

CANADA / JUDGMENT

Wells v. Wells

2023 BCSC 1922

COURT

Supreme Court of British Columbia

DECIDED

16 January 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 1922 Wells v. Wells

THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wells v. Wells,

2023 BCSC 1922

Date: 20230116

Docket: S1956892

Registry: Prince George

Between:

Yvette Loretta Marie Wells

Plaintiff

And

Casey David Wells, Insurance Corporation of British Columbia,

and Yellowhead Road & Bridge

Defendants

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

L.D. Karr (as Agent)

Counsel for Yellowhead Road & Bridge, Yellowhead Road & Bridge (Fort George) Ltd., and Yellowhead Road & Bridge (North Peace) Ltd.:

B. Black

No other appearances

Place and Date of Trial/Hearing:

Prince George, B.C.

January 16, 2023

Place and Date of Judgment:

Prince George, B.C.

January 16, 2023

- [1] THE COURT: When I issued these oral reasons for judgment, I reserved the right to edit them as to grammar, background and citations should a transcript be ordered. I have made such edits, without affecting the substance or final disposition.
- [2] The application before the Court today has somewhat evolved from what is contained in the original notice of application as filed. It is now an application to renew the notice of civil claim for six months and, if that application is granted, then to substitute the defendant through a misnomer in the style of cause. Neither party takes issue with those matters being resolved on this application.
- [3] The underlying action involves a motor vehicle accident which was a single vehicle collision in which the plaintiff was a passenger in a vehicle travelling on the highway near Bear Lake, which is alleged to have been covered in snow and ice. The accident occurred on January 25, 2018.
- [4] In error, one of the defendants was named as "Yellowhead Road & Bridge", which obviously is not a proper legal entity. While the operating trade name of various subsidiary and/or related companies is "Yellowhead Road & Bridge", there are various individual companies operating under that trade name which each have carriage of particular areas of which they work. The parties here agree that the area in issue is serviced by the company "Yellowhead Road & Bridge (Fort George) Ltd." ("Yellowhead Fort George").
- [5] In issue on this application is, really, the renewal of the notice of civil claim. If the notice of civil claim is renewed or ordered to be renewed, then Yellowhead Fort George does not take any issue on being substituted in place of the existing defendant under the misnomer.

Procedural Background

- [6] As noted, the accident occurred on January 18, 2018. Counsel that was retained initially by the plaintiff was a younger lawyer who was somewhat inexperienced. It is assumed that he used the trade name based upon his review of the website, without performing any corporate records searches or further inquiries to confirm that the proper legal entity was named.
- [7] Thereafter, there were changes in the counsel within the plaintiff's firm in terms of management of this particular file. The more senior lawyer who assumed conduct, quite simply, did not pay attention to the style of cause allowing the misnomer to stay in place with the fact that the named party was not a legal entity remaining unnoticed.
- [8] In addition, and what is likely the more practical reason why it remained unnoticed is that settlement discussions were being undertaken with the Insurance Corporation of British Columbia ("ICBC") directly, such that counsel was not concerning themselves too much with the pleadings or the status of the action.
- [9] Eventually, those settlement negotiations with ICBC came to an end towards the end of June, 2022, with the lawyer having conduct then realizing the error as he was scheduling examinations for discovery and noticed that no response had been filed on behalf of "Yellowhead Road & Bridge". As such, he looked into the matter, realized it had not been served, and that the defendant had not been properly identified.
- [10] Shortly thereafter, on July 27, 2022, that counsel sent a letter to Yellowhead Fort George's registered and records office to advise them of the claim, and the intention to make the amendments as sought to correct the misnomer. This apparently did not come to Yellowhead's Fort George's attention. Yellowhead Fort George's representative deposes that they did not receive the letter. Instead, they learned it upon receiving these application materials, which were filed and served in around the first week of October 2022. The matter did not come on for hearing until today due to scheduling issues, including with counsel's own schedules and calendars.
- [11] Neither party is taking any issue with respect to the time between October 2022 and today.
- [12] Discoveries were then adjourned, with the action being paused. Discoveries remain to be conducted, and no trial date has been set, meaning that, if the action is renewed and Yellowhead Fort George substituted, it will not be coming into the action without having the opportunity to participate in those particular steps of the litigation.
- [13] The plaintiff has sworn an affidavit personally deposing that she relied on her counsel at all times to properly perfect and advance her claim.

Legal Framework

- [14] The application for renewal of the notice of civil claim is brought under R. 3-2(1):

(1) An original notice of civil claim does not remain in force for more than 12 months, but if a defendant named in a notice of civil claim has not been served, the court, on the application of the plaintiff made before or after the expiration of the 12 months, may order that the original notice of civil claim be renewed for a period of not more than 12 months.

[15] In *Fast Fuel Services v. Michelin North America (Canada) Inc.*, 2008 BCCA 216 ("Fast Fuels") at para. 9, the court reviewed the leading authorities for renewal of claims, including *Bearhead v. Moorhouse*, 1977 CanLII 346 (BCSC) and confirmed that the factors that govern such an application are:

- 1) was the application brought promptly;
- 2) did the defendant have notice of the claim;
- 3) has the defendant suffered prejudice;
- 4) is the failure to serve due to the fault of the defendant; or
- 5) was the failure to serve due to the fault of the plaintiff or his solicitor?

[16] These factors are not exhaustive. For example, on a renewal application, the plaintiff must establish that the pleadings disclose a cause of action: *Seeliger v. Eagle Ridge Hospital*, 2007 BCCA 582 ("Seeliger"), at para. 33. The defendant does not argue that the pleadings here do not disclose a cause of action.

[17] The overriding principle, however, as noted in *Sutherland v. McLeod*, 2004 BCCA 653 at para. 28, is to see that justice be done.

[18] The parties do not disagree as to the test in this respect. I will deal with the various factors in turn.

Was the application brought promptly?

[19] Counsel for the applicant argues that the consideration of delay is to be measured from when it is noted that the claim has lapsed. They argue that from learning that there had not been proper service, which was determined at the same time that the misnomer was noted, they took prompt steps. In particular, they immediately wrote to Yellowhead Fort George and provided a copy of the claim, notwithstanding that the letter seems to have not formally reached its target.

[20] As noted, the accident happened in January 2018. The notice of civil claim was filed November 1, 2019, with it then lapsing to November 1, 2020. The error was noted June 2022, with the letter to Yellowhead Fort George being written a month later, and the application then filed by October 5, 2022.

[21] The four months between June and October 2022 is not a significant period of time. The defendant does not take any particular issue that this application was not brought in a sufficiently timely manner.

Did the defendant have notice of the claim?

- [22] The applicant acknowledges that the defendant did not have any notice of the claim until July or October 2022, that being four and a half years after the accident happened.
- [23] However, I note that the limitation period expired January 2020, meaning that if the plaintiff had waited until the last possible moment to have filed the claim, that claim could have been held until January 2022, taking into account the one-year extension of time as a result of the suspension of such time limits under the Emergency Program Act, R.S.B.C. 1996, c. 111, enacted to address COVID-19 issues. As such, the defendant's knowledge of this claim is some seven to 11 months later than the outside time it could have had notice in the ordinary course.

Has the defendant suffered prejudice?

- [24] The parties disagree as to what the test is in terms of prejudice, and who bears the onus to establish such prejudice.
- [25] It is of note that this case involves a renewal after the two-year limitation period, plus the time for service, which this court has confirmed is generally the period in which it is not to be assumed that there is prejudice, such that actual prejudice must be established, as noted in *Stuart v. Patterson*, 2010 BCSC 1236.
- [26] The applicant relies upon *Fast Fuel* at para. 21 where the court noted as follows:
- [21] The force of that statement may now be somewhat tempered by other considerations but, in my view, where a defendant has notice of an action within the time prescribed by the Rules for service of a writ, only a compelling case of prejudice should defeat its renewal, unless perhaps the plaintiffs' conduct in causing the delay is so egregious a refusal to renew can be justified. This is not a compelling case of prejudice caused by delay in the relevant period if it is any case at all.
- [27] Here there was no notice of the action within that three, or even four year extended, period. That the defendant had notice of the action within that period was a significant qualifier made by the court in *Fast Fuel*.
- [28] Similarly, in *Seeliger* while the court noted at para. 39 that delay, per se, generally does not equate with prejudice, noting that for such a delay to be prejudicial it must impair the defendant's ability to mount an adequate defence.
- [29] In *Amezcuca v. Taylor*, 2010 BCCA 128 ("*Amezcuca*"), another case relied upon by the applicant, there was a considerable delay, one that was well past the limitation and service time period. Specifically, the MVA in issue there was in October 1999, and the initial application to add the Minister as a party was brought in August of 2008.

- [30] At para. 48, the court affirmed that chambers judge statement that actual or presumed prejudice is that which would affect the ability of the defendant to respond to the claim. However, at para. 51 the court confirmed that the onus was on the Minister, as the proposed party to be added, to demonstrate with evidence that it will suffer actual prejudice, concluding at para. 55 as follows:
- [55] In balancing the prejudice, there was, as I have noted, no evidence from the Minister as to actual prejudice. That left the chambers judge to consider presumed prejudice. The presumed prejudice to the plaintiff after the expiry of a limitation period was the inability to pursue the claim in a separate action. The prejudice to the Minister was the loss of "a windfall opportunity to avoid entirely any potential liability" for a claim that the law considers actionable: see *Weinlich v. Campbell*, 2005 BCSC 1865, 32 C.P.C. (6th) 18, at para. 55, which refers to the statement by Master Bolton in *Takenaka v. Stanley*, 2000 BCSC 242, 91 B.C.L.R. (3d) 179, that "[a] right to seek justice cannot fairly be equated with a right to cut short the search without an answer."
- [31] The defendant relies on various decisions such as *Minter v. Reeves*, 1979 CanLII 479 (BCCA) at para. 11, where the court noted that it was not clear that there was any such onus on the appellants to demonstrate injustice or prejudice, but that they can rely upon the prejudice that necessarily follows from a long delay.
- [32] The court there went on further to note that the object of the rules is as to a speedy and inexpensive determination of matters, which supports the conclusion that delays ought not be countenanced, particularly long ones such as in the case at bar.
- [33] In *Davies v. Bakk*, 2002 BCSC 1605 at para. 23, the court commented upon the prejudice from an eight-year delay, that being that the plaintiff's witnesses would have been consulted over that period of time, such that the incident, in that case a hockey altercation during a penalty filled game, may be fixed in their minds, whereas it would not for the defendants, given that the defendants would not have made the same inquiries with the witnesses. In *Davies*, the plaintiff there argued that was incremental prejudice, with the court finding at para. 25 that they were satisfied that they could infer incremental prejudice as a result of delay, referencing *Minter*.
- [34] In *Swetlishnoff v. Swetlishnoff*, 2011 BCSC 1257 at para. 41, the court confirmed that it was not required to make a particular finding of prejudice, but could conclude that the defendants were likely prejudiced by what was, in one action a three-year delay and five-year delay in a second action. However, there were references there to actual prejudice at para. 41:
- [41] I am not required to make a finding of particular prejudice, but I do conclude that it is likely that the defendants are prejudiced by a three- and five-year delay. Marie Swetlishnoff is now 89 years of age. She receives dialysis three times per week. Clearly she is in frail health. Increased age and ill health may reduce her ability to remember facts to defend these actions. These actions involve contributions which date back 40 years. Mr. Swetlishnoff, the

plaintiff, has not provided any details of his contribution. Entitlement to an interest in the property is not conceded. Everyone's memory may have been clearer five years ago.

- [35] In *Mountain-West Resources Ltd. v. Fitzgerald*, 2005 BCCA 48 ("Mountain-West") at para. 13, the court noted as follows:
- [13] In my opinion, the delay in this case is inadequately explained and is inexcusable. The authorities say that in circumstances such as exist in this case, prejudice to the defendant is to be presumed. In addition, there is evidence here of actual prejudice - discarded documents, faded memories, and ageing witnesses.
- [36] The applicant notes that the accident was investigated by the RCMP such that in their argument, Yellowhead Fort George cannot point to any actual prejudice arising from the delay from January 2021 and today that would prevent it from mounting any defence. It is notable that the delay period to be considered in determining prejudice is from that point in time, not one from when the claim arose. As such, in order to establish prejudice, whether it be presumed or actual, the court must consider it in the context of that time period; i.e. from January 25, 2021 until the application being filed in October 2022.
- [37] Yellowhead Fort George argues that there is evidence of actual prejudice. In particular, there were six Yellowhead Fort George employees that were working in the service area at the time, two of whom have now left; one of whom left in 2018. I note however, that a 2018 departure was prior to the limitation and service period expiring. As such, any prejudice suffered from an employee leaving during that period is not the result of the delay in service. Notably, the deponent did not say when the other employee left. As such, I do not consider that the employees leaving, or potential loss of their evidence, is evidence of prejudice as a result of the delay by the plaintiff.
- [38] The other evidence as to prejudice was that the remaining employees do not remember the conditions on the day of the accident, although it is not clear if they would have remembered three years after the accident either.
- [39] More notably is that one of the employees who was a road superintendent believes he did attend at the scene, based on his review of time cards, which note his attendance at a motor vehicle accident in that area around the same time. However, he specifically deposes that he has no memory of the accident itself.
- [40] In addition, the evidence of the general manager and of the road superintendent support that there are relevant documents needed to mount their defence that are no longer available.
- [41] In particular, Yellowhead Fort George has not been able to locate any incident report with photographs, despite that their practice is to photograph the scene and complete an incident report for any such attendance.

- [42] The evidence of the superintendent is that he would have expected that anyone attending would have done so, as that is their ordinary course of practice. As such, they conclude that the records appear to have either been discarded or misplaced due to the passage of time.
- [43] Yellowhead Fort George's general manager also deposes that once notified of an accident that gives rise to any potential claim, they immediately take steps to identify and preserve evidence. They say that they did not get notice of this claim. As such, there was no steps taken to preserve and identify any evidence that may have existed. Quite simply, they do not assume that every accident that occurs on a highway they service gives rise to a claim, because they do not. As such, it is the act of giving notice of a claim that puts them on alert that they should preserve and protect that evidence. Given that they had no notice here, that was not done.
- [44] Yellowhead Fort George argues that the conclusion of the court in Mountain-West is applicable here given that they were precluded from taking the necessary steps from being able to preserve memories and documents given the lack of notice.
- [45] In response, the applicant argued that this is not evidence of prejudice after the limitation and service period, because there is no specific evidence of when the documents may have been discarded or even that they were definitively created at all in the first place.
- [46] The problem I have with the applicant's argument is that it is somewhat circular, in that if the defendant does not remember the incident or remember specifically discarding of documents relating to it, a failing that is inherently due to the passage of time, then they could never be in a position to establish prejudice. That could put the threshold as to proof of prejudice to a level that in most cases would be impossible to meet, as it requires proof of a negative.
- [47] Here, they are relying on their ordinary business practices as evidence that any documents, if they existed, would not have been retained. In this respect, I note the comments of the court in *Belknap v. Meakes*, 1989 BCJ No 2187, as follows:

If a person can say of something he regularly does in his professional life that he invariably does it in a certain way, that surely is evidence and possibly convincing evidence that he did it in that way on the day in question.

Wigmore on Evidence, vol. 1A (Tillers rev. 1983), states that there is no reason why habit should not be used as evidence either of negligent action or of careful action (para. 97), and that habit should be admissible as a substitute for present recollection. Phipson on Evidence, 13th ed. (1982), paras. 9-22, reaches a similar conclusion.

Similar reasoning admits evidence of a general course of business, a question dealt with by the New Brunswick Court of Appeal in *Medical Arts Ltd. V. Minister of Municipal Affairs* (1977), 1977 CanLII 2293 (NB CA), 17 N.B.R. (2d) 147 at p. 152, 23 A.P.R. 147

[48] The applicant also argues that not all evidence is lost, given that the police investigated the accident and that police reports still exist. In other words, the applicants argue that the defendants will not suffer prejudice from a delay in not knowing the claim existed against them, because that investigation occurred regardless of their knowledge.

Is the failure to serve due to the fault of the defendant, or the plaintiff or his solicitor?

[49] The plaintiff concedes that the fault here is that of her counsel. There is no suggestion that this arises as a result of the fault of the defendant.

[50] However, counsel for the plaintiff argues that the failure of the plaintiff to ensure that their claim is preserved should not be visited upon the plaintiff themselves, relying on *Shinatani v. Tang*, 2017 BCSC 1938, for the proposition that where a delay is attributable to the litigant's solicitor not the litigant himself, there should be some accommodation made. However, that proposition does not equate to a finding that if there is fault of the solicitor, the application should go as a matter of course.

What are the overall interests of justice?

[51] As has been noted, if the refusal to renew the writ or the notice of civil claim will do a substantial injustice, the claim should be renewed.

[52] The applicant argues that the failure to ascertain that the claim had lapsed in a timely manner was due to counsel's failure, which should not be held against the plaintiff, particularly given that, the plaintiff argues, actual prejudice has not been established to the extent that it would justify the injustice to the plaintiff in having its claim denied at this stage.

[53] In *Amezcu*, despite considerable delay there, the court noted at para. 59 that the counsel's approach was not "dilatory", in the sense that the failure to promptly address the need to renew the claim was not done as a means of "gaining time" but rather due to an expectation of settlement.

[54] The materials here show that there was a similar expectation, given the ongoing discussions with ICBC, such that I agree with the applicant that the failure to act quickly here was not the type of delay that constitutes or was the result of fault or faulty strategy, as opposed to mistake.

Conclusion and Order

[55] As no single factor is determinative, I must consider all of the factors and come to a conclusion that is in the overall interests of justice.

[56] I do have significant concerns regarding the potential prejudice to Yellowhead Fort George given its evidence as to likely loss of documents, and incremental prejudice as a result of the potential of memories having faded, as referenced in *Davies*.

- [57] The ability of Yellowhead Fort George to defend this claim will be negatively affected by the loss of documents. In this respect, I am satisfied that they have established that there is actual prejudice to them. The fact that there may be alternative documents, such as those found in the police report, is not an answer that adequately responds to the evidence that their business records no longer exist.
- [58] While, as noted, they cannot say definitively when those documents may have been lost or that they were definitively created, I consider the evidence of their ordinary business practices and find that it is not in the overall interests of justice to allow a claim to proceed against them when the ability to defend themselves has been imperilled as a result of the delay in being notified of this claim against them.
- [59] As such, I do not find that it is in the interests of justice to allow this claim to be renewed for the purposes of pursuing Yellowhead Fort George.
- [60] The application is dismissed with costs to Yellowhead Fort George.
- [61] CNSL L. KARR: Thank you, I am sorry, before we conclude this, may I also suggest that the other outstanding orders that are not opposed by ICBC or Yellowhead [indiscernible].
- [62] THE COURT: Sorry, I thought you were not pursuing them because they were not issues. What are the other ones?
- [63] CNSL L. KARR: Sorry [indiscernible].
- [64] THE COURT: I do not have the notice of application in front of me.
- [65] CNSL L. KARR: I'll pull it up in front of you. So what we were seeking is that the notice of civil claim be renewed. Obviously Your Honour has given your order on that. Basically [indiscernible] to amend the notice of civil claim in the form that was attached, and it's [indiscernible].
- [66] THE COURT: Well, that is to change it to Yellowhead, to use the proper --
- [67] CNSL L. KARR: No [indiscernible] that was one of the aspects, but the other one [indiscernible] --
- [68] THE COURT: It is 12:47 -- I do not have time this afternoon to continue this matter. I made that clear at the outset.
- [69] CNSL L. KARR: There was a bunch of things against the defendant, Mr. Wells, but -- and he's aware of this application, as ICBC [indiscernible] they take no position against those. So while I understand [indiscernible] no party takes any issue with anything else that we're seeking, other than this renewal issue.
- [70] THE COURT: Well, I cannot give leave to file a form of amended claim that I do not have before me, and includes other amendments, as the court record will not be able to identify what the amended pleadings are going to be.

- [71] CNSL L. KARR: Well, submitted with our application was an amended -- a draft amended notice of claim.
- [72] THE COURT: Yes, but aren't the amendments changing -- substituting a party. So how can I record for Madam Clerk what amendments are being made, so that this order could be made?
- [73] CNSL L. KARR: I suppose [indiscernible] happened is that if we didn't succeed in the [indiscernible] claim, obviously the renewal -- there were very few amendments that relate to my friend's application [indiscernible].
- [74] THE COURT: Let me read it . Okay, I think we can do it this way. I will make the order that the notice of civil claim can be amended based on the amendments in the attachment to the notice of application, but only as noted in paragraphs 10, 11, 12, 17, 18, 20, and 21, and not with the substitution of the defendant or the amendment in paragraph 5.
- [75] CNSL L. KARR: I think that's it. Your Honour, I think that covers it. Basically what we are not seeking any longer, obviously, is to change [indiscernible] --
- [76] THE COURT: To have the matter changed to substitute the name of the defendant or making amendments to paragraph 5.
- [77] CNSL L. KARR: Yes, and I apologize for not making that clear before. I was trying to [indiscernible] --
- [78] CNSL L. KARR: Thank you, Your Honour.
- [79] THE COURT: And costs will be due to Yellowhead Fort George. Thank you.
- [80] CNSL L. KARR: Thank you, Your Honour.
- "Master Robertson"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/19/2023BCSC1922.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/wells-v-wells-2023>

Prepared on 25 October 2026 · Esheria