

COURT OF APPEAL FOR ONTARIO

CITATION: Malik v. Nikbakht, 2021 ONCA 176

DATE: 20210323

DOCKET: C67101

Feldman, Paciocco and Coroza JJ.A.

BETWEEN

Sarfraz Malik

Plaintiff/Respondent (Appellant)

and

Amir Nikbakht, Derek Da Silva,
and Conbora Formings Inc.

Defendants/Appellant (Respondent)

Joel Cormier and Hudson Chalmers, for the appellant

Theodore P. Charney, Caleb Edwards and James Omran, for the respondent Amir Nikbakht

Heard: March 12, 2021 by video conference

On appeal from the order of Justice Peter J. Cavanagh of the Superior Court of Justice, dated May 22, 2019, with reasons reported at 2019 ONSC 3118, allowing an appeal from the order of Master Charles G.T. Wiebe of the Superior Court of Justice, dated April 30, 2018, with reasons reported at 2018 ONSC 2816.

Paciocco J.A.:

MATERIAL FACTS

[1] On October 10, 2013, a vehicle operated by the appellant, Sarfraz Malik, was involved in a three-car collision. Mr. Malik and the passengers in his vehicle, Mr. Malik's wife and their three children, were injured.

[2] On November 12, 2014, Mr. Malik sued the owners and operators of the other vehicles for damages relating to the injuries he suffered. Notably, Mr. Malik did not include a claim pursuant to s. 61 of the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*") for his losses arising from the injuries to his children.

[3] Mr. Malik's wife, Khadija Malik, and his three children brought lawsuits of their own, including against Mr. Malik. Unlike Mr. Malik, they included s. 61 *FLA* claims for their damages arising from the injuries to each other.

[4] In February 2018, more than four years after the accident, Mr. Malik brought a motion for leave to amend his statement of claim to add his own s. 61 *FLA* claims relating to his losses arising from the injuries to his children. One of the defendants, Amir Nikbakht, the respondent in this appeal, resisted Mr. Malik's motion, arguing that the s. 61 *FLA* claims Mr. Malik wanted to advance constituted a new statutory cause of action that was statute barred under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B.

THE DECISIONS BELOW

[5] On April 30, 2018, Master Wiebe of the Superior Court of Justice granted Mr. Malik's motion for leave to amend his pleadings. Master Wiebe concluded that he was bound by *Bazkur v. Coore*, 2012 ONSC 3468, 292 O.A.C. 391 (Div. Ct.), a decision by a single judge of the Divisional Court. In *Bazkur*, the court held that subsequent s. 61 *FLA* claims added to a timely negligence action are merely claims for additional damages arising from the existing negligence claim and therefore not subject to the two-year limitation period in the *Limitations Act, 2002*.

[6] Mr. Nikbakht successfully appealed Master Wiebe's decision to a judge of the Superior Court of Justice. On May 22, 2019, the appeal judge ruled that Master Wiebe was bound by *Bazkur*, but that he was not. He declined to follow *Bazkur* after concluding that it was "plainly wrong". The appeal judge gave extensive reasons supporting his conclusion that a claim under s. 61 *FLA* is a cause of action distinct from the timely negligence claim brought by Mr. Malik. The s. 61 *FLA* claims Mr. Malik sought to add were therefore statute barred. Accordingly, the appeal judge set aside Master Wiebe's order and dismissed Mr. Malik's motion for leave to amend.

THE ISSUE ON APPEAL

[7] Mr. Malik now appeals the appeal judge's decision and seeks an order allowing the amendment to his statement of claim. Mr. Malik argues that the appeal

judge erred in law in finding that his s. 61 *FLA* claims constituted a cause of action distinct from his negligence claim. He submits that he has already pleaded, in a timely manner, the same acts of negligence on the part of the defendants that support the s. 61 *FLA* claims and is simply seeking recovery under another head of damages.

[8] As I will explain, I would not give effect to this appeal.

ANALYSIS

[9] In my view, the appeal judge was correct in holding that a s. 61 *FLA* claim is a cause of action that, in Mr. Malik's case, is statute barred.

[10] As the appeal judge correctly acknowledged, the common law does not permit family members to sue for compensation for injuries to their relatives. He explained, at para. 26, that s. 61(1) *FLA* therefore "created" a statutory cause of action that did not previously exist at common law: *Camarata v. Morgan*, 2009 ONCA 38, 246 O.A.C. 235, at para. 10.

[11] Section 61(1) *FLA* provides:

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, ... 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.

[12] As put by Laskin J.A. (concurring), this provision “dramatically expanded recovery”: *Macartney v. Warner* (2000), 46 O.R. (3d) 641 (Ont. C.A.), at para. 51.

[13] Significantly, the new cause of action created by s. 61 of the *FLA* is “derivative”: *Camarata*, at para. 9. In other words, Mr. Malik’s s. 61 *FLA* claim would be for his damages arising out of injuries caused to his children as the result of allegedly negligent breaches by the defendants of duties of care they owed to his children. As the appeal judge pointed out, at paras. 28-29, this is a fundamentally different claim than Mr. Malik’s negligence action, which claimed damages arising out of his own injuries caused as the result of allegedly negligent breaches by the defendants of duties of care they owed to him. Indeed, as the appeal judge recognized, at para. 17, had Mr. Malik brought his s. 61 *FLA* claims in a timely way, he could have done so even without instituting a negligence action of his own.

[14] I do not read this court’s decision in *Ridel v. Cassin*, 2014 ONCA 763, which cites *Bazkur*, at para. 10, as holding that *Bazkur* was correctly decided. In *Ridel*, this court cited *Bazkur*, along with other authorities, only for the uncontroversial proposition that claims for additional damages arising from an existing cause of action in a timely claim are not barred by the *Limitations Act, 2002*. The error in *Bazkur* occurred in the application of that principle.

[15] It follows that the appeal judge was correct in finding that Mr. Malik was not entitled to amend his statement of claim to bring a new statutory cause of action outside of the applicable limitation period.

DISPOSITION

[16] For these reasons, I would affirm the appeal judge's decision and dismiss Mr. Malik's appeal.

[17] At the end of the hearing, the parties expressed confidence that they could agree to an appropriate amount for costs. If they fail to do so and a costs order is required, either party may notify the Registrar within 15 business days of the release of these Reasons for Decision, and a timeline for the exchange of costs submissions will be provided.

Released: Tuesday, March 23, 2021

K.P.



Jayna K. Feldman J.A.

I agree. Corza J.A.