No. SC 532/78
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
MATTHEW KETLO PLAINTIFF	REASONS FOR JUDGMENT
AND:	OF
D.S.C. LEASING COMPANY LTD. and DONALD ROSS STEWARD DEFENDANTS	HIS HONOUR JUDGE PERRY

Hugh McSheffrey, Esq.,	Counsel for the plaintiff
Dick Byl, Esq.,	Counsel for the defendant
Place of hearing:	Prince George, B.C.

The plaintiff, Matthew Ketlo, is a 59 year old Indian living on the Indian reserve at Fort Fraser. On July 24, 1976, whilst hitch-hiking on the highway, he was given a lift by the driver of an Oldsmobile passenger car, whom he did not know. The driver, who had apparently been drinking, drove off the highway, and as a result of his alleged negligence in this one-car accident, the plaintiff passenger, was injured.

On September 8, 1978 he issued the writ in this action claiming damages for injuries and loss of income. The endorsement contained the allegation that the motor vehicle in question was, on July 24, 1976, owned by the defendant, D.S.C. Leasing Company Ltd., operating as Airways Rent-A-Car, and was then being operated with the consent of the first defendant by the second defendant, Donald

Ross Stewart.

By their statement of defence, filed on July 13, 1979, the defendants admit the foregoing allegations, but deny that the accident caused injury, damage, or loss to the plaintiff.

The substantial defence raised is that the plaintiff's claim is statute barred. In para. 5 of their defence, the defendants specifically plead the Limitations Act, S.B.C. 1975, c. 37 [now the Limitation Act, R.S.B.C. 1979, C. 236]. The 1979 enactment made no significant change in the sections applicable to this case.

The parties have now applied to me under R. 39(22) for an order that "the following issues of law and fact be tried and determined alone and apart from all other issues of law and fact".

> " On the assumption that the motor vehicle accident in the action herein occurred near the village of Fraser Lake, in the Province of British Columbia, on the 24th day of July, 1976, and on the assumption that the plaintiff in the action herein issued a writ on the 8th day of September, 1978:
>
> 1. When were the identities of the defendants known to the plaintiff?
>
> 2. Is section 6(3) of the Limitation Act, R.S. B.C. 1979, ch. 236, applicable in the circumstances of this action to postpone the running of time with respect to the applicable limitations?
>
> 3. Has the limitation period in the action herein expired?"

The relevant statutory provisions are these.

Limitations Act:

> 3.(1) The following actions shall not be brought after the expiration of 2 years after the date on which

the right to do so arose;

(a) An action for damages in respect of injury to a person --- whether based on contract, tort, or statutory duty.

6. (3) The running of time with respect to the limitation periods fixed by this Act for an action

(a) for personal injury --- is postponed and time does not commence to run against a plaintiff until the identity of the defendant is known to him and those facts within his means of knowledge are such that a reasonable man, knowing those facts and having taken the appropriate advice a reasonable man would seek on those facts would regard those facts as showing

(j) that an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success; and

(k) that the person whose means of knowledge is in question ought, in his own interests and taking his circumstances into account, to be able to bring an action.

4. For the purpose of subsection (3)

(a) "appropriate advice", in relation to facts, means the advice of competent persons qualified in their respective fields, to advise on the medical, legal, and other aspects of the facts, as the case may require;

(b) "facts" include

(i) the existence of a duty owed to the plaintiff by the defendant; and

(ii) that a breach of duty caused injury, damage, or loss to the plaintiff.

5. The burden of proving that the running of time has been postponed under subsection (3) is on the person claiming the benefit of the postponement.

Supreme Court Rules

Rule 7 (10) is:

7. (10) A person carrying on the business in a name or style other than his own name may be sued in that name or style as if it were the name of a firm ---

The Interpretation Act, R.S.B.C. 1979 c. 206.

29. "person" includes a corporation ----"

8. Every enactment shall be construed as being remedial, and shall be given such fair large and liberal construction and interpretation as best ensures the attainment of its objects.

28. (3) In an enactment words in the singular include the plural, and words in the plural include the singular.

It is common ground that the writ of summons was issued more than two years after the occurence of the incident causing the injury. The onus is on the plaintiff to prove that the running of time has been postponed under s. 6(3) and s. 6(4) of the Limitation Act.

The writ should have been issued on or before July 24, to be within the two year limitation period. The writ issued on September 8, 1978, is prima facie out of time.

It is not in dispute that the plaintiff knew that the injuries he sustained in the accident gave him a cause of action within the limitation period. The case therefore differs from Grayson v. Canada Safeway Limited, [1981] 2 W.W.R. 321 (B.C.C.A.), cited by Mr. Byl, in which it was held that where the injury was fairly serious from the beginning, the time limit would not be extended simply because the injury was more serious than the plaintiff first thought.

The problem here involves the plaintiff's knowledge of the identity of the defendants. On this question the crucial date, therefore is September 8, 1976. Were the identities of the parties known to Mr. Kettlo by that date? It is conceded by defendants' counsel that if the plaintiff can discharge the onus cast upon him to establish that he did not know the parties against whom he had a

cause of action until after September 8, 1976, he is saved by the exceptions contained in ss.6(3) and 6(4).

Construing the difficult language of s. 6(3)(a) of the Limitation Act as best I can, it seems to me that the legislature intended to provide two separate escape hatches to a plaintiff suing in an action for personal injury.

Firstly, s.6(3)(a) imperatively states that the normal limitation period is postponed so that time does not commence to run against the plaintiff, until the identity of the defendant is known to him. Applying s. 28(3) of the Interpretation Act, it appears that where there is more than one defendant, the plaintiff must bring himself within s.6(3)(a) in respect of his knowledge of each defendant's identity. Then following the connective "and", appears the requirement, putting it compendiously, as to the facts giving rise to a claim. The plaintiff is required to sue in time if the facts, such as the seriousness of the injury, as in the Grayson case, should show, to a reasonable person, taking advise, a reasonable prospect of success.

The facts of a particular case may show that the plaintiff had a reasonable prospect of success in respect of his injury within the normal two-year limitation period. Even so, the plaintiff may have the benefit of the legislation if he can discharge the onus resting upon him under s. 6(5) as to identity. It appears that the burden under s.-s.(3) is one requiring him to prove a negative, namely, that he did not know the identity of the defendant. Section 6(3)(a) does not say that time does not commence to run against a plaintiff until the identity of the defendant is known, or ought to be known to him. It simply says "is known to him". It does not prescribe that he must show due diligence to ascertain such identity.

This question does not arise in the present case. I am not required to consider whether Mr. Ketlo exercised diligence, as this point has not been argued by counsel for the defendants.

I am asked to answer an uncluttered question of fact, namely having regard to the onus of proof, did he or did he not know the identities within the prescribed time. In other words when did the time commence to run? Has the plaintiff established to the court's satisfaction that he did not actually know the name of the defendant in time?

It is not a matter of a fact being knowable but known. The fourth definition of the word "know" in the Shorter Oxford English Dictionary is: "To be cognizant of (a fact); to apprehend with the mind to understand". Applying that definition, I think it is not a matter of half-knowing or perhaps knowing but of conclusively knowing so that it can be said that the plaintiff can safely bring a lawsuit against the proposed defendant.

In deciding the question, the section is of a remedial nature intended to allow a plaintiff to escape the rigours of the Limitation Act in a proper case. Accordingly I think that s.8 of the Interpretation Act applies. It requires that enactment shall be given such fair, large and liberal construction as best ensures the attainment of its objects.

On this trial of an issue the plaintiff undertook to satisfy the onus upon him by his own testimony and that of his daughter, Marlene George. The defendant called one witness, Mr. James Wilson Stewart, an I.C.B.C. adjuster.

No question of credibility arises. Mr. Ketlo impressed me as a completely honest, utterly guileless, and frank individual who was striving to recall the events to the best of his recollection,

and I have no reason to question the credibility of either Mrs. George or Mr. Stewart.

As stated, Matthew Ketlo is 59 years of age. He went to school at the Lejac Indian School and completed grade 7. He is able to read and write but that is about the extent of his educational equipment. He left school at 16, and went to work. He is now a tie hacker. He has always lived on the reserve. He has no knowledge of the intricacies of corporate ownership or of what is really meant by the word "corporation".

He testified that the man who gave him and his friend a ride on July 24, 1976, was driving a light brown coloured car. There is no evidence that he had any conversation with the driver as to his name or business. The driver, now admitted to be the defendant, Donald Ross Stewart, drove off the road. Mr. Ketlo was helped out of the car by a friend, whereupon he collapsed on the pavement. It was not made clear whether Stewart immediately left the scene, but in any event, the plaintiff never saw him or the car again. He says he got another ride back to the reserve. It is not at all clear whether this ride was by ambulance or by another vehicle. He could not move. He was taken by ambulance to the hospital in Vanderhoof. He remained in hospital until August 9, 1976. He says, and I find, that thereafter he was on medication for two to three months. I find that when he was discharged from hospital, he was aware of the fact that he was injured in a car accident and that he was, at that time, turning over in his mind, the possibility that, so far as his injuries were concerned, he had a cause of action against the driver whomever he might be. He assumed at that time that the driver was also the owner.

He resolved to pursue the matter on his own. He first

decided to talk to a Mr. Matthews, who was the ambulance driver who had taken him to hospital. A more sophisticated person may well have elected to seek legal assistance at that time, but I do not find it unreasonable that a man like Mr. Ketlo should start off his investigation in the way he did. He was entitled to seek information without spending money in his initial pursuit of it.

It is clear that Mr. Ketlo is not sure of the date on which he saw Matthews. During examination for discovery, it was put to him that he saw Matthews within one month of August 9, 1976. In reply he said that he was confused, and could not say for sure. The plaintiff's assertion that he was under medication at this time was not disputed by defendant's counsel. I agree with Mr. McSheffrey that it is therefore in order for me to infer that his thought processes at the time were somewhat hazy. The date might have been firmly established if Matthews had been called by one of the parties. No information was offered as to his availability or recollection, so the point has not been clarified.

In any event, I find on the plaintiff's evidence that I cannot be sure that the identity of the driver was actually made known to the plaintiff by Matthews. My impression was that he had a muddled recollection of his meeting with Matthews. He says, however, that he recalls that Matthews gave him a piece of paper. Rummaging through his memory in an attemtp to tell me, as honestly as he could, what had occurred at this meeting some six years ago, he said that he thought Matthews had given him a piece of paper which he thinks had on it the location of the accident and the name of the driver. But he did not testify as to when he saw that paper again. He said that he probably destroyed it. He did not say that he actually read the name on the piece of paper.

Mr. Byl submits that the plaintiff's own evidence of this meeting with Matthews firmly establishes that he knew the identity of the driver at some time prior to September 8, 1976.

I do not feel able to share counsel's confidence that such was the case. The fact is that on his further unchallenged testimony, the plaintiff went to the Royal Canadian Mounted Police detachment at Fraser Lake about one week after his talk with Matthews, for the purpose of continuing his investigation. In my judgment that was a continued quest for the name of the driver.

Perhaps Mr. Ketlo was not too astute in some areas, but in this instance, his mind, as unsophisticated as it may be, must have been riveted on this problem of ascertaining the name. If the paper did in fact, have written upon it the very information that he was seeking, it seems improbable to me that he would destroy it. It is far more likely that if, as he says, he destroyed it, he must have determined that whatever was written on it, was of no use to him. His daughter, Mrs. Marlene George, who appears to have been helping him, did not know the driver's name at this time.

Furthermore, there is a complete absence of evidence of any link existing between Matthews and the driver of the offending car. The ambulance driver, as is customary, arrived on the scene after the accident. His function was to attend to the injured man. According to ex. 1 the car was towed away, and there is no evidence that the driver was on the scene when the ambulance arrived. There is therefore no independent evidence that Matthews was even in possession of the driver's name, and I do not feel confident in making that assumption.

Why would Ketlo go to the police one week later if that paper had contained the driver's name? At all events, his attendance

at the proper police detachment which might be expected to clear the matter up, turned out to be an unfruitful mission. It is impossible to find, on Ketlo's evidence that the police gave him the driver's name.

There was put in evidence, a photocopy of the Fraser Lake R.C.M.P. detachment collision report form of the accident (ex. 1). This form gives the name of the driver as Donald Ross Stewart and it also shows the owner of the car in question to be Airways Rent-a-Car. It also shows that three persons were injured in the accident, but the list of injured does not include either the name of Matthew Ketlo or Donald Ross Stewart. However, it is clear on the evidence that the police did not give Mr. Ketlo a copy of this form. Furthermore, the plaintiff did not positively assert that the police verbally gave him the names.

The plaintiff next consulted a solicitor in January, 1977. Mr. Byl admits that it is probable that Ketlo did not know at that time the name of the driver or that the owner was D.S.C. Leasing Company Ltd.

The plaintiff next attended at the local office of the Insurance Corporation of British Columbia (I.C.B.C.) where he had an interview with Mr. James Wilson Stewart, of the Prince George I.C.B.C. office, who conducted business in Vanderhoof once a week. The interview between Mr. Stewart and the plaintiff took place on May 7, 1977. Mr. Stewart testified on behalf of the defendant. He processed a claim for the plaintiff (ex.3) It appears that Mrs. George was with the plaintiff on that occasion. He testified that on that date Mr. Ketlo did not know the name of either the driver or the owner. Nor did Mr. Stewart.

Notwithstanding this evidence, given by a witness for the

defendants, Mr. Byl submits that I should ignore it, and find that the time commenced to run when the plaintiff interviewed Matthews. At the same time, he asks me to accept the evidence of the adjuster, Mr. Stewart, which I do. In regard to Stewart's evidence, Mr. Byl does concede that there are "numerous indications" that on May 5, 1977, Ketlo did not know the name of the driver.

To treat these separate pieces of evidence in the way suggested by counsel, means that I must find that Ketlo knew the driver's identity at the time he spoke to Matthews but had forgotten it by the time he spoke to Stewart. But that is not the evidence. It was not put to Ketlo during cross-examination that he once knew the name but had forgotten it.

In dealing with evidence, I think it is right to have regard to the particular makeup, astuteness, and condition of a witness in searching for the truth.

Having regard to this particular plaintiff, and to the circumstances, I simply say that I cannot be sure that he had actual knowledge of the identity of the defendant driver at the time he saw Matthews. I therefore hold that the time did not commence to run against him at that time in respect of the defendant driver.

As to the owner Mr. Byl submits that I should find that when the plaintiff saw the R.C.M.P. he knew that the owner was identified to him as Airways Rent-a-Car, and that under Rule 7(10) the plaintiff could have sued that entity, since clearly the D.S.C. corporation carried on business under the firm name of Airways Rent-a-Car. Even assuming that the date of his appearance at the R.C.M.P. office was prior to September 8, 1976, I find on the evidence that the police did not give him the form with the name of Airways-Rent-a-Car written thereon. I further find that it is not certain on the

evidence that the police verbally furnished the plaintiff with the names of either the owner or the driver.

On the whole of the evidence, I find that the plaintiff has discharged the onus of proof placed upon him by s. 6(5) of the Limitation Act in respect of both defendants, and that he is entitled to the benefit of the Limitation Act in regard to postponement of the running of time. Question numbered 2 is accordingly answered in the affirmative. Question numbered 3 is answered in the negative. As to question number 1, I do not think I am required to answer the question in the form in which it is presented. Having regard to the language of s.6(3)(a) of the Act I find that the identity of each defendant was not known to him and that time did not commence to run against the plaintiff until after September 8, 1976.

F.S. Perry
Local Judge of the
Supreme Court

Prince George, B.C.
January 27, 1983