Cassels

Know Your Limitations: The Law Of Misnomer Cannot Save Your Pleading

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Under the law of misnomer, correcting a party who has been misnamed or misdescribed is permitted, even where the limitation period to bring a claim has expired.[1] This type of amendment can be granted typically in two scenarios: one, where it is a case of true misnomer; and two, where the action was commenced against the original defendant *prior* to the expiry of the limitation period. It is the second situation that is of particular interest – specifically, in cases where a plaintiff is attempting to rely on the law of misnomer simply to get around a statute-barred claim.

Here is an example. A plaintiff commences a claim against a motor vehicle manufacturer for damages arising out of a motor vehicle accident well beyond the two year limitation period. The plaintiff subsequently learns that it sued the wrong manufacturer. The plaintiff brings a motion to substitute the named defendant manufacturer for the correct manufacturer on the basis of misnomer.

The above example is not the case of a classic misnomer involving a mere irregularity, such as a spelling mistake or a misnamed party. It is also not the case where the "litigation finger" was pointed at the named defendant manufacturer and the proper unnamed defendant manufacturer is attempting to avoid liability by relying on a technical defence under the *Limitations Act*.[2] Rather, this is a case where a plaintiff failed to exercise reasonable diligence *within* the two-year limitation period to identify any manufacturer, let alone the correct one. This is a tactic commonly used by plaintiffs in product liability cases to dodge the expiry of a limitation period.

Where leave is granted to correct a misnomer, such leave is granted on the basis that the claim was commenced by or against the misnamed party *within* the applicable limitation period.[3] Permitting amendments on the basis of misnomer after the passage of a limitation period requires the plaintiff's intention to name the correct party.[4] In such cases, the role of the court is to guard against a plaintiff using the doctrine of misnomer simply as a tool to avoid an expired limitation period. In *Brown-Vidal v John Doe*[5], the Divisional Court stated that "while the courts are prepared to override limitation periods where there has been a misnomer, the misnomer must be clear and the delay in discovering the identity of the tortfeaser must be explained."[6]

When facing a potential misnomer issue, defendant manufacturers need to investigate potential limitation period issues early and take action from the outset. The law of misnomer cannot be used to save a plaintiff's pleading where the plaintiff failed to exercise due diligence to identify the, or any, manufacturer, within the time required by the *Limitations Act*. (Click here to read more on the law of misnomer we

previously reported on back in November 2017.)

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[1] *Limitations Act, 2002*, SO 2002, c 24, Sched B, ss 21(1) & (2).
[2] See *970708 Ontario Inc v PCS Security Systems Inc*, 2014 ONSC 4433 at para 44, citing *Brand Name Marketing Inc v Rogers Communications Inc*, 2010 ONSC 2892 (Ont Master) at para 84 for an example of this scenario.
[3] *Corp of Township of North Shore v Grant*, 2018 ONSC 503 at para 35.
[4] *Patrick v Southwest Middlesex (Municipality)*, 2017 ONSC 17 at paras 27 and 46.
[5] 2016 ONSC 4359, at para 16.
[6] *Brown-Vidal v John Doe*, 2015 ONSC 3362 at para 58; affirmed 2016 ONSC 4359.

This publication is a general summary of the law. It does not replace legal advice tailored to your specific circumstances.