Court of Appeal
Belanger v. Gilbert
Date: 1984-09-19

G.Gregory, for appellant.

I.R.Campbell, for respondent.

(Vancouver No. CA002153)

19th September 1984. Excerpt from the transcript.

[1] HINKSON J.A.:- We do not find it necessary to call on you, Mr. Campbell. I am going to ask Macdonald J.A. to give the first judgment.

[2] MACDONALD J.A.:- This is an appeal from the opinion of a judge rendered upon a special case under R. 33 [reported at 52 B.C.L.R. 197]. It arose out of an action brought for injuries suffered by the plaintiff alleging that he was a passenger in a vehicle which was struck in the rear end by one owned and driven by the defendant.

[3] The issue was whether the cause of action had been confirmed within the meaning of the term in s. 5 of the Limitation Act, R.S.B.C. 1979, c. 236. The material showed that the writ was issued more than two years after the arising of the cause of action and the claim was barred by statute without the application of s. 5. The section requires confirmation of the cause of action to be made before expiration of the limitation period and in writing. The other detail of the requirements I need not give.

[4] In this case one letter is relied upon, a letter written before the expiration of the two-year limitation period. It was written on 15th September 1981, to solicitors for the plaintiff by Mrs. B. White, claims adjuster of the Insurance Corporation of British Columbia. Referring to the file detail, it says this:

> Further to your letters of April 9th and 27th, 1981, attached please find our draft in the amount of $348.75 in payment of Dr. Schilling and Dr. Fleming's account.
>
> I am also at this time returning the account of Dr. Fleming in the amount of $223.30 and would request that you include this in your special damages when we settle the claim. We will also be requiring some form of breakdown regarding this account before considering it for payment. If Mr. Belanger has recovered sufficiently to enable us to attempt settlement of his claim perhaps you could give me a call.

[5] The learned judge decided that there had been a confirmation in writing, pursuant to the section, a confirmation through this letter. In my opinion he was right in so deciding. I think concession of some liability is implicit in the letter. That disposes of the second ground argued before us.

[6] The letter was not written without prejudice, but counsel in his able argument put to us that all conversations or communications with respect to settlement must be deemed to be without prejudice. Even if the letter had been marked as without prejudice it would not, in my judgment, assist the appellant in this case. Not all letters so marked are to be held inadmissible. I refer to the judgment of his court in *Schetky v. Cochrane,* 24 B.C.R. 496, [1918] 1 W.W.R. 821 (C.A.), and the judgment of Martin J.A. at p. 827. On that page Martin J.A. referred to the case of *Re Daintrey; Ex parte Holt,* [1893] 2 Q.B. 116 (Div.Ct.) in which he said:

> … it was held that an admission of bankruptcy may be proved in a letter from the debtor to the creditor, though marked "without prejudice"…

And he quoted from the judgment saying:

> "In our opinion the rule which excludes documents marked 'without prejudice' has no application unless some person is in dispute or negotiation with another, and terms are offered for the settlement of the dispute or negotiation …"

[7] Martin J.A. went on:

> This lays it down that before the privilege arises two conditions must exist, *viz.:* (a) a dispute or negotiation between two or more parties; and (b) in which terms are offered …

[8] The letter in question, even though it had been marked "without prejudice", cannot meet that test. In my opinion the learned judge was correct and I would dismiss the appeal.

[9] HINKSON J.A.:- I agree.

[10] LAMBERT J.A.:- I agree with everything that has been said by Macdonald J.A. and would dispose of this appeal as he proposes for the reasons that he has given.

[11] I would like to add one additional point. In my opinion it is possible for a letter to be considered as a "without prejudice" letter and inadmissible in evidence in relation to its

contents about the flow of settlement negotiations either on liability or quantum, but at the same time for the same letter to be admissible in evidence for the exclusive purpose of s. 5 of the Limitation Act. It is not necessary to decide that question on the facts of this case, and I explicitly do not do so.

[12] For the reasons of Macdonald J.A. I too would dismiss the appeal.

[13] HINKSON J.A.:- The appeal is dismissed.

Appeal dismissed.