Repairs: Putting things right

for our insureds in 2017

The ideal way to handle errors is to repair them before they can cause any harm. Claim repairs have the potential not only to limit costs to the insurance program, but also to restore clients' faith in the legal profession and to protect lawyers' reputations. LAWPRO counsel repair claims in all areas of law, using a wide range of strategies. For instance, our counsel have: taken steps to remedy litigants' failure to comply with the *Rules of Civil Procedure*; demonstrated that claims are *not* statute barred; added new defendants despite initial findings that it was too late; rectified documents; and, argued issues of contractual interpretation.

Contractual interpretation

In a case about the interpretation of a title insurance policy,[1] the title insurer failed in its attempt to deny coverage to a lender on the basis that the lender's solicitor disbursed the mortgage proceeds to the borrower's solicitor "in trust," rather than to the borrower directly. The court found that Law Society requirements permit this arrangement and that it is common practice among conveyancing solicitors. Furthermore, the title insurance policy did not expressly forbid this manner of payment.

Regularizing service of statements of claim

LAWPRO counsel have salvaged at-risk cases by obtaining orders regularizing service. In one instance, turnover in counsel employed by a firm obscured the fact that a statement of claim had been improperly served (by fax). LAWPRO was successful in convincing the court that the plaintiff ought not to be prejudiced by the lawyers' inadvertence, and validated the service *nunc pro tunc* (retrospectively).[2] In two other cases,[3] the courts extended the time for serving statements of claim *nunc pro tunc*.

Setting aside default judgments

A default judgment granted at an undefended trial was set aside. The defendant received no notice of the trial, and the plaintiff failed to make full and fair disclosure to the Court.[4]

Restoring actions to the trial list

A claim arose when an action was struck from the trial list in December, 2014.[5] The defendants initially agreed to restore the action to the trial list, but then withdrew their consent. The action was commenced in April 2010, examinations for discovery were completed by November, 2010, and then the action stagnated because of the plaintiff's impecuniosity.

The court found that the plaintiff adequately explained the litigation delay, and that the defendants, who had never complained about the pace of litigation, would suffer no compensable prejudice as a result of the delay.

1 2017 ONSC 890
2 2017 ONSC 6673
3 2017 ONSC 3711, 2017 ONSC 1112
4 2017 ONSC 2697
5 Court File No.: CV-10-1445-0000 (unreported). PDF copy available from debra.rolph@lawpro.ca. See also 2017 ONSC 1742

Fighting dismissals at status hearings

Attempts to revive long-dormant matters at status hearings have met with mixed results. In one instance,[6] Master McGraw dismissed a plaintiff's motion to extend the time to set its action down for trial. The action was commenced in 2001, and had been dormant for 10 years. The defendant's cross-motion to dismiss the action under Rule 24 was allowed. In another,[7] Master Pope declined to dismiss the plaintiff's action at a 2017 status hearing, notwithstanding that the action was commenced in September, 2008. The defendants were not prejudiced by the delay, and they did little to move the action along.

Non-compliance with timetables

While the Rules permit the use of mutually-agreed timetables to hold off the dismissal of actions, Rule 60.12 affords the court some discretion in enforcing the "consequences." In a LawPRO repair matter,[8] the plaintiff consented to a peremptory timetable, and to an order entitling the defendant to dismiss the action without notice for non-compliance with that timetable. Master Mills declined to dismiss the plaintiffs' action on that basis. She also set aside the Registrar's dismissal of the action, and she declined to dismiss the action for delay under Rule 24, on the grounds that plaintiffs should not suffer because of their counsel's inadvertence.

Setting aside administrative dismissals

In a matter involving a numbered company's lawsuit against a bank,[9] Heeney, J. set aside the Registrar's dismissal order. The changes to Rule 48.14, effective January 1, 2015, were a significant factor. The new rule provides that actions are to be dismissed for delay only five years after the action is commenced. The Rules Committee evidently felt that five years is not prejudicial delay. Less than five years had passed since this action was commenced.

In another matter, where the Registrar dismissed an action on the basis that two years had passed since it was struck off trial list – despite there being no documentation in the court records of the date on which the action was struck off[10] – Master Jolley set aside the Registrar's administrative dismissal.

Finally, LawPRO was successful in having a matter restored to the trial list where the defendant had early notice of the accident, the plaintiff had always intended to prosecute the action, and the delay, based on an overlooked set-down date, was adequately explained.[11]

Amendments to pleadings

Where problems with pleadings stand in the way of litigants' exercise of their rights, LawPRO is often asked to seek amendments. In one matter, a plaintiff was allowed to add a dog owner as a defendant more than two years after the plaintiff was bitten, because the plaintiff was initially led to believe that the dog was owned by the added defendant's boyfriend.[12] In another matter, amendments to a statement of claim were allowed after the limitation period had ostensibly expired, where the amendments did not constitute new causes of action.[13]

In an unreported case,[14] Glithero, J. ordered that three individuals be added as defendants in an action claiming damages for assault, even though the motion was launched just over three years after the assault occurred. The plaintiff's brain injuries sustained in the assault impacted his ability to discover his claims. The added defendants were given leave to plead limitation defences.

One repaired case[15] considered the date on which a minor is represented by a litigation guardian for the purpose of ss. 6 and 8 of the *Limitations Act 2002*. The Court of Appeal held that the limitation period began to run against the proposed defendant when the litigation guardian issued the statement of claim on the minor's behalf. On that date, the plaintiff's mother held herself out to be the litigation guardian. The application to add the city in which the accident happened as a defendant was dismissed, because timely notice under s. 44(12) of the *Municipal Act* had not been given to it. The relevant 10-day notice period also ran from the date that the statement of claim was issued against the motorists, but the city was not given notice until nearly one year later.

Misnomer

LawPRO counsel convinced the Court of Appeal to use the law of "misnomer" to permit a plaintiff to properly plead a representative action against a labour union after expiration of a limitation period.[16] In considering whether to grant relief, a court may take the defendants' "tactical conduct" into account – in this case, waiting until the limitation period had expired before moving to dismiss the claim as a nullity, after having fully participated in the litigation up until that point. The Court of Appeal noted that the concept of "nullity" is to be narrowly interpreted, or avoided.

6 2017 ONSC 2645
7 2017 ONSC 3784
8 2017 ONSC 3186
9 2017 ONSC 6943 this judgment does not appear on CanLII. PDF copies are available from debra.rolph@lawpro.ca
10 2017 ONSC 7582
11 2017 ONSC 5098
12 2017 ONSC 4074
13 2017 ONSC 4740
14 C-370-12, October 30, 2017. PDF copy available from debra.rolph@lawpro.ca
15 2017 ONCA 385
16 2017 ONCA 321 Leave to appeal to the SCC has been granted

Other limitations issues

The Court of Appeal removed roadblocks for plaintiffs by overturning three limitations decisions and affirming two others. In the first of the four cases, the court reversed a finding that an environmental contamination claim was statute barred.[17] The finding was made in the court below on the basis of the date by which the plaintiff began to suspect contamination. The Court of Appeal held instead that mere suspicion that a property might be contaminated does not start the limitation period running.

The second overturned case was a $500,000 personal injury matter arising from a slip and fall in a residential rental unit. The Court of Appeal held that the claim was not governed by the one-year limitation period in s. 29(2) of the *Residential Tenancies Act*.[18] Because the damage claim exceeded $25,000, the Superior Court, rather than the Landlord and Tenant Board, had jurisdiction. The one-year limitation period in the *Residential Tenancies Act* did not apply in the Superior Court action.

The third case involved the appeal of a lower court ruling that a father's action against his daughter and two other defendants was statute-barred.[19] The father sought to prove that the defendants were holding assets (taxi licences) for him in trust. The claim was discovered in 2002. Under s. 43(2) of the *Limitations Act*, in force at that time, there was no limitation period for such actions;[20] as a result, the Court of Appeal held that the action had been commenced in time.

Earlier in the year the Court of Appeal affirmed a lower court decision that held that an estate trustee was not entitled to rely on s. 38(3) of the *Trustee Act* to defeat a testator's former wife's claim against the estate.[21] The trustee had fraudulently concealed material facts relating to the claim against the estate. The court also affirmed a lower court decision finding that the two-year limitation period for a mortgagor's claim for improvident sale ran from the date the sale closed, and not from the date of signing of the agreement of purchase and sale.[22]

Trial courts also grappled with discoverability issues in 2017. In another case about suspicion versus knowledge of harm,[23] Lemon, J. refused the defendants' motion to dismiss the plaintiff's claim as statute barred. The Court declined to treat the plaintiff's "demand letter" as proof that it had discovered the claim. The fact that subsequent investigations confirmed what the plaintiff already suspected did not mean that the limitation period ran from the date of the initial suspicions.

In a motor vehicle accident matter,[24] the court summarily dismissed the plaintiff's action against his father as statute barred. The plaintiff and his solicitor knew or should have known shortly after the accident that the plaintiff's father owned the motor vehicle in which the plaintiff was injured.

Interpreting rule 30.1.01(6)

The Divisional Court held that a lawyer defending a civil claim for sexual assault did not breach the implied undertaking rule by providing the plaintiff's discovery evidence to his client's criminal lawyer for impeachment purposes. Rule 30.1.01(6) of the *Rules of Civil Procedure* permits this. No judicial preclearance is required.[25]

Rectification of wills

The Court of Appeal upheld Mesbur, J.'s order rectifying a testator's will to reflect the instructions the testator gave to the solicitor who drew it. The solicitor's error arose from drafting the will in accordance with a proposed corporate reorganization which was never implemented, but rather superseded by a slightly different reorganization plan.[26]

Conclusion

As soon as a claim is reported, LawPRO counsel begin assessing potential repair strategies, bringing to bear many years' worth of experience in performing this kind of work. Early reporting of claims maximizes the chances that they can be repaired. Successful repairs can benefit the individual insured, who may be able to avoid a claims history surcharge; and they also support the profession as a whole in that they help limit the cost of operating the insurance program. As you can see from these selected summaries, LawPRO's "repair" portfolio is extensive and varied: from setting aside administrative dismissals, to adding parties to actions, to rectifying wills – there is no shortage of effort expended on behalf of our insureds. ■

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17 2017 ONCA 16
18 2017 ONCA 442
19 2017 ONCA 957
20 R.S.O. 1990 c. L-15
21 2017 ONCA 9, dismissing appeal from 2016 ONSC 2377
22 Unreported endorsement, CV-10-410353, May 1, 2017, affirmed 2018 ONCA 6
23 2017 ONSC 6683
24 2017 ONSC 6328
25 2017 ONSC 5566 (Div.Ct.)
26 2017 ONCA 831