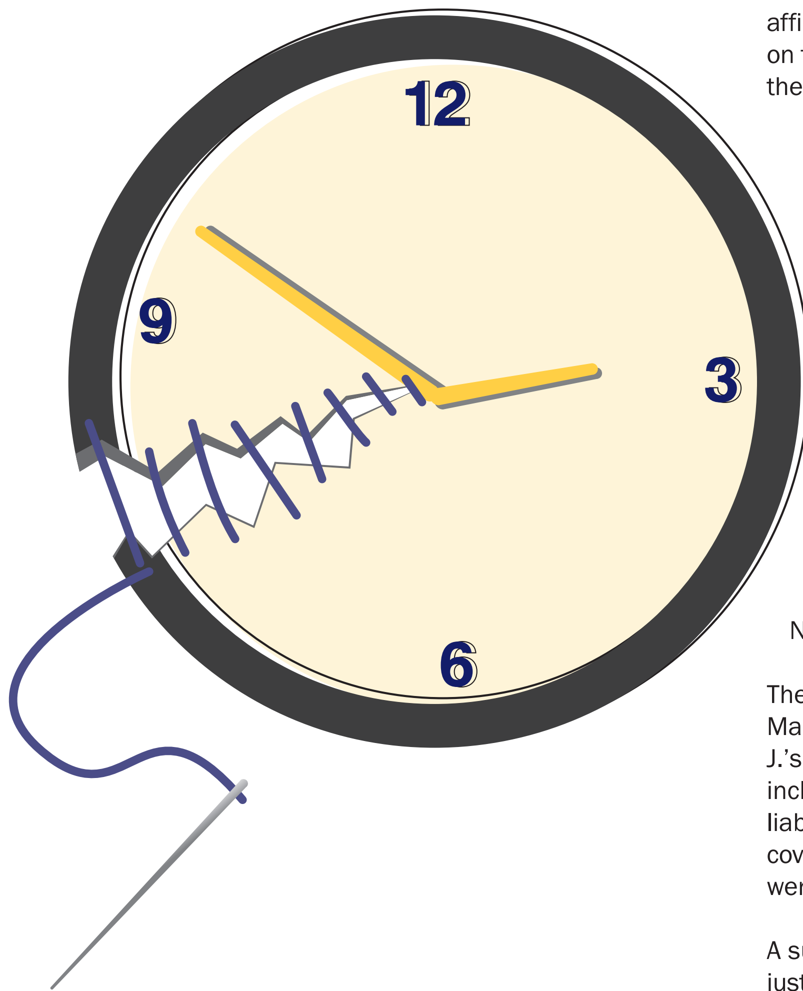
Repairs: A stitch in time saves nine

LAWPRO takes this proverb to heart. Our timely efforts to "repair" errors committed by solicitors save the Ontario bar millions of dollars every year.



The Superior Court's equitable jurisdiction

The Ontario Superior Court's broad equitable jurisdiction has facilitated the "repair" of many solicitors' errors.

TCR Holdings Corp. v. Ontario[1] involved the "unstitching" of an amalgamation. Newbould J. held, and the Court of Appeal affirmed, that the Superior Court may set aside an amalgamation on the basis of the Court's general equitable jurisdiction, and on the basis of its power to relieve against mistakes.

The plaintiff, a company with substantial assets, amalgamated with several of its subsidiary companies. One of the subsidiaries included in the amalgamation, 420846 Ontario Limited ("846"), owed $1.6 million to Henry Heidt and Angela Young. TCR's solicitor forgot about 846's indebtedness. After the amalgamation, Heidt and Young tried to collect the money owing to them from the plaintiff.

The plaintiff moved to set aside the amalgamation *nunc pro tunc*. The respondent Ontario, on behalf of the Director appointed under the *Business Corporations Act*, did not oppose the order sought. Heidt and Young obtained intervenor status, and opposed the application.

Newbould, J. set aside the amalgamation.

The Court of Appeal dismissed the intervenors' appeal. MacPherson, J.A. found no basis for interfering with Newbould, J.'s conclusion that the plaintiff's intention was that 846 be included in the amalgamation as a corporation without any liabilities. Heidt and Young never bargained for the plaintiff's covenant, and they would receive a windfall if the amalgamation were not set aside.

A superior court has "all the powers that are necessary to do justice between the parties:" *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*[2] More specifically, "superior courts have equitable jurisdiction to relieve persons from the effect of their mistakes:" *771225 Ontario Inc. v. Bramco Holdings Co.*[3]

Newbould, J. characterized the inclusion of the heavily indebted 846 in the amalgamation as "an inadvertent mistake" and, citing *Bramco* and *Attorney General of Canada v. Juliar*,[4] concluded that there was no reason not to grant relief to the plaintiff under

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its equitable jurisdiction to relieve against mistake. MacPherson, J.A. agreed.

The plaintiff was awarded costs before Newbould, J., and in the Court of Appeal.

Heidt and Young then brought a new motion, arguing that the costs orders of the Court of Appeal and Newbould, J. should be set aside, because LawPRO had agreed to pay the fees of the plaintiff's lawyers, Blake Cassels and Graydon. They argued that because the plaintiff was not obliged to pay fees to Blakes, the plaintiff was not entitled to receive costs from Heidt and Young.

The Court of Appeal disagreed. The fact that LawPRO was prepared to backstop Blakes' fees was irrelevant. Both courts were entitled to order costs against the real losing parties, Heidt and Young.[5]

Misnomers

If an action is governed by the *Limitations Act, 2002*, the old doctrine of "special circumstances" is no longer available to add parties to an action, where the limitation period against them has expired. Two recent cases demonstrate that "misnomer" can sometimes be used to accomplish this purpose.

Raymond v. Ontario Corporation Number 345404 (Bonik Incorporated).[6]
The Court of Appeal refused to interfere with the approach to s. 21(2) of the *Limitations Act, 2002* – the misnomer provision – taken by Justice I.S. McMillan in his unreported judgment of October 22, 2009.

The plaintiff slipped and fell on an apartment parking lot. Justice McMillan found that the plaintiff intended to sue the company which owned that property. Unfortunately, the plaintiff's solicitor failed to do a title search, and the wrong company was sued.

However, the company that was incorrectly sued was closely related to the company which actually owned the property. It had the same address and common principals. The plaintiff's claim came to the attention of the defendant within the limitation period. The defendant, through its principals, recognized that it was the target of the litigation.

The Court of Appeal dismissed the defendant's appeal.

Gray v. Olco 2010.[7]
The plaintiff slipped and fell at a gas station in Stouffville. He retained counsel immediately.

Counsel issued a statement of claim against Olco without doing a title search, a corporate search, or a business name search. By the time new counsel did the appropriate searches, and learned the identity of the proper defendants, more than two years had passed since the accident.

Master Muir allowed the amendments on the basis that they corrected misnomers. He concluded that the "litigation finger" was clearly pointed at the defendant, and that a reasonable party in the defendant's position would know that the document referred to it.

The evidence did not disclose any non-compensable prejudice to the defendant. There was no credible evidence that the passage of time from the issuance of the claim until the present hampered the defendant's ability to investigate the claim.

Setting aside registrars' dismissal orders

Setting aside administrative dismissals is the number one area for LawPRO's repair efforts.

In *Finlay v. Paassen*,[8] LawPRO counsel representing the plaintiff obtained an excellent result in the Court of Appeal. The Registrar's order dismissing the plaintiff's action was set aside.

The plaintiff's motor vehicle action had proceeded in a reasonably expeditious way, but for some unexplained reason, plaintiff's solicitor failed to set the action down for trial. The Registrar mistakenly failed to serve plaintiff's solicitor with a status notice. Some months later, the Registrar dismissed the action under Rule 48.14. Plaintiff's solicitor found out about the dismissal order the following month. He drafted a motion to set aside the order, but left the firm without serving it or setting it down for a hearing. He told no one at his firm about the dismissal. The defendants sent several letters to the firm, advising that the action was dismissed. The firm did nothing for two years.

When the firm finally moved to set aside the dismissal two years later, Justice Ramsay refused the relief requested. He focused mainly on the two-year delay in bringing the motion. He made no finding that the defendants had suffered prejudice.

The Court of Appeal allowed the plaintiff's appeal. Up until the time of the service of the status notice, the action had proceeded without any unreasonable delay; the plaintiff's law firm did not deliberately decide not to move the litigation forward. The failure to do so was attributable at worst to sloppiness in the law office during and after the time the lawyer in charge of the file left the firm.

The two-year period was not so long that by itself it warranted denying relief. The defendants did not point to any specific prejudice they would incur if the Registrar's order was set aside. Cumulatively, these considerations outweighed the two-year delay

in bringing the motion and justified setting aside the Registrar's order. It was in the interests of justice to do so. The court stated that: "Speculation about whether a party has a lawsuit against its own lawyer, or the potential success of that lawsuit, should not inform the court's analysis of whether the Registrar's dismissal order ought to be set aside."

The outcome in *Wellwood v. OPP*,[9] was less fortunate for the plaintiff. The majority of the Court of Appeal upheld the Master's finding that there was unwarranted delay both in prosecuting the action, and in moving to set aside the Registrar's order.

Cronk, J.A. distinguished the court's judgment in *Finlay* on the basis that the delay in *Finlay* was not deliberate. She found that on the evidence in this action, the plaintiff's delay in proceeding with the action and moving to set aside the dismissal order was inordinate, unexplained and not unintentional.

In *Viola v. Tortorelli*,[10] LawPRO counsel successfully relied on the reasoning in *Finlay* and *Wellwood*.

In 2006, the plaintiff sued the defendants for $85,000 owing on a mortgage. In early 2008, the plaintiff changed solicitors. The second solicitor served, but inadvertently failed, to file a notice of change of solicitor. Because the notice of change was not filed with the court, the second solicitor never received the Registrar's notice of status hearing. The Registrar dismissed the plaintiff's action in December, 2008.

The second solicitor did not receive the dismissal notice, but learned of the dismissal in January, 2009. He brought a motion to set aside the dismissal in September 2009. Master Dash refused the relief sought.

The plaintiff appealed. LawPRO counsel became involved at this point.

Justice Herman, sitting as a single judge of the Divisional Court, concluded that Master Dash made an overriding error when he concluded that the plaintiff had not established inadvertence. Master Dash had, in fact, found that the second solicitor did not receive the status notice due to inadvertence, and that the failure to receive the notice led to the dismissal of the action. Evidence from the first solicitor about whether he did or did not receive the dismissal notice was not necessary.

In the interests of time and costs, Justice Herman substituted her own decision for the Master's. Inadvertence was established. The delays in this case – both with respect to proceeding with the litigation and bringing the motion to set aside the dismissal – were far from desirable. The plaintiff's failure to move promptly after finding out about the dismissal of the action was particularly troublesome.

At the same time, the delays were not egregious. They were less than the five-year delay in *Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*[11] or the 27-month period between the date of dismissal and the serving of motion materials in *Wellwood v. Ontario Provincial Police.*[12] The examinations for discovery were nearly concluded.

Two other factors were key. First, the absence of prejudice will generally favour setting aside the dismissal order. There was no prejudice here. Second, in general, a party should not lose his or her right to proceed due to the inadvertence of counsel.[13]

After weighing the various factors, Justice Herman concluded that the just order was to set aside the Registrar's order dismissing the action.

Conclusion

Like everyone else, solicitors make mistakes. As is true with life generally, prompt remedial action can sometimes eliminate, or at least mitigate, the damage done. LawPRO's experienced repair counsel have frequently salvaged seemingly hopeless cases. In other cases, LawPRO's in-house claims counsel have provided helpful guidance to lawyers seeking to rectify errors. If you have a matter that could lead to a claim, call LawPRO sooner rather than later.

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1 *TCR Holdings Corp. v. Ontario*, 2010 ONCA 233

2 *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (C.A.), at p. 282

3 *771225 Ontario Inc. v. Bramco Holdings Co.*, (1995), 21 O.R. (3d) 739 (C.A.), at p. 741

4 *Bramco*, supra, and *Attorney General of Canada v. Juliar*, (2000), 50 O.R. (3d) 728 (C.A.)

5 *TCR Holdings Corp v. Ontario*, 2010 ONCA 888

6 *Raymond v. Ontario Corporation Number 345404 (Bonik Incorporated)*, 2010 ONCA 214, dismissing the appeal from the unreported judgment of I.S. McMillan, J., Court file C-10064107, Sault Ste. Marie, released October 22, 2009

7 *Gray v. Olco* 2010, ONSC 1015, Court File No 08-Cv-347509Pd3, released February 11, 2010 (Master Muir)

8 *Finlay v. Paassen*, 2010 ONCA 204 , allowing appeal from Ramsay, J. July 2, 2009

9 *Wellwood v. OPP*, 2010 ONCA 386, reversing 2009 CanLII 1476 (Ont.Div.Ct.); [2009] O.J. No. 235

10 *Viola V. Tortorelli*, 2010 CarswellOnt 9219 (Div. Ct.), 2010 Onsc 6148; reversing 2010 ONSC 711, 2010 CarswellOnt 633

11 *Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, (2007), 87 O.R. (3d) 660 (Ont. C.A.)

12 *Wellwood v. Ontario Provincial Police*, [2009] O.J. No. 235 (Ont. Div. Ct.).

13 *Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd.*, Supra, at para 28