

**CITATION:** McConnell v. Fraser, 2020 ONSC 6649  
**COURT FILE NO.:** 17-1383  
**DATE:** 20201030

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

DAVID McCONNELL

Plaintiff

– and –

KAREN MICHELLE FRASER, GARY  
FRASER, HOME DEPOT OF CANADA  
INC., and HOME DEPOT OF CANADA  
INC. o/a THE HOME DEPOT

Defendants

)  
)  
)  
) *W. Patrick Sloane* for the plaintiff  
)

)  
)  
)  
) *Eric W.D. Boate* for Karen Michelle Fraser  
) and Gary Fraser  
)

)  
)  
)  
)  
) **HEARD: In Writing**

**RULING ON MOTION TO AMEND THE STATEMENT OF CLAIM**

**C. BOSWELL J.**

[1] David McConnell was doing some drywall work in the home of Michelle and Gary Fraser back in September 2015. He fell from a scaffold and was seriously injured. The scaffolding had been rented from Home Depot. Mr. McConnell sued the Frasers and Home Depot for \$1 million in damages, alleging negligence against both.

[2] The negligence claim against the Frasers was framed more or less as an occupiers' liability claim. In other words, it was alleged by Mr. McConnell that, amongst other things, the Frasers failed to ensure their home was properly maintained, that guests in their home would be safe, that the conditions in which Mr. McConnell was working were safe and that he was provided with safe equipment.

[3] Examinations for discovery were conducted in April 2018. The plaintiff asserts that he learned, for the first time, during Mr. Fraser's examination, that Mr. Fraser may have bumped into the scaffolding, causing it to become unstable and him to fall from it. He seeks to amend his

statement of claim to allege negligence against Mr. Fraser for either distracting the plaintiff as he worked or bumping into the scaffolding.

[4] The Frasers oppose the proposed amendments. They say that what the plaintiff is doing is asserting a new cause of action. They contend that the new cause is statute barred by the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, ss. 4 and 5.

[5] These reasons explain why I agree with the Frasers and dismiss the motion to amend.

## I. OVERVIEW

### The Factual Context

[6] In 2015 the Frasers were the owners of a property at 94 Clam Lake Road in Kearney, Ontario. Kearney is located in the District of Parry Sound. The Frasers' home is a bungalow with a walk-out. It has a great room off of the kitchen with a cathedral ceiling peaking at 12'10" in height.

[7] The Frasers posted an ad in an online classifieds site called Kijiji.ca in September 2015 seeking a handyman to do some drywalling in their home. They had done some renovations that summer which included cutting a dormer into the roof of the cathedral ceiling. The area around the dormer needed to be drywalled.

[8] Mr. McConnell, an experienced contractor, responded to the Fraser's ad. A contract was agreed to between them. The work commenced in late September 2015.

[9] On the 29<sup>th</sup> of September, Mr. McConnell was working on scaffolding near the top of the cathedral ceiling. He lost his balance and fell from the scaffolding to the floor, landing on his left side.

[10] Mr. McConnell alleges that he suffered significant injuries in the fall including a fractured left clavicle, a left pelvic fracture, multiple rib fractures, a collapsed lung and injuries to his head.

### The Issued Claim

[11] Mr. McConnell sued the Frasers as well as Home Depot for damages arising from the injuries he suffered in the fall. His Statement of Claim was issued on September 20, 2017, just shy of two years from the date of the fall.

[12] His claim is framed in negligence of course. Against the Frasers the claim is generally grounded in the duties that occupiers of premises owe to those entering onto such premises. For edification, the *Occupier's Liability Act*, R.S.O. 1990, O.2 creates a statutory duty of care in those circumstances. Specifically:

3 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises, and the property brought on the premises by those persons are reasonably safe while on the premises.

[13] The Statement of Claim is not short of alleged breaches of the duty of care owed by the Frasers to Mr. McConnell. They were set out at para. 12 of the Statement of Claim. I have reproduced them at Appendix “A”.

### **The Discovery of Mr. Fraser**

[14] Mr. Fraser was examined for discovery on April 10, 2018. During the course of that examination he was asked about the moments leading up to Mr. McConnell’s fall.

[15] Mr. Fraser testified that he had been outside of the home and decided to come in to see how Mr. McConnell was making out. The scaffolding that Mr. McConnell was using was located just inside sliding glass doors that led out to a deck at the back of the house. Mr. Fraser entered the house through those glass doors. He said the scaffolding was no more than two feet away from those doors.

[16] According to Mr. Fraser, he had just entered the house and was just inside the sliding glass doors when Mr. McConnell fell. It was perhaps 30 seconds between his entering and the fall. He denied that he bumped into the scaffolding at all.

[17] Mr. McConnell testified during his examination for discovery that he felt a bump, the scaffold shook a little, and then he fell. He said he was in excruciating pain. Right away he saw Mr. Fraser and Mr. Fraser told him, “I saw everything”.

### **The Proposed Amendments**

[18] Following the discoveries Mr. McConnell’s counsel concluded that the claim should be amended to specifically plead that Mr. Fraser either distracted Mr. McConnell when he came in through the glass doors, or that he bumped into the scaffolding, causing Mr. McConnell to fall.

[19] At Appendix “B” I have set out the additional paragraphs the plaintiff is seeking to add to the claim. They are found at proposed paragraphs 9a and 9b. The particulars of the alleged negligence set out in paragraph 12 remain otherwise unchanged in the proposed amended pleading.

### **The Positions of the Parties**

[20] The plaintiff asserts that he has a *prima facie* right to amend his pleadings at any time, unless doing so would cause irremediable prejudice. He contends that no such prejudice would arise in this case because the amendments are of a modest nature and only provide additional context for the existing claim sounding in negligence. Moreover, the issue of whether Mr. Fraser was in the room at the time of the fall and may have bumped the scaffolding has already been fully canvassed on discoveries.

[21] The Frasers submit that there are two live issues on the motion. First, whether the proposed amendments are properly characterized as raising a new cause of action. The Frasers would answer that question in the affirmative. If they are right, then the second issue is whether the new cause of action is statute-barred by the *Limitations Act*. The Frasers would similarly answer the second question in the affirmative. If they are right about that, the new cause is untenable in law and ought not to be permitted to proceed.

## II. THE LEGAL FRAMEWORK

### Amending Pleadings

[22] The *Rules of Civil Procedure* take a generous approach to the amendment of pleadings. Essentially, a party may amend his, her or its pleadings at any time in the course of a proceeding, provided that the amendments do not cause prejudice that cannot be attenuated through an adjournment or an order for costs. See Rule 26.01.

[23] Despite the very permissive language of Rule 26.01, the jurisprudence is clear that there is no absolute right to amend. An amendment will not be permitted if it raises an issue that is *prima facie* unmeritorious or would have been struck if pleaded originally. See *Marks v. Ottawa (City)*, 2011 ONCA 248, at para. 19. See also *Dugal v. Manulife Financial Corporation*, 2011 ONSC 387 at para. 5 and *Carom v. Bre-X Minerals Ltd.* (1998), 41 O.R. (3d) 780 (S.C.J.) at para. 10.

[24] The assertion here, as I noted, is that the proposed amendment raises a new cause of action which is statute-barred and therefore untenable in law. I turn therefore to the question of what is meant by the phrases “cause of action” and “new cause of action”.

### Causes of Action

[25] Black’s Law Dictionary defines a cause of action as “a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person.

[26] Master Dash addressed the question of whether a proposed amendment constitutes a *new* cause of action in *Ascent Incorporated v. Fox 40 International Inc.*, 2009 CanLII 36994 (S.C.J.) where he said, at para. 3:

The key is whether substantially all of the material facts giving rise to the “new cause of action” have previously been pleaded or whether new facts are sought to be added that are relied upon to support a new cause of action. A new cause of action is not asserted if the amendments simply plead an alternative claim for relief arising out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based. (Internal citations omitted).

[27] I agree with Master Dash’s views on this point.

## **The Limitations Act, 2002**

[28] Should I conclude that the proposed amendments raise a new cause of action, the issue becomes whether that cause of action is timely.

[29] The *Limitations Act, 2002*, as above, imposes a general limitation period of two years from the date a claim was discovered. For our purposes here the terms “claim” and “cause of action” are interchangeable.

[30] Sections 5(1) and (2) of that *Act* assist with the determination of when a claim is discovered. They provide as follows:

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

### **III. DISCUSSION**

[31] This motion is relatively easily disposed of in my view.

[32] The claim against the Frasers, as initially drafted, was rooted in the duty of care that occupiers of premises owe to those persons entering onto the premises. The plaintiff alleged that the Frasers breached the duty of care they owed to Mr. McConnell by failing to, amongst other things, ensure that their property was safe and the equipment provided to him for use in the renovations was safe and secure.

[33] All of the allegations of liability against the Frasers were originally grounded in acts of omission.

[34] By contrast, the allegations of liability against the Frasers set out in the proposed amendments are acts of commission.

[35] The operative facts giving rise to the amended claim – the distraction caused by Mr. Fraser and the bumping into the scaffolding – were nowhere to be found in the initial pleading. They are not allegations grounded in an occupier’s duty of care. They are grounded in a more general duty of care that one person owes to another according to the common law.

[36] It is impossible, in my view, to conclude other than that the proposed amendment advances a new cause of action.

[37] The presumption created by s. 5(2) of the *Limitations Act, 2002* is that Mr. McConnell knew of this new cause of action on the date of loss. It is a rebuttable presumption but in my view, the facts and circumstances of this case are not capable of rebutting it.

[38] Mr. McConnell testified on discovery that something bumped into the scaffolding immediately before he fell. He was quite clear that he felt a bump and the scaffolding shook and he fell. This is something he knew on the date of loss. He also testified that there was no one else in the room at the time he fell. Nevertheless after the fall Mr. Fraser was, he said, “right there” and Mr. Fraser told him he’d seen the whole thing.

[39] By means of some relatively straightforward inductive reasoning, one will inevitably reach the conclusion that the only possible person who could have bumped the scaffolding was Mr. Fraser. There was, frankly, otherwise no one in the vicinity capable of interacting with the scaffolding.

[40] I do not accept that the new cause of action was only “discovered” when Mr. Fraser testified on his examination for discovery that he had entered the room through the glass patio doors immediately before the fall. In my view, Mr. McConnell knew, accordingly to his own evidence, that the scaffolding had been bumped and it was apparent that the only person who could have done the bumping was Mr. Fraser. He had this knowledge on the date of loss.

[41] I conclude that the new cause of action is statute-barred by the *Limitations Act, 2002*. It is an untenable claim at this point.

[42] In the result, I am not prepared to grant leave to the plaintiff to amend his pleading as sought. The motion is dismissed.

[43] The parties are urged to agree on the issue of costs. If they are unable to do so they may make written submissions on the issue, not to exceed two pages, on a 14 day turnaround. The Frasers' submissions will be due by November 13, 2020 and Mr. McConnell's by November 27, 2020. They can be submitted through the court's generic email address which is Barrie.SCJ.courts@ontario.ca.

---

Boswell J.

**Released:** October 30, 2020

**APPENDIX “A”**

**The Alleged Liability of the Frasers – Statement of Claim dated September 20, 2017**

12. The Plaintiff, Mr. McConnell, sustained serious and permanent injuries as a result of the Fall, which was the direct result of the negligence of the Defendants, Mrs. Fraser and Mr. Fraser, their agents, servants and/ or employees (if applicable) for whose negligence they are at law responsible, particulars of which include but are not limited to the following:
- a) they failed to properly maintain the Premises;
  - b) they failed to properly repair the Premises;
  - c) they failed to properly control and/ or upkeep the Premises;
  - d) they failed to maintain and/ or repair the Premises in such a manner as to ensure that obstructions, hazards and dangers were removed immediately;
  - e) they failed to hire competent agents, servants and employees (if applicable) to maintain the Premises;
  - f) they failed to hire competent agents, servants and employees (if applicable) to properly inspect, maintain and ensure the safety of persons within the Premises;
  - g) they created a dangerous and hazardous situation and/or allowed it to continue;
  - h) they failed to have due regard for the safety of persons present on the Premises, including the Plaintiff, Mr. McConnell, who would be utilizing/working at the Premises;
  - i) they failed to warn individuals, such as the Plaintiff, Mr. McConnell, of the dangers and hazards present on the Premises;
  - j) they failed to warn individuals, such as the Plaintiff, Mr. McConnell, of the presence of dangerous, unsafe or unmarked hazardous conditions in the Premises;
  - k) they failed to post warnings or give adequate notice, or any notice whatsoever to the Plaintiff, Mr. McConnell, and others of the dangers and hazards present within the Premises;
  - l) they failed to take proper steps to ensure that persons using the Premises would be reasonably safe;
  - m) they failed to inspect the Premises with sufficient frequency, properly or at all;
  - n) they failed to maintain the Premises with sufficient frequency, properly or at all;



- o) they failed to mark or warn of the dangerous/unsafe conditions within the Premises in such manner as to remove the danger caused by the potential risk of the loss of balance and subsequent fall from an unsafe height;
- p) they failed to remove the dangerous/unsafe conditions on the Premises in such a manner as to remove the danger caused by the potential risk of individuals losing their balance and falling from an unsafe height;
- q) they took no steps or inadequate steps to reduce or eliminate the hazard of the dangerous/unsafe conditions caused by the potential risk of individuals losing their balance and falling from an unsafe height, when they knew or ought to have known that the Plaintiff was hired for the purposes of completing work within the Premises (and no safety equipment was provided with the scaffold);
- r) they allowed the premises to remain in a dangerous state;
- s) they failed to have an adequate system of inspection/daily maintenance in place or at all and they failed to follow that system of inspection/daily maintenance;
- t) they instructed and encouraged the Plaintiff, Mr. McConnell, to put himself in a dangerous/ unsafe situation;
- u) they failed to provide the Plaintiff, Mr. McConnell, with any other option but to continue to work without the required safety equipment;
- v) they failed to provide any fall prevention equipment, outriggers or safety railings to the Plaintiff to ensure his safety while working within the Premises;
- w) they failed to provide the Plaintiff with a longer ladder, as requested, in order to avoid unsafe reaching from an unsecured ledge;
- x) if fall prevention equipment, outriggers or safety railings were in fact provided by the Defendant Home Depot with the rental of the scaffold tower, they failed to utilize/set up all the parts supplied, putting the Plaintiff in danger;
- y) they failed to provide the proper scaffold to the Plaintiff for the job required;
- z) such further and other particulars as the Plaintiff may advise.

**APPENDIX “B”**

**The Alleged Liability of the Frasers – Proposed Amended Statement of Claim**

In addition to the alleged grounds set out in para. 12, as detailed in Appendix “A”, the Plaintiffs propose to plead the following:

- 9.a The Defendant, Gary Fraser, walked underneath and or beside the scaffolding as the Plaintiff, Mr. McConnell was utilizing it, which distracted him and contributed to the Fall.
- 9.b In addition or in the alternative the Plaintiff pleads that as the Defendant, Gary Fraser, was walking underneath and/or beside the scaffolding, he bumped the scaffolding while the Plaintiff, Mr. McConnell, was standing on it. As a result, this moved the scaffolding and contributed to the Plaintiff, Mr. McConnell, losing his balance and falling to the ground.