This is Exhibit "L"
to the Affidavit of
Jonathan William Kiska
sworn before me at Ottawa,
in the Province of Ontario, this 27th
day of July, 2017.

A Commissioner, etc.

Wade Smith

From: Wade Smith
Sent: June-27-17 2:38 PM
To: Deirdre Moore (Deirdre@cceh.ca)
Cc: John Kiska (jonathankiska@gmail.com); Lauren Daneman
Subject: FW: WestlawNext Canada - Lo v. Lo
Attachments: Lo v Lo.rtf

Good afternoon Ms. Moore

One of the problems with your latest amended Answer is that you claim damages for the intentional infliction of mental suffering. This claim is not permitted in family law. I am attaching the leading case on this point.

Wade L. Smith
Bell Baker LLP
700-116 Lisgar Street
Ottawa, Ontario
K2P 0C2
613-237-3448 (324)

-----Original Message-----
From: nextcanada@westlaw.com [mailto:nextcanada@westlaw.com]
Sent: June-27-17 2:38 PM
To: Wade Smith
Subject: WestlawNext Canada - Lo v. Lo

Wade Smith sent you content from WestlawNext Canada.
Please see the attached file.

Item:	Lo v. Lo
Citation:	2009 CarswellOnt 2979
Sent On:	Tuesday, June 27, 2017
Sent By:	Wade Smith
Client ID:	UNITED

Note:

2009 CarswellOnt 2979
Ontario Superior Court of Justice

Lo v. Lo

2009 CarswellOnt 2979, [2009] W.D.F.L. 3696, [2009] O.J. No. 5620, 177 A.C.W.S. (3d) 252, 70 R.F.L. (6th) 309

Irene Lo (Applicant) and Paul Lo (Respondent)

C. Nelson J.

Judgment: May 22, 2009
Docket: Newmarket 18594-04

Counsel: Eric D. Freedman, for Applicant
Andrew Feldstein, for Respondent

Subject: Civil Practice and Procedure; Family; Torts

MOTION by wife that she be granted leave to amend application to include claim for damages for torts of assault, battery, and intentional infliction of mental suffering.

***C. Nelson J.*:**

I. Facts

1 Paul and Irene Lo were married on May 5, 1978. The parties separated in May 2002. They have two children, Mary (age 27) and Sarah (age 20). Irene Lo filed an application on April 21, 2004, in which she sought equalization, spousal support, and orders relating to property, as well as a restraining order. Over the course of this matter Irene Lo has retained four lawyers. Her three previous lawyers — Mr. Polisuk, Mr. Morganstein, and Ms. Hirschberg — were all family law lawyers.

2 On January 16, 2006, Justice Perkins made a final order on consent. On March 22, 2006, Irene Lo brought a motion to set aside the consent order due to a mistake in the valuation of Paul Lo's pension. This court granted her motion on this narrow ground.

3 On February 25, 2009, Irene Lo brought a motion for an order that she be granted leave to amend her application in terms of a draft amended application provided to the court and, in the alternative, for an order that she be granted leave to amend the application to include a claim for damages for the torts of assault, battery, and intentional infliction of mental suffering. Irene Lo's proposed amended application also adds claims for divorce and spousal support under the *Divorce Act*.[1]

4 In support of the proposed amendments to her application, Irene Lo has added additional facts including allegations of mental and physical abuse by Paul Lo both before and after the date of separation, as well as allegations that Paul Lo was unfaithful to her. Paul Lo denies these allegations. The proposed amended application is considerably more detailed than Irene Lo's initial application. The material facts in support of the relief requested are so detailed, in fact, that the proposed pleading reads like an affidavit and goes far beyond setting out material facts. To say that it is prolix would be an understatement. I have not, however, been asked to strike these pleadings of facts on any ground other than that of lack of jurisdiction.

II. Issues

5 The issue before this court is whether the applicant wife, Irene Lo, should be permitted to amend her application to include the torts of assault, battery, and intentional infliction of mental suffering and the material facts pleaded in support of these torts. I must determine whether this court has jurisdiction to order the amendments. In determining the issue I also must decide whether some of the relief the applicant now seeks is statute-barred.

(a) The Positions of the Parties

The Applicant Wife

6 The applicant wife submits that the assault and battery claims were discovered in 2002 and, therefore, it is the previous *Limitations Act* that should apply.[2] With a four-year limitation under the former *Act* the limitation period would have expired in 2006.

7 However, the applicant wife also submits that the doctrine of "special circumstances" should allow the court to extend the limitation period to enable her to make her amendments. This doctrine was described by the Ontario Court of Appeal in *Joseph v. Paramount Canada's Wonderland* as a common law doctrine that provides that, in cases where special circumstances exist, a cause of action may be added even after the limitation period has expired, so long as this would not cause prejudice to the other party that could not be compensated for, with either an adjournment or costs[3]. The lack of prejudice leads to "special circumstances".

The Respondent Husband

8 The respondent husband submits that the assault and battery claims were discovered some time between April 2004 and August 2006; thus the new *Limitations Act* and its two-year limitation period, should apply.[4] On this basis, the respondent husband submits that the statute of limitations has expired and the wife's claims are, therefore, statute-barred.

9 The respondent husband also argues that the applicant wife cannot rely on the doctrine of "special circumstances" as that doctrine does not apply under the new *Limitations Act* because of the Ontario Court of Appeal's decision in *Joseph*, which I will discuss further below.

10 As well, the respondent husband submits that even if the applicant wife were aware of her cause of action for these torts before December 31, 2003, the new *Limitations Act* would still apply. This is because section 24(7) of the new *Act* brings into play section 10 of the new *Act*, which provides that the basic limitations period will not run for a claim based on assault while the person with the claim is incapable of commencing the proceeding. Further, unless the contrary is proved, the person with such a claim is presumed to have been incapable of commencing the proceeding earlier than he or she did if, at the time of the incident, the parties had an intimate relationship or the alleged victim was dependent on the other party.

11 The respondent husband also submits that even if "special circumstances" are applicable in this case, there is a presumption of prejudice and the onus shifts to the applicant wife to show that there is no prejudice. This, he submits, she has failed to do.

III. The Ruling

12 It is the ruling of this court that the applicant wife cannot make the proposed amendments she seeks. This is because these claims are either not properly claimed in a family law context or are statute-barred due to the expiration of a limitation period. What follows below are my reasons for making this determination

IV. Analysis

(a) Rule Permitting Amendments to Applications

13 Generally, a court may permit amendments pursuant to rule 11(3) of the *Family Law Rules*, which states: [5]

> 11 (3) On motion, the court shall give permission to a party to amend an application, answer or reply, unless the amendment would disadvantage another party in a way for which costs or an adjournment could not compensate.

14 This general power to amend is, however, procedural only and is subject to statutory provisions and the common law relating to jurisdiction and limitations.

(b) The Tort of Intentional Infliction of Mental Suffering is not Permitted in the Family Law Context

15 The limitations issue with regards to the tort of intentional infliction of mental suffering is moot, since the Supreme Court of Canada has stated that this tort should not be brought in a family law context. In *Frame v. Smith*, Justice Wilson, in dissent, discussed the tort of intentional infliction of mental suffering at paragraph 47: [6]

> Finally, and most importantly, the extension of this cause of action to the custody and access context would not appear to be in the best interests of children. Like the tort of conspiracy the **tort of intentional infliction of mental suffering would be relatively ineffective in encouraging conduct conducive to the maintenance and development of a relationship between both parents and their children. It is obvious also that such a cause of action, if it were made available throughout the family law context, would have the same potential for petty and spiteful litigation and, perhaps worse, for extortionate and vindictive behaviour as the tort of conspiracy. Indeed, the tort of intentional infliction of mental suffering appears to be an ideal weapon for spouses who are undergoing a great deal of emotional trauma which they believe is maliciously caused by the other spouse. It is not for this Court to fashion an ideal weapon for spouses whose initial, although hopefully short-lived objective, is to injure one another, especially when this will almost inevitably have a detrimental effect on the children.** Yet, if this cause of action were extended to encompass the facts of this case, it seems to me that there is no rational basis upon which its extension to other areas of family law could be resisted. The gist of the tort is the intentional infliction of mental suffering regardless of the relationship between plaintiff and defendant. It would be available in respect of all inter-spousal conduct both before and after marital breakdown. **I would therefore not extend this common law tort to the family law context where the spin-off effects on the children could only be harmful.**
>
> [Emphasis added]

16 This view of the law was approved of by the majority judgment, which states at paragraph 8: [7]

> Wilson J., in her judgment, has also adequately disposed of the possibility of other existing torts applying to the circumstances of this case.

17 I had some difficulty following Mr. Freedman's submission on this issue. However, if I understand him correctly, he submits that the decision in *Frame* should not apply here because the children are now adults and cannot be harmed by the evidence. I do not agree. Justice Wilson, in the decision in *Frame*, clearly outlined the wider policy considerations as to why this tort should not be extended to the family law context. Wilson J.'s reasoning is perfectly applicable to this case. The applicant wife is, therefore, not permitted to amend her application to include this tort in the context of a family law case.

18 In light of this finding, the remainder of these reasons relate solely to the battery and assault claims.

(c) The Torts of Assault and Battery are the same for the Purpose of Determining the Relevant Limitation Period

19 Under the new *Limitations Act* both the tort of assault and the tort of battery are governed by the provision regarding "assault". Section 1 of the new *Limitations Act* provides:

1. In this Act ... "assault" includes a battery....

20 Under the former *Limitations Act*, both battery and assault had the same limitation period.[8] Thus, under either *Act* the limitation period for assault and battery is the same.

(d) Limitation Periods

21 The limitation period for assault and battery under the new *Limitations Act* is the basic limitation period of two years from the date the claim was discovered. This basic limitation period is set out in section 4 of the new *Limitations Act*:

> **4.** Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

22 Discoverability is outlined in section 5 of the new *Limitations Act*:

> **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.

23 Section 10 of the new *Limitations Act* also contains a specific provision relating to assault (which also includes battery). Section 10 states:

> **10. (1)** The limitation period established by section 4 does not run in respect of a claim based on assault or sexual assault during any time in which the person with the claim is incapable of commencing the proceeding because of his or her physical, mental or psychological condition.
>
> **(2)** Unless the contrary is proved, a person with a claim based on an assault shall be presumed to have been incapable of commencing the proceeding earlier than it was commenced if at the time of the assault one of the parties to the assault had an intimate relationship with the person or was someone on whom the person was dependent, whether financially or otherwise.

24 The limitation period for assault under the former *Limitations Act* was four years. Section 45 (1)(j) provided:

> **45.(1)** The following actions shall be commenced within and not after the times respectively hereinafter mentioned, ...
>
> (j) an action for assault, battery, wounding or imprisonment, within four years after the cause of action arose; ....

(e) Timing of the Incidents

25 In order to determine what the applicable statute of limitations is in this case, I must first consider whether the alleged incidents occurred before or after January 1, 2004. The transitional provisions in section 24 of the new *Limitations Act* may or may not apply, depending upon this determination. Section 24 only applies to claims based on acts or omissions that occurred before January 1, 2004. When such a claim arises, these transitional provisions provide, among other things, that if the limitation period did not expire before January 1, 2004, and a limitation period under the new *Act* would apply were the claim to be based on an act or omission that occurred after January 1, 2004, then the claim will fall under the former *Act* if discovered before January 1, 2004, and under the new *Act* if discovered after January 1, 2004.

26 According to the applicant wife's proposed amended application, the alleged incidents began in January 2002. The alleged assault and/or battery incidents seem to have occurred in 2002 (thus prior to January 1, 2004), whereas the intentional infliction of mental suffering seems to span the periods both before and after January 1, 2004. All the alleged incidents, as set out in the applicant wife's draft amended pleadings, seem to have concluded by the summer or fall of 2004. However, since I have determined that the tort of intentional infliction of mental suffering cannot be brought in this case, the relevant dates for these purposes (relating only to the torts of assault and battery) all occurred in 2002.

(f) Has the Limitation Period Run Out?

(i) Do the transitional provisions in section 24 apply?

27 The starting point in determining if the limitation period has run its course is a determination of which *Act* applies. To answer this question, one must look to the transitional provisions of the new *Act*.

28 Since the alleged events occurred prior to January 1, 2004, but no proceedings were taken before that date, the transitional provisions under section 24 of the new *Limitations Act* apply to these claims by virtue of section 24(2):

> **24 (2)** This section applies to claims based on acts or omissions that took place before January 1, 2004 and in respect of which no proceeding has been commenced before that date.

29 The alleged incidents of assault and battery all took place before January 1, 2004 and proceedings were not commenced regarding these torts before January 1, 2004. Therefore, the transitional provisions (section 24) apply to this case.

(ii) The effect of the transitional provisions.

30 Section 24(5) states:

> **24(5)** If the former limitation period did not expire before January 1, 2004 and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after that date, the following rules apply:
>
> 1. If the claim was not discovered before January 1, 2004, this Act applies as if the act or omission had taken place on that date.
>
> 2. If the claim was discovered before January 1, 2004, the former limitation period applies.

31 Essentially, section 24(5) applies if two requirements are met:

1. that the former limitation period did not expire before January 1, 2004; and

2. that a limitation period under the new *Limitations Act* would be applicable to the claim if it were a claim based on an act or omission that took place after January 1, 2004.

32 In this case, because the alleged incidents did not commence until January 2002, it is impossible for the former limitation period (which was four years) to have expired before January 1, 2004. Therefore, the first requirement of section 24(5) is met. The second requirement of section 24(5) is also met because a claim for assault or battery is covered by sections 4 and 10 of the new *Limitations Act*. As outlined above, section 4 is the basic limitation period and section 10 outlines the presumption relating to the discoverability of assault claims under circumstances such as those raised in this case.

33 As both requirements of section 24(5) are met, the following two rules also apply to the claim:

1. if the claim was discovered before January 1, 2004 the former limitation period (four years) would apply; and

2. if the claim was discovered after January 1, 2004 the new limitation period (two years) would apply.

34 Thus, the determination of which *Act* applies depends upon whether the claims were discovered before or after January 1, 2004. This issue will be discussed below. However, irrespective of which *Act* applies, section 10 of the new *Limitations Act* applies to the claims because of section 24(7) of the new *Limitations Act*. This section states:

> **24 (7)** In the case of a claim based on an assault or sexual assault that the defendant committed, knowingly aided or encouraged, or knowingly permitted the defendant's agent or employee to commit, the following rules apply, even if the former limitation period expired before January 1, 2004:
>
> 1. If section 10 would apply were the claim based on an assault or sexual assault that took place on or after the January 1, 2004, section 10 applies to the claim, with necessary modifications.
>
> 2. If no limitation period under this Act would apply were the claim based on a sexual assault that took place on or after January 1, 2004, there is no limitation period.

(iii) Application of section 10 of the new Limitations Act.

35 With respect to the issue of discoverability, Mr. Feldstein urges me to find that section 10 of the new *Limitations Act* applies and that, consequently, these claims were not "discovered" until after January 1, 2004. While I agree that section 10 of the new *Limitations Act* has application in this case, I do not agree that this automatically places the claims under the new *Limitations Act*. By virtue of section 24(7) of the new *Limitations Act*, section 10 applies to cases of assault including cases of assault that fall under the former *Limitations Act*.

36 Section 10 essentially provides a rebuttable presumption in favour of the applicant wife. It provides that the limitation period will not run while she is incapable of commencing the claim. As a result of the intimate relationship between the parties and the wife's dependence on the husband at the time of the alleged assault, the wife is presumed to have been incapable of starting the proceeding until the time that she did, unless the contrary is proved.

37 In this case the parties had an intimate relationship; Irene Lo was dependent on Paul Lo. Thus, this section applies. However, counsel for the applicant wife chose not to rely on this section, noting that the applicant wife readily acknowledges that the claims were "discovered" years before she commenced the proceeding to amend her application. It seems that Mr. Freedman made this acknowledgement because he preferred to have these claims fall under the former *Limitations Act* in the hopes that the doctrine of "special circumstances" would apply, and the court would permit the amendments to the wife's application on this basis, despite the expiry of the limitation period. I will deal with this issue further below.

38 I find that even though the presumption in section 10 of the new *Act* applies to this situation, irrespective of whether Mrs. Lo seeks to rely on it, her own evidence rebuts this presumption. She acknowledges that she always intended to sue the respondent husband for these additional torts. She states, in her affidavit, that she did not originally make these claims only because she believed these claims were supposed to be brought in a separate civil action, which she, at the

time, could not afford to bring. As a result, she says she did not turn her mind to bringing the claim until after she received her equalization payment in 2006. The materials make it quite clear that the wife was well aware of the fact that she could make her claims long before she settled the action before Perkins J. It is also worth repeating that she retained the services of family law counsel who were aware of her claims.

39 In *Coutanche v. Napoleon Delicatessen*, the Ontario Court of Appeal dealt with the issue of whether a plaintiff's lack of awareness regarding the limitation period would postpone the running of the limitation period. [9] The court held that it would not. The court stated at paragraph 18:

> The plaintiffs' ignorance of the limitation period is referred to three times in the Reasons and submissions were made to us that the motion judge had erred in giving any weight to this fact. Reference was made to the decision of the Alberta Court of Appeal in *Hill* where the point was made that error as to, or ignorance of the law did not postpone the running of a limitation period. A slightly fuller discussion of the point is found in *Luscar* at paragraph 127:
>
> > What is it that must be discovered? Discovery applies to the facts, not the law. This point is made in the recent decision of this court in *The Royal Canadian Legion Norwood (Alberta) Branch 178 v. The City of Edmonton* (1994), 149 A.R. 25, 16 Alta. L.R. (3d) 305 (C.A.). In that case, the issue of whether s. 4(1)(*e*) of the *Limitations Act* refers to discovery of the facts or the law was directly addressed at p. 9 where Lieberman J.A. adopted the reasoning of an earlier decision in the same court:
> >
> > > The issue of whether "discovery" applies to the facts or to the law or to both was addressed by this court in *Hill v. South Alberta Land Registration District* (1993), 135 A.R. 266, 33 W.A.C. 266, 8 Alta. L.R. (3d) 379. In that decision Côté, J.A., delivering the unanimous judgment of the court, referred to a case comment on the trial judgment then under appeal and said at p. 385:
> > >
> > > **Discoverability relates to facts, not law. Error or ignorance of the law, or uncertainty of the law, does not postpone any limitation period.**
> >
> > [Emphasis added, footnotes omitted]

40 In this case, the fact that the applicant wife thought she had to bring a separate civil action, and waited until she felt she could afford to do so, does not, in my view, stop the running of the limitation period.

(iv) Discovery of the claims.

41 Having determined that the presumption under section 10 of the new *Act* has been rebutted, I must now determine whether (without applying the presumption in section 10), the applicant wife's claims were discovered before of after January 1, 2004. This will then lead to the determination, pursuant to section 24(5) of the new *Limitations Act*, of which *Act* applies in this case.

42 The issue of discoverability was recently addressed in the Ontario Court of Appeal's decision in *Placzek v. Green*. [10] At paragraph 52 of that decision, the court stated:

> Whether under the former limitations regime or under the new Act, in the context of limitations law, "discovered" refers to discovering the material facts on which a cause of action or claim is based for the purpose of triggering the limitation period: see *Kamloops (City of) v. Nielsen*, [1984] 2 S.C.R. 2; *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, at p. 224; and see s. 5 of the new Act.

43 In *Central & Eastern Trust Co. v. Rafuse*, [11] at paragraph 77, the court stated that the decision in *Nielsen v. Kamloops (City)* [12]:

> laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence....

44 Given my ruling regarding section 10, I find that the claims were discovered on the date these alleged incidents occurred. Since all of the alleged assault and battery incidents occurred prior to January 1, 2004, the former *Limitations Act* applies and the limitation period is four years. This means that the four year limitation period had expired when Irene Lo brought her motion on February 25, 2009, for an order to amend her application by adding the new tort claims.

(g) Does the Doctrine of "Special Circumstances" Apply?

45 As I noted above, the doctrine of "special circumstances" does not apply to limitation periods under the new *Limitations Act*. However, having determined that the former *Limitations Act* is the *Act* that applies in this case, there is still an outstanding issue of whether "special circumstances" would allow Irene Lo to amend her application, notwithstanding the missed limitation period.

46 There are very strong policy reasons why limitation periods should not be lightly interfered with. The Supreme Court of Canada has outlined three reasons for applying limitation periods. They are: (1) certainty; (2) evidentiary; and (3) diligence: [13]

> Statutes of limitations have long been said to be statutes of repose ... The reasoning is straightforward enough. There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations....
>
> The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim....
>
> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion....

47 The rationale was also described in *Deaville v. Boegeman*, at paragraph 20: [14]

> When considering the purpose of limitation periods, the maxim, although used frequently in other connections, *expedit reipublicae ut sit finis litium* is appropriate; it is indeed in the public interest that there should be an end to litigation: *Smith v. Clay* (1767), 3 Bro. C.C. 646, 29 E.R. 743.

48 The origin of the special circumstances doctrine, relied upon by the applicant wife, is outlined in *Joseph* at paragraph 10: [15]

> The special circumstances doctrine originated in Canadian jurisprudence in *Basarsky v. Quinlan*, [1972] S.C.R. 380, [1971] S.C.J. No. 118. In that case, the plaintiff brought a claim within the applicable limitation period, but later sought to add a new claim after the period had expired. The Supreme Court adopted the rule in *Weldon v. Neal* (1887), 19 Q.B.D. 394 (C.A.), that an amendment cannot be made that would prejudice the other party by taking away the existing right of the time bar, except in peculiar or special circumstances that warrant the amendment. The Supreme Court concluded that the defendant was not prejudiced and exercised its power to allow the amendment on the basis of special circumstances.

49 The court in *Joseph* then noted that this common law doctrine came to be applied to motions to amend pleadings after a limitation period expired, pursuant to rule 26.01 of the *Rules of Civil Procedure*, and changes to the name of a party, pursuant to rule 5.04(2) of the *Rules of Civil Procedure*. [16]

50 While rule 26.01 does not refer to limitation periods or special circumstances specifically, the court in *Joseph*, at paragraph 12, noted that:

> [Rules 26.01 and 5.04(2)] have been interpreted to allow a court ... to add a cause of action after the expiry of a limitation period where special circumstances exist, unless the change would cause prejudice that could not be compensated for with either costs or an adjournment: see, e.g., *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 O.R. (3d) 768, [2001] O.J. No. 4567 (C.A.).

51 The comparable provision to rule 26.01 under the *Family Law Rules* is rule 11(3), which I outlined earlier in these reasons. [17]

52 In *Deaville*, the court noted, at paragraph 20, that "the expiry of the limitation period creates a presumption, however slight in some cases, of prejudice to the defendant." Sometimes courts will apply the doctrine of special circumstances to counter this presumption of prejudice. This issue was summarized in *Frohlick v. Pinkerton Canada Ltd.* [18] where the court was dealing with a request for leave to amend under rule 26.01 of the *Rules of Civil Procedure*. In that case the court stated at paragraphs 17 and 22:

> ... [T]he proper interpretation of rule 26.01 is that the expiry of a limitation period gives rise to a presumption of prejudice. This presumption of prejudice will be determinative unless the party seeking the amendment can show the existence of special circumstances that rebut the presumption.
>
> Where a limitation period has passed, there will be a presumption of prejudice that cannot be compensated for by costs or an adjournment. The moving party must demonstrate why, on the facts of the case, the court should not apply the normal rule that the presumption of prejudice flowing from the loss of the limitation period is determinative. This involves a consideration of special circumstances that would lead the court to conclude that the presumption of prejudice should not apply.

53 The concept of "special circumstances" will not be lightly applied. As stated in *Ioannou v. Evans* at paragraph 34, "circumstances justifying amendments after a limitation period has passed will be rare...." [19]

54 In *Ioannou* at paragraph 35, the court described special circumstances as "the facts of the particular case that make it in the interests of justice to, in effect, displace the defendant's entitlement to rely upon a limitation period defence." The court in *Deaville* noted that the meaning of "special circumstances" is a matter of discretion, which is very dependant upon the facts of each individual case. Furthermore, "the court may consider the totality of the factual background to the proceedings. The conduct and circumstances of the parties are relevant considerations...." (*Ioannou* at paragraph 37)

55 In considering whether the special circumstances doctrine should be used to permit the applicant wife to amend her application, I must, therefore, consider the facts of the case.

56 The applicant wife claims that a special circumstance was created because she was delayed in bringing these claims partly due to an error of the court, whereby her application was accidentally moved to "inactive status." In her affidavit, she claims this lasted "nearly a year." The respondent husband notes that between the time that the applicant raised the issue of reactivating the court file to the time that the dismissal order was set aside was only just over three months. I accept the respondent husband's submission on this point. I find that the applicant wife's claims have been exaggerated. While a systemic court error could be a valid special circumstance, it did not cause as much of a delay as the applicant wife claims. As well, in my view, there was nothing to prevent the applicant wife from initiating another proceeding based on her claims for assault and battery.

57 The applicant wife also argues that she was delayed in bringing her action because for a period of time she was under the impression that she would need to bring a separate civil action which she could not afford to do at the time. As noted above, the *Coutanche* decision states that ignorance of the law does not prevent a limitation period from running.

58 I find that the evidence suggests that, at the very least, the applicant wife had the relevant information and finances needed to commence these proceedings by November 30, 2006, when the applicant wife's lawyer advised the respondent husband's lawyer that his client would be amending the pleadings. As well, in 2007, counsel for the parties discussed adding these new claims. This certainly leads me to question why there was such a long delay between then and now.

59 The final potential argument that may be made by the applicant wife in favour of special circumstances is that there is an absence of prejudice. If there was an absence of prejudice, this may be considered as special circumstances. As stated in *Frohlick* at paragraph 26:

> From the foregoing discussion, it is apparent that I view the concept of "special circumstances" as overlapping with the moving party's burden to rebut the presumption of prejudice. Facts that indicate an absence of prejudice may also constitute special circumstances justifying leave to amend under the authority of rule 26.01.

60 The applicant wife submits that her proposed amendments will not cause prejudice to the respondent husband because all the relevant witnesses (who she feels only includes the parties and their children) are available to testify. The respondent husband disagrees, noting that some potential witnesses are either no longer available, or dead. He was, however, somewhat vague regarding the identity of his witnesses and the evidence these witnesses might be able to give.

61 Counsel for the applicant wife made a compelling argument that the respondent husband has not sufficiently explained why unavailability of potential witnesses would prejudice his case. In my view, however, the applicant wife has not rebutted the underlying presumption that prejudice would flow, as some evidence would now likely be stale. The long delay on the part of the wife is likely to have prejudiced the husband's ability to properly and fully develop responses to her claims. I am not able to find that there is an absence of prejudice in this case.

62 Therefore, even taking into account the wife's reasons for delay outlined above, I find that she has unnecessarily delayed bringing these claims for at least two years. As a result, it would not be in the interests of justice for me to exercise the court's power to allow the proposed amendments. Allowing amendments that are statute-barred due to the passage of a limitation period is a power that should be used sparingly, and only in the most deserving of circumstances. Allowing these amendments in this type of case might well encourage litigants to further draw out protracted family law proceedings by adding additional claims that could have been brought within the limitation period — but were not.

63 Based on the facts of this case, this applicant had every opportunity to deal with her claims within the limitation period. Unlike a case in which a person has not retained experienced counsel and prosecuted most family claims, Mrs. Lo is not, in my view, in a position where she is prejudiced. Family law claims should be dealt with as expeditiously as possible and, once settled, these cases should not remain open for litigation indefinitely. It is in the best interest of justice that this case should be resolved, and that the resolution be final.

V. Conclusion

64 The applicant wife is not permitted to amend her application to include the tort of intentional infliction of mental suffering, as this tort is not permitted in the family law context. Furthermore, the applicant wife is not permitted to amend her application to include the torts of assault and battery, as these claims are barred due to the passage of the limitation period.

65 Consequently, Mrs. Lo shall not be allowed to amend her pleadings by relying on alleged facts relating to the intentional infliction of mental suffering or assault and/or battery.

VI. Costs

66 I may be spoken to on the issue of costs, should the parties not be able to settle the issue.

Motion dismissed.

Footnotes

1 *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

2 *Limitations Act*, R.S.O. 1990, c. l.15, [the former *Limitations Act*] or [the former *Act*].

3 *Joseph v. Paramount Canada's Wonderland* (2008), 90 O.R. (3d) 401 (Ont. C.A.) [*Joseph*].

4 *Limitations Act*, 2002, S.O. 2002, c. 24, Sch. B, [the new *Limitations Act*] or [the new *Act*]

5 *Family Law Rules*, O. Reg. 114/99.

6 *Frame v. Smith*. [1987] 2 S.C.R. 99 (S.C.C.). [*Frame*].

7 *Ibid.*

8 See section 45(1)(j).

9 *Coutanche v. Napoleon Delicatessen* (2004), 72 O.R. (3d) 122 (Ont. C.A.).

10 *Placzek v. Green*, [2009] O.J. No. 326 (Ont. C.A.).

11 *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.).

12 *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.).

13 See *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.) where the court stated, at paras. 22-24.

14 *Deaville v. Boegeman*, [1984] O.J. No. 3403 (Ont. C.A.).

15 *Supra*

16 *Rules of Civil Procedure*, R.R.O 1990, Reg. 194.

17 *Supra*

18 *Frohlick v. Pinkerton Canada Ltd.* (2008). 88 O.R. (3d) 401 (Ont. C.A.).

19 *Ioannou v. Evans*, [2008] O.J. No. 21 (Ont. S.C.J.).

Citing References (5)

Treatment	Title	Date	Type	Depth	Abridgment Classifications
Considered in	**1. Rathore v. Singh** 2016 ABQB 498 (Alta. Q.B.)	Aug. 11, 2016	Cases and Decisions		CIV.XVI.3.g CIV.XXIV.3.e.iii TOR.VIII.1
Considered in	**2. Tyner v. Tyner** 2015 ONSC 3475 (Ont. S.C.J.)	May 29, 2015	Cases and Decisions		FAM.III.5.c.vii FAM.III.6.k FAM.IV.1.b.v.A FAM.IV.1.b.v.B RST.V.4 TOR.VIII.2
Referred to in	**3. Holden v. Gagne** 2013 ONSC 1423 (Ont. S.C.J.) **Judicially considered 6 times**	Mar. 07, 2013	Cases and Decisions		FAM.III.6.b.i FAM.IV.1.b.v.B FAM.IV.3.a.i FAM.XVIII REM.I.5.a.ii.C.2 TOR.XX.4.a.i
Referred to in	**4. Murray v. Toth** 2012 ONSC 5815 (Ont. S.C.J.) **Judicially considered 2 times**	Oct. 17, 2012	Cases and Decisions		CIV.XXIV.10.t EST.IV.7 REM.I.7.c.x RST.I.2.c TOR.IV.3.a TOR.VIII.2
—	**5. 29 Canadian Family Law Quarterly 253, 29 C.F.L.Q. 253 Tort Claims in Family Law — The Frontier**	2010	Secondary Sources	—	—

