IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Collier v. Nova Fish Farms Inc.*, 2025 NLSC 66
Date: April 10, 2025
Docket: 201605G0011

BETWEEN:

GERARD JODY COLLIER

PLAINTIFF

AND:

NOVA FISH FARMS INC.

FIRST DEFENDANT

AND:

COLD WATER FISHERIES INC.

SECOND DEFENDANT

Before: Justice Leanne M. O'Leary

Place of Hearing:	Gander, Newfoundland and Labrador
Date of Hearing:	March 13, 2025
Appearances:	
No appearance	Gerard Jody Collier
Bridget S. Daley	Appearing on behalf of the Defendants

Authorities Cited:

CASES CONSIDERED: *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113, 433 A.P.R. 113 (Nfld. C.A.); *Fennelly v. Lloyd's Underwriters*, 2016 NLTD(G) 1; *Fennelly v. Lloyd's Underwriters*, 2021 NLSC 160; *Penney v. L.B.*, 2022 NLSC 160; *Dawe v. Brown* (1994), 120 Nfld. & P.E.I.R. 40, 373 A.P.R. 40 (Nfld. S.C. (T.D.)); *Kilfoy v. Shanahan's Investigation and Security Ltd.*, 2010, CarswellNfld 486; *Halifax Insurance Co. v. Hunt*, [1992] N.J. No. 154, 33 A.C.W.S. (3d) 1046 (Nfld. S.C. (T.D.)); *Barbiero v. Pollack*, 2024 ONCA 904; *Hryniak v. Mauldin*, 2014 SCC 7

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

O'LEARY, J.:

INTRODUCTION

[1] This is an application by the First and Second Defendants ("the Defendants"), Nova Fish Farms Inc. and Cold Water Fisheries Inc., for an order dismissing the Plaintiff's action for want of prosecution. The application is pursuant to Rule 40.11 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the "*Rules*").

[2] More than nine years have passed since the Plaintiff, Gerard Collier, filed his Statement of Claim alleging negligence against both Defendants.

BACKGROUND

[3] There appears to be no dispute as between the parties on the relevant procedural history.

[4] The events giving rise to the within cause of action occurred on or about February 1, 2014, more than eleven years ago.

[5] The Statement of Claim was issued January 29, 2016, more than nine years ago.

[6] In his Statement of Claim, the Plaintiff alleged he sustained injuries while operating a snow mobile on the ice-covered harbor at Bay d'Espoir, in the vicinity of St. Alban's, in the Province of Newfoundland and Labrador. He alleges his snowmobile collided with abandoned aquaculture pens owned by the Defendants which were frozen into the ice. The Plaintiff alleged the aquaculture pens lacked reflectors, lights or other marking and there were no warning signs in the vicinity to warn of the dangers presented by the abandoned equipment frozen in the ice.

[7] The Plaintiff alleges he sustained a fracture to his right leg.

[8] The Statement of Defence of both Defendants was filed on August 23, 2016. By court order dated May 11, 2017, the Defendants filed an Amended Statement of Defence on May 19, 2017.

[9] The Defendants have denied liability for the incident. They deny knowledge of the incident involving the Plaintiff and his snowmobile journey. The Defendants deny any collision between the Plaintiff and any abandoned aquaculture equipment. They deny any ownership or responsibility for any such aquaculture equipment. The Defendants further claim contributory negligence on the part of the Plaintiff. The Defendants allege that the Plaintiff was solely responsible for the incident of February 1, 2014, as he was operating the snowmobile in an unsafe manner and speed, below the standard required of a reasonable person in the operation of a snowmobile.

[10] The Defendants' List of Documents was filed on March 6, 2017.

[11] On April 26, 2017, the Defendants filed an Interlocutory Application pursuant to Rule 32 requiring the Plaintiff to file his List of Documents. The application was heard on May 11, 2017. The Plaintiff's List of Documents was filed pursuant to court order on May 16, 2017.

[12] An Examination for Discovery of the Plaintiff was conducted on July 4, 2017.

[13] The Plaintiff did not request a discovery of any of the Defendants' representatives.

[14] The Defendants filed an Interlocutory Application pursuant to Rule 40.06 on September 21, 2018 requesting an order that the matter be placed on the Pre-Trial List on the Plaintiff's failure to take any steps to move forward with the matter or certify a readiness for trial.

[15] The matter was placed on the Pre-Trial List by court order dated December 7, 2018.

[16] A pre-trial conference was held on October 21, 2019. Defence Counsel advises that the pre-trial conference was adjourned for the Plaintiff to provide further evidence on certain factual and legal issues, including the standard of care. The pre-trial conference was adjourned to December 10, 2019.

[17] On November 19, 2019, the Plaintiff filed an Interlocutory Application seeking an order for production of documents from the Royal Canadian Mounted Police (the "RCMP"), specifically their investigation file in relation to the incident of February 1, 2014. A Consent Order for the production was filed on December 10, 2019.

[18] The presiding judge struck the matter from the Pre-Trial List following the pre-trial conference on December 10, 2019. The Defendants were provided leave to deliver Interrogatories to the Plaintiff.

[19] The Defendants delivered Interrogatories to Plaintiff Counsel on December 15, 2020.

[20] On March 5, 2021, the Defendants filed another Interlocutory Application pursuant to Rules 31.04 and 40.08, seeking an order for the Plaintiff to provide Answers to Interrogatories. By order of this Court dated April 22, 2021, the Plaintiff was to deliver a Response to Interrogatories within fourteen days. A Response to Interrogatories was provided to the Defendants on June 4, 2021.

[21] No steps were taken in the proceeding until almost three years later when the Defendants filed a Notice of Intention to Proceed on April 15, 2024.

[22] The Defendants filed the within application to dismiss the Plaintiffs' claim on May 27, 2024, with an initial return date of August 13, 2024. The Defendants were given until September 20, 2024 to file any further Affidavit evidence in support of their application. The Plaintiff was provided until September 27, 2024 to file any Affidavits in reply. Any memorandum of either party was to be filed by October 11, 2024.

[23] The Defendants filed a Supplemental Affidavit of Adam Ronan on September 20, 2024 (the "Ronan Affidavit"). The Plaintiff filed no affidavit evidence or memorandum in response to the Defendants' application for dismissal.

[24] The matter was set for hearing on October 25, 2024 (the "October Hearing"). Both counsel attended the October Hearing remotely. Plaintiff counsel sought a postponement of the hearing due to illness. Although nothing had been filed by the Plaintiff since the August return date, Plaintiff Counsel stated an intention to file materials in response to the application. Counsel sought an extension of the filing

deadline which had passed. The Defendants did not object to the postponement but sought an order for costs of the appearance. The application was postponed until March 13, 2025. The filing deadline for materials was extended to January 17, 2025. The cost of the appearance was granted to the Defendants on Column 3 of the Scale of Costs.

[25] There were no further filings made after the October Hearing.

[26] There was no appearance on behalf of the Plaintiff on March 13, 2025. Defence counsel advised she had written to Plaintiff Counsel on numerous occasions following the October Hearing and specifically in relation to the bill of costs arising from the October Hearing. Defence counsel advised that she had received no reply to her communications to Plaintiff counsel.

[27] At the time of March hearing date, there was no Notice of Change of Solicitors filed by the Plaintiff, and no notice of intention to self-represent.

[28] The Defendants requested that the hearing continue on schedule in the absence of the Plaintiff and any legal representative. The Defendants submit that the failure to file any responsive materials during the extension of time provided at the October Hearing, the failure to reply to any communication from the Defence counsel since the October Hearing and the failure to communicate with counsel or the Court prior to the March 2025 hearing date was further evidence of the Plaintiff's overall indifferent approach to the action and his lack of interest or intention to proceed with this matter.

[29] The hearing proceeded in the absence of the Plaintiff or any legal counsel on his behalf. The date of the hearing was set at the October Hearing and at the request of Plaintiff Counsel. The Court provided an extension for filing of materials at the October Hearing. That extended deadline was January 17, 2025. Despite the extended filing deadline, no materials were filed by the Plaintiff in response to the application to dismiss. Given the notice of the second hearing date, the hearing proceeded on March 13, 2025 as scheduled.

ISSUE

[30] The sole issue for the court is whether the Plaintiff's claim should be dismissed for want of prosecution?

LAW AND ANALYSIS

[31] Rule 40.11 of the *Rules* allows the defendant to make application to the court to dismiss the plaintiff's proceeding for want of prosecution. In particular. Rule 40.11 reads as follows:

> **40.11.** Where a plaintiff does not apply to set a proceeding down for trial, the defendant may apply to set it down for trial or apply to the Court to dismiss the proceeding for want of prosecution, and the Court may order the proceeding to be dismissed or make an order that is just.

[32] The Defendants rely on the leading Newfoundland and Labrador Court of Appeal decision in *Penney v. Lush* (1996), 139 Nfld. & P.E.I.R. 113, 433 A.P.R. 113 (Nfld. C.A.), which sets out the principles I must apply when determining whether I will exercise my discretion to dismiss an action for want of prosecution.

[33] Based on that authority, and its subsequent citation by this court in *Fennelly v. Lloyd's Underwriters*, 2016 NLTD(G) 1 ("*2016 Fennelly*") and *Fennelly v. Lloyd's Underwriters*, 2021 NLSC 160 ("*2021 Fennelly*"), there are three questions which I must ask:

1. **Has there been an inordinate delay?**
2. **If so, is the delay excusable?**
3. **If the delay is both inordinate and inexcusable, is the delay likely to cause prejudice to the Defendant?**

1. Has there been an inordinate delay?

[34] There is no strict rule for the length of delay that will be deemed inordinate. In *2016 Fennelly* and *Penney v. L.B.*, 2022 NLSC 160, Associate Chief Justice McGrath canvassed a series of cases in this jurisdiction finding inordinate delay when matters have not been set down for trial anywhere from five to eighteen years from the time the claim was filed. McGrath, A.C.J. stated that in certain cases consideration had also been given to the length of time that had passed since the occurrence of the events giving rise to the cause of action (see: *Penney v. L.B.* at para. 64).

[35] The Defendants have submitted some of the local jurisprudence in emphasis of the range of time noted by Associate Chief Justice McGrath in *Penney v. L.B.* In *Dawe v. Brown* (1994), 120 Nfld. & P.E.I.R. 40, 373 A.P.R. 40 (Nfld. S.C. (T.D.)), Hickman C.J. held that a delay of five years from the date of issuance of the statement of claim was inordinate and not to be tolerated by the Court.

[36] In *Kilfoy v. Shanahan's Investigation and Security Ltd.*, 2010, CarswellNfld 486, Handrigan J. found an eight year delay from the date the event occurred to the hearing be inordinate.

[37] At the other end of the scale is *Halifax Insurance Co. v. Hunt*, [1992] N.J. No. 154, 33 A.C.W.S. (3d) 1046 (Nfld. S.C. (T.D.)), where Barry J., as he then was, held that a delay of almost sixteen years from the time the cause of action arose and nine years from the date the statement of claim was issued was inordinately long, unexplained and inexcusable.

[38] In *Penney v. L.B.*, McGrath, A.C.J. stated that the twenty-four years since the cause of action arose and eighteen years since the issuance of the statement of claim was at the higher end of the scale. She stated she had no hesitation finding that the period represented inordinate delay.

[39] The only evidence of delay in this case is as disclosed in the Application, the procedural history of this file and the affidavits filed by the Defendants. This evidence is undisputed by the Plaintiff.

[40] The Defendants note the Plaintiff has failed to advance this file since the Statement of Claim was issued on January 29, 2016, eight years before the Defendants' application was filed in 2024 and nine years before this hearing. It is now more than eleven years since the incident occurred which gives rise to the claim. The Defendants submit that the record demonstrates no steps were initiated by the Plaintiff to prosecute the claim except for the Interlocutory Application to obtain the RCMP investigation file more than five years ago.

[41] I find that the delay in this case of eight years from issuance of the claim to the issuance of the Interlocutory Application to dismiss and ten years from the incident to the application is inordinate.

2. If there has been inordinate delay, is that delay excusable?

[42] In *Penney v. Lush*, the Court of Appeal stated that as a rule, until a credible excuse is made out, the natural inference would be that the delay is inexcusable.

[43] The Defendants submit that the Plaintiff has the obligation to pursue his claim diligently and he has provided no excuse for his failure to do so. Further, it submits, there has been no stated intention of the Plaintiff to ever proceed forward with this claim. The Defendants submit that the conduct and record of prosecution of the claim by the Plaintiff is not indicative of a party intent on diligently advancing a claim without delay.

[44] There was no explanation for the delay offered by the Plaintiff or Plaintiff counsel. There was no Affidavit evidence filed in response to the Defendants' application issued in May 2024. The Plaintiff was represented by legal counsel without interruption since issuance of the Statement of Claim. This is not a case, as

in *Dawe v. Brown* or *Penney v. L.B.*, where lack of appreciation of court procedure and lack of legal representation provides any excuse for the delay which has occurred.

[45] Document exchange occurred within a year following issuance of the Statement of Claim. The Plaintiff's List of Documents was filed in mid-2017 in compliance with an order of the Court. The Defendants requested that the matter be placed on the Pre-Trial List. Counsel for the Plaintiff was mostly non-communicative with counsel for the Defendants on this step. On failure of the Plaintiff to respond, the Defendants proceeded with an application under Rule 40 in September 2018. The Court made the order placing the matter on the Pre-Trial List in December 2018.

[46] The pre-trial conference was held ten months later in October 2019. The judge presiding over the conference adjourned it to allow the Plaintiff to take steps on the evidentiary and legal burdens associated with the issues for trial. The pre-trial conference was adjourned for a further two months to allow these steps to be taken.

[47] The pre-trial conference judge struck the matter from the Pre-Trial List at the continuation of the pre-trial conference in December 2019. The discussions at the pre-trial conference are not before this Court but it is a fair inference from the striking of the matter from the pre-trial list that the judge determined that this matter was not then ready for trial. The judge provided the Defendants with leave to deliver Interrogatories and/or conduct further discoveries.

[48] Another year followed with the Plaintiff taking no steps to move this matter forward. The Defendants served Interrogatories on the Plaintiff in December 2020. The Plaintiff did not respond. In March 2021, the Defendants sought an order for the Plaintiff to respond to the Interrogatories. An order was filed on April 22, 2021 requiring the Plaintiff to file responses to the Interrogatories within fourteen days. The Response to the Interrogatories was not filed by the Plaintiff until June 2021.

[49] A review of the procedural history of the case demonstrates that the Plaintiff took no steps to progress the action since the filing of the Response to Interrogatories in early June 2021. A critical review of the overall conduct since the Plaintiff filed his List of Documents in 2017 is that the progress of the litigation has been defence-driven. With the limited exception of an application to obtain the police investigation file, the Plaintiff has initiated no steps to progress the action.

[50] There has been no explanation offered from the Plaintiff for the delay in advancing this claim at any time since the Plaintiff filed his List of Documents. The Plaintiff has provided no evidence of intention to proceed forward with the claim, including in response to this application to dismiss.

[51] In the absence of any explanation for the delay, I find the delay inexcusable.

3. Are the Defendants likely to be seriously prejudiced by the delay?

[52] Having determined that the delay is both inordinate and inexcusable, I must then consider the issue of prejudice.

[53] The Court of Appeal in *Penney v. Lush* stated that "the longer the delay the greater the likelihood of serious prejudice at the trial" (at paragraph 12). The Court may draw an inference of prejudice from the delay itself or prejudice may be directly proven in the circumstances of the specific case. The Defendants submit this is an appropriate case to presume or infer prejudice due to the passage of time.

[54] In *2021 Fennelly*, Justice Burrage held that prejudice could be inferred in a matter which had been delayed for an extended time. At thirteen years in that case, he noted it was well past the point that prejudice against the defendants could be inferred. Justice Burrage noted that the longer the delay the greater the likelihood of prejudice.

[55] In *Kilfoy*, Handrigan J. also inferred prejudice from the passage of time, he noted at paragraph 16:

> "And I agree … there has to be a point, and we've reached it and perhaps passed it quite some time ago in this case, where prejudice should be inferred simply because of that – the passage of time. I think it would be putting the Defendants in a very difficult position to require them to defend this claim in those circumstances."

[56] In *Kilfoy*, the delay had been eight years from the date of the event occurring to the application to dismiss. By comparison, in Mr. Collier's case we are at eleven years since the incident allegedly occurred and the application to dismiss.

[57] As the interval between the events alleged to constitute the cause of action and the trial of the action is prolonged, there is a substantial risk that a fair trial of the issues will no longer be possible. As McGrath, A.C.J. stated in *Penney v. L.B.* at paragraph 93: "there is a significant and increasing risk that prejudice will arise the longer the period of cumulative and ongoing delay. It is reasonable to infer that people's memories will fade over time and do not improve with advancing age".

[58] In the recent decision *Barbiero v. Pollack*, 2024 ONCA 904, the Ontario Court of Appeal reiterated this principle and moved away from an earlier line of authority in that province which supported the position that delay gave rise only to a rebuttable presumption of prejudice. In *Barbiero*, the Ontario Court of Appeal stated that the passage of time on its own can constitute sufficient prejudice to dismiss an action for delay. The Court of Appeal held that such an approach was consistent with the Supreme Court of Canada's call in *Hryniak v. Mauldin*, 2014 SCC 7, for a culture shift in the civil justice system away from an indifference towards delay.

[59] In addition to the inferred prejudice from the passage of time, the Defendants submit that they will be seriously prejudiced at a trial of this matter given its inability to locate a principal witness most familiar with the subject of the litigation. The Defendants submit they can demonstrate actual prejudice should the matter continue.

[60] The Defendants submit that Murray Schalin, Chief Financial Officer of the Second Defendant, was intended to be the Defendants' principal witness. Mr. Schalin's evidence was anticipated to address the process of harvesting specific species; involvement and placement of aquaculture pens; co-mingling of pens with other fish harvesters; the manner in which pens are frozen in the ice; and, storage of pens before 2014.

[61] The Ronan Affidavit deposes as to efforts by the Defendants and their counsel to locate Mr. Schalin during the course of this proceeding. The Affidavit confirms regular contact between Defence counsel and Mr. Schalin through the period of 2017 and 2019. It further details the efforts made by Defence Counsel in and since 2022 to locate Mr. Schalin. Those efforts have been unsuccessful.

[62] The Plaintiff did not request nor complete an examination for discovery of Mr. Schalin, or any representative of the Defendants. The Defendants did not otherwise preserve his testimony. I note this only as a fact and a record of the procedural history. In *Penney v. L.B.*, McGrath, A.C.J. stated that there is no obligation on the defendants to preserve evidence of its own witnesses or, as in that case, the witnesses of co-defendants. She stated at paragraph 102:

> … While it is true that the Defendants could have conducted discovery examinations of these co-Defendants and witness, there is no obligation on a defendant to do so and a defendant should not be faulted for failing to preserve oral evidence when a plaintiff has delayed in advancing their claim.

[63] The Defendants submit that Mr. Schalen had previously identified another witness, Dean Foss. Defence counsel have made contact with Mr. Foss. While employed as Operations Manager at the relevant time he has no first-hand knowledge of the alleged incident involving the Plaintiff.

[64] There is no evidence before the court that the testimony or proposed evidence of any witness on liability has been preserved other than the Plaintiff through his discovery. There is no evidence on the current state of witness recollection and memory. Without some means of preservation, witness memory can be expected to

fade with the passage of time, being more than a decade now in this case. It is now more than twelve years since this incident happened and we are still at the pre-trial stage of this proceeding.

[65] I do not find that the efforts expended by the Defendants to locate their witness, Mr. Schalen, have been sufficiently extensive to state with certainty that he will be unavailable should a trial of this matter proceed. I make no finding on the sufficiency of the efforts by the Defendants to locate Mr. Schalen as detailed in the Ronan Affidavit. I can find that if his evidence is available, without any record of preservation, his memory and recollection is likely impacted by the passage of time.

[66] The inability to locate Mr. Schalen to date, the limited evidence from Mr. Foss and the lack of evidence preserved by the parties are further support for the reasonableness of an inference of prejudice from the passage of time in this case. With consideration to the case law and the impact of delay on trial fairness, I find it reasonable to infer prejudice from the delay since the filing of the claim and the twelve years since the events giving rise to the cause of action incurred.

CONCLUSION

[67] For the foregoing reasons, the application of the Defendant is granted, and the Plaintiff's action is dismissed for want of prosecution pursuant to Rule 40.11.

[68] As the successful party, the Defendants are entitled to their costs against the Plaintiff pursuant to Column 3 of the Scale of Costs of Rule 55.

LEANNE M. O'LEARY
Justice