Cassels

It Had to Be You: A Primer on the Law of Misnomer

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We wanted to provide a primer, or reminder, on the law of misnomer, as this issue comes up a lot in product liability cases.

If the limitation period to bring a claim has expired, correcting a party who has been misnamed or misdescribed is permitted.[1] Motions to add defendants or correct names of parties are often brought under Rules 26.01 and 5.04(2) of the Ontario *Rules of Civil Procedure*.[2] Under Rule 26.01, the Court shall grant leave to amend a pleading on such terms as are just, ***unless prejudice would result that could not be compensated for by costs or an adjournment***. Under Rule 5.04(2), the Court is permitted to "add, delete or substitute a party" or "correct the name of a party incorrectly named," under the same terms.

Case law indicates that when "there is a coincidence between the plaintiff's intention to name a party and the intended party's knowledge that it was the intended defendant, an amendment may be made" even if the limitation period has passed.[3] However, every case of misnomer does not result in leave to amend. The Court retains residual discretion to refuse leave where non-compensable prejudice would result.[4] If the "litigation finger" is pointed at the defendant, it may be unjust to allow him or her to avoid liability by relying on a technical defence under the *Limitations Act, 2002*.[5]

The first step of the two-step test for misnomer is determining who the "litigation finger" is pointed at[6]:

How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "Of course it must mean me, but they have got my name wrong". Then there is a case of mere misnomer. If, on the other hand, he would say: "I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries", then it seems to me that one is getting beyond the realm of misnomer.[7]

A plaintiff's pleading will be viewed as reflecting a correctible "misnomer" in respect of a defendant where it is apparent: (1) that the plaintiff intended to name the defendant; and (2) that the intended defendant knew it was the intended defendant in relation to the plaintiff's claim. As previously indicated, such a misnomer can be corrected notwithstanding that it requires that the defendant be added to the litigation after the expiry of the limitation period.[8]

If it is a case of misnomer, the second question to answer is whether the Court should use its discretion under Rule 5.04(2).[9]

Plaintiffs and defendants alike must be mindful of the relationship between named parties and unnamed

parties. Parties, and defendants specifically, should review descriptions of parties to ensure that all defendants and their roles are accurately described. Importance of prejudice to the proposed substituted defendants is key.[10] A party denying that it is not the manufacturer is not sufficient; the party must indicate at whom the "litigation finger" is pointed, taking prejudice into account. For example, in *Mitusev v. General Motors Corp.*, it was "inconceivable" that the plaintiffs' solicitors did nothing to inform the true manufacturer of the recliner mechanism at issue.[11]

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[1] *Limitations Act, 2002*, SO 2002, c 24, Sched B, ss 21(1) & (2).
[2] RRO 1990, Reg 194.
[3] *Lloyd v. Clark*, 2008 ONCA 343 at para 4; *Bennett v JK (Jim) Moore Ltd.*, 2014 ONSC 2859 and *Ormerod v Strathroy Middlesex General Hospital*, 2009 ONCA 697.
[4] *Mazzuca v. Silvercreek Pharmacy Ltd.* (2001), 56 OR (3d) 768 (Ont. CA). Note that the special circumstances doctrine no longer applies under the Limitations Act, 2002 and since *Joseph v Paramount Canada's Wonderland*, 2008 ONCA 469 so we cannot rely on any special circumstances that would otherwise justify the amendment. This notion of prejudice is cited in case law as recent as 2016 i.e., *Fontanilla Estate v Thermo Cool Mechanical*, 2016 ONSC 7032.
[5] 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.
[6] *970708 Ontario Inc. v PCS Security Systems Inc.*, 2014 ONSC 4433 at para 55.
[7] *Davies v Elsby Brothers Ltd.*, [1960] 3 All ER 672 (Eng. CA); See also *Mohabir v Mohabir*, 2014 ONSC 5484 at para 13.
[8] *Stekel v Toyota Canada Inc.*, 2011 ONSC 6507 at para 24; *Bearss v Scobie*, 2013 ONSC 5910.
[9] *Ormerod v Strathroy Middlesex General Hospital*, 2009 ONCA 697 at para 28.
[10] *Bennett v JK (Jim) Moore Ltd.*, 2014 ONSC 2859.
[11] *Mitusev v General Motors Corp.*, 2005 CarswellOnt 4266 (Ont. SCJ) at para 24.
