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**Egglestone v. Barker**

Between  
Egglestone, and  
Barker et al.

[2001] O.J. No. 1617  
Court File No. 00-CV-199551CP

**Ontario Superior Court of Justice**  
**Cumming J.**

Heard: April 26, 2001.  
Judgment: May 1, 2001.  
(23 paras.)

**Counsel:**

Joel Rochon and Vincent Genova, for the plaintiff.  
Tracy Ryder, for Her Majesty the Queen.

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**CUMMING J. (endorsement):—**

**Introduction**

¶ 1 This is a class proceeding pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"). The proposed representative plaintiff, Vance Hamilton Egglestone, brings this action on behalf of all individuals who were incarcerated at the Penetanguishene Mental Health Centre, Penetanguishene, Ontario, (the "facility") and who participated in one or more of three treatment programs between 1965 and 1979. The facility provides a maximum security environment for individuals found not guilty of crimes by reason of insanity. Inmates are sent on Warrants of Remand from the courts, the penitentiaries, reformatories and other facilities.

¶ 2 The essence of the claim is alleged unlawful human experimentation at the facility through the said treatment programs in respect of some 2000 male inmates who are the putative class members.

¶ 3 The defendant Elliott Thompson Barker and the defendant Gary Maier were psychiatrists employed at the facility during the period in question.

¶ 4 The statement of claim alleges breaches of fiduciary duty, negligence, and assault based upon human experimentation without informed consent.

**The Motion**

¶ 5 The plaintiff moves to add Danny A. Joannis as a co-representative plaintiff. The defendant, Her Majesty the Queen in Right of Ontario ("Crown") objects. The motion raises complex issues which need only be discussed briefly at this time.

**Background**

¶ 6 On February 8, 2000 a notice of claim, with a draft statement of claim, naming Mr. Egglestone as the

proposed representative plaintiff, was given by Mr. Egglestone's counsel to the Crown Law Office - Civil ("CLOC") to comply with the notice requirement of s. 7(1), (2) of the Proceedings Against the Crown Act, R.S.O. 1990, c. P.27, as am. ("PACA")

- 7.-(1) Subject to subsection (3), except in the case of counterclaim by way of set-off, no action for a claim shall be commenced against the Crown unless the claimant has, at least sixty days before the commencement of the action, served on the Crown a notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose, the Attorney General may require such additional particulars as in his or her opinion are necessary to enable the claim to be investigated.
- (2) Where a notice of a claim is served under subsection (1) before the expiration of the limitation period applying to the commencement of an action for the claim and the sixty-day period referred to in subsection (1) expires after the expiration of the limitation period, the limitation period is extended to the end of seven days after the expiration of the sixty-day period.

¶ 7 On August 17, 2000, a second notice of claim, with a draft statement of claim, was received by the CLOC naming Mr. Joanisse as the proposed representative plaintiff. This draft statement of claim did not refer to Mr. Egglestone. However, the two draft statements of claim are essentially the same in respect of the putative class, the alleged material facts and the causes of action raised.

¶ 8 On October 16, 2000, a letter dated October 12, 2000, from Mr. Joanisse was received by the counsel with CLOC.

This letter reads:

Danny Joanisse  
500 Church St  
Penetang Ontario  
L9M 1G3

Oct 12th 2000

To the Ministry of the Attorney General Bill Manuel

Deal Joel am just letting you know that I will be pulling out of this class action, Representative Plaintiff. I due understand my claim was issue and by the time you get my letter 60 days will be up. Am all so giving a copy of this letter to the Ministry of the Attorney General so that they are well a wear that am not taking part in this class action.

Thank you for your time. Good luck with the Class Action  
Danny Joanisse

"Danny Joanisse"

October 16, 2000 is exactly 60 days following August 17, 2000, the date of receipt of Mr. Joanisse's notice of claim.

¶ 9 The statement of claim naming Mr. Egglestone as the proposed representative plaintiff was issued in this court October 25, 2000.

## Analysis

¶ 10 The draft Joannis statement of claim alleges that Mr. Joannis was first admitted to the facility as an involuntary patient on May 17, 1971 (the day before his fifteenth birthday). The claim alleges he had various periods of being detained at the facility, with the last admission being June 16, 1999.

¶ 11 Section 7(1) of the Public Authorities Protection Act, R.S.O. 1990, c. P.38 ("PAPA") provides for a six month limitation period from the time the cause of action arose, or from the cessation of continuing injury or damage, for certain acts

7.-(1) No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect of default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof. [Emphasis added]

¶ 12 Put simply, the Crown says that Mr. Joannis's alleged right of individual action is necessarily barred because more than six months have lapsed since receipt of the Joannis notice of claim (August 17, 2000). The Crown submits that to grant this motion and permit Mr. Joannis to be a representative plaintiff now would have the effect of extending the limitation period beyond that which is provided for pursuant to the PAPA.

¶ 13 The Egglestone statement of claim states that Mr. Egglestone was detained in the facility at various times since his first admission January 26, 1976, with his last admission being August 10, 1995.

¶ 14 I disagree with the Crown's submissions. First, it must be recognized that Mr. Joannis is a putative class member in the existing class action at hand, initiated by Mr. Egglestone. The issue as to a limitation period in respect of any or all putative class members in this action is a live issue, but not one that is before the court in the context of Mr. Egglestone's motion to add Mr. Joannis (an existing putative class member in this action commenced by Mr. Egglestone) as a proposed co-representative plaintiff. This motion does not impact upon a limitation of action question in respect of putative class members. The motion at hand is merely a procedural step within the context of a procedural statute, the CPA.

¶ 15 It is also to be noted that, given the existing Egglestone action, any limitation period that had not yet run as of October 25, 2000 is suspended in favour of class members as of the commencement of the class proceeding: s. 28 CPA.

¶ 16 Second, it is apparent from the allegations in the statement of claim and the limited record at hand that many, possibly all, of the putative class members are under a continuing mental disability which impacts upon the issue as to when, if yet, the limitation of action provision runs against them. This is an issue that requires consideration only after a complete record of the relevant evidence. It would be unfair and unjust to deal with this issue at this time and, particularly, within the limited context of the motion at hand to simply add Mr. Joannis as a representative plaintiff.

¶ 17 Third, the allegations in the Egglestone statement of claim, and the limited record to date, raise issues of serious mental incapacity, allegedly exacerbated by the treatment programs offered, which allegedly have been the cause of continuing mental instability and disability. These allegations suggest the probability that any limitation of action issue will have to consider the factual evidence as to whether this is a "case of continuance of injury or damage" within the meaning of s. 7(1) of the PAPA and, if so, when, if at all, there has been a "ceasing thereof".

¶ 18 Therefore, for the above reasons, a limitation of action issue does not properly arise in the context of the limited procedural motion at hand.

¶ 19 As well, any limitation of action defence in this case must properly be raised by way of a statement of defence.

Disposition

¶ 20 For the reasons given, the court grants the motion to add Mr. Joannis as a co-representative plaintiff.

¶ 21 For greater certainty, the court states that the Crown is free to raise the limitation of action issue in respect of any putative class members in its statement of defence, with that issue to be dealt with by the court with the necessary and proper record.

¶ 22 As well, for greater certainty, the Crown remains free to challenge the suitability of any proposed representative plaintiff under s. 5(1)(e) of the CPA in respect of a motion for certification.

¶ 23 Finally, it is to be noted incidentally that in the event there is no representative plaintiff with a cause of action against the defendant in a class proceeding, that class action would not be sustainable.

CUMMING J.

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