the nature of a claim under s. 61 of the *FLA* at paras. 9-10:

> The claims brought by the dependents of the deceased under s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 are in no better position than the claim brought by the estate. Claims under s. 61 of the *Family Law Act* are derivative. The limitation period governing the principal action, that is the claim brought by the trustee, also governs the claims made under s. 61: *Smith Estate v. College of Physicians and Surgeons of Ontario* (1998), 41 O.R. (3d) 481 (C.A.).
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> Section 61 (1) of the *Family Law Act* creates a cause of action in favour of certain relatives of "a person [who] is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages." The section contemplates claims triggered by the injury or death of that person. While the death of the injured person will have consequences for the kind of damages claimed, death does not create a new cause of action. The cause of action under s. 61 arose in the circumstances of this case when the deceased suffered his injuries.

This passage confirms that a claimant's claim under s. 61 of the *FLA* is separate from his or her direct claim, if there is one, against the alleged wrongdoer. It is a claim arising from a statutorily created cause of action. It is a derivative claim.

[17] In his original statement of claim, the respondent claims damages from the appellant in negligence in respect of his own injuries based upon the alleged breach of a duty of care owed by the appellant to him. The fact that the respondent was the driver of a vehicle involved in the accident in which he was injured (allegedly by the fault or neglect of the appellant) and that he seeks damages in negligence against the appellant for his injuries is irrelevant to his entitlement to make a claim pursuant to s. 61 of the *FLA*. In respect of his proposed *FLA* claim, the respondent claims damages for his pecuniary loss resulting from the injuries that his children suffered by the alleged fault or neglect of the appellant. Even if the respondent had escaped any injury as a result of the accident, if his children were injured by the fault or neglect of the appellant, he would still have been able to maintain an action under s. 61 of the *FLA*, provided it was brought within the applicable limitation period.

[18] Given this context, I now address the decision of the appeal judge in *Bazkur* which the Master concluded, correctly in my view, was binding on him.

[19] The facts on the appeal in *Bazkur* were, in all material respects, the same as the facts on the motion before the Master which resulted in the order on the appeal before me. In *Bazkur*, the plaintiff and her husband were occupants in a vehicle that was struck by another vehicle owned and operated by the defendants. The plaintiff brought her action in a timely way for claims arising from her own personal injuries. After the expiry of the limitation period for claims in relation to a new cause of action, the plaintiff moved before a master for leave to amend the statement of claim to claim damages pursuant to the *FLA* in relation to injuries that the plaintiff's husband sustained

as a result of the accident. The master held that the proposed amendments were statute barred and she dismissed the motion.

[20] In the appeal decision in *Bazkur*, the appeal judge relied upon the fact that the plaintiff had a statutory entitlement to seek damages under the *FLA* when the accident happened, and that the plaintiff could have made a claim for damages under the *FLA* in lieu of or in addition to the claims made in the statement of claim. The appeal judge held, in this regard, that the case before him mirrored the situation before the court in *Cahoon v. Franks*, [1967] S.C.R. 455. The appeal judge relied upon the Supreme Court of Canada decision in *Cahoon* to support his decision.

[21] In *Cahoon*, the plaintiff was parked when another vehicle owned and operated by the defendant collided with the plaintiff's automobile. The plaintiff commenced an action against the defendant and claimed damages for the value of his automobile which was destroyed in the collision. After the one-year limitation period for an action for the recovery of damages occasioned by a motor vehicle had expired, the plaintiff sought and was granted leave to amend his statement of claim to include a claim for damages for his own personal injuries suffered from the collision. The defendant appealed, and the question on appeal was whether the amendments set up a new cause of action that was statute barred.

[22] The appellant in *Cahoon* relied upon an English authority, *Brunsden v. Humphrey* (1884), 14 Q.B.D. 141, in support of his submission that the amendments set up a new cause of action because different rights were infringed in the claim for injury to property and in the claim for injury to the person. The Supreme Court of Canada disagreed, and relied upon the reasons that were quoted from the decision of Porter J.A. in the court below, from which I quote:

> It is important to bear in mind that it was the "forms of action" that were abolished by the *Supreme Court of Judicature Act, 1873*. To apply *Brunsden v. Humphrey* to the facts here would be to revive one of the very forms of action which that Act abolished. The cause of action or, to use the expression of Diplock, L.J., "the factual situation" which entitles the plaintiff here to recover damages from the defendant is the tort of negligence, a breach by the defendant of the duty which he owed to the plaintiff at common law which resulted in damage to the plaintiff. The injury to the person and the injury to the goods, and perhaps the injury to the plaintiff's real property and the injury to such modern rights as the right to privacy flowing from negligence serve only as yardsticks useful in measuring the damages which the breach caused.
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> ...
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> The decision in *Brunsden v. Humphrey* may well have persisted in Great Britain largely because the courts were bound by it. Free as we are to apply reason unhampered by precedent, I am of the opinion that the principle of *Brunsden v. Humphrey* ought not to be adopted.

The Supreme Court of Canada agreed with Porter J.A. and held that the plaintiff's amendment to claim damages for personal injuries, in addition to his claim for damages for property damage, did not set up a new cause of action. The appeal was dismissed.

[23] The appeal judge in *Bazkur* accepted at para. 13 that "a cause of action has been defined as a factual situation the existence of which entitles one person to obtain from the court a remedy against another person", relying upon *Ascent Inc. v. Fox 40 International Inc.*, [2009] O.J. No. 2964. The appeal judge held at paras. 17-19 that the master had erred in holding that the *FLA* claim was a separate cause of action:

> The appellant states that amendments to existing pleadings would of necessity have followed from the amendments permitted in the cases referred to above and the addition of new facts in an amended pleading does not create a new cause of action. The appellant also submits that the applicable cause of action is that the respondents were negligent and that their negligence resulted in the appellant having sustained damages. The proposed amendments simply provide additional particulars of the damages claimed and do not advance a new cause of action.
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> The parties remain the same. The basis for the new damages claimed under the *Family Law Act* remains the alleged negligence of the defendants in the operation of a motor vehicle leading to the accident in question already described in the original pleadings.
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> In my view, the Learned Master erred in focusing too closely upon the need to amend the statement of claim to refer to the facts that the plaintiff's husband was a passenger who was also injured in the plaintiff's vehicle and that her statutory entitlement to additional damages from the defendants in this action is based, in part, upon those injuries. By maintaining a focus upon the original cause of action and the law established by the Court in *Cahoon*, the plaintiff's claims against the defendants for damages arising from the action in question, she [the master in the court below] should have determined, as I do, that the amendments sought do not raise a new cause of action.

[24] The respondent submits that even though *Cahoon* dealt with the issue of whether a tort causing both injury to person and to property (as opposed to family members) gives rise to separate causes of action, from a conceptual standpoint, the decision is analogous to the decision on this appeal. The respondent submits that his claim under s. 61 of the *FLA* arises as a result of the underlying negligence of the appellant in causing the accident. The respondent submits that the amended pleading alleges no new breach and relies upon the same allegations of negligence in support of the claim for damages as the original pleading. The respondent submits that the basis for his claims is the tort of negligence, and that *Bazkur* and *Cahoon* are directly on point and I should follow them.

[25] In my view, with respect, the appeal judge in *Bazkur* erred by relying upon the decision in *Cahoon* for his conclusion that the plaintiff's *FLA* claim was only a head of damages and did not raise a new cause of action. In *Cahoon*, there was one cause of action for the tort of negligence which Porter J.A. of the Alberta Court of Appeal described as "a breach by the defendant of the duty which he owed to the plaintiff at common law which resulted in damage to the plaintiff". In *Cahoon,* the plaintiff claimed damages for injury to his property and for injury to his person based upon the same alleged breach of a duty of care owed to him. These were separate remedies for the same cause of action.

[26] The respondent submits that the circumstances in *Cahoon* are the same as those in this appeal in that his amended pleading alleges no new breach. I disagree. The respondent's claim for damages as originally pleaded is in negligence for his injuries resulting from an alleged breach of a duty of care owed by the appellant to him. In contrast, the respondents' proposed *FLA* claim is not based upon an alleged breach of a duty of care owed by the appellant to him. It is a derivative claim based upon injuries to the respondent's children which were allegedly caused by the appellant's fault or neglect. At common law, the respondent would not have a right to sue the appellant in negligence for damages for injuries caused to the respondent's children by a breach of the appellant's duty of care owed to the respondent. A claim under s. 61 of the *FLA* arises from a statutorily created cause of action: *Camarata* at para.10. This is the material distinction between *Cahoon*, where claims for property damage and for personal injuries arose from the same breach of duty, and *Bazkur* (and this appeal).

[27] The appellant also relies upon the decision of the Court of Appeal for Ontario in *Davis v. East Side Mario's Barrie*, [2018] O.J. No. 2283. In *Davis*, the appellant, while carrying her newborn baby, fell while going down a set of stairs to use the washroom located on the lower level of the respondent's premises. The original statement of claim pleaded negligence, breach of duty, breach of contract and breach of the *Occupiers' Liability Act*, and focused on the safety of the staircase on which the appellant fell. On a motion for summary judgment, the motion judge granted summary judgment and dismissed the action on the basis that the appellant had not established any breach of the respondent's duty of care. The appellant then amended her pleading and the amended pleading focused on the respondent's failure to advise her of the location of the main floor washroom or an accessible family washroom. The appellant relied in her amended pleading on the *Occupiers' Liability Act* ("*OLA*") and the *Consumer Protection Act* ("*CPA*").

[28] The Court of Appeal in *Davis* held that the amended statement of claim did not merely provide particulars of the cause of action previously pleaded and that the second motion judge had erred in so finding. The Court of Appeal held that the plea in the amended claim is very different than the original pleading in that it pleads a new duty of care: the duty to advise the appellant of the existence and availability of the washroom facilities on the main floor of the restaurant. The Court of Appeal held that the new claim is a fundamentally different claim based on facts not originally pleaded and that the *CPA* and its relationship with the *OLA* is a new plea in support of a new cause of action. The Court of Appeal held that because the new plea raised a new cause of action, it was statute barred because it was raised for the first time long after the two year period of limitation had expired: *Davis* at paras. 34-38.

[29] I regard the decision of the Court of Appeal in *Davis* as applicable to this appeal because the respondent does not rely upon the duty of care owed by the appellant to him, as originally pleaded, for his *FLA* claim. The respondent's *FLA* claim is based on injuries to his children by the appellant's fault or neglect in breach of duties owed to them. Like the amended pleading in *Davis*, the respondent's amended pleading is a pleading of a new cause of action. It is immaterial that the respondent relies upon the same acts and omissions of the appellant in support of the respondent's direct claim (for breach of a duty owed to him) and in support of his derivative claim (for breaches of duties owed to his children). The respondent's direct claim and his derivative claim arise from legally separate causes of action.

[30] In *Zeitoun v. The Economical Insurance Group* (2008), 91 O.R. (3d) 131 (Div. Ct.) the Divisional Court held that the standard of review to be applied by a judge hearing an appeal from a master is that the decision will be interfered with only if the master made an error of law or exercised his or her discretion on the wrong principles or misapprehended the evidence such that there is a palpable and overriding error. Where the master has erred in law, the standard of review is correctness whether the decision is final or interlocutory and whether or not it is vital to the disposition of the lawsuit: *Zeitoun* at paras. 40-41.

[31] The Master was bound to follow the decision of the appeal judge in *Bazkur* as a matter of *stare decisis*. In this respect, the Master did not err. However, in my view, with respect, the appeal judge in *Bazkur* erred in law in deciding the appeal as he did. This error led to the Master's incorrect decision to allow the amendment after the limitation period for making a claim under s. 61 of the *FLA* had expired.

[32] For these reasons, I conclude that the respondent's claim for damages for recovery of his pecuniary loss under s. 61 of the *FLA* is not a head of damages in respect of his direct claim in negligence for damages caused by the appellant's alleged breach of a duty of care owed to him at common law. The respondent's motion for leave to amend his statement of claim to make his *FLA* claim was brought after the expiry of the two year limitation period under the *Limitations Act, 2002*. The respondent's *FLA* claim is statute barred.

[33] The appeal judge in *Bazkur* was sitting as a single judge of the Divisional Court in *Bazkur* (because the master's decision was a final order). I am sitting as a judge in motions court (because the order on appeal is an interlocutory order). In *Anthes Equipment Ltd. v. Wilhelm Layher GmbH*, [1986] O.J. No. 2338 (H.C.), Reid J. (when addressing whether a judge sitting in motions court has jurisdiction to hear an appeal from a final order of a master) held that judges of the Superior Court of Justice (then named the Supreme Court of Ontario) have coordinate jurisdiction even where a judge may be sitting in a different division of the court, for example, as a single judge of the Divisional Court. See also *Metro Zen (Canada) Inc. v. Eisen* 2018 ONSC 6536 at paras. 15-17.

[34] I have coordinate jurisdiction with the appeal judge in *Bazkur*. In *R. v. Scarlett*, 2013 ONSC 562 Strathy J. (as he then was) held at para. 43 that decisions of a court of coordinate jurisdiction, while not absolutely binding, should be followed in the absence of cogent reasons to depart from them, and he summarized the circumstances in which the judgment should not be followed as those where the subsequent judge is satisfied that the first decision was plainly wrong.

[35] For the foregoing reasons, I am satisfied that the decision of the appeal judge in *Bazkur* was plainly wrong. It follows that the Master's decision which followed the *Bazkur* decision was incorrect.

Disposition

[36] The appeal is allowed and the order of the Master is set aside. In its place, an order is made dismissing the respondent's motion for leave to amend the statement of claim to add the *FLA* claim.

[37] The parties agreed that costs should be fixed in the amount of $2,500 in favour of the successful party. I therefore fix costs of this appeal in the amount of $2,500 to be paid by the respondent to the appellant within 30 days as provided for by rule 57.03(1)(a) of the *Rules of Civil Procedure*.

Cavanagh J.

Date: May 22, 2019