July 28, 2016

BRIEFING NOTE

The Risk of Pre-Litigation Settlement Communications: Extending the Limitation Period

Trombley v. Pannu, 2016 BCCA 324

Defendants (and their insurers) can inadvertently lose a limitation defence by acknowledging liability. This was at the centre of the B.C. Court of Appeal's decision in *Trombley*, where the plaintiff argued that the defendants' adjuster's request for the plaintiff's settlement position was an admission of liability.

Facts

The plaintiff was injured when he fell on the stairs at his mother's residence. The defendant landlords' insurance adjuster wrote to plaintiff's counsel advising that, given the early stage of the investigation, she was unable to comment on liability. After the parties exchanged information, the adjuster sent a letter to the plaintiff's counsel marked "Without Prejudice", reproduced in part as follows:

> As the matter of investigation and assessment has continued, there has been no indication of what is expected in terms of settlement. As we are nearing the two year mark following the date this incident occurred, in an attempt to keep matter moving forward, please forward your settlement demands.
>
> …we look forward to further discussions regarding settlement.

The adjuster later left a phone message asking for the plaintiff's counsel's plans for settlement or commencing an action. Plaintiff's counsel then filed the claim two years and three weeks after the plaintiff's fall.

Summary Trial & Appeal

The defendants applied for summary dismissal on the grounds that the claim was filed after the expiry of the limitation period. The plaintiff argued that the limitation period had been extended, because the adjuster's letter acknowledged liability.

In dismissing the action, the trial judge considered the wording of the *Limitation Act*, and then turned to *Ryan v. Moore*, 2005 SCC 38, which provides that:

> In order to establish confirmation, one of two events must be proven: (1) that the party acknowledged the cause of action; or (2) that there was a payment made in respect of the cause of action.

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The Court is to apply an objective test: "whether a reasonable person in the context in which a letter was written would interpret the words and actions of the parties as an acknowledgement of some liability". In order to constitute confirmation of a cause of action, an acknowledgment of liability must be in writing, signed by hand or electronic signature, be made by the person making the acknowledgment or that person's agent, and be made to the person with the claim or that person's agent, official receiver or trustee.

The trial judge distinguished two previous decisions in which insurance adjuster's requests for settlement discussion acknowledged liability, on the basis that in *Trombley*, the adjuster's letters were marked "Without Prejudice" and the adjuster noted that there was an upcoming limitation period. The trial judge interpreted this as showing the adjuster's intention to canvass settlement in order to avoid impending litigation, rather than acknowledging liability. The judge concluded that the adjuster's letter was only a request for information.

The Court of Appeal agreed with the trial judge, placing emphasis on the context of the letters. The Court noted that the key question is whether, objectively construed, the party who made the communication intended to admit some liability. As the adjuster indicated that she could not comment on liability as the investigation was underway, marked the letter "Without Prejudice", and noted the upcoming limitation, the Court decided that the adjuster had not acknowledged liability.

Note that the former *Limitation Act* applied in *Trombley*. The current *Limitation Act* has a similar provision for extending a limitation period by acknowledging liability, which has not yet received judicial interpretation.

Nothing New

Compare the adjuster's letter in *Trombley* to the adjuster's letters under consideration in *Podovinikoff v. Montogomery* (1984), 14 DLR (4th) 716 (CA):

> [Letter #1] The writer has attempted to reach you by telephone regarding settlement of your personal injury claim. As we have been unsuccessful, we would ask that you contact the writer at your earliest convenience…
>
> [Letter #2] Please be advised that the Insurance Corporation's Claim Centres have now re-opened to the public. In view of this, we would ask that you contact the writer at your earliest convenience in regard to settlement of your personal injury claim…

In *Podovinikoff*, the Court found that the letters acknowledged liability and extended the limitation period At first glance, these two letters appear to be similar to the adjuster's letter in *Trombley*. In both cases, the letters invite the plaintiff to discuss settlement, and they do not explicitly make any offers or admit liability. However, context is important. The two letters in *Podovinikoff* indicated the adjuster's intention to settle, rather than to deny that the plaintiff had a valid claim. This is in contrast to *Trombley*, where the letter was sent as part of an ongoing investigation into liability, and did not necessarily imply that the defendant intended to settle.

In 1995, the Court of Appeal revisited the law in *Fournier v. Evanow* (1995), [1995] 4 WWR 552 (CA) and again in *Germyn v. Federici* (1995), 2 BCLR (3d) 138 (CA). In *Fournier*, the plaintiff's claim was dismissed for being limitation-barred. The appeal was allowed, as five months prior to the expiry of the limitation period ICBC

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offered the plaintiff $25,000, and did not specify that the offer was without prejudice and was not an acknowledgment of liability. The Court found that this extended the limitation period, despite ICBC's letter stating that "the time limit set out in the *Limitation Act* would not be extended". The Court commented that this statement "simply gives incorrect advice concerning the law".

In *Germyn*, the Court of Appeal found that ICBC's payments to the plaintiff's doctor for medical reports did not extend the limitation period. While the payments were made in respect of the plaintiff's cause of action, they were not made to the plaintiff, a person through whom she claimed, or to her agent, as required in order to confirm a cause of action under the former *Limitation Act*.

Takeaway

While *Trombley* does not create new law, it serves as a reminder of the need for caution in pre-litigation correspondence. A seemingly innocuous invitation to discuss settlement could be interpreted as an acknowledgment of liability, thereby extending the limitation period. Similarly, pre-litigation payment of a plaintiff's expenses may confirm the plaintiff's cause of action.

Any correspondence containing comments about settlement should be noted as "Without Prejudice" in order to minimize the risk of extending the limitation period. The correspondence should also note that the defendant does not confirm any cause of action or acknowledge any liability.

As *Trombley* and *Podovinikoff* show, the difference between extending a limitation period and having a claim dismissed can come down to how pre-litigation correspondence is worded. To ensure that you do not inadvertently make a costly mistake, I recommend retaining a competent lawyer prior to litigation.

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