

Suspension of Limitation Period Due to Incapacity

Rebecca Moore
July 2020

In Ontario, the time period for a claimant to commence an action is outlined in the *Limitations Act, 2002*, (“LA”). The ‘basic limitation period’ is two years from the date on which the claim was discovered. There are, however, exceptions that have been carved out for particular categories of claimants. One such commonly known example is for minors, which is set out in s.6 of the LA.

Another exception to the basic limitation period is for claimants that may fall within the definition of an ‘incapable person.’ As outlined in s. 7(1) of the LA, the limitation period will not begin to run during the time a person is “**incapable of commencing a proceeding in respect of the claim because of his or her physical, mental, or psychological condition.**”

As per s.7(2) of the LA, a claimant is presumed to be capable of commencing a proceeding, unless the contrary is proven.

The interpretation of this provision, including the evidence required to rebut the presumption of capacity, was recently explored by the Court of Appeal in [Carmichael v. GlaxoSmithKline Inc.](#)¹

Facts

The respondent, Mr. Carmichael, commenced an action in October 2011 as against GlaxoSmithKline Inc. (GSK). GSK was allegedly negligent in the manufacturing and marketing of the drug Paxil, which reportedly induced Mr. Carmichael’s psychosis, causing him murder his son in July 2004.

¹ *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447

Mr. Carmichael was charged with the murder of his son. He was found not criminally responsible on account of mental disorder in September 2004.

Between September 2004 and October 2011 (when the civil action was commenced), the respondent attended five hearings before the Ontario Review Board, published a website and booklet, conducted media interviews, provided instructions to his lawyers including a divorce lawyer and his lawyer before the Review Board, and travelled to Texas to meet with a lawyer about potentially suing GSK.

In October 2009, Mr. Carmichael received the results of a DNA test performed by Dr. Lucire (forensic psychiatrist). He was reportedly advised that Paxil caused his psychosis. In December 2009, the Ontario Review Board granted Mr. Carmichael an absolute discharge.

Summary Judgment Motion

GSK brought a motion for summary judgment, seeking an Order that the action was statute-barred pursuant to the LA.

The motion's judge dismissed the motion, finding the limitation period had not begun to run until Mr. Carmichael received an absolute discharge from the Ontario Review Board on December 2, 2009.

Appeal – What Does Incapable Mean?

On appeal, the Court of Appeal reviewed the proper interpretation of s.7(1) of the LA, noting two key elements that must be established: that the claimant is incapable of commencing a proceeding with respect to the claim and that they are incapable because of their physical, mental or psychological condition. The burden of rebutting this presumption of capacity falls onto the claimant to prove on a balance of probabilities.²

The term '**incapable**' is not defined by the LA. The Court of Appeal has, however, previously found that "a person has the capacity to make a decision if they are able to understand the information that is relevant to making that decision and able to appreciate the reasonably foreseeable consequences of that decision: see e.g. *Substitute Decisions Act, 1992*, [S.O. 1992, c. 30, ss. 6](#) (property decisions) and 45 (personal care decisions); *Health Care Consent Act*, [\[1996, S.O. 1996, c. 2, Sched. A\] s. 4\(1\)](#) (medical

² Section 7(2) of the LA; *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, at para 78

treatment); [*R. v. Conception*, 2014 SCC 60, [2014] 3 S.C.R. 82], at para. 22 (medical treatment).”³

Determining capacity is a low threshold, but can vary based on the decision in issue. For example, while someone may be able to manage their personal care, they may not be able to manage their personal finances.⁴ The capacity to instruct counsel is considered higher on the competency hierarchy.⁵

This question of capacity must be determined in relation to ‘**commencing the particular proceeding at issue.**’ As stated by Justice Jamal, this “implicitly recognizes that capacity can vary for different decisions.”⁶

Factors in Determining Capacity

When determining if a claimant was incapable of a commencing the claim, this decision will be guided by the potential indicators outlined in *Huang v. Braga*⁷ and *Hengeveld v. Ontario (Transportation)*:⁸

1. a person’s ability to know or understand the minimum choices or decisions required to make them;
2. an appreciation of the consequences and effects of his or her choices or decision;
3. an appreciation of the nature of the proceedings;
4. a person’s ability to choose and keep counsel;
5. a person’s ability to represent him or herself;
6. a person’s ability to distinguish between the relevant and irrelevant issues; and
7. a person’s mistaken beliefs regarding the law or court procedures.⁹

While the above factors are helpful indicators of capacity for the purpose of s7(1), the list is not be considered as exhaustive. The Court of Appeal indicated:

³ *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, at para 84; citing *Ohenhen (Re)*, 2018 ONCA 65, at para 81

⁴ *Ibid.* at para 86; citing *Ohenhen (Re)*, 2018 ONCA 65, at para 80

⁵ *Ibid.* at para 87, citing *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Gen. Div.), aff’d 37 O.R. (3d) 221 (C.A.), leave to appeal refused, [1998] S.C.C.A. 61

⁶ *Ibid.* at para 88

⁷ 2016 ONSC 6306, appeal quashed 2017 ONCA 268, leave to appeal refused 2017 ONSC 3826

⁸ 2017 ONSC 6300

⁹ *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, at para 94

I agree that the factors listed in *Huang/Hengeveld*, while not exhaustive, provide helpful indicators of capacity under [s. 7\(1\)\(a\)](#). They provide concrete and objectively verifiable indicators of a potential litigant's capacity to commence an action: if absent, this tends to support a finding that the person was incapable of commencing a proceeding in respect of the claim; if present, this tends to weigh against a finding that the person was incapable of commencing a proceeding in respect of the claim. These factors are neither necessary nor sufficient in themselves to establish incapacity; they are *indicia* that guide a holistic weighing of all the evidence on capacity in the context of the case. Depending on the circumstances, it may also be relevant for a court to consider other factors.¹⁰

Moving onto the second element of s.7(1), '**...because of his or her physical, mental or psychological condition,**' Justice Jamal finds each category as being distinctly defined so as to allow for a liberal and generous interpretation. It is also possible that more than one category may apply to a particular case.¹¹

Evidentiary Requirements

Justice Jamal goes on to review the evidence necessary for a claimant to rebut the presumption of capacity. Generally, this will require "persuasive medical or psychological evidence."¹²

Examples of evidence on a claimant's incapacity include the claimant's ability to commence other civil proceedings, instruct counsel, travel, swear affidavits, make decisions affecting their legal rights, their appearance and demeanour, evidence from those who know the claimant well, testimony of the plaintiff, and the opinion of their counsel.¹³

A claimant's capacity to function on a day to day basis may not equate to having capacity to commence a claim. Conversely, having a mental illness does not necessarily mean an individual is incapable of instructing their lawyer or commencing a proceeding.

Court of Appeal's Decision

Upon application of the above principals, the Court of Appeal found the motion judge's decision should be set aside.

¹⁰ *Ibid.* at para 96

¹¹ *Ibid.* at paras 99-100

¹² *Ibid.* at para 104

¹³ *Ibid.* at para 105

Notably, this case also provides an example of when the court will exercise its fact finding powers, as provided for in s. 134 of the *Courts of Justice Act*. RSE 1990, c. C. 34. The Court of Appeal stated:

Thus, when an appellate court can find no genuine issue requiring a trial and can reach a fair and just determination of the merits of a motion for summary judgment through an appropriate exercise of its fact-finding powers under s. 134, it should do so. As the Supreme Court stated in *Hryniak*, when speaking of courts of first instance, “[t]his will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result”: at para. 49. These comments apply equally to the exercise of fact-finding powers by a reviewing appellate court: see *Cook*, at para. 81.¹⁴

In this case, there were five reasons provided that formed the basis for the Court of Appeal’s decision to exercise its fact finding powers:

1. the appeal did not raise questions of credibility, but was dependent upon expert evidence;
2. the record was ‘complete’ as it included affidavits, transcripts from cross examinations and discovery, medical reports and information that was before the Board;
3. the facts were not disputed by the parties, rather the legal interpretation of the facts;
4. neither party requested the court remand the matter for redetermination if the motion judge’s order was to be set aside; and
5. the events giving rise to the litigation occurred 16 years ago giving ‘particular poignancy’¹⁵ to the SCC’s assertion that “[p]rompt judicial resolution of legal disputes allows individuals to get on with their lives.”¹⁶

The court therefore undertook a review of the evidence. Applying the *Huang/Hengeveld* indicators, it was found that the respondent had not proven he was incapable of commencing this proceeding because of a psychological condition before December 2, 2009.

The evidence that was relied upon to support this finding included the respondent’s ability to instruct a lawyer (including his criminal, family law and US lawyer, as well as his lawyer before the Board headings), the fact that he wrote and spoke publically about the circumstances of his son’s death, and his previous engagements with GSK directly.

¹⁴ *Ibid.* at para 132

¹⁵ *Ibid.* at para 135

¹⁶ *Hryniak v. Mauldin*, 2014 SCC 7, at para 25, *Carmichael v. GlaxoSmithKline Inc.*, 2020 ONCA 447, at para 135

The respondent's case was therefore found to be statute-barred by virtue of the LA.

Conclusion

Limitation periods can be suspended due to a person's incapacity. A person generally has the capacity to make a decision if they are able to understand the information that is relevant to making that decision and able to appreciate the reasonably foreseeable consequences of that decision or lack of decision.

The decision to commence a lawsuit can be complex and can involve a multitude of considerations. A person is presumed to have capacity to commence a lawsuit within the basic limitation period. However, this presumption can be rebutted, generally through persuasive medical or psychological evidence.

Limitation periods should not be treated lightly. They provide certainty to potential defendants and prevent defendants from having to defend claims based on stale evidence.

On the other hand, fairness to plaintiffs is also required. A person who is genuinely incapable of making a decision to commence a lawsuit should not be held to a strict limitation period.