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Settlement letter didn't imply liability, court of appeal rules

JILLIAN KESTLER-D'AMOURS

A recent Court of Appeal of British Columbia ruling on whether settlement negotiations can be considered an acknowledgement of liability has reaffirmed the importance of labelling all settlement communications, according to experts in the field of civil litigation.

The central issue raised in *Trombley v. Pannu* 2016 BCCA 324 was whether an insurer investigating a slip and fall incident had admitted liability in letters sent to the plaintiff to discuss a settlement, even though these letters were marked "without prejudice."

An acknowledgement of liability would have triggered a provision in the two-year statute of limitations in B.C. and given the plaintiff more time to file a claim, explained David Outerbridge, a lawyer at Torys LLP.

"What struck me the most was that what seemed to me to be a fairly obvious without prejudice settlement discussion might ever be thought of as being an admission of liability," Outerbridge said.

According to the facts of the case, John Trombley slipped and fell on the stairs outside the property he rented from the defendants, landlords Gurnake Singh Pannu and Ranjit Kaur Pannu, in July 2012.

In August 2013, Trombley's lawyer notified the defendants that he would be pursuing a claim for damages against them and about a month later, their insurance adjuster wrote to Trombley to inform him that she had begun an investigation into the matter.

After seven months spent looking into the claim, the adjuster wrote a "without prejudice" letter to the appellant's counsel to discuss a settlement and notifying them that the two-year limitation period was nearing its expiration.

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But those discussions never took place and Trombley filed a notice of civil claim three weeks after the limitation period expired. Trombley's lawyer argued that the letter from the insurer was an acknowledgement of some liability, thus freezing the limitation period.

The Court of Appeal dismissed the plaintiff's appeal, agreeing with the Supreme Court of British Columbia's previous ruling that the letters did not constitute an acknowledgement of liability.

"While an invitation to engage in settlement discussions may be an acknowledgment of the claimant's cause of action, it does not follow in every case that it is impliedly an acknowledgment of some liability," the Court of Appeal wrote in its decision.

The court referenced a Supreme Court of Canada ruling [*Ryan v. Moore* 2005 SCC 38], which established a test to determine whether words or actions can be interpreted as an acknowledgement of liability.

In other words, communications can be judged as acknowledging liability if "a reasonable person looking at this [would] recognize it as an acknowledgement of liability," explained Barry Cox, a civil litigation expert at Boghosian + Allen LLP.

Cox said a ruling in favour of the plaintiff in *Trombley* would have made defendants in future cases wary since a letter discussing settlement terms before a claim is issued could, in effect, "be used against you in the event the limitation period is ultimately missed."

"If the case had been decided any other way, it would inject a lot more uncertainty into things with respect to limitation periods," Cox said.

Michael Dew, a lawyer at Jenkins Marzban Logan LLP, said the most interesting issue raised by the case was one that the court did not address: whether a party can rely on without prejudice communications to prove an extension of the limitation period.

Different courts have come to different decisions in this regard, Dew said, and the debate "is still up in the air."

In this case, the defendants may have been sufficiently confident in the content of the letters that they did not feel the need to get into the admissibility argument, Dew explained.

Otherwise, Dew said they could have relied on *Farrell v. Tisdale* 1987 B.C.J. No. 1652 and *Canada (Attorney General) v. Forsberg* [1996] B.C.J. No. 2659 to argue the communication could not be shown to the court "because it's a without prejudice communication, which is covered by settlement privilege and therefore is not admissible for any purpose."

Ultimately, the trial judge and court of appeal judges only examined the letters' contents.

"It's really just a question of looking at the content of the statement that was made by the defendants and then asking whether that is sufficiently convincing to constitute an admission of some liability," Dew said.

Shantona Chaudhury, a lawyer at Pape Barristers, said the court's decision protects the ability of defendants to settle claims without acknowledging that they've done anything wrong. This is especially important in the insurance industry, she said.

"It would be pretty drastic if the rule was, the second you start talking about settlement, the limitation period no longer runs. No one would talk about settlement, and settlement is something that the courts try to encourage," Chaudhury said.

Corrections

In *Legal woes taking toll, report says* on pages 1-10 of the Aug. 19, 2016 edition of *The Lawyers Weekly* the acronym for the Canadian Forum on Civil Justice was incorrectly transcribed. The correct abbreviation is CFCJ.

In *Face in crowd takes on new, more sinister meaning* on page 5 of the Aug. 12, 2016 edition of *The Lawyers Weekly*, Regan Morris was incorrectly quoted. His correct quote is, "Facial recognition technology has the potential to erode the ability to remain anonymous in public places."