

SUPREME COURT OF YUKON

Citation: *Cherepak v. Jane Doe*, 2019 YKSC 17

Date: 20190328
S.C. No. 15-A0057
Registry: Whitehorse

BETWEEN

RICHARD CHEREPAK AND YOLANDE CHEREPAK

PLAINTIFFS

AND

JANE DOE, LINDA POWERS, WILLIAM PETRIE and
SEABOARD LIQUID CARRIERS LIMITED operating under the name and style of
WIEBE TRANSPORT AND THE SAID SEABOARD LIQUID CARRIERS LIMITED

DEFENDANTS

Before Madam Justice E.M. Campbell

Appearances:

Debra L. Fendrick

Counsel for Richard and Yolande Cherepak

Counsel for William Petrie and

Seaboard Liquid Carriers Limited

Ward A. Hanson

Counsel for Jane Doe

R. Justin Matthews

Counsel for Linda Jean Powers and

Michael J. Percival

the Estate of Brendan Kinney

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiffs applied to have the estate of Brendan Kinney added as a defendant to their claim. They also applied to amend their Statement of Claim, as set out in their Notice of Application. Derrick Gibbons, the plaintiff in a separate but related action, also filed an application to have the estate of Mr. Kinney added as a defendant to his claim. I heard the two applications at the same time. I granted both applications with reasons to follow. Here are my reasons in relation to the application of Mr. and Mrs. Cherepak.

FACTS

[2] The plaintiffs' claim relates to a motor vehicle collision that occurred on or about August 9, 2014, in Whitehorse, Yukon.

[3] The plaintiffs are the parents of Clare Cherepak, one of the three passengers who was in a car driven by Jane Doe when it collided with a semi-tractor at the intersection of the Alaska Highway and the South Access Road.

[4] Brendan Kinney and Derrick Gibbons were the other two passengers of the car at the time of the collision.

[5] Sadly, Ms. Cherepak and Mr. Kinney died as a result of the collision.

[6] The plaintiffs, as parents of the deceased, Ms. Cherepak, filed a Statement of Claim pursuant to the *Fatal Accidents Act*, R.S.Y. 2002, c. 86, on July 17, 2015, and a first amended Statement of Claim on August 5, 2015, both within the one-year limitation period provided by s. 8(4) of the *Fatal Accidents Act*.

[7] There were four named defendants to their action: Jane Doe, the driver of the car; Linda Powers, the registered owner of the car; William Petrie, the driver of the semi-tractor; and Seaboard Liquid Carriers Limited operating under the name and style of Wiebe Transport, the owner of the semi-tractor.¹

[8] This file is being case managed together with three other separate claims filed in relation to the motor vehicle accident:

- *Derrick Gibbons v. Jane Doe et al.* (File 16-A0069)
- *William Petrie v. Jane Doe et al.* (File 16-A0070)

¹ The Defendants Petrie and Seaboard Liquid Carriers Limited operating under the name and style of Wiebe Transport and the said Seaboard Liquid Carriers Limited were removed as defendants as per the Order of Madam Justice Campbell dated December 13, 2018.

- *Seaboard Liquid Carriers Limited v. Jane Doe et al.* (File 17-A0068)².

[9] Mr. Kinney was the son of Linda Powers, one of the named defendants to this action and sole registered owner of the car involved in the collision.

[10] The estate of Mr. Kinney is already a named defendant in the *William Petrie* and the *Seaboard Liquid Carriers Limited* actions.

[11] According to the proposed amended Statement of Claim, Brendan Kinney was entrusted with the car involved in the collision by Linda Powers and/or was a beneficial owner of the car. Brendan Kinney consumed drugs and alcohol prior to entrusting the car to Jane Doe and prior to acting as a co-driver to Jane Doe. Further, he knew or should have known that Jane Doe was incompetent, lacked appropriate training, was under the influence of drugs or alcohol, or would be otherwise reckless in the operation of the car.

ISSUES

[12] I decided in the related *Gibbons* action that a judge in the Yukon has a limited discretion to grant an amendment to add or substitute a party to an existing claim after a limitation period has expired if special circumstances exist.

[13] The only issue remaining in this matter is whether the estate of Mr. Kinney should be added as a defendant to the plaintiffs' claim. If so, should it be with leave to the proposed defendant to plead a limitation defence at trial?

POSITIONS OF THE PARTIES

[14] At the outset of the hearing, the plaintiffs stated that they were no longer relying on the discoverability principle for the purpose of this application. The plaintiffs are not

² A Notice of Discontinuance was filed on March 22, 2019, on this matter.

conceding that discoverability is unavailable to them in this case, however they asked this Court to make a determination based on the assumption that the relevant limitation period has expired.

[15] The plaintiffs submit that they are statutory beneficiaries of statutory damages provided by the *Fatal Accidents Act* as a result of the death of their young daughter at the scene of the motor vehicle collision.

[16] The plaintiffs submit that they commenced their action within one year of the death of their daughter, as per the *Fatal Accidents Act*, against all known potential tortfeasors identified at the time: Jane Doe, the driver of the car, Linda Power, the sole registered owner of the car, William Petrie, the driver of the semi-tractor, and Seaboard Liquid Carriers Limited, the owner of the semi-tractor.

[17] The plaintiffs submit that there has been timely notice to the proposed defendant as a result of the the estate of Mr. Kinney being named in two related actions, the *Petrie* and *Seaboard Liquid Carriers Limited* actions.

[18] The plaintiffs also submit that there is a clear relationship and interest, as well as a substantial connection, between their existing action against Linda Powers and the proposed action against the estate of Mr. Kinney. They further submit that there is a lack of inordinate delay considering the complex nature of this litigation and the several related actions. According to the plaintiffs, the material facts in relation to a claim of negligent entrustment only became clear through documentary discovery as well as the examinations for discovery that took place in September 2017, well after the expiry of the limitation period. The plaintiffs finally submit that, most importantly, there is an absence of any real prejudice to the proposed defendant as opposed to the undoubted

prejudice they will suffer if the estate of Mr. Kinney is not added as a defendant to their claim.

[19] According to the plaintiffs, the evidence filed in support of their application meets the special circumstances exception. The estate of Mr. Kinney should therefore be added as a defendant to their claim.

[20] The plaintiffs rely on the affidavit of Lorna Hutchinson, a paralegal employed in the plaintiffs' counsel firm, in support of this application.

[21] The proposed defendant and Ms. Powers, who are represented by the same counsel, oppose the plaintiffs' application. They submit that the plaintiffs failed to meet their evidentiary burden in this case. There is no affidavit from the plaintiffs and/or their counsel. There is no evidence with respect to what the plaintiffs knew and when; whether or not the plaintiffs passed the information they had to their counsel and, if they did, when; and whether or not they could have added the estate of Mr. Kinney to their claim prior to the expiration of the one-year limitation period but chose not to. As a result, there is no evidence upon which this Court can assess whether special circumstances exist. They also submit that the addition is sought more than one year after the expiry of the limitation period under the *Fatal Accidents Act*. In such cases, prejudice to the proposed defendant is presumed. The proposed defendant and Ms. Powers submit that this Court should therefore dismiss the application based on the absence of critical evidence and the presumed prejudice to the proposed defendant. In the alternative, the proposed defendant and Ms. Power submit that this Court may allow the addition with leave to the new proposed defendant to advance a limitation defence at trial. The other defendants did not take position regarding the plaintiffs' application.

The special circumstances exception

[22] In *Walbaum and Walbaum v. G. & R. Trucking Ltd.*, [1983] S.J. No 1126

(S.K.C.A.), the Court of Appeal of Saskatchewan listed a number of observations for judges to consider in determining whether special circumstances exist in a given case that warrant granting an application for a change (addition or substitution) of parties despite the expiry of a limitation period. They are as follows:

[27] ...

1. A bona fide error by a plaintiff whose intention was to sue a person in a particular capacity (e.g. the owner of the car involved in a collision), is a factor favouring the application.
2. The exercise by the plaintiff of a deliberate choice of several known alternatives (and thereby arriving at the name of one defendant) is fatal to the application; conversely, the availability to the plaintiff of only one known defendant is a factor favouring the application.
3. The misnomer of the defendant in the sense that the plaintiff has chosen to sue the right person (and the proposed amendment does not involve the addition or substitution of a different and new party) but then has proceeded to mis-describe him (e.g. by using the wrong Christian name) is a factor favouring the application.
4. The misnomer of the defendant in the sense that the plaintiff unwittingly has chosen to sue the wrong person (and the proposed amendment involves the addition or substitution of a different and new party), but there is a clear relationship in interest, or a substantial connection between the original and the proposed defendant (e.g. an erroneous use of the name of an individual instead of a company substantially owned or controlled by the individual), is a factor favouring the application.
5. An attempt at substituting one party for another, who is unrelated in interest and unconnected to the first

party and who has received an untimely notice of the litigation, is a factor fatal to the application.

6. Conduct by the proposed defendant, or his agent, that results in an inducement of the plaintiff's error is a factor favouring the application.
7. Inexcusable negligence by the plaintiff, or his agent, as a cause of the error, is a factor that militates against, but not necessarily fatal to, the application.
8. Inexcusable delay in applying for the amendment is a factor that militates against, but is not necessarily fatal to, the application.
9. An untimely notice to the proposed defendant of the litigation, or the plaintiff's intention to involve the proposed defendant, thereby causing substantial prejudice to (the defence limitation period aside), or a misleading of, the proposed defendant, is fatal to the application.

[23] The absence of actual prejudice, apart from the right to rely on a statute of limitations, is also an important consideration; one that favours granting the application:

[28] ... How does one give effect to the purpose of the statutory limitation periods and at the same time give effect to the purpose behind the power of amendment? The purpose of the limitation periods is twofold. Firstly, they secure the defendant by enabling him to rely on the fact that he no longer will have to preserve or seek out evidence to defend claims against him. Secondly, they protect the defendant from economic and psychological insecurity that results from the possibility that contingent claims may be asserted by legal action and may disrupt his finances, affect his business and social relations. The purpose behind the power of the amendment is to correct an injustice that would otherwise ensue as a result of a mistake, often of an informational or procedural nature, and usually made unwittingly and not by the person most likely to suffer, that is, the litigant. ... The Canadian courts, on the other hand – particularly as demonstrated in the most recent cases – have sought to balance the two principles of law involved here and have perhaps adopted a more evenhanded approach. In so doing, they have been more lenient in allowing amendments

where no real prejudice resulted to the opposite party (apart from the right to rely on the statute of limitations) but at the same time, have been careful not to unfairly attenuate the exacting force of the limitation periods. That approach, in my respectful view, is the right one. (*Walbaum*) (my emphasis)

ANALYSIS

[24] I agree with counsel for the proposed defendant and Ms. Powers that, in most cases, an affidavit from the plaintiff and/or his or her counsel will be necessary to provide a sufficient evidentiary basis upon which a judge may exercise his or her limited discretion to grant a change of party after the expiry of the applicable limitation period(s) based on special circumstances.

[25] However, in the particular circumstances of this case, I find that the affidavit of Ms. Hutchinson, along with the procedural history of the plaintiffs' claim and the related actions provide a sufficient basis to make a determination.

[26] In her affidavit, Ms. Hutchinson indicates that the plaintiffs filed their Statement of Claim seeking damages pursuant to the *Fatal Accidents Act* on July 17, 2015.

[27] The affidavit of Ms. Hutchinson refers to and includes a copy of the Motor Vehicle Accident System Report as well as the Certificate of Registered Ownership for the car involved in the collision. These documents identify Jane Doe as the driver of the car and Linda Powers as the sole registered owner of the car.

[28] Ms. Hutchinson indicates in her affidavit that the plaintiffs also filed an action against their own insurance company in the event the car involved in the accident was found to be operated by an uninsured or underinsured driver.

[29] She also mentions that the plaintiffs amended their Statement of Claim on August 5, 2015, to correct the name of the defendant, Seaboard Liquid Carriers Limited.

[30] She states that there was a case management conference in this proceeding on September 1, 2015. The matter was adjourned for one year and then adjourned generally on August 23, 2016, pending a case management conference of all actions arising out of the accident.

[31] Ms. Hutchinson further indicates that the plaintiffs' amended Statement of Claim was renewed for one year on June 20, 2016. No appearances or Statements of Defence had been filed in the other related actions by that date.

[32] The affidavit does not reveal when the plaintiffs' Statement of Claim was served on the named defendants. However, the affidavit reveals that an appearance was entered for Jane Doe on March 24, 2017, together with a Statement of Defence.

[33] It also reveals that an appearance was entered for Linda Powers on April 19, 2017, followed by a Statement of Defence on May 4, 2017.

[34] The affidavit of Ms. Hutchinson also indicates that the examinations for discovery of the parties in the multiple actions arising out of the accident took place in Vancouver in September 2017.

[35] Finally, the affidavit of Ms. Hutchinson includes excerpts of the examinations for discovery of Jane Doe and Linda Powers.

[36] The proposed defendant and Ms. Powers submit that there is absence of evidence regarding what the plaintiffs knew and when, as well as what decisions they made based on the information they had. The proposed defendant and Ms. Powers also submit that knowledge by the plaintiffs of the involvement of Mr. Kinney prior to the expiry of the limitation period can be inferred from their Statement of Claim. According to the proposed defendant and Ms. Powers, the Statement of Claim already alleges,

among other things, that the collision was caused by the negligence of Ms. Powers, as owner of the car, by consenting to the use of the car while knowing, or having the means of knowing, that her son would allow others to drive the car.

[37] The concerns raised by the proposed defendant and Ms. Powers regarding the lack of an evidentiary record, while valid, fail to recognize the plaintiffs' situation in this matter. They are the parents of a young woman who tragically died in a motor vehicle accident. There is no suggestion that they were present when, or around the time when, the four young individuals decided to go for a ride in the car that collided with a semi-tractor on or about August 9, 2014. There is no suggestion that they have first hand knowledge of what happened.

[38] The Motor Vehicle Accident System Report, as well as the certificate of registered ownership of the car, attached to Ms. Hutchinson's affidavit, identify Jane Doe as the driver of the car and Linda Powers as the sole registered owner of the car. These documents do not mention Mr. Kinney nor do they disclose any arrangement between Ms. Powers and her son regarding the car involved in the collision.

[39] Jane Doe and Linda Powers were named as defendants in the plaintiffs' initial Statement of Claim. The driver and the owner of the semi-tractor, whose names appear on the Motor Vehicle System Accident Report, were also included as defendants in the plaintiffs' initial Statement of Claim.

[40] The claim against the family insurer together with the information contained in the two documents support the plaintiffs' submissions that they had, from the beginning, the intention to pursue a claim against all the owner(s) and all the individual(s) in control of the two vehicles involved in the collision.

[41] The plaintiffs submit that the matter before the Court is not a straightforward motor vehicle accident. It is complex litigation involving a number of related claims and a number of parties.

[42] The plaintiffs further submit that under a claim in negligent entrustment, liability can be established with respect to a person who supplies an item, here a motor vehicle, to another person who the supplier knows or ought to know because of youth, incompetence or otherwise, will use that item to cause harm to others (see *Palmquist v. Ziegler*, 2010 ABQB 337, at paras. 205 to 216).

[43] While the plaintiffs' Statement of Claim refers to the possible involvement of Mr. Kinney, the plaintiffs submit that the claim in negligent entrustment only materialized on or after the examinations for discovery of September 2017, subsequent to the limitation period expiring.

[44] The excerpts of the examinations for discovery of Jane Doe and Linda Powers, attached to Ms. Hutchinson's affidavit, support that submission. In the excerpts, Jane Doe indicates that Mr. Kinney told her about his new car the day of the accident; she indicates that they went for a spontaneous drive. She also indicates that Mr. Kinney was under the influence of alcohol and that he agreed to let her drive the car. She believes she was the most sober person at the time.

[45] Linda Powers indicated at her examination for discovery that Mr. Kinney had bought the car a few days before the accident. He had the car keys in his possession. The car was parked at his residence, located a few minutes away from Ms. Powers' house. She also stated that Mr. Kinney did not have a driver's licence at the time, he had a learner's permit. The car was registered in her name as she had registered it for

him. They had a discussion at the time he bought the car to the effect that while he had a learner's permit he could use the car for work and personal use as long as there was someone licenced in the vehicle. He would have full use of the vehicle once he had his driver's licence.

[46] On balance, I find that the evidence before me supports the plaintiffs' position that the elements of the claim in negligent entrustment against the proposed defendant and/or the facts related to Mr. Kinney being the beneficial owner of the car materialized when Jane Doe and Linda Powers testified at their respective examinations for discovery in September 2017.

[47] There is also a clear relationship in interest and a substantial connection between the original defendants, Ms. Powers and Jane Doe, and the proposed defendant, as it is alleged that Ms. Powers entrusted Mr. Kinney with the car or that he was the beneficial owner of the car. It is also alleged that, in that capacity, he entrusted Jane Doe with the car prior to the accident.

[48] While, based on the evidence before me, it cannot be said that Ms. Powers wilfully registered the car in her name in order to induce third parties in error; her action contributed to the confusion and to the plaintiffs' failure to name the estate of Mr. Kinney in their original Statement of Claim.

[49] The plaintiffs filed their application to add the estate of Mr. Kinney as a defendant in March 2018, six months or so after the examinations for discovery.

[50] Considering the number of claims bearing different limitation periods, the number of parties involved in this proceeding and the related proceedings, as well as the date of

the joint examinations for discovery ordered through case management, I do not find that there was undue delay in this matter.

[51] I also find that the proposed defendant cannot rely on untimely notice in this case due to the involvement of the estate of Mr. Kinney from the outset in two of the four related actions (*Petrie and Seaboard Liquid Carriers Limited*) and the fact that all related actions have been case managed together by the Court almost from their inception.

[52] The proposed defendant and Ms. Powers rely on the decision of the British Columbia Court of Appeal in *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297, at paras. 7 – 8, to submit that prejudice is presumed in this case because the addition is sought after the expiry of the limitation period plus the one-year period for service of a Statement of Claim on a Defendant. (Rule 5 of the *Rules of Court*).

[53] However, counsel for the proposed defendant acknowledged at the hearing that, except for the loss of the limitation period, he was not in a position to claim any actual prejudice, on behalf of the estate of Mr. Kinney, that could not be compensated by an award of costs. Counsel for the proposed defendant alluded, at the hearing of the application, to the possible need for discovery of the plaintiffs if the estate of Mr. Kinney is added as a defendant to the plaintiffs' claim.

[54] On the other hand, the plaintiffs will lose a possible cause of action if the addition were not granted.

[55] In this case, I find that the presumed prejudice arising from the passing of time since the motor vehicle accident and the expiry of the limitation period is diminished by the particular circumstances of this case for the following reasons. Firstly, as mentioned previously, the estate of Mr. Kinney is already a named defendant in the *Petrie* and the

Seaboard Liquid Carrier Limited actions, which relate to the same motor vehicle accident. Secondly, counsel for the proposed defendant is also counsel for Ms. Powers, who is a named defendant in all related actions. Counsel for the estate of Mr. Kinney has therefore been involved and is well aware of the developments in all related actions that are case-managed together. He also participated, on behalf of the proposed defendant, in the common examinations for discovery that took place in September 2017, even though he was not, in that capacity, an active participant in all the examinations for discovery that proceeded at that time (see *Zhu v. Aston Martin Lagonda Ltd.*, 2018 BCSC 46, at paras. 32 to 36).

[56] Based on the foregoing, I find that the estate of Mr. Kinney would not be prejudiced in a way that would impede its ability to properly defend its interests in this proceeding and that could not be compensated by an award of costs, if it were added as a defendant to the present action (*Amezcuva v. Taylor*, 2010 BCCA 128, at paras. 48 to 55).

[57] Overall, in light of the considerations listed in *Walbaum*, I find that the circumstances of this case favour the granting of the plaintiffs' application.

CONCLUSION

[58] I therefore grant the plaintiffs' application to add the estate of Mr. Kinney as a defendant to their claim and to amend their Statement of Claim accordingly.

[59] I do so without granting leave to the defendant to plead the limitation defence as I am satisfied that the evidence presented by the plaintiffs meets the special circumstances exception. As I indicated in my decision in relation to Mr. Gibbons' application, the purpose of the special circumstances exception is to afford judges a

limited discretion to grant an amendment to an existing action despite the expiry of a limitation period (*Walbaum*, supra, at para. 28). Granting the addition of a party under the special circumstances exception simply to have the issue litigated a second time at trial or on summary judgment under the discoverability principle would defeat the purpose of that exception.

[60] Costs may be spoken to if necessary.

CAMPBELL J.