

CAN A PLEADING BE AMENDED BECAUSE OF A LAWYER'S MISTAKE?

By Bill McNally and Bottom Line Research & Communications ¹

A lawyer frequently finds him or herself in the position where he or she has made a mistake in the drafting of the pleadings and, consequently, seeks to have the pleadings amended. But is there a solid argument for amendment of the pleadings merely due to a lawyer's mistake?

There is not a lot of judicial discussion specifically on the point of "lawyer's mistakes". Rather, cases turn on the characterization of the type of amendment being sought. So, for example, courts look at whether the amendment adds a new cause of action, affects a third party, withdraws an admission, changes a name, substitutes a party, changes the amount stated in a prayer for relief, or pleads a statute, to name a few categories of amendments which courts have examined.

So, what can be said about amending lawyers' mistakes in pleadings?

The Supreme Court of Canada's decision in *Ladouceur v. Howarth* ² involved a situation where the plaintiff's lawyer mistakenly stated in his pleadings that the father involved in the motor vehicle accident was injured, not the son. Not until after the limitation period had expired did the lawyer realize his mistake and apply to amend his pleadings to substitute the son for the father. All of the lower courts denied the amendment, notwithstanding that they found his mistake to be *bona fide*.

The Supreme Court granted the application, allowing the lawyer to amend his pleadings. Spence J.A. relied on *Williamson v. Headley* ³ for the general principle: ⁴

...underlying all the cases...that the court should amend, where the opposite party has not been misled, or substantially injured by the error.

This general principle was unanimously applied by the Ontario Court of Appeal in *Mazzuca v. Silvercreek Pharmacy Ltd.*,⁵ a case in which the plaintiff's lawyer had mistakenly named the plaintiff in her personal capacity when the proper thing to have done was to name her corporation. The lawyer sought an amendment in her pleadings, although the limitation period had expired.

Specifically on the point of mistake, the majority decision per Cronk J.A. emphasized that there was:

...no evidence of lack of good faith on the part of the plaintiff's solicitor in commencing the proceedings or of delaying in any material sense to seek the required amendment once the need to do so became apparent at the discovery stage. No deliberate and informed decision to refrain from naming [the plaintiff] was made . . .⁶

Laskin J. concurred with the majority in the result and allowed the amendment, though his view on the issue of mistake differed:

...the case law has distinguished between different kinds of mistakes; between mistaking the correct name of the plaintiff and mistaking who had the right to sue, and between deliberate and unintentional mistakes. It seems to me that these distinctions are problematic, even confusing, and have not been consistently applied. We should be concerned not with the kind of mistake the lawyer has made but with the effect of the mistake, with whether the mistake has prejudiced the defendant.⁷

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. . . in *Ladoucer*. . . the Supreme Court was undoubtedly correct in focusing on the effect of the mistake and in finding that it did not prejudice the defence . . .⁸

The headnote summary in *Mazzuca* states that "the defendant had not been misled as to the nature of the claim being advanced against it and it would not be prejudiced by an amendment to correct a simple error by counsel."

Chevalier v. Ross,⁹ a decision of the Ontario High Court of Justice Divisional Court per Lount J., dealt with a mistake made by the plaintiff (note: *not* a lawyer) in calculating his damages against the defendant. On appeal from a decision of the Master who denied the amendment to the Statement of Claim, the High Court granted the appeal, allowing the amendment. Lount J. relied on *Cropper v. Smith*¹⁰ per Bowen L.J., who stated:

I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. . .

Canada Permanent Mortgage Corporation v. The City of Toronto,¹¹ a decision of the Ontario Court of Appeal per Hope J.A., dealt with whether an admission inadvertently made in the pleadings could be withdrawn by the solicitor. In this case it could not be, as the solicitor had “produced no evidence or argument whatsoever that the admission...was not, in fact, correct.” The principle which the Court applied was that which was found in *Halsbury's*:¹²

If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend is granted if the amendment can be made without injustice to the other side. There is no injustice if the other side can be compensated by an order as to costs; but if, owing to the way in which the pleading has been framed, the other party has been put into such a position that an injury would be done to him by the amendment, the Court will not give leave.

The approach taken by Alberta courts on the issue of amending pleadings generally is well stated in *Edmonton (City) v. Lovat Tunnel Equipment Inc.*¹³ Lee J. relied on *Canada Permanent Trust Company v. King Art Developments*¹⁴ to summarize the law:

...it is trite law that an amendment will permitted where it can be made without prejudice to the opposite party or where the prejudice can be compensated with costs. When an admission has been made...or where merely technical defenses have been omitted and are not sought to be advanced or where there has been a long delay, the court will be less likely

to grant the amendment. All of the factors either for or against the exercise of the discretion to permit amendment must be weighed and that decision made which will best do justice between the parties.

*Odgers on High Court Pleading and Practice*¹⁵ was also relied upon for the following passage:

Either party is ordinarily given leave to make such amendment as is reasonably necessary for the due presentation of his case on payment of the cost of and occasioned by the amendment, providing that there has been no undue delay on his part, and provided also that the amendment will not injure his opponent or affect his vested rights. Where the amendment is necessary to enable justice to be done between the parties, it will be allowed on terms even at a late stage. “However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such a position that they must be injured, it ought not to be made.” . . .

To this Lee J. added: “In my view, delay alone without prejudice on the other side which cannot be compensated for in costs, is insufficient reason to refuse amendment”, citing *Milfive Investments Ltd. v. Sefel*.¹⁶

In Alberta, *Tkachuk v. Janzen Estate (administrator ad litem of)* (1997),¹⁷ may contain the most pointed statement per Ritter J. relating to lawyers’ mistake made in pleadings, although the statement is *obiter*:

...It is as equally likely that the loss of these allegations in the Amended Statement of Claim came about as a result of solicitor or secretarial error, particularly having regard to the nature of word processing. Should one be bound to accept the consequences of secretarial or solicitor error, where that solicitor or secretarial error does not prejudice the Defendant? I conclude not.¹⁸

Accordingly Ritter J. allowed the plaintiff to amend its pleadings by adding a direct allegation of negligence against the defendant, notwithstanding that the limitation period

had expired. (Only vicarious liability of the defendant had been alleged prior to the amendment being granted.)

*Nichwolodoff v. Edmonds*¹⁹ involved “the inadequate efforts of a solicitor in his handling of a personal injury action . . .”²⁰ An amendment to the Statement of Claim was allowed under s. 6 of the *Limitations Act*, which provides for the addition and substitution of defendants after a limitation has expired, in certain circumstances.

Singer v. Starbuck’s Coffee Inc.,²¹ a decision of Master Laycock of the Alberta Court of Queen’s Bench, also involved an error made by counsel in identifying the correct corporate name and identity of the plaintiff in its Statement of Claim. The defendant raised the issue of the solicitor’s diligence in finding and correcting the mistaken name of the party. Master Laycock held that the issue of the solicitor’s diligence was not fatal. Although that had been an issue in *Nagy v. Phillips*,²² Master Laycraft found that “While the plaintiff may have been more thorough in searching (the) corporate registry and may be criticized for waiting until the eve of their limitation period before commencing the search for the proper corporate identity, they moved immediately upon discovering the error to bring their motion to amend.”²³

In *Elcor Elevator Services Corp. v. 624149 Alberta Ltd.*²⁴ the plaintiff had mistakenly left out of his calculations for damages an invoice for some additional work provided to the contractor whom he was suing. The plaintiff was allowed to amend its statement of claim to reflect the higher amount but could not amend the lien filed against the property at the Land Titles Office as the court lacked jurisdiction to do so.

The Court of Queen’s Bench in *Horbach v. Base-Fort Patrol Ltd.*²⁵ reversed the decision of Master Funduk and allowed the plaintiff to increase four-fold the amount of damages he sought from the defendant, even though the Certificate of Readiness for trial had already been filed. Master Funduk denied the amendment as he found no change in the circumstances of the plaintiff or the plaintiff’s counsel. The reason given by counsel for requesting the amendment was that he had only recently ascertained from seminar

materials and from reading decisions that the courts were becoming increasingly generous in the amount of the award given wrongful dismissal cases. Master Funduk felt that the time to brief the law and determine the nature of the claim was before the Statement of Claim was issued, not before trial, when the Certificate of Readiness had already been filed.

On appeal, the Queen's Bench apparently did not agree and granted the amendment, although it did not set out its reasons for doing so.

In conclusion, where counsel becomes aware of a mistake in the pleadings he or she has drafted, an amendment may be sought to correct the error. The success (or lack thereof) achieved in a motion to amend may depend more on the type of amendment sought than on the fact that the lawyer made a mistake. The underlying principle regarding a lawyer's mistake seems to be that an amendment should be allowed where the opposite party has not been misled, or substantially injured by the error. The court will focus on the effect of the mistake and whether it prejudiced the other party. A party will not be prejudiced if they can be compensated in costs. The courts also seem to assess whether the mistake was *bona fide* and whether there was diligence in bringing an application for amendment once the mistake was discovered.

ENDNOTES

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- 1 With thanks for the research of Shelly Minarik of Bottom Line Research & Communications
2 [1974] S.C.R. 1111; (1973) 41 D.L.R. (3d) 416
3 [1950] O.W.N. 185
4 at 1116 (S.C.R.)
5 (2001), 56 O.R. (3d) 768; [2001] O.J. No. 4567
6 para. 68 (Q.L.)
7 para. 85 (Q.L.)
8 para. 86 (Q.L.)
9 [1902] O.J. No. 45; 3 O.L.R. 219; 2 O.W.R. 115
10 (1884), 26 Ch. D. 700 at p 710
11 [1951] O.R. 726; [1951] 4 D.L.R. 587
12 25 *Halsbury's Laws of England*, 2nd ed. 1937, pp. 256 *et seq.*
13 (2000), 257 A.R. 343; [2000] A.J. No. 87 at paras. 21-24
14 (1984), 52 A.R. 139 at 147
15 D.B. Casson, *Ogders on High Court Pleading and Practice*, 23rd ed. (London: Sweet &
16 Maxwell, 1991) at 199
(1998), 216 A.R. 196; [1998] A.J. No 563

17 (1997), 51 Alta. L.R. (3d) 340; (1997), 204 A.R. 386; [1997] A.J. No. 558
18 (1981), 101 A.R. 253; [1981] A.J. No. 888
19 (2001), 93 Alta. L.R. (3d) 153; [2001] A.J. No. 958
20 at para. 2 (Q.L.)
21 (2000), 267 A.R. 365; 86 Alta. L.R. (3d) 359; [2000] A.J. No. 818
22 (1996), 41 Alta. L.R. (3d) 58
23 at para. 22 (Q.L.)
24 (1997), 202 A.R. 56; [1997] A.J. No. 368
25 (1981), 101 A.R. 253; [1981] A.J. No. 888