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Misnomers and Misdescriptions: The "Litigation Finger Test" to the Rescue!

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In the last month, the Court of Appeal decided two cases based on the "litigation finger test". [1] The litigation finger test can assist a plaintiff in cases of misdescription or misnomer of a party. If the test is met, the plaintiff may be permitted to correct its mistake and "add" the intended person as a party (in correcting the name of the party incorrectly named), even after the expiry of the limitation period.[2]

The Litigation Finger Test

The original "litigation finger test" was formulated by Lord Devlin in *Davies v Elsby Brothers, Ltd.* He stated:

The test must be: 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.[3]

However, the law on this point has evolved since Lord Devlin's decision in *Davies*, and the current approach in Ontario has been summarized by the Court of Appeal as follows:

Where 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 despite the passage of the limitation period to correct the misdescription or misnomer.[4]

In applying the litigation finger test, the court is not limited to considering what the intended party would know, but may, in addition, consider the knowledge of the intended party's representatives (such as the party's insurer or lawyer) when they received the statement of claim.[5]

Even where the test is met, the court retains a residual discretion (under Rule 5.04(2) of the *Rules of Civil Procedure*) to refuse to permit the correction of the misnomer.[6] The Court of Appeal stated the following about the court's residual discretion:

[31] As I see it, as the scope of what the courts treat as a misnomer broadens, it is appropriate to take a wider view of the court's discretion to refuse the correction of a misnomer. A "classic" misnomer, one in which the claim contains a minor spelling error of the defendant's name and is personally served upon the intended but misnamed defendant, prompts the application of a standard historically developed to remedy mere irregularities. Now that the concept of "misnomer" has been broadened to apply to a wider range of situations, the standard used to permit its correction should take into account the extent of its departure from mere irregularity in all the circumstances of the case.

[32] The factors the motion judge applied in this case, whether the defendant was misled or was unduly prejudiced, are undoubtedly deserving of the greatest weight. As a general principle, these factors should be determinative. A general principle, however, is not an inflexible rule. Where the mistake in naming the defendant involves more than a mere irregularity or in any particular case with exceptional circumstances, the court may exercise its residual discretion under the rule to refuse to permit its correction. It may well be that the motion judge took a narrow view of his residual discretion to refuse to permit the correction of the misnomer. However, I am satisfied he realized he had a residual discretion since the factors he applied are broader than the rule's threshold of prejudice that cannot be compensated by costs or an adjournment.[7]

Recent Decisions of the Court of Appeal Applying the Test

In *Simmonds v G&G Pool Services*,[8] a decision released on September 20, 2018, the principal of the intended defendant, Garden City Inc, had reviewed the statement of claim and found a lawyer to defend the claim on behalf of the corporation that was incorrectly named as a defendant, 2286120 Ontario Inc. ("**228**"). The lawyer for 228 sent a letter to the plaintiff's lawyer two weeks before the possible expiry of the limitation period, stating that the wrong defendant had been sued and that the plaintiff had contracted with Garden City Inc. Even though the plaintiff had the opportunity to correct his mistake before the expiry of the limitation period, he did not do so.

The plaintiff's motion for leave to amend his statement of claim to substitute Garden City Inc. for 228 in the title of proceeding was dismissed at first instance. The Court of Appeal allowed the appeal. It found that the plaintiff had satisfied the litigation finger test. The plaintiff knew who the proper defendant was, which satisfied the first branch of the test. With respect to the second branch of the test, Garden City Inc. knew that it was the intended defendant. According to the Court of Appeal, this was clear from the letter from 228's lawyer advising the plaintiff's lawyer that the wrong defendant had been sued. According to the Court of Appeal, the only reasonable inference was that 228's lawyer had received that information from Garden City Inc.

In *Galanis v Kingston General Hospital*,[9] a decision released on September 27, 2018, the motion judge granted the plaintiffs leave to amend their statement of claim to substitute the names of three doctors for "Dr. John Doe Anesthesiologist" in the title of proceeding. In that case, a notice of action was served before the expiry of the limitation period, but the statement of claim was served after the limitation period expired.

The Court of Appeal dismissed the appeal. It stated:

Although the motion judge relied on allegations in the statement of claim, he made an alternative finding based upon the notice of action which was served within the limitation period. The motion judge concluded that the two appellant doctors would have known the litigating finger pointed at them based upon the allegations against Dr. John Doe Anesthesiologist in the notice of action, the medical records, and their status as anaesthesiologists at the relevant time (or, in Dr. Dodge's case, as a resident anaesthesiologist). This was a finding of mixed fact and law entitled to deference from this court absent error in principle or palpable and overriding error. We find no such error in the alternative finding. [10]

Earlier this year, the Court of Appeal also relied on the litigation finger test in *Bertolli v Toronto (City)*, a decision released on June 28, 2018.[11] In that case, the plaintiffs were seeking to substitute the Regional Municipality of York and Brennan Paving and Construction Ltd. for the originally named defendants, the City of Toronto and John Doe Maintenance Company, based on misnomer. The Court of Appeal held that the plaintiffs had failed to meet the litigation finger test, and that "the Master's inference that the substituted defendants would know they were the intended defendants was not available on any reasonable view of the evidence."[12] The Court of Appeal found that the Master had erred in assuming that the substituted defendants would have knowledge of a notice of claim delivered to them shortly after the alleged accident. Further, the Court of Appeal stated that even when read in combination, the notice of claim and the statement of claim were not capable of supporting an inference that the substituted defendants were the intended defendants because absent particulars of the precise location of the accident alleged in the

statement of claim, the reasonable reader could not know, without further inquiry, that the documents referred to the same accident.

Conclusion

It is obviously important for a plaintiff to sue the right parties and to make sure that the defendants are correctly described and named. As this is a basic rule, it is concerning that the Court of Appeal has had to deal with the litigation finger test in numerous decisions. However, to err is human and plaintiffs sometimes do not have all the necessary information at the beginning of a case to properly identify all defendants (such as in cases where pseudonyms are used to name certain defendants). Given this, the application of the litigation finger test ensures fairness. It only applies where a person knew that she was the intended defendant. Further, the court can exercise its residual discretion to refuse the correction of a misnomer when the intended defendant would be prejudiced or if allowing the correction would otherwise yield an unfair result.

In cases where pseudonyms are used or where there is doubt about the correct identity of defendants, plaintiffs should ensure, in order to meet the litigation finger test, that the allegations in the statement of claim are as particularized as possible so that the intended defendants or their representatives would know, when reading the claim, that the "litigation finger" is pointing at them.

[1] *Simmonds v G&G Pool Services*, 2018 ONCA 772 and *Galanis v Kingston General Hospital*, 2018 ONCA 786.

[2] Section 21 of the *Limitations Act, 2002*, SO 2002, c 24, Sched B, reads as follows:

Adding party

21 (1) If a limitation period in respect of a claim against a person has expired, the claim shall not be pursued by adding the person as a party to any existing proceeding.

Misdescription

(2) Subsection (1) does not prevent the correction of a misnaming or misdescription of a party.

[3] *Davies v Elsby Brothers, Ltd.,* [1960] 3 All ER 672 at 676 (CA). See also *Spirito Estate v Trillium Health Centre*, 2008 ONCA 762 at para. 12, and *Ormerod v Strathroy Middlesex General Hospital* (2009), 97 OR (3d) 321 at para. 11 (CA).

[4] *Ormerod v Strathroy Middlesex General Hospital* (2009), 97 OR (3d) 321 at para. 21 (CA); *Lloyd v Clark*, 2008 ONCA 343 at para. 4; *Simmonds v G&G Pool Services*, 2018 ONCA 772 at para. 2.

[5] *Ormerod v Strathroy Middlesex General Hospital* (2009), 97 OR (3d) 321 at paras. 24-25 (CA).

[6] *Ibid.* at paras. 28-30 (CA). See also *O'Sullivan v Hamilton Health Sciences Corporation (Hamilton General Hospital Division)*, 2011 ONCA 507.

[7] *Ormerod v Strathroy Middlesex General Hospital* (2009), 97 OR (3d) 321 at paras. 31-32 (CA).

[8] *Simmonds v G&G Pool Services*, 2018 ONCA 772.

[9] *Galanis v Kingston General Hospital*, 2018 ONCA 786.

[10] *Ibid.* at para. 2.

[11] *Bertolli v Toronto (City)*, 2018 ONCA 601.

[12] *Ibid.* at para. 5.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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