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Court of Appeal affirms the importance of the "appropriate means" test under s. 5(1)(a)(iv)

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In *Presley v. Van Dusen*,[1] the Court of Appeal for Ontario affirmed the importance of the appropriate means test under s. 5(1)(a)(iv) of the *Limitations Act, 2002*, and confirmed that superior knowledge and expertise sufficient to delay the commencement of proceedings is not restricted to "strictly professional relationships;" rather, plaintiffs are entitled to rely on the expertise of persons who are members of non-traditional professions or not professions at all in order to demonstrate that it was reasonable to rely on such expertise to delay commencing a claim.

The appellants, Janice Presley and Robert Frederick, brought a claim against Jack Van Dusen, and others, for the negligent design, installation, approval and inspection of their septic system. Over several years, Van Dusen attempted to fix the problem with the appellants' septic system. Five years following the first problem with the septic system, a claim was commenced against him and the other defendants. Both the Small Claims Court and Divisional Court agreed that the claim was brought outside the limitation period. On appeal, the appellants argued that both lower courts failed to conduct a sufficient discoverability analysis as they did not consider when the appellants knew or ought to have known that a proceeding would be an appropriate means to remedy their claim under s. 5(1)(a)(iv) of the *Limitations Act, 2002*.

The Court of Appeal agreed with the appellants' argument and affirmed that a determination under s. 5(1)(b) as to the date on which a reasonable person would have discovered the claim requires the consideration of all four elements enumerated under s. 5(1)(a). The Court of Appeal held that the lower courts erroneously found that once the date of discovery is determined, there is no requirement to make an express determination with respect when the appellants knew or ought to have known that litigation was appropriate pursuant to s. 5(1)(a)(iv). Sharpe J.A. concluded that the Courts below also conducted an insufficient analysis as to whether the presumption under s. 5(2) was rebutted as a result of their failure to make a determination under s. 5(1)(a)(iv). The Court reiterated the proposition that a plaintiff's reasonable reliance on the expertise of a professional may delay the date on which he or she knew or ought to have known litigation was an appropriate means to remedy their injury or loss. In this case, the Court of Appeal clarified that this reliance on expertise is not restricted to strictly professional relationships but also extends to members of "non-traditional professions" or individuals "who are not professionals at all".

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[1] 2019 ONCA 66.

Van Dusen's continuous assurances and scheduled attempts to have the septic system defects rectified were sufficient to give the appellants a reasonable belief that litigation was inappropriate in these circumstances. The Court distinguished this case from other decisions in which ongoing communications and negotiations took place when it was already known that legal proceedings were appropriate and the issue being considered was whether the claim can be settled. By contrast, in this case, the conversations between the appellants and the respondent were aimed at determining whether an issue even existed. While the appellants might be criticized for not being more insistent that Van Dusen fulfill this assurance more promptly, the evidence established that they were engaged in ongoing discussions with him and took actions to enable him to access the property. Therefore, the appellants reasonably relied on Van Dusen's assurances. These assurances led the appellants to the reasonable belief that the problem could and would be remediated without cost and without any need to have recourse to the courts. Accordingly, the claim was commenced in time.

The goal of s. 5(1)(a)(iv) is to deter needless litigation.[2] *Presley* follows a series of decisions of the Court of Appeal that have emphasized the application of the appropriate means test under s. 5(1)(a)(iv).[3] These decisions confirm that a claim is not properly discovered until "a proceeding would be an appropriate means" to remedy it. In those cases where the Court of Appeal did make a finding that it was reasonable for the plaintiff to rely on the defendant's superior knowledge and expertise, the defendants belonged to traditional expert professions, such as a physician,[4] a dentist,[5] and an accountant.[6] The Court's decision in *Presley* acknowledges that plaintiffs are also entitled to rely on the expertise of persons who may not be "professionals" in the traditional sense, but assist the plaintiff in attempting to remedy the problem so as to make a claim and litigation unnecessary.

[2] *407 ETR Concession Co. v. Day*, 2016 ONCA 709 at para. 48, leave to appeal refused, [2016] S.C.C.A. No. 509.

[3] See for example, *407 ETR ibid.* and *Presidential MSH Corp. v. Marr, Foster & Co. LLP*, 2017 ONCA 325.

[4] *Brown v. Baum*, 2016 ONCA 325.

[5] *Chelli-Greco v. Rizk*, 2016 ONCA 489.

[6] *Presidential MSH Corp., supra* note 3.