SUPREME COURT OF YUKON

Citation: *Gibbons v. Jane Doe*, 2019 YKSC 16

Date: 20190328
S.C. No. 16-A0069
Registry: Whitehorse

Between

Derrick Gibbons

Plaintiff

And

Jane Doe,
Linda Jean 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:

Vince G. Critchley	Counsel for the plaintiff
Ward A. Hanson	Counsel for William Petrie and Seaboard Liquid Carriers Limited
R. Justin Matthews	Counsel for Jane Doe
Michael J. Percival	Counsel for Linda Jean Powers and the Estate of Brendan Kinney

REASONS FOR JUDGMENT

INTRODUCTION

[1] The plaintiff applied to have the estate of Brendan Kinney added as a defendant in this proceeding. He also applied to amend his statement of claim, as set out in his notice of application, accordingly. Richard and Yolande Cherepak, the plaintiffs in a separate but related action, brought pursuant to the *Fatal Accidents Act*, R.S.Y. 2002, c. 86, also filed an application to have the estate of Brendan Kinney added as a

defendant to their 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 Mr. Gibbons' application.

The plaintiff's claim

[2] The plaintiff's claim relates to a motor vehicle collision that occurred on or about August 9, 2014, in Whitehorse, Yukon. The plaintiff was one of three passengers 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. The plaintiff claims damages in relation to injuries he allegedly suffered as a result of the collision.

[3] Brendan Kinney and Clare Cherepak were the other two passengers of the car at the time of the collision. Sadly, Mr. Kinney and Ms. Cherepak died as a result of the collision.

[4] Brendan Kinney was Linda Jean Powers' son. Ms. Powers was, at the time of the events, the sole registered owner of the car involved in the collision. Ms. Powers is already a named defendant in this matter.

[5] The plaintiff filed his Statement of Claim on July 25, 2016, against four defendants: Jane Doe (the driver of the car at the time of the collision), Linda Jean Powers (the registered owner of the car), William Petrie (the driver of the semi-tractor involved in the collision), and Seabord Liquid Carriers Limited carrying on business as Wiebe Transport's (the owner of the semi-tractor)[1]. The Statement of Claim was filed within the two-year limitation period prescribed by s. 2(1)(d) of the *Limitation of Actions Act*, R.S.Y. 2002, c. 139.

[1] A Notice of Discontinuance was filed in this matter on December 10, 2018, regarding the following defendants: William Petrie and Seaboard Liquid Carriers Limited.

[6] The plaintiff turned 19 years of age, the age of majority in the Yukon, on January 9, 2015.

[7] Three other separate claims where filed in relation to this motor vehicle accident:

- *Richard Cherepak and Yolande Cherepak v. Jane Doe et al.* (File # 15-A0057);
- *William Petrie v. Jane Doe et al.* (File # 16-A0070);
- *Seaboard Liquid Carriers Limited v. Jane Doe et al*. (File 17-A0068)[2].

[8] All matters are being case managed together by the Supreme Court of Yukon and are proceeding alongside one another.

[9] The proposed new defendant, the estate of Brendan Kinney, is already a named defendant in the *Petrie* and the *Seaboard Liquid Carriers Limited* actions.

[10] According to the proposed amended Statement of Claim attached to the plaintiff's Notice of Application, Brendan Kinney had either been entrusted with the car that was involved in the collision by his mother, and/or was a beneficial owner of that car. Mr. Kinney had consumed drugs and alcohol prior to entrusting the car and acting as a co-driver to Jane Doe. Further, Mr. Kinney entrusted the car to Jane Doe when he knew or should have known that she lacked training, was not a competent driver, was under the influence of drugs or alcohol or was otherwise reckless in the operation of the car.

ISSUES

[11] The issues before the Court are the following:

1- Is the addition of a party to an existing claim after the expiry of the limitation period permitted in the Yukon? If so, what is the legal test?

2- Should the estate of Brendan Kinney be added as a defendant in this matter?

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

POSITIONS OF THE PARTIES

[12] The plaintiff submits that s. 17 of the *Judicature Act*, R.S.Y. 2002, c. 128, does not bar the addition of parties to an existing claim even after the expiry of the limitation period. The plaintiff submits that the "just and convenient" test set out in Rule 15 of the *Rules of Court of the Supreme Court of Yukon* for the addition of a party to an existing claim continues to apply even in situations where the addition is sought after the expiry of the limitation period. The plaintiff also submits that Yukon courts have consistently applied the "just and convenient" test when exercising their discretion to add parties to an existing statement of claim. According to the plaintiff, it would not be logical to limit the application of the "just and convenient" test to cases where the addition is sought within the limitation period when, in those cases, an applicant could instead simply choose to commence a separate action. The plaintiff further submits that the facts of this case clearly meet the "just and convenient" test.

[13] In the alternative, the plaintiff submits that the common law special circumstances exception is applicable to cases where the addition of a party is sought after the expiry of the limitation period. The plaintiff's submission relies on the fact that other jurisdictions have continued to apply the special circumstances test despite the enactment of provisions similar to s. 17 of the *Judicature Act*. The plaintiff submits that there are special circumstances in this case that warrant granting the addition of the estate of Mr. Kinney as a defendant in this proceeding. The plaintiff further submits that no party will be prejudiced if his application is granted.

[14] The estate of Mr. Kinney, the proposed new defendant, and Ms. Powers, who are represented by the same counsel, oppose the plaintiff's application. They agree with the plaintiff that the Supreme Court of Yukon has jurisdiction to add parties and allow

amendments to pleadings even after the expiry of the limitation period. However, they submit that the plaintiff has not met his evidentiary burden to justify adding the estate of Mr. Kinney as a party to this matter. In the alternative, if the Court were satisfied that the estate should be added as a defendant, it should be with leave to the proposed defendant to plead a limitation defence. The other named defendants did not take position regarding the plaintiff's application.

ANALYSIS

1. Is the addition of a party to an existing claim after the expiry of the limitation period permitted in the Yukon? If so, what is the legal test?

The Law

[15] Rule 15(5) of the *Rules of Court* provides for the addition of a party at any stage of a proceeding on the basis of the "just and convenient" test:

> (a) At any stage of a proceeding, the court on application by any person may
>
> …
>
> (ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party, and
>
> (iii) order that a person be added as a party where there may exist, between the person and any party to the proceeding, a question or issue relating to or connected
>
> (A) with any relief claimed in the proceeding, or
>
> (B) with the subject matter of the proceeding,
>
> which, in the opinion of the court, it would be just and convenient to determine as between the person and the party. (my emphasis)

[16] Rule 15 is silent on the issue of time limitations. Read on its own, Rule 15 could be interpreted as providing that the "just and convenient" test applies to all ongoing civil litigation in the Yukon whether a limitation period has expired or not.

[17] However, s. 17 of the *Judicature Act* specifically addresses the scope of permissible amendments to pleadings in an existing action in the Yukon:

> When an action is brought to enforce any right, legal or equitable, the Court may permit the amendment of any pleading or other processing therein on any terms as to costs or otherwise as it considers just even though, between the time of the issue of the statement of claim and the application for amendment, the right of action would, but because of action brought, have been barred by the provisions of any statute or Act, if the amendment does not involve a change of parties other than a change caused by the death of one of the parties.

[18] A narrow interpretation of this provision arguably leads to the conclusion that the court's jurisdiction to grant a change of party after the expiry of the limitation period is limited to cases involving the death of one of the parties.

[19] The plaintiff submits that the *Rules of Court* are not subject to the *Judicature Act* and that the "just and convenient" test continues to apply to an application for a change of party even after the limitation period has passed.

[20] The plaintiff's argument is rooted in an amendment to s. 38 of the *Judicature Act* that was assented to on December 15, 2008. The amendment removed from s. 38 all references to the use of the *British Columbia Supreme Court Rules* in Yukon proceedings. The expression "Subject to" was also removed at the same time.

[21] Prior to the December 15, 2018 amendment, s. 38 read as follows :

> Subject to this and any other Act, the Rules of the Supreme Court of British Columbia in force from time to time shall, mutatis mutandis, be followed in all causes, matters, and proceedings, but the judges of the Court may make rules of

> practice and procedure, including tariffs of fees and costs in civil matters and fees and expenses of witnesses and interpreters in criminal matters, adding to or deleting from those rules, or substituting other rules in their stead. R.S., c.96, s.37.

[22] Section 38 now reads:

> The Commissioner in Executive Council may, on the recommendation of the judges, prescribe rules in relation to the practice and procedure of and in the Supreme Court in all civil proceedings.

[23] The plaintiff submits that, as a result of the amendment, the *Rules of Court* are no longer subject to the *Judicature Act*, and more specifically to s. 17 of the *Judicature Act*.

[24] However, the expression "subject to" in s. 38 prior to its amendment was clearly aimed at qualifying the extent to which the *British Columbia Supreme Court Rules* were to apply in the Yukon. They were to be subject to the Yukon legislative regime.

[25] The amendment to s. 38 did not alter the wording of s. 2 of the *Judicature Act*, which continues to provide that a judge shall exercise his or her jurisdiction with regard to procedure and practice in the manner provided by the *Judicature Act* and the *Rules of Court*. Section 38 simply provides for the enactment of rules of practice and procedure by the court.

[26] Consequently, the *Rules of Court* and the provisions of the *Judicature Act* must continue to be read and interpreted together. As Justice Maddison stated in *Lebel v. Roe*, [1993] Y.J. No.49, at para. 6, the *Judicature Act*, being statute law, prevails over the *Rules of the Court*. Rule 15 must therefore be interpreted in a manner that is consistent and does not interfere with the provisions of the *Judicature Act*, and more particularly s. 17 of the *Judicature Act*.

[27] A consistent reading of both provisions provides that s. 17 does restrict the application of the "just and convenient" test set out in Rule 15 to cases where the change of party is sought before the expiry of the limitation period, or when discoverability remains an arguable issue to be determined at trial (*Carreck v. VLB Resource Corp*., 2001 YKCA 3, at para. 13).

[28] Having said that, this Court must also consider whether the enactment of s. 17 had the effect of abrogating the pre-existing common law in the Yukon regarding the addition or substitution of a party to an ongoing proceeding after the limitation period has passed.

[29] In *Carreck*, the Court of Appeal of Yukon was seized with a matter that involved the interpretation of s. 17 in the context of a claim arising out of the death of the plaintiff's father in a motor vehicle accident. In that case, the plaintiff first sought to be appointed administrator of his late father's estate. The plaintiff then sought to have his father's estate, as represented by him in his capacity as administrator, added as a plaintiff to his action. The plaintiff also applied to add a new claim under the *Survival of Actions Act*, R.S.Y. 2002, c. 212, for loss of future earnings by the estate, to his existing action for damages for wrongful death under the *Fatal Accidents Act*, R.S.Y. 1986, c. 64. The plaintiff was essentially attempting to commence a new claim on behalf of a new plaintiff, after the limitation period had passed, through an amendment to his existing statement of claim. The chambers judge relied on Rule 15(5) to grant the application. The appeal proceeded on the basis that the chambers judge had granted the amendment without deciding the limitation issue. The Court of Appeal upheld the chambers judge's ruling and left the limitation issue to be decided at trial on grounds of discoverability. The Court of Appeal did so on the basis that:

> [13] Postponement of a limitation period on grounds of discoverability has not been codified by statute in the Yukon and remains a common-law issue. In my view, the Yukon law is not so clear on the authorities that the limitation defence must succeed. I think it remains an arguable issue to be determined at trial. …

[30] It is in that context that the Court of Appeal commented on the scope of s. 17 as follows:

> [7] Section 17 is more limited in its scope than s. 4 of the B.C. statute, as Mr. Justice Maddison noted in *Lebel v. Roe*, [1993] Y.J. No. 49 (Y.T.S.C.). In the Yukon an amendment does not overcome the limitation defence if it involves "a change of parties other than a change caused by the death of one parties. …

[31] The Court of Appeal went on to state that British Columbia's jurisprudence on the issue of permissible amendments to a claim after the limitation period has passed needed therefore to be considered with caution (para. 9).

[32] Discoverability was the issue at the center of the appeal in *Carreck*. For that reason, the Court of Appeal did not have to consider whether the enactment of s. 17 displaced any existing common law rule applicable to cases seeking a change of parties after limitation periods have passed, without relying on discoverability, as it was not necessary to dispose of the appeal.

[33] In *Lebel*, a change of parties based on discoverability was also the issue to be decided. Justice Maddison therefore did not have to address the interaction of s. 17 with the common law outside the issue of discoverability.

[34] Discoverability is not an issue in this case. Without conceding that the discoverability rule is unavailable to him in the circumstances of this case, the plaintiff has asked this Court to decide his application on the basis that the limitation period has expired.

[35] There are no decisions in the Yukon that specifically address the impact and interaction of s. 17 with a judge's common law jurisdiction in cases involving a change of parties, other than in cases of death, after the expiry of the limitation period.

[36] The plaintiff relies on *Walbaum and Walbaum v. G. & R. Trucking Ltd*., [1983] S.J. No 1126 (S.K.C.A.), to submit that the enactment of s. 17 did not displace the common law, which permits, in special circumstances, a change of parties to an existing claim after the expiry of a limitation period.

[37] In *Walbaum*, the Court of Appeal had to determine whether s. 44(11), of the *Queen's Bench Act*, R.S.S., 1978, c. Q-1, had the effect of abrogating the common law in Saskatchewan and prohibiting any amendment that involved a change of parties, except through death, after the limitation period had passed:

> [12] The wording of Rule 11 makes it necessary to distinguish between an application for an amendment (as contemplated by the Rule) that involves no change of parties, except through death, and one that does (either through substitution or addition). It is clear that in the first situation, the judge now has an unfettered statutory discretion to grant the amending order. Such discretion, of course, is to be exercised judicially. It is not clear whether in the second situation the enactment has abrogated the common law to prohibit absolutely the granting of the amendment, or whether the common law continues to apply. In the present case, we are concerned with the second situation, and it is therefore necessary first to determine what is the common law in relation to those situations, and secondly, whether Rule 11 has abrogated or altered the common law.

[38] The wording of s. 44(11) quoted at para. 11 in *Walbaum,* was almost identical to s. 17 of the *Judicature Act*. It provided that:

> [11] Where an action is brought to enforce any right, legal or equitable, the court may permit the amendment of any pleading or other proceeding therein upon such terms as to costs or otherwise as it deems just notwithstanding that,

> between the time of the issue of the writ and the application for amendment, the right of action would, but by reason of action brought, have been barred by the provisions of any statute; provided that such amendment does not involve a change of parties other than a change caused by the death of one of the parties.

[39] The Court of Appeal concluded that the wording of s. 44(11) did not expressly abrogate the common law in relation to such amendments and that, consequently, the common law rule still applied (para. 34).

[40] The origin of statutory provisions such as s. 17 of the *Judicature Act* and former s. 44(11)[3] of the *Queen's Bench Act* can be traced back to the common law, which they altered, and more specifically to the decision of Lord Esher in *Weldon v. Neal* (1887), 19 Q.B.D. 394. What is known as the Weldon rule provides that judges should not permit amendments to an existing claim that would result in the addition of a cause of action barred by a statute of limitations (*Walbaum*, at paras. 9 to 11).

[41] In *Onishenko Estate v. Quinlan*, [1972] S.C.R. 380 (also referred to as *Basarsky v. Quinlan*), the Supreme Court of Canada recognized that the Weldon rule also carries a special circumstances exception, which gives judges a limited discretion to grant an amendment to add a cause of action despite the expiry of a limitation period.

[42] In *Walbaum*, the Court of Appeal recognized that, in Saskatchewan and in other jurisdictions in Canada, the application of the Weldon rule had been extended to cases where a change of parties to an existing action was sought after the expiry of a limitation period. The Court of Appeal went on to state that the extension of the Weldon rule meant that its special circumstances exception also applied to those cases.

[3] Section 44(11) of the *Queen's Bench Act* was later amended to lower the threshold to be met in order to add or substitute a party after the expiry of a limitation period (*Stockbrugger Estate v. Wolfe Estate*, [1987] S.J. No. 323.

[43] The Court of Appeal therefore concluded that s. 44(11) did not abrogate the courts' discretion to grant a change of party to an existing claim after the expiry of a limitation period pursuant to the special circumstances exception to the Weldon rule.

[44] In reaching its conclusion, the Court of Appeal stated:

> [29] Does the common law, as it developed in Canada to date respecting amendments in situations involving a change of parties, apply to Saskatchewan notwithstanding s. 44 Rule 11, of the Queen's Bench Act? As noted, before the enactment, the common law gave the judge a restricted discretion to grant amendments in situations not involving a change of parties and the same restricted discretion in situations involving a change of parties. The enactment sought to change the common law by extending the judge's restricted discretion to give him a new unfettered discretion, but in the proviso went on to limit the exercise of this new extended discretion to those situations not involving a change of parties. The proviso does no more than say: "Nothing in the main part of this rule shall be deemed to apply to situations involving a change of parties."
>
> It does not say:
>
> "Nothing in the law as expressed here or elsewhere shall be deemed to give a judge any degree of discretion where an amendment involves a change of parties."
>
> [30] The intent of the proviso was to limit the extention [as written] of the discretion introduced by the enactment, but not to abrogate the restricted discretion that was there before the extension was made. If the effect of the enactment had been to invest a judge with discretion for the first time rather than extend a discretion he already had, the contention that no discretion whatever was intended by the proviso in situations involving a change of parties would have had considerable force.
>
> …
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> [34] It follows from the foregoing analysis that the enactment did not alter the common law in relation to amendments involving a change of parties.

[45] I find the analysis in *Walbaum* compelling.

[46] There is no legal precedent in the Yukon that specifically addresses the application of the Weldon rule in the Yukon[4]. Based on *Basarsky* and *Walbaum*, I see no reason why the Weldon rule and its special circumstances exception should not apply in the Yukon in cases where the amendment sought (after the expiry of the limitation period) is a change of party.

[47] Considering the striking similarities between the wording of s. 17 and s. 44(11), I conclude that the reasoning of the court in *Walbaum* applies to the interpretation of s. 17. As the wording of s. 17 does not explicitly abrogate the common law, I find that judges in the Yukon have a limited discretion to permit a change of parties to an existing action, other than through death, after the limitation period has expired pursuant to the special circumstances exception to the Weldon rule.

The special circumstances exception

[48] In *Walbaum*, the Court of Appeal listed a number of observations for judges to consider in determining whether special circumstances exist in a given case that warrant granting the application for a change of parties despite the expiry of a limitation period. They are as follows:

> [27] …
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> 1. A bona fide error by a plaintiff whose intention was to sue a person in a particular capacity (e.g. the owner of a car involved in a collision), is a factor favouring the application.
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> 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

[4] There is no reported decision regarding the application of the Weldon rule in the Yukon. *Carreck* is the only reported Yukon decision that refers to *Basarsky*. However, in *Carreck*, the Court of Appeal of Yukon simply acknowledged that the parties had argued *Basarsky* on appeal (*Basarsky* was also mentioned in first instance). The Court of Appeal did not weigh in on its application to the Yukon.

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.

[49] The absence of actual prejudice, apart from the right to rely on the statute of limitations, is also an important factor to consider; 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)

2. Should the estate of Brendan Kinney be added as a defendant in this matter?

[50] The plaintiff filed an affidavit from his lawyer, Mr. Saro J. Turner, dated March 13, 2018, in support of his application. The plaintiff is represented by different counsel for the purpose of this application.

[51] Mr. Turner states in his affidavit that the plaintiff has not been in a position to provide much, if any, details to him about the circumstances surrounding the motor

vehicle accident due to his amnesia and to the mid to severe head injury he suffered as a result of the collision. Mr. Turner also indicates that, due to his medical condition, the plaintiff relied on him to make a number of procedural and tactical decisions in this matter. Mr. Turner acknowledges that, in retrospect, he had information that supported the addition of the estate of Mr. Kinney as a defendant before the expiry of the limitation period in this matter. However, he wanted to obtain more information about the circumstances surrounding the motor vehicle accident before making the application. It is only at, or soon after, the examinations for discovery of Jane Doe, Linda Powers and William Petrie, held after the expiry of the limitation period (the week of September 25 – 29, 2017), that his knowledge of Mr. Kinney's role in this matter crystallized.

[52] Mr. Turner also states that if there had not been so many parties and counsel from different parts of the country involved in this action and the related actions, which I note are case-managed together, then in the usual and ordinary course, he would have scheduled discovery sooner than three years after the incident.

[53] Counsel for the estate of Mr. Kinney acknowledges that Mr. Turner notified him of his intention to add the estate of Mr. Kinney as a defendant to the plaintiff's claim soon after the end of the examinations for discovery and within three years of the plaintiff turning nineteen.

[54] As mentioned, Mr. Gibbons turned 19, the age of majority in the Yukon, on January 9, 2015. Accordingly, the two-year limitation period that applies in his case expired on January 9, 2017 (ss. 2(1)(d) and 5 of the *Limitation of Actions Act*).

[55] The plaintiff also relies 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 no prejudice can arise before the expiry of the two years he had to file his Statement of

Claim plus the one year he had to serve his Statement of Claim on the proposed defendant (Rule 5 of the *Rules of Court*).

[56] The plaintiff submits that since Mr. Turner informed all parties, including the estate of Mr. Kinney, of his intention to add the estate prior to the expiry of that three-year period on January 9, 2018, the proposed defendant cannot rely on any presumed prejudice to oppose his application.

[57] Counsel for the proposed defendant acknowledged during the hearing that he could not rely on any presumed prejudice in this matter. Counsel for the proposed defendant also acknowledged that he was not in a position to claim any actual prejudice, except for the loss of the limitation period, on behalf of the proposed defendant that could not be compensated by an award of costs. Counsel for the proposed defendant alluded to the possible need for further examination for discovery of the plaintiff.

[58] I note that counsel for the proposed defendant is also counsel for Ms. Powers, who is a named defendant in all related actions. Also, as mentioned previously, the estate of Mr. Kinney is already a named defendant in the *Petrie* and *Seaboard Liquid Carriers Limited* 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 the examination for discovery of Mr. Gibbons.

[59] Based on the foregoing, I find that the estate of Mr. Kinney would not suffer any actual prejudice if it were added as a defendant to the present action.

[60] Also, based on the evidence before me, I find that this is not a case where the plaintiff made a deliberate choice of several known alternatives or chose not to add the estate of Mr. Kinney as a defendant in the first place for tactical reasons. Even though this is not a case of a misnomer *per se*, the evidence indicates that the plaintiff always intended to pursue a claim in damages against the owners, drivers and individuals in control of the two vehicles involved in the motor vehicle accident. Indeed, the Statement of Claim filed by the plaintiff named the drivers and the registered owners of both vehicles involved in the accident as defendants in this matter.

[61] Mr. Turner indicates in his affidavit that, in retrospect, he should have named the estate of Mr. Kinney in the plaintiff's Statement of Claim. Indeed, I note that in the *Petrie* and the *Seaboard Liquid Carriers Limited* related actions, the estate of Mr. Kinney, was named as a defendant within the prescribed limitation periods. While it would have been prudent to add the estate of Mr. Kinney at the outset considering the information that Mr. Turner had at the time, the facts set out in his affidavit do not demonstrate inexcusable negligence, which is a factor that would militate against, but not necessarily be fatal to the plaintiff's application. I agree with the plaintiff that Mr. Turner's actions and decisions in this matter can be characterized as an honest error in judgment. The plaintiff, who, due to his health, relied on his counsel to make decisions for him regarding a number of aspects of his court action should not be deprived of a possible claim against the estate of Mr. Kinney as a result of the honest error in judgment made by his counsel (see *Weinlich v. Campbell,* 2005 BCSC 1865, at paras. 51, 62 – 63).

[62] The plaintiff has also established that there is a connection between his existing claim, the named parties and the proposed new defendant, the estate of Mr. Kinney. The proposed amended Statement of Claim clearly sets out allegations to the effect that

Mr. Kinney was at least exercising some measure of control over the car registered under his mother's name prior to the accident and that Mr. Kinney may have consented to Jane Doe driving the car.

[63] Overall, in light of the considerations listed in *Walbaum*, I find that the particular circumstances of this case favour the granting of the plaintiff's application.

CONCLUSION

[64] I therefore grant the plaintiff's application to add the estate of Mr. Kinney as a defendant to his claim and to amend his Statement of Claim accordingly.

[65] I do so without granting leave to the defendant to plead the limitation defence as I am satisfied that the evidence presented by the plaintiff meets the special circumstances exception. The purpose of the special circumstances exception is to afford judges a limited discretion to grant an amendment despite the expiry of a limitation period (*Walbaum*, 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.

[66] Costs may be spoken to if required.

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CAMPBELL J.