IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *Balsom v. Rideout*, 2022 NLCA 20
Date: March 17, 2022
Docket Number: 202101H0018

BETWEEN:

GAIL BALSOM — APPELLANT

AND:

COREY RIDEOUT — RESPONDENT

Coram: Fry C.J.N.L., Welsh and White JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador, General Division 201906G0122 (2021 NLSC 30)

Appeal Heard: December 17, 2021
Judgment Rendered: March 17, 2022

Reasons for Judgment by: Welsh J.A.
Concurred in by: Fry C.J.N.L. and White J.A.

Counsel for the Appellant: Jorge P. Segovia and Patrick B. Power
Counsel for the Respondent: Gregory M. Smith Q.C. and Shane R. Belbin

Authorities Cited:

CASES CITED: *Sable Offshore Energy Inc. v. American International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623; *Wheaton v. Palmer* (1999), 183 Nfld. & P.E.I.R. 233 (Nfld. S.C.T.D.); *Wheaton v. Palmer*, 2001 NFCA 43, 205 Nfld. & P.E.I.R. 304, leave to appeal refused (2002), 224 Nfld. & P.E.I.R. 180 (note); *Meyers v. Dunphy*, 2007 NLCA 1, 262 Nfld. & P.E.I.R. 173.

STATUTES CONSIDERED: *Limitations Act*, SNL 1995, c. L-16.1, sections 5, 16 and 17(1).

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, rule 38.01.

OTHER: Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 5th edition (Canada: LexisNexis Canada Inc., 2018).

Welsh J.A.:

[1] Corey Rideout, who claims that he sustained injuries in a motor vehicle accident that was caused by Gail Balsom, commenced an action by issuing a statement of claim. The focus of this appeal is whether the statement of claim was issued within the statutorily prescribed limitation period, and in particular, whether the limitation period was extended by conduct confirming the cause of action. The scope of settlement privilege in this context is considered.

BACKGROUND

[2] On September 1, 2017, at approximately 5:30 p.m., motor vehicles driven by Mr. Rideout and Ms. Balsom collided. Mr. Rideout issued a statement of claim that was filed on September 11, 2019 naming Ms. Balsom as the defendant. On February 14, 2020, Ms. Balsom filed a statement of defence, asserting among other things that Mr. Rideout's action was commenced after the expiration of the two year statutorily prescribed limitation period.

[3] On February 25, 2020, Ms. Balsom applied pursuant to rule 38.01(2) of the *Rules of the Supreme Court, 1986*, for an order dismissing Mr. Rideout's claim on the basis that a determination of the limitations issue would dispose of

the action. Counsel agreed, and the applications judge accepted that this was an appropriate procedure. It was also agreed and accepted that the statement of claim had been issued more than two years after the date of the accident.

[4] The judge dismissed Ms. Balsom's application on the basis that there had been a confirmation of the cause of action which advanced the date when the limitation period began to run, with the result that the cause of action was commenced within the limitation period. In reaching that conclusion, the judge relied on communications between Ms. Balsom's insurer and Mr. Rideout's solicitor, which the judge determined were not protected by settlement privilege.

ISSUES

[5] At issue is whether the applications judge erred:

(1) In concluding that the communications between Ms. Balsom's insurer and Mr. Rideout's solicitor were not protected by settlement privilege, and

(2) In determining that there had been a confirmation of the cause of action, with the result that the action had been commenced within the limitation period.

ANALYSIS

The Law

Rule 38.01

[6] Rule 38.01 of the *Rules of the Supreme Court, 1986*, provides for dismissal of a cause of action based on the determination of an issue, such as in this case, expiration of a limitation period:

> (1) The Court may, on the application of any party or of its own motion, at any time prior to a trial or hearing,
>
> (a) determine any relevant question or issue of law or fact, or both;
>
> ...
>
> (2) Where in the opinion of the Court, the determination of any question or issue under rule 38.01(1) substantially disposes of the whole proceeding, ... the Court may thereupon order the entry of such judgment or make such order, as is just.

The Limitations Act

[7] A two year limitation period within which an action for damages for personal injury must be commenced is set out in section 5 of the *Limitations Act*, SNL 1995, c. L-16.1:

> Following the expiration of 2 years after the date on which the right to do so arose, a person shall not bring an action
>
> > (a) for damages in respect of injury to a person or property, ... whether based on contract, tort or statutory duty;

[8] The limitation period may be extended where the conduct of the defendant results in a confirmation of the cause of action. Section 16 of the *Act* provides:

> (1) A confirmation of a cause of action occurs where a person
>
> > (a) acknowledges that cause of action, ... ; or
> >
> > (b) makes a payment in respect of that cause of action ... .
>
> (2) Where a person against whom an action lies confirms that cause of action, the time before the date of that confirmation shall not count when determining the limitation period for a person having the benefit of the confirmation against the person bound by that confirmation.
>
> (3) Subsection (2) applies only to a right of action where the confirmation is given before the expiration of the limitation period for that right of action.
>
> ...
>
> (Emphasis added.)

Ms. Balsom relies on section 16(1)(a) for purposes of this appeal.

[9] Section 17(1) of the *Act* provides that a cause of action is "extinguished upon the expiration of the limitation period for that cause of action."

Settlement Privilege

[10] The principles that govern settlement privilege are discussed in *Sable Offshore Energy Inc. v. American International Corp.*, 2013 SCC 37, [2013] 2 S.C.R. 623. Abella J., for the Court, explained:

> [2] The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.
>
> ...
>
> [12] Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found ... .
>
> [13] Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible ... .
>
> ...
>
> What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.
>
> [14] ... First, although the privilege is often referred to as the rule about "without prejudice" communications, those precise words are not required to invoke the privilege. <u>What matters instead is the intent of the parties to settle the action ... . Any negotiations undertaken with this purpose are inadmissible</u>.
>
> ...
>
> [19] There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" ... . These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence ... and preventing a plaintiff from being overcompensated ... .
>
> (Emphasis added.)

[11] In assessing whether correspondence falls within the scope of settlement privilege, the whole of the circumstances must be considered to determine the writer's purpose. The fact that the correspondence is intended to commence or continue settlement negotiations may be inferred. Inclusion of the phrase "without prejudice", an actual settlement offer, or a clear statement that the correspondence is for settlement purposes are relevant factors, but are not essential. Viewed in context, requesting or providing information regarding the matter, or setting out a party's position may be sufficient to bring the correspondence within the scope of settlement privilege. (See also: Sopinka,

Lederman and Bryant, *The Law of Evidence in Canada*, 5th edition (Canada: LexisNexis Canada Inc., 2018), at paragraphs 14.347 to 14.359.)

[12] In discussing settlement privilege in the context of a limitation period in *Wheaton v. Palmer* (1999), 183 Nfld. & P.E.I.R. 233 (Nfld. S.C.T.D.), Orsborn J. considered, among other things:

> [155] ... If the communication in question can be said to be a part of a previous "without prejudice" privileged correspondence, then the expression of intention and the privilege will continue. Further, the non-disclosure intention may be implied from the surrounding circumstances, including any settlement-oriented subject matter in the communication itself.

Note: the appeal of the *Wheaton* decision was allowed on the basis that settlement privilege had been waived when the parties filed an agreed statement of facts that included the information (*Wheaton v. Palmer*, 2001 NFCA 43, 205 Nfld. & P.E.I.R. 304, at paragraphs 61 to 65, leave to appeal refused (2002), 224 Nfld. & P.E.I.R. 180 (note)).

[13] In *Meyers v. Dunphy*, 2007 NLCA 1, 262 Nfld. & P.E.I.R. 173, this Court considered the scope of settlement privilege in the context of section 16 of the *Limitations Act*. Wells C.J.N.L., for the Court, identified three conditions that underpin a claim of settlement privilege:

> [12] ...
>
> (a) a litigious dispute must be in existence or within contemplation;
>
> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and,
>
> (c) the purpose of the communication must be to attempt to effect a settlement.

[14] After discussing the history of settlement privilege and judicial authority, Wells C.J.N.L. identified relevant principles, including:

> [27] ...
>
> 1. Protection of admissions against interest, for the purpose of encouraging settlement discussions, is a compelling public policy basis for settlement privilege;
>
> ...

> 5. Where exclusion of the communication would facilitate an abuse of the privilege, or another compelling or overriding interest of justice requires it, without prejudice communications are admissible.

[15] In many respects, the facts in *Meyers* are similar to this case. The parties were involved in a motor vehicle accident, and a statement of claim was issued after the expiration of the limitation period. All but one piece of correspondence was marked "Without Prejudice". The respondent's correspondence "proposed meeting to negotiate settlement" (*Meyers*, at paragraph 2).

[16] In *Meyers*, the Court accepted, for purposes of the analysis, that the correspondence amounted to a confirmation of the cause of action pursuant to section 16 of the *Limitations Act*. However, the Court concluded that the correspondence was inadmissible because it was protected by settlement privilege. Accordingly, the correspondence could not be used as evidence of the acknowledgment of a cause of action that would adjust the date from which the limitation period would run. In the result, there was no evidence to support the application of section 16 of the *Act*. In concluding on this point, Wells C.J.N.L. explained:

> [34] ... Neither can I accept his assertion that the situation created by the decision [to rule the correspondence inadmissible] is "... unreasonable and fundamentally unfair to the appellant". The appellant participated in the exchange of "Without Prejudice" correspondence, thereby impliedly agreeing that it was not to be used by either party. His implied agreement must be taken to include its not being used to confirm a cause of action for limitations purposes, because that prohibition was expressly specified in the disclaimer. ...

[17] The question of an exception to the settlement privilege was also considered in *Meyers*. After discussing the issue and judicial authority, Wells C.J.N.L. concluded that, absent some special reason, confirmation for purposes of section 16 of the *Limitations Act* would not outweigh "the public policy interest, in promoting resolution of disputes by negotiated settlement, and justify admitting in evidence communications protected by settlement privilege" (*Meyers*, at paragraph 52).

Application of the Law

Factual Matrix

[18] The factual matrix is the beginning point in the analysis. The applications judge relied on the following (2021 NLSC 30, at paragraph 26):

1. February 23, 2018, by letter, Mr. Rideout's counsel ("Counsel") advised Ms. Balsom's insurer (the "Adjuster") that Mr. Rideout believed Ms. Balsom caused and was liable for the accident;

2. October 15, 2018, the Adjuster contacted Counsel to obtain Mr. Rideout's statement and bodily injury questionnaire; Counsel emailed the Adjuster asking if he wanted Mr. Rideout's medical records;

3. October 16, 2018, the Adjuster requested the records and offered to pay for them;

4. December 10, 2018, the Adjuster emailed Counsel "inquiring first about the medical records and then if '... your client is in a position to settle?'";

5. June 25, 2019, the Adjuster emailed Counsel advising that the file was being transferred to another adjuster and "asking whether counsel was 'in a position to present the [claim] demand for review'";

6. June 26, 2019, Counsel presented a claim demand to the Adjuster;

7. July 9, 2019, the Adjuster emailed Counsel acknowledging receipt of the claim demand and asking for "... something written from his employer confirming the hours missed [from work] in order to properly assess his claim and present you with an offer";

8. August 6, 2019, the Adjuster emailed Counsel as a follow-up "... to see if you have been able to obtain written confirmation of your [client's] lost income so I can assess his claim".

[19] On September 4, 2019, after the limitation period had expired, Counsel caused Mr. Rideout's employer to provide a letter to the Adjuster regarding Mr. Rideout's wage losses. Mr. Rideout's statement of claim was filed on September 11, 2019. An offer to settle, dated September 5, 2019, was received by Counsel on September 11, 2019.

[20] Mr. Rideout concedes that, if the correspondence is not admissible evidence, confirmation of a cause of action pursuant to section 16(1)(a) of the *Act* cannot be established. I turn, then, to consideration of settlement privilege as applied to the correspondence.

Settlement Privilege

[21] The correspondence from the first Adjuster was marked "without prejudice". However, the adjuster who replaced him on June 25, 2019 did not continue that practice. The use of the phrase "without prejudice" is one of several factors to be considered in characterizing correspondence as privileged. The new adjuster gave no reason to suggest that there was any change in the position being taken by the insurer. The correspondence continues in the same vein with requests for and exchange of information related to assessing Mr. Rideout's claim. It follows that the correspondence from the second adjuster would constitute a part, or continuation of the earlier correspondence, with the inference that it would be covered by the "without prejudice" designation indicative of the claim for continuing privilege (decision of Orsborn J. in *Wheaton*, at paragraph 155).

[22] The designation of the correspondence as "without prejudice", considered together with the contents of the correspondence, supports the conclusion that it was intended to be for the purpose of possible settlement. Mr. Rideout asserted in the initial correspondence that he believed Ms. Balsom caused and was liable for the accident. This led to the collection of information by the insurer indicative of assessing the facts relative to settlement negotiations. At no point does the insurer admit liability. Rather, on December 10, 2018, the Adjuster inquired whether Mr. Rideout was "in a position to settle". On June 25, 2019, the Adjuster asked whether Counsel was "in a position to present the [claim] demand for review". The claim demand was provided by Mr. Rideout on the following day. On July 9, 2019, the second adjuster sought further information "in order to properly assess [Mr. Rideout's] claim and present [him] with an offer". This correspondence, exchanged before the limitation period expired, comprised, in the words of Orsborn J. in *Wheaton*, settlement-oriented subject matter which, in the circumstances, supports the inference that it was intended that settlement privilege would apply.

[23] Further, the applications judge noted:

> [38] ... The earliest correspondence from the adjuster that is noted in the materials that Mr. Rideout filed is dated October 15, 2018. As soon as two months after that, on December 10, 2018 the adjuster asked Mr. Rideout's counsel if "... your client is in a position to settle?" After that, there are repeated requests about the same until June 26, 2019 when Mr. Rideout's counsel presented a claim on his behalf.
>
> [39] From then, until October 30, 2019 counsel and the adjuster exchanged ongoing correspondence, containing offers and counteroffers as they tried to settle Mr.

> Rideout's claim. So, it is clear from this background that Ms. Balsom's adjuster (and her principal, Ms. Balsom's insurer) wanted to settle the claim early on in their dealings and practically all correspondence between them, especially in the last six months, was directed to that end.

[24] During all the time prior to expiration of the two year limitation period on September 1, 2019, Mr. Rideout could have, but did not, issue a statement of claim to preserve his right to make a claim against Ms. Balsom should settlement negotiations fail.

[25] The above considerations support the characterization of the correspondence as comprising settlement negotiations. Nonetheless, the applications judge went on to impose an obligation on the insurer, during the collection and exchange of information for purposes of possible settlement, to specify that liability for the accident and for Mr. Rideout's damages was not admitted. The judge considered that there was "no indication, for example, that the adjuster doubts Ms. Balsom's liability for the accident, or that she believes that Mr. Rideout may have contributed to it" (decision of the applications judge, at paragraph 34). That statement misconstrues the nature of the correspondence. The fact that the parties were engaged in settlement discussions and collecting and exchanging information cannot be construed as an admission of liability or acknowledgement of a cause of action. It remained open to Ms. Balsom to file a defence in response to a statement of claim issued by Mr. Rideout. This, in fact, occurred.

[26] The applications judge concluded:

> [37] My compelling sense is that Ms. Balsom's insurer and adjuster accepted that she caused the accident from when Mr. Rideout's counsel wrote to Ms. Balsom's insurer on February 23, 2018 and told the insurer that Mr. Rideout believed Ms. Balsom caused the accident. And that belief accounts for the lack of restraint that is evident to me in the correspondence that Ms. Balsom's adjuster and Mr. Rideout's counsel, especially the former, exchanged.

[27] The requests for and exchange of information, necessary in order to determine an appropriate offer to settle, are consistent with settlement negotiations. Ms. Balsom's position regarding liability for Mr. Rideout's claim was, in fact, set out in the statement of defence that she filed in response to the statement of claim.

[28] By misconstruing the nature of the correspondence and imposing an obligation on the insurer to specifically deny liability, the judge erred in

applying the relevant principles of law and in determining that settlement privilege did not apply.

Exception to Settlement Privilege

[29] The judge, having concluded that settlement privilege did not apply, went on to state that even if the privilege applied, this was a case where "the privilege has to yield" (decision of the applications judge, at paragraph 41). As set out in *Meyers*, a special reason is necessary before confirmation for purposes of section 16 of the *Limitations Act* would outweigh "the public policy interest, in promoting resolution of disputes by negotiated settlement, and justify admitting in evidence communications protected by settlement privilege" (*Meyers*, at paragraph 52). The applications judge did not identify a special reason that would justify overriding the interests meant to be protected by settlement privilege. His conclusion that privilege must yield was an error that was conceded in Mr. Rideout's submissions.

[30] The applications judge was also of the view that admitting the correspondence would not prejudice Ms. Balsom's rights:

> [43] Ms. Balsom has applied to dismiss Mr. Rideout's claim as being out of time. Mr. Rideout wants to tender that correspondence simply to address that argument. It remains to be seen if it will support his claim that the correspondence confirmed his cause of action. It is clearly relevant to that issue and it will not prejudice Ms. Balsom if I admit it for that purpose, which I do. ...

[31] In fact, admitting the correspondence for purposes of acknowledging a cause of action pursuant to section 16 of the *Act* would clearly prejudice Ms. Balsom's right to rely on the limitation period. Upon expiry of the two year limitation, no claim could be brought against her. (See: *Meyers*, at paragraphs 28 to 34; and section 17(1) of the *Limitations Act*.)

Interplay between the Second and Third Criteria in the Test

[32] Mr. Rideout submits that care must be taken not to conflate the second and third criteria of the test. For convenience, I repeat these criteria:

> (b) the communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and,
>
> (c) the purpose of the communication must be to attempt to effect a settlement.

[33] The interplay between these criteria is discussed in *The Law of Evidence in Canada, supra*, at paragraphs 14.350 to 14.354. Regarding criterion (b), addressing the question of intention that the communication would not be disclosed, the authors provide the following summary of the law:

> 14.350 ... This intention [that the communication will not be disclosed] may be implied from the use of the phrase "without prejudice" at the head of the correspondence. Justice Sopinka, in *Maracle v. Travellers Indemnity Co. of Canada* [[1991] 2 S.C.R. 50], in referring to a letter written "without prejudice", stated [at page 59]:
>
> > The use of this expression is commonly understood to mean that if there is no settlement, the party making the offer is free to assert all its rights, unaffected by anything stated or done in the negotiations.
>
> Although the use of this phrase is not conclusive of the intention, it may constitute some, if not *prima facie*, evidence of it and thus its use is of value. Moreover, in the course of negotiations, if a letter has been written by one party "without prejudice", then an intention to maintain the privilege with respect to the whole of the correspondence of which the letter forms a part may be inferred.
>
> ...
>
> 14.352 The Supreme Court of Canada has stated, "What matters instead [of the precise words, "without prejudice"] is the intent of the parties to settle the action. Any negotiations undertaken with this purpose are inadmissible [*Sable Offshore*, at paragraph 14].
>
> 14.353 ... Furthermore, many of the cases in this area seem to pay little attention to the question of intention, and focus instead on the other conditions for application of the privilege. In *Excelsior Life Insurance Co. v. Saskatchewan* [(1987), 63 Sask. R. 35 (Sask. Q.B.)], the Court appears to have inferred the requisite intention from the intention to avoid litigation. <u>This essentially means that the intention can be implied from the fact that the parties are engaged in settlement negotiations and it would, therefore, seem to diminish the importance of intention as a separate element for application of the privilege.</u> In fact, in *William Allan Real Estate Co. v. Robichaud* [(1987), 37 B.L.R. 286 (Ont. H.C.J.)], Campbell J., ... held that the privilege arises if the communication is made for the sake of buying peace or to effect a compromise, without more. As his Lordship stated:
>
> > What sensible man would attempt settlement if it could be used against him at trial?
>
> ...

> 14.354 If the parties are clearly involved in negotiating a settlement or buying peace, the intention should be inferred in the absence of anything to suggest otherwise. ...

(Emphasis added.)

See also: *Wheaton*, at paragraph 155.

[34] As applied to this case, based on the considerations discussed above, the inference would follow that the insurer intended that the correspondence comprised settlement negotiations, and, as such, would not be disclosed. The fact that the insurer was forthright in seeking the information necessary to make an offer to settle is indicative of an intention to settle Mr. Rideout's claim. There was nothing to suggest that the insurer was relinquishing the protection of settlement privilege.

SUMMARY AND DISPOSITION

[35] In the result, I am satisfied that the judge erred in the application of the criteria and principles of law that are engaged in determining whether the correspondence between the insurer and counsel for Mr. Rideout was protected from disclosure by settlement privilege. Initial designation of the correspondence as "without prejudice", considered together with the contents of the correspondence, leads to the conclusion that the correspondence was intended for the purpose of settlement negotiations, and as such, was protected by settlement privilege.

[36] Accordingly, a confirmation of a cause of action pursuant to section 16 of the *Limitations Act* could not be established. The two year statutorily prescribed limitation period had expired before Mr. Rideout's statement of claim was issued. It follows that Mr. Rideout's claim must be dismissed.

[37] I would allow the appeal, set aside the decision of the applications judge, and order that Mr. Rideout's claim is dismissed and the statement of claim struck. As the successful party, Ms. Balsom shall have her costs for one counsel on column 3 of the scale of costs in this Court and in the Court appealed from.

_____

B. G. Welsh J.A.

I Concur: _____

D.E. Fry C.J.N.L.

I Concur: _____

C.W. White J.A.