

1975

## Amendment of Proceedings After Limitation Periods

Garry D. Watson

*Osgoode Hall Law School of York University, gwatson@osgoode.yorku.ca*

### Source Publication:

Canadian Bar Review. Volume 53, Number 2 (1975), p. 237-301.

Follow this and additional works at: [https://digitalcommons.osgoode.yorku.ca/scholarly\\_works](https://digitalcommons.osgoode.yorku.ca/scholarly_works)



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

---

### Recommended Citation

Watson, Garry D. "Amendment of Proceedings After Limitation Periods." *Canadian Bar Review* 53.2 (1975): 237-301.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

# AMENDMENT OF PROCEEDINGS AFTER LIMITATION PERIODS

GARRY D. WATSON\*

*Toronto*

It may be asserted without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.†

---

## I. *Introduction.*

All of the Canadian common law provinces have rules of practice giving the courts broad powers to amend proceedings.<sup>1</sup> Generally, the courts have honoured the sweeping directive of the rules that "all necessary amendments shall be made . . . to secure the advancement of justice, the determining of the real matter in dispute, and the giving of judgment according to the very right and justice of the case".<sup>2</sup> And in such a way as to justify the optimistic pronouncement of Lord Justice Bowen quoted above. The rules of court themselves place no limits on the power of amendment and few have been added by judicial decision. The benevolent principle, established early and acted upon consistently, is that "however negligent or careless may have been the . . . omission, and however late the proposed amendment, the amendment should be allowed" unless some injustice which cannot be compensated in costs would be done to the opponent.<sup>3</sup> For the

\* Garry D. Watson, of Osgoode Hall Law School, York University, Downsview, Ont.

† Bowen L.J. addressing American lawyers in 1887, quoted in Vanderbilt, *Improving the Administration of Justice—Two Decades of Development* (1957), p. 88.

<sup>1</sup> *Alberta*, Supreme Court Rules 1969, rs 38, 132, 558-561; *British Columbia*, Supreme Court Rules 1961, Os 16 and 28; *Manitoba*, Queen's Bench Rules 1968, rs 51(2) and 156; *New Brunswick*, Rules of the Supreme Court 1956, Os 16 and 28; *Newfoundland*, Rules of the Supreme Court 1919, O.27; *Nova Scotia*, Civil Procedure Rules 1972, r. 15; *Ontario*, Rules of Practice, rs 132, 136 and 185; *Prince Edward Island*, Rules of the Supreme Court 1954, Os 16 and 28; *Saskatchewan*, Queen's Bench Rules 1961, rs 48 and 210. This article is directed only to the procedure of the common law provinces.

<sup>2</sup> Ont. Rules of Practice, r. 185. The analogous rules in the other provinces, have similar though not identical wording.

<sup>3</sup> Per Brett M.R. in *Clarapede v. Commercial Union Ass'n* (1884), 38 W.R. 262, at p. 263 and restated by him in *Steward v. N. Metropolitan*

most part the application of this principle has rid procedure of the pitfalls that faced litigants under the common law pleading system; the "advancement of justice" has been secured so that, generally, cases today are decided on the merits rather than on procedural niceties.

However, one dark and often bleak corner exists in the law of amendment: the courts' restrictive attitude to amendments after the expiration of the statute of limitations. Though in general<sup>4</sup> the rules are silent on this matter the courts have seen fit to carry over to modern procedure the position that existed under common law pleading.<sup>5</sup> This continuity, somewhat of a paradox in an age of reform, was achieved in *Weldon v. Neal*.<sup>6</sup> There, Lord Esher refused a plaintiff leave to amend to add to her slander action, after the expiry of the limitation period, claims for assault and false imprisonment. In so doing he set forth in a much quoted passage what has generally come to be considered an immutable principle of modern practice:

---

*Tramways Co.* (1886), 16 Q.B.D. 556 (C.A.). This statement has been frequently adopted in Canadian courts, e.g., *Slattery v. Ottawa Elec. Rlwy Co.*, [1946] O.W.N. 437 (H.C.); *Miller v. C.P.R.*, [1933] 1 W.W.R. 233 (Alta App. Div.). On the subject of the exercise of the amendment power see generally, Holmsted and Gale, Ontario Judicature Act and Rules of Practice (1969), r. 185; Williston and Rolls, *The Law of Civil Procedure* (1970), Vol. 1, pp. 732-739.

<sup>4</sup> As will be noted *infra*, Part IV, a few Canadian jurisdictions have enacted special rules or statutory provisions to deal with certain aspects of this problem.

<sup>5</sup> The rule, that no amendment would be allowed which set up a new cause of action after the expiry of the limitation period, clearly formed part of the common law pleading system, see, *Cross v. Kaye* (1796), 6 Dornf. & East 543 (K.B.); *Peter v. Craft* (1804), 4 East 433 (K.B.); *Maddock v. Hammett* (1796), 7 Term Rep. 55, 101 E.R. 851 (K.B.); *Roberts v. Bate* (1837), 6 A. & E. 778 (Q.B.); *Goodchild v. Leadlam* (1848), 1 Exch. 707. The suggestion in Millar, *Civil Procedure in the Trial Court in Historical Perspective* (1952), p. 185, that the rule was unknown to the common law, or in modern England, is incorrect. But at common law "cause of action" was given a much broader meaning than it later received. Little distinction seems to have been made between "cause of action" and "form of action". The courts appear to have acted on the principle that no change in the cause of action occurred unless the form of action was changed. This would explain the cases decided at common law permitting amendments after the statutory period which, under some modern interpretations of the concept, appear to allow a change in the "cause of action". See e.g., *Bearcroft v. Hundred of Burnham* (1695), 3 Lev. 347, 83 E.R. 723 (C.P.); *Exec. of Duke of Marlborough v. Widmore* (1731), 2 Str. 890 (K.B.); *Maddock v. Hammett*, *supra*; *Lakin v. Watson* (1834), 2 C. & M. 685, 149 E.R. 936 (Ex.); *Christie v. Bull* (1847), 16 M. & W. 669, 153 E.R. 1385 (Ex. Ch.); *Cocks v. Malins* (1851), 6 Exch. 803.

<sup>6</sup> (1887), 19 Q.B.D. 394, 56 L.J.Q.B. 621 (C.A.).

We must act on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. If an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant; a proceeding which, as a general rule, would be, in my opinion, improper and unjust. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do so.<sup>7</sup>

Until very recently,<sup>8</sup> in subsequent cases no recognition has been accorded to the exception provided for in the last sentence of Lord Esher's statement. Generally it has been assumed that whenever the amendment sought would change the cause of action after the expiration of the limitation period, there automatically results an injustice to the defendant which cannot be compensated for in costs. That such injustice may result in the "core" cases (for instance, where the plaintiff attempts to use the timely commencement of a contract action as a vehicle for the subsequent addition of an unrelated claim for assault or negligence which is then statute barred) can easily be appreciated.<sup>9</sup> But any injustice is usually much less apparent in cases constituting the "penumbra" of the principle. And unfortunately, though not unexpectedly, the majority of the reported cases fall into this category. In the penumbra cases the picture is typically one of an "honest plaintiff" who, having made a slip or taken a mistaken step in the litigation, then seeks to remedy the defect through an amendment. The requested amendment is often one of form only or does not drastically change the plaintiff's claim, and would in no way prejudice the defendant, in fact, in conducting the defence on the merits. In these circumstances the injustice to the defendant is difficult to appreciate. To most reasonable men to refuse the plaintiff's amendment in such a case, on the basis that it is an

<sup>7</sup> *Ibid.*, at p. 395 (Q.B.D.).

<sup>8</sup> See *Basarsky v. Quinlan*, [1972] S.C.R. 380, 24 D.L.R. (3d) 720, [1972] 1 W.W.R. 303. Also in two earlier cases, *Clark v. Thomas Gaytee Studios Inc.*, [1930] 3 W.W.R. 489, 25 Sask. L. R. 108 (C.A.) and *Kirkpatrick v. Slasor*, [1971] 5 W.W.R. 737 (B.C.S.C.), the exception was referred to in permitting amendment.

<sup>9</sup> In terms of the approach advocated here it is not clear whether *Weldon v. Neal* itself was correctly decided. To answer that question more would need to be known about the facts of the case, e.g., did the plaintiff rely on the same occurrence as giving rise to the original and amended claims? What prior and actual knowledge did the defendant have regarding the claims being made by the plaintiff? Could the defendant show any prejudice (apart from the loss of the limitation defence) in having to now meet these new claims?

attempt to set up a claim now barred by statute is, in the words of Lord Justice Bowen, "to allow an honest litigant to be defeated by a mere technicality".

My major purpose here will be to examine critically the supposedly well-established rule that a plaintiff may not amend to change his cause of action after the expiration of the limitation period, and to challenge the assumption that to allow such an amendment will always be unjust to the defendant. As a first step, in Part II below, the manner in which Canadian courts have handled the rule will be documented. Defendants have sought to make the rule operative in various contexts. In this respect a familiar pattern is repeated. When a technical rule is made available to litigants, (or rather, to their lawyers) much creativity and ingenuity are unleashed in an attempt to broaden the application of the rule. Frequently, Canadian courts, influenced by their English counterparts,<sup>10</sup> have applied the rule not only strictly but in a range of contexts far beyond that faced by the English Court of Appeal in *Weldon v. Neal*, the modern genesis of the rule. But the cases, while never expressly rejecting the rule, reveal an increasing judicial reluctance to allow it to operate to deny a plaintiff a trial on the merits. In Part III, the rule and its purpose are analysed in an attempt to justify this judicial reticence and to suggest how the courts might handle the problem in a more satisfactory manner. Finally, in Part IV, a model rule of practice is proposed to deal comprehensively with the problem.

It should be stressed that this problem of the post-limitation amendment of proceedings is not an esoteric one, nor one that is merely of academic interest. The volume of decisions on the point is itself enough to dispel any such belief. If one looks only at the case law for the past ten years, it will be seen that there have been at least six decisions of the Supreme Court of Canada involving the issue, a further twenty-seven reported decisions on the Court of Appeal level and something in excess of seventy-five decisions in courts of first instance. Just how and why the problem should

---

<sup>10</sup> Owing to the sheer volume of Canadian cases, no attempt will be made here to analyse or catalogue the English cases on the subject. However, it should be pointed out that Canadian courts have frequently referred to them. The English cases, prior to the new English rule on the subject (see *infra*, Part IV), are collected in *The Annual Practice* (1966), p. 461. For the subsequent case law see *The Supreme Court Practice* (1973), p. 20/5. In approach and outcome the English cases are generally consistent with the Canadian cases. There is also a considerable body of Australian case law, see Williams, *Practice of the Supreme Court of Victoria* (2nd ed., 1973), O.16, rs 2 and 11, O.28, r. 1 and a vast quantity of United States cases see Wright and Miller, *Federal Practice and Procedure*, Vol. 6 (1971), pp. 482-536.

arise so often will be discussed in more detail in Part III. At this juncture it is sufficient to observe that the major factor is the existence of numerous short limitation periods, particularly those applicable to actions arising out of motor-vehicle accidents, which often expire before the plaintiff has fully formulated his case. Moreover, it is not just the volume of cases that is important: the nature of these cases needs to be appreciated. Whereas most procedural decisions fall short of being dispositive of all or part of an action, the situation is usually otherwise with cases involving a request for a post-limitation amendment. Success to the defendant in opposing leave to amend can often lead to victory for him on the whole or a significant part of the plaintiff's case, without having to defend on the merits. This aspect seems to be well understood by parties, particularly defendants, for when the issue arises it is hard-fought, often to the appellate level.

In examining the Canadian cases, attention will be given not only to the decisions and their reasoning but also to the methodological approach of the courts. Although the matter of approach is discussed at some length in Part III, a few comments by way of definition and introduction will be helpful at this point. Two quite different approaches to the basic problem are possible, and can be identified in the cases. The dominant approach is here referred to as an "analytical" (or "conceptual") one, and the other as a "functional" approach. The analytical approach is characterized by a concern with the inquiry "does the amendment sought set up a new cause of action?", this question being asked in a context which assumes (a) that all claims and amendments can be abstractly classified into distinct categories of causes of action, and (b) that such a question is a pertinent inquiry, or the only pertinent inquiry. This approach eschews any consideration of whether the proffered amendment will actually prejudice the defendant in defending on the merits. It assumes that if a new cause of action is alleged by the amendment the defendant will be prejudiced, on the theory that he will be thus deprived of accrued rights under the now expired statute of limitations. By contrast the functional approach has as its central concern the question whether the defendant will be prejudiced *in fact* by the amendment in defending the action at trial. When this approach is adopted the pertinent question is not whether the amendment raises a new cause of action. The significant issue is, did the defendant receive such notice of the plaintiff's case against him that he will suffer no actual prejudice in having to meet the amended claim? The analytical approach undoubtedly predominates in the older cases. However, today this approach is frequently tempered by, or abandoned in favour of, a functional

analysis. This development in the modern cases is important, not only in itself, but also because it greatly weakens the contemporary precedential value of much of the older case law.

## II. *The Canadian Case Law.*

To facilitate discussion of the case law the reported decisions are grouped around several varied applications of the doctrine. The major dichotomy is between cases involving a change of parties and those in which, while no change of parties is attempted, the defendant argues that the plaintiff is attempting to change his cause of action to add a new, statute barred, claim.

### A. *Amendments Changing the Plaintiff's Cause of Action.*

#### (i) *Amendments to the Plaintiff's Statement of Claim Objected to as Involving the Addition of a New, Statute-barred Claim.*

These are cases in which the issue raised is most closely analogous to that faced by the court in *Weldon v. Neal*. Here the defendant relies on the rule in its original and purest form. The plaintiff seeks to amend an already sufficient statement of claim<sup>11</sup> by adding or substituting another claim. In opposing the amendment, the defendant raises the objection that this involves the setting up of a new cause of action, and, since it is sought after the statute of limitations has expired, it must be refused in deference to his accrued rights under the statute.

If the new claim which the plaintiff seeks to allege is known by a different name to the one he originally pleaded (that is it involves what was, historically, another form of action) or it relies upon a different statutory provision to the original claim, the defendant's objection to the amendment has generally been upheld. Hence, amendments have been refused which sought to add a claim for negligence to one for nuisance,<sup>12</sup> claims for fraud and assault to one for malpractice by negligence,<sup>13</sup> a claim for malicious prosecution to claims for false arrest, assault and

---

<sup>11</sup> In the sense that it does not omit essential allegations, but states a valid claim and would not be subject to a motion to dismiss for failure to state a cause of action. Cases in which the plaintiff seeks to amend a statement of claim which fails to state a cause of action are discussed, *infra*, section A (ii).

<sup>12</sup> *Pitt v. Bank of Nova Scotia*, [1956] O.W.N. 872 (Master).

<sup>13</sup> *Ellis v. Pelton*, [1933] O.W.N. 191 (C.A.); *Burk v. S., B., & K.*, [1952] 1 D.L.R. 317, 4 W.W.R. (N.S.) 520 (B.C.S.C.) (Medical malpractice action: amendment to add claim for assault to negligence claim, refused).

false imprisonment,<sup>14</sup> or a claim in contract to one for negligence.<sup>15</sup> Similarly, amendments seeking to add claims under the Liquor Control Act<sup>16</sup> or the Trustee Act<sup>17</sup> to claims under the Fatal Accidents Act, or to change the basis of recovery to a different statutory provision,<sup>18</sup> or to allege a contract with persons other than those with whom contractual relations were originally alleged,<sup>19</sup> have been refused. An analytical approach dominates these cases. Often the reasoning of the judgments is sparse, it being generally taken as axiomatic that a new cause of action is alleged whenever the new claim has a different legal name or relies on a different statute. However, the recent decision of the Supreme Court of Canada in *Basarsky v. Quinlan*<sup>20</sup> represents a radical departure in approach by a court to this type of problem situation. In that case the plaintiff administrator had timely commenced an action under the Trustee Act claiming that the defendant's negligent driving had caused the deceased's death. After the expiration of the limitation period the plaintiff applied to add a claim for \$150,000.00 under the Fatal Accidents Act on behalf of the widow and children of the deceased. In objecting to the amendment the defendant, who had been successful in both courts below, relied on *Weldon v. Neal* and "the jurisprudence emanating therefrom". The amendment, they claimed, attempted to set up a new and statute barred claim. Mr. Justice Hall, writing the reasons of the court, seized upon the much neglected caveat of Lord Esher in *Weldon v. Neal* that the court "would, under very peculiar circumstances"<sup>21</sup> allow

<sup>14</sup> *Mockler v. Town of Grand Falls* (1953), 32 N.B.R. 51 (N.B.S.C.).

<sup>15</sup> *City Construction Co. Ltd. v. Salmon's Transfer Ltd.*, [1973] 5 W.W.R. 378 (B.C.C.A.).

<sup>16</sup> *McEvoy v. Taylor*, [1940] O.W.N. 106 (H.C.) (Amendment to add a claim for wrongful death under the Liquor Control Act to a claim under the Fatal Accidents Act, refused).

<sup>17</sup> *Schubert v. Sterling Trusts Corp.*, [1938] O.W.N. 133 (Master) (Amendment to add a claim under the Trustee Act to a claim under the Fatal Accidents Act, refused). But now compare *Basarsky v. Quinlan*, *supra*, footnote 8.

<sup>18</sup> *Kiselewsky v. Compton and Maybee* (1970), 73 W.W.R. 377, 13 D.L.R. (3d) 624 (B.C.C.A.) (Motor vehicle case. Amendment introducing a new theory as to the cause of the accident and which would have made the defendant owner liable under a different statutory provision, refused on the ground that in the circumstances the amendment would actually prejudice the defendant); cf. *Weston v. Copplestone*, [1974] 5 O.R. (2d) 724 (H.C.).

<sup>19</sup> *Davidson v. Campbell* (1888), 5 Man. L.R. 251 (Q.B.).

<sup>20</sup> *Supra*, footnote 8.

<sup>21</sup> Hall J. pointed out that in the report of *Weldon v. Neal* in 56 L.J.Q.B. 621 the term "would" is used, whereas in the report in 19 Q.B.D. 394, see text *supra*, at footnote 7, the phrase used is "might perhaps".



an amendment despite the expiry of the limitation period. Equating "peculiar" to "special" in modern usage, Hall J. found in the case before him special circumstances warranting the amendment: all the facts relating to the defendant's liability for the death had been pleaded in the original statement of claim; the defendant had admitted liability for the death; and on the examination for discovery of the plaintiff, prior to the passage of the limitation period, the defendant's counsel had asked a variety of questions on matters relevant only to a claim under the Fatal Accidents Act. Consequently, it could not be suggested that the defendants were "actually prejudiced" by the plaintiff's failure to specifically name the Fatal Accidents Act in the original statement of claim and, in light of the special circumstances existing in the case, the court held that the amendment should be permitted.<sup>22</sup>

Less uniform in outcome are those cases where the amendment, while altering the grounds upon which the plaintiff seeks relief, falls short of a change in his "form of action", for instance, where his claim remains one for negligence but different acts are relied on as constituting the negligence. That a lack of uniformity, and possibly some change in approach, should occur in such cases is understandable. Here a need to strike a balance becomes apparent. It is self-evident in these cases that the plaintiff is making a material change in his case; he would have no need to seek an amendment if the matter was already covered by the allegations of his existing statement of claim. On the other hand, since the prohibition is only upon amendments *changing the cause of action* it is implicit in the rule, and often expressly recognized by the courts<sup>23</sup> that the plaintiff retains some power of amendment despite the expiration of the limitation period. In these circumstances analytical classification is more difficult than in cases involving a clear change of legal theory and the application of this approach has not always produced consistent decisions. On occasions, functional considerations have been resorted to when the inconclusiveness of analytical classification is appreciated.

In these cases the plaintiff has often been allowed to amend but differences of judicial opinion have occurred on several points. For instance, where the amended claim remained one for

---

<sup>22</sup> Contrast, *Kiselewsky, supra*, footnote 18, where an amendment relying on a different statutory provision was refused in circumstances where the court felt the defendant would be actually prejudiced by the amendment.

<sup>23</sup> *E.g.*, *Western Canadian Greyhound Lines v. Pomerleau*, [1955] 4 D.L.R. 133, 15 W.W.R. 182 (Alta App. Div.); *Smith v. B.C. Elec. Rlwy*, [1937] 1 W.W.R. 718 (B.C.S.C.) and also *Pontin v. Wood*, [1962] 1 All E.R. 294 (C.A.).

negligence, the outcome has varied.<sup>24</sup> Similarly, cases in which an amendment has been sought to claim a different or an additional kind of damage, while retaining the same legal theory, have produced conflicting decisions.<sup>25</sup> One such conflict, as to whether the addition of a claim for personal injuries to a claim for property damage arising out of a motor vehicle collision amounts to the addition of a new cause of action, has now been resolved by a Supreme Court of Canada decision holding that it does not.<sup>26</sup> Cases involving amendments to increase the damages claimed have been consistent, all permitting the amendment.<sup>27</sup>

Despite the difficulty in resolving these cases (that is where the amendment sought falls short of a complete change in the plaintiff's theory or recovery) by a process of abstract analytical classification, many of the older cases adopted this approach. Frequently, the opinions amounted to little more than an assertion that a new cause of action was (or was not) alleged,

<sup>24</sup> Cf. *Barker v. B.C. Elec. Rlwy* (1934), 48 B.C.R. 427 (S.C.) (Amendment adding allegation of failure to keep streetcar tracks in repair, to original allegation of negligent operation of streetcar, refused); *Le Fort v. B.C. Elec. Rlwy Co.* (1955), 16 W.W.R. 292 (B.C.S.C.) (Amendment adding allegation of defective bell system on bus, to original allegation of negligent driving, refused); and the cases discussed *infra*, footnote 140, with, *Fogg v. Town of Kenora*, [1940] O.R. 421 (C.A.) (Amendment adding allegation of negligence in permitting an excessive slope on sidewalk, to original allegation of failure to remove ice, allowed); *Mansfield v. Patterson* (1955), 18 W.W.R. 38 (B.C.S.C.) (Amendment adding allegation of gross negligence to original allegation of negligent driving, allowed); *Can. Motor Sales Corp. Ltd. v. The "Madonna"*, 24 D.L.R. (3d) 573, [1972] F.C. 25 (Claim for damage to goods carried: writ endorsement referred to a specific voyage and to bills of lading of a particular date. Amendment alleging later voyage, and different bills of lading, allowed); *Weston v. Copplestone*, *supra*, footnote 18.

<sup>25</sup> Cf. *City of Vancouver v. Dubois* (1954), 13 W.W.R. (N.S.) 42 (B.C.S.C.) (Motor vehicle case. Amendment to add claim for loss of services of plaintiff's servants, to original claim for destruction of plaintiff's vehicle, refused); with, *Poste v. Gregoire*, [1964] 1 O.R. 155 (Master) (Motor vehicle case. Amendment to add claim for cargo damage to claim for damages to vehicle, permitted); and *Stockton v. Webb* (No. 2), [1934] 2 W.W.R. 564 (Man. C.A.) (Addition of claim for special damages to original claim for general damages, permitted). See also the cases in the next footnote.

<sup>26</sup> *Cahoon v. Franks*, [1967] S.C.R. 455, 63 D.L.R. (2d) 274, 60 W.W.R. 684; subsequently applied in *Thorne v. McGregor*, [1973] 3 O.R. 54, 35 D.L.R. (3d) 687 (H.C.) and *Armour v. Stackhouse*, [1973] O.R. 432 (H.C.). See also *Carter v. Dodd*, [1961] O.W.N. 306; *Roe v. F. A. Buskard & Son Ltd.*, [1952] O.W.N. 206 (Master).

<sup>27</sup> *Ozipko v. Massey-Ferguson Ltd.* (1965), 53 W.W.R. 439 (Alta App. Div.); *Stockton v. Webb* (No. 2), *supra*, footnote 25; *White v. Proctor*, [1936] O.W.N. 268 (H.C.).

without any explanation as to why this was so.<sup>28</sup> However, in more recent cases a functional approach to the problem has been evident.<sup>29</sup> One general doctrine has been developed in the area under discussion which gives to the plaintiff a broad privilege of amendment. Even where the amendment sets up a cause of action different to that alleged in the original statement of claim, it has usually been allowed if the court finds that it is within the "umbrella of the writ",<sup>30</sup> that is, if it comes within the general endorsement on the writ. The basis of this doctrine is that it is the issuing of the writ which stops the running of the statute of limitations and it does so with respect to all claims covered by the endorsement of the writ. Consequently, any amendment that is within the endorsement of the writ is not statute barred and is permitted. This approach has been used in cases from various provinces<sup>31</sup> though far more frequently in British Columbia

<sup>28</sup> See, e.g., *Mansfield v. Patterson*, *supra* footnote 24; *Le Fort v. B.C. Elec. Rlwy*, *supra*, footnote 24; *City of Vancouver v. Dubois*, *supra*, footnote 25.

<sup>29</sup> See, e.g., *Western Canadian Greyhound Lines v. Pomerleau*, *supra*, footnote 23 (Amendment to correct an initial mix-up as to which of two defendants was owner and who was the driver, permitted on the ground that defendants were in no way prejudiced because they at all times knew the facts and must have recognized the mistake as soon as they received the statement of claim); *Thorne v. McGregor*, *supra*, footnote 26 (In permitting the addition of a claim for property damage to a personal injury action, Addy J. referred to the fact that the defendant had sufficient notice not to be prejudiced in having to meet the new claim); *Can. Motor Sales Corp. Ltd. v. The "Madonna"*, see *supra*, footnote 24 (Amendment to allege a different voyage permitted because, through correspondence, the defendant knew all along that the plaintiff was really claiming in respect of this voyage); *Slattery v. Ottawa Elec. Rlwy Co.*, [1946] O.W.N. 437 (H.C.) (Functional approach used in refusing amendment).

<sup>30</sup> The phrase appears to be that of Morris L.J. in *Graff Bros. Estates Ltd. v. Rimrose Brook Joint Sewage Board*, [1953] 2 Q.B. 318, [1953] 3 W.L.R. 419, at p. 426, [1953] 2 All E.R. 631, at p. 636, and quoted in *White v. Vancouver Gen. Hospital* (1963), 45 W.W.R. 34 (B.C.S.C.).

<sup>31</sup> The doctrine has been applied in the following cases: *Royal Bank v. Mullen*, [1923] 3 W.W.R. 17 (Alta S.C.) (Action against the endorser of a promissory note; amendment to allege that notice of dishonour had been given the defendant, allowed); *Smith v. B.C. Elec. Rlwy Co. & Martin*, *supra*, footnote 23 (Original allegation was negligent operation of a streetcar by M: amendment to allege negligent operation of a different streetcar by another employee, allowed); *Dowling v. Rud* (1959), 17 D.L.R. (2d) 527, 36 W.W.R. 471 (B.C.C.A.) (Change from statutory liability to common law vicarious liability, allowed); *White v. Vancouver Gen. Hospital*, *ibid.* (Amendment adding different acts of negligence to those originally alleged, allowed); *Jones v. Vancouver* (1956), 17 W.W.R. 494 (B.C.S.C.) (Action against municipality; addition of claim of nonfeasance to one based on misfeasance, allowed); *Mercer v. B.C. Elec. Rlwy Co.* (1912), 3 W.W.R. 190 (B.C.C.A.); *Long and City of Toronto v. Mines*,

than elsewhere.<sup>32</sup> The doctrine was actually rejected in an early Ontario decision<sup>33</sup> but has since been applied in later cases in that province.<sup>34</sup> It is interesting to observe that this approach has both functional and analytical aspects. From an analytical standpoint, the amendment is permissible because it is the writ which preserves the plaintiff's claim from the bar of the limitations statute and all claims are preserved which are covered by or set out in the endorsement (there being no longer any general restriction upon asserting more than one cause of action in a law suit). In functional terms, any amendment within the umbrella of the writ is permissible because it is one of which the defendant was duly notified before the expiration of the limitation period. These functional considerations have been emphasized in many of the cases.<sup>35</sup> Indeed, in several recent decisions courts, showing concern for such functional consideration, have broadened the application of the doctrine by recognizing a permissible area of amendment beyond the strict limits of the endorsement of the writ.<sup>36</sup>

Reliance of the *Weldon v. Neal* rule has not been exclusively the preserve of defendants. On occasion it has been invoked by

---

[1948] O.W.N. 328 (Master); *Roe v. F. A. Buskard & Son Ltd.*, *supra*, footnote 26; *MacKenzie v. Schluter* (1967), 65 D.L.R. (2d) 540, 62 W.W.R. 291 (B.C.C.A.).

<sup>32</sup> See the cases in preceding footnote. The reported cases in which the doctrine has been invoked came from British Columbia, Ontario and Alberta. The paucity of cases from the Prairie provinces is explicable since those provinces have abolished the use of the generally endorsed writ, see discussion *infra*, text at footnotes 38-40. But see, *Mitchell v. Campbell*, [1957] 2 W.W.R. 497, [1937] 3 D.L.R. 542 (C.A.) for an analogous argument treating a defective statement of claim as a writ of summons.

<sup>33</sup> *Schubert v. Sterling Trusts Corp.*, *supra*, footnote 17.

<sup>34</sup> *Long and City of Toronto v. Mines*, *supra*, footnote 31; *Roe v. F. A. Buskard & Son Ltd.*, *supra*, footnote 26 (Motor vehicle case: amendment to add a claim for personal injuries to a claim for damage to plaintiff's car, allowed).

<sup>35</sup> See, e.g., *Roe v. F. A. Buskard and Son Ltd.*, *ibid.*; *Smith v. B.C. Elec. Rlwy Co. & Martin*, *supra*, footnote 23.

<sup>36</sup> *MacKenzie v. Schluter*, *supra*, footnote 3, (Writ claimed damages suffered as a result of "the negligent driving of S": in fact the car had been driven by H, with the consent of S who was the owner. A statement of claim so alleging held to be a permissible "extension of the endorsement of the writ", because defendant knew all along he was really being sued as owner and was not prejudiced); accord: *Hywron v. McLroy*, [1973] 2 W.W.R. 169 (Man. C.C.); but cf. *Kisilewky v. Compton and Maybee*, *supra*, footnote 18, and *City Construction Co. Ltd. Salmon's Transfer Ltd.*, *supra*, footnote 15. See also *Can. Motor Sales Corp. Ltd. v. The "Madonna"*, *supra*, footnote 24 (Amendment changing bills of lading sued on, permitted because, through correspondence, defendant knew all along on which bills of lading the plaintiff was suing).

plaintiffs, sometimes with success, in an attempt to prevent defendants from amending their counterclaims.<sup>37</sup>

(ii) *Amendments Sought to Validate a Defective Statement of Claim or a Defective Writ Endorsement.*

These cases differ slightly from the types of cases discussed in the preceding section. Here the plaintiff's initial pleading or writ is defective in some way so that it fails, technically, to state any cause of action against the defendant. If the limitation period has expired when the plaintiff applies for leave to amend to cure the defect, defendants have argued that the *Weldon v. Neal* principle prohibits the amendment. In the past, grave injustices were done to plaintiffs where courts have accepted the defendants' argument.

<sup>37</sup> The common law rule as to the application of limitation provisions to counterclaims is that a defendant cannot assert a cause of action by counterclaim if it is statute barred at the time he delivers his counterclaim: *Lowe v. Bentley* (1928), 44 T.L.R. 388 (K.B.); *Wiltshire v. McLeod*, [1932] O.W.N. 21 (H.C.). This rule, since it frequently prevents a defendant from counterclaiming at all in motor-vehicle cases (which are typically governed by short limitation periods) has been altered in most Canadian jurisdictions by legislation, similar to the Ontario Highway Traffic Act, R.S.O., 1970, c.202, s.146(3), providing that if the plaintiff's action is brought within the twelve month limitation period and the defendant counterclaims "in respect of damages occasioned in the same accident, the lapse of time herein limited (i.e. 12 months) is not a bar to the counterclaim . . .". Under this legislation where the defendant has omitted to include a counterclaim in his initial pleading and has requested leave to amend to add one, plaintiffs have argued that the legislation does not permit such an amendment after the expiration of the limitation period. This argument has been unanimously rejected by the courts: *Weir v. Lazarus*, [1964] 1 O.R. 158, aff'd without reasons, [1964] 1 O.R. 205 (C.A.); *Danylchuk v. Taylor*, [1950] 2 W.W.R. 331, 58 Man. R. 45; *Vancouver (City) v. Krauss* (1963), 43 W.W.R. 71 (B.C.S.C.). Unanimity has not prevailed, however, when the problem has been a slightly different one: where the defendant has delivered a counterclaim, and then sought leave to amend the allegations therein after the 12 month limitation period. In Ontario an argument relying on the *Weldon v. Neal* principle was initially rejected by Master Marriott on the basis (which seems quite sound) that where the counterclaim is for damages arising out of the same accident as the plaintiffs claim, the legislation provides that the 12 month limitation period is not applicable to the counterclaim: *Innamorato v. Sutton*, [1961] O.W.N. 306. But shortly thereafter the same Master reversed his position and concluded that delivery of a counterclaim exhausts the defendant's freedom from the 12 month limitation period given him by the legislation: *Carter v. Dodd*, *supra*, footnote 26. This principle has been restated, though never actually applied, in subsequent Ontario cases: *Poste v. Gregoire*, *supra*, footnote 25; *Weir v. Lazarus*, *supra*. A contrary conclusion, not referred to in any of the Ontario cases, had been earlier arrived at by the Appellate Division of the Supreme Court of Alberta: *Buck v. Kinsella* (1958), 25 W.W.R. 593. That court took the position, which seems clearly correct, that under the legislation the 12 month limitation period is made entirely inapplicable to a counterclaim for damages arising out of the same accident as the plaintiff's claim.

However, in recent years the courts have looked upon such arguments with disfavour.

In the Prairie provinces actions are no longer commenced by means of a writ bearing a general endorsement. Instead, in Saskatchewan<sup>38</sup> the first step in an action is the issuing of a writ with a full statement of claim attached, while in Alberta<sup>39</sup> and Manitoba<sup>40</sup> proceedings are simply commenced by the issuing of a statement of claim. These procedures have provided defendants with the basis of a formalistic argument: if the statement of claim is defective in that it technically fails to state a good cause of action then any later amendment to cure the defect (even if a minor one) must set up for the first time a cause of action, and if it comes after the expiration of the limitation period it must be refused. The effect of this argument, if accepted by a court, is that the statute of limitations continues to run, even after the commencement of an action, until a technically good statement of claim is filed. The cruel logic and harsh consequences of such reasoning, while adopted in some earlier cases,<sup>41</sup> now seems generally to have fallen into disfavour. In Saskatchewan it has been rejected by statute.<sup>42</sup> In the other Prairie provinces the courts have refused to accept the reasoning where it would operate to throw the plaintiff out of court because of the omission of a merely formal or minor allegation.<sup>43</sup>

<sup>38</sup> Sask. Queen's Bench Rules, 1961, rs 6-7.

<sup>39</sup> Alberta Supreme Court Rules, 1969, r. 6(1).

<sup>40</sup> Man. Queen's Bench Rules, 1968, r. 6.

<sup>41</sup> *Shtitz v. C.N.R.*, [1927] 1 W.W.R. 193 (Sask. C.A.) (Fatal accident action, brought by the administrator claiming damages on behalf of himself and four infant sisters of the deceased. The statute gave no right of action to the administrator or the sisters of the deceased as such. Amendment to add the essential allegation that he was the deceased's father and that the deceased had stood in *loco parentis* to his young sisters—both being classes of persons given rights of action under the legislation—refused); *McKerrel v. City of Edmonton* (1912), 3 W.W.R. (Alta S.C.) (Action, for death of a child brought by the father. The statute required that such an action be brought by the administrator, and the plaintiff was refused an amendment to allege that he was the administrator and brought the action in that capacity); *Swindell v. Northern Elevator Co.*, [1928] 3 W.W.R. 433 (Sask. C.A.); *Reynolds v. McPhalen* (1908), 7 W.W.R. 380 (B.C. Full Ct). See also *Tannas v. Mosser*, [1930] 1 W.W.R. 738 (Sask. C.A.).

<sup>42</sup> Queen's Bench Act, R.S.S., 1965, c. 73, s. 44 (11), see *infra*, Appendix, item 4. This provision was first introduced in 1940.

<sup>43</sup> *Thornton v. Milne* (1968), 69 D.L.R. (2d) 709, 63 W.W.R. 768 (Man. C.A.) (Motor vehicle case in which plaintiff failed to allege that D<sub>1</sub> drove with knowledge and consent of D<sub>2</sub>, the owner. Amendment allowed); *Markarsky v. C.P.R.* (1904), 15 Man. R. 53 (K.B.); *Miller v. C.P.R.*, *supra*, footnote 3. In Manitoba as early as 1937, Trueman J.A. rejected the doctrine by treating a defective statement of claim as a writ of summons: *Mitchell v. Campbell*, *supra*, footnote 32.

In jurisdictions where actions are commenced by a generally endorsed writ, the omission of an essential allegation from the statement of claim (for example, in an action for assault) will not usually leave the plaintiff vulnerable to the type of argument just discussed. Typically in such jurisdictions his claim will have been preserved from the bar of the statute by the "umbrella" of the endorsement on the writ (for instance, the plaintiff's claim is for damages for assault). However, an analogous argument has been used in these jurisdictions when a material allegation has been omitted from the endorsement itself. In this type of situation defendants have argued that the writ is a nullity and incapable of amendment, or of being cured by the subsequent delivery of a statement of claim adequately alleging a cause of action. In essence the defendant contends that the defectively endorsed writ does not stop the running of the statute of limitations and that no post-limitation amendment should be permitted.

The cases in which this argument has been raised have not been entirely consistent in outcome. In some cases the courts have held the endorsement to be so defective as to be a nullity,<sup>44</sup> while in others a curative amendment has been allowed.<sup>45</sup> Fortunately for the plaintiffs, the great majority of cases have fallen into this second category and reveal a functional approach to the problem. The decisions indicate the courts' willingness to look at all the circumstances to determine whether the defendant actually knew the case being made against him (for instance, through prior correspondence)<sup>46</sup> or whether it could be inferred that he must have been aware of the nature of the claim.<sup>47</sup> This represents a

---

<sup>44</sup> *Elloway v. B.C. Electric Rlwy Co. Ltd.* (1956), 4 D.L.R. (2d) 734 (B.C.S.C.), aff'd C.A., unreported judgment, September 19th, 1958, (Personal injury action in which the writ was merely endorsed "Plaintiff's claim is for damages". Held that this was incapable of amendment by a statement of claim delivered more than five years after the issue of the writ. A six-month limitation period applied to the action); *Wilson v. Janzen* (1967), 64 D.L.R. (2d) 669 (B.C.S.C.).

<sup>45</sup> *Nelson v. Maglio* (1964), 44 D.L.R. (2d) 484, 47 W.W.R. 505 (B.C.C.A.) (Personal injury action, failure to allege negligence of defendant. Defect held to be curable by amendment); Accord: *Reece v. Brown* (1961), 38 W.W.R. 122 (B.C.S.C.) (Personal injury action, failure to allege defendant liable as driver's principal); *Gerard v. Frketich* (1964), 45 D.L.R. (2d) 155 (B.C.S.C.) (Personal injury action, failure to allege that D<sub>2</sub> liable because D<sub>1</sub> drove with his consent); *Joseph v. Brown*, unreported decision of B.C.C.A., Nov. 21st, 1958, reproduced in part in *Gerard v. Frketich*, *supra*, (Personal injury action, failure to allege negligence); *Tierney v. Jameson* (1957), 21 W.W.R. 428 (B.C.S.C.).

<sup>46</sup> As in *Pontin v. Wood*, *supra*, footnote 23, cited with approval in several of the B.C. decisions, in preceding footnote. See also *Wilson v. Janzen* (1967), 64 D.L.R. (2d) 669 (B.C.S.C.).

<sup>47</sup> See, e.g., the *Nelson*, *Joseph* and *Gerard* cases, *supra*, footnote 45.

sound approach to the problem. It recognizes that if an action has been timely commenced and the defendant has knowledge of the basis of the plaintiff's claim (albeit conveyed impliedly or informally), he has received all the protection that the statute of limitations was designed to give him.

#### B. *Amendments Changing the Parties to an Action.*

The major extension of the *Weldon v. Neal* principle has been its application to situations in which it has been successfully argued that the requested amendment involves a change of parties to the action. A general rule has developed that the addition or substitution of a new party, either plaintiff or defendant, after the limitation period has expired will not be permitted. To allow such amendments, it is said, would be to deprive the existing or new defendant of his defence under the limitation provision.<sup>48</sup>

In certain situations (which, however, arise quite rarely in practice) such an extension of the *Weldon v. Neal* principle is justified on either an analytical or functional view. For instance, if A commences an action for personal injuries against B and then later seeks, after the limitation period, to add as a defendant C—someone who was until then unrelated to and unaware of the litigation—it seems quite proper that the request be refused. The refusal may be unfortunate for A if it has transpired that C (for instance, a repairman) and not B (the owner and driver of the car) was the person whose neglect caused his injuries. But to decide otherwise is not only to allow the setting-up of a claim which is conceptually statute barred, it is to defeat the very purpose of statutory limitations—timely notice to the defendant that a claim is being asserted against him.<sup>49</sup>

Analogous situations can arise where an amendment seeks to add a plaintiff—if A commences a timely action against B and subsequently an attempt is made to join C (heretofore a stranger to the litigation) as a plaintiff in the action in order to assert a different claim to that being made by A. This might occur, for

<sup>48</sup> This extension seems first to have been made in *Hudson v. Fernyhough* (1889), 61 L.T. 722, but *Mabro v. Eagle, Star and British Dominion Ins. Co.*, [1932] 1 K.B. 485, is most often cited as authority for the extension.

<sup>49</sup> Cases of this kind arise not infrequently in practice and the courts consistently refuse leave to amend. See the cases referred in *infra*, footnote 80. But in one sense even these cases are not completely free from difficulty for frequently the new defendant is still subject to being drawn into the litigation, through being made a third-party by the original defendant. If in such cases he has to defend the third-party claim is it really unfair to require him to defend the plaintiff's claim? This matter is discussed further, *infra*, footnote 187.



example, where A and C were co-passengers in a car involved in an accident. A makes a claim against B, negotiates with him and finally sues. At least in circumstances where C has never notified B that he is making a claim it would be improper to allow C, after the limitation period, to join in A's action in order to assert a claim for his own personal injuries. In such a case B would clearly be deprived of the protection the statute of limitations was intended to give him if C were allowed to be added in this way.

In practice, however, "core" cases of the kind just described are rare. The vast majority of reported cases in which it is argued that a change of parties is being sought by a post-limitation amendment, merely involves non-prejudicial errors in the naming or choosing of the parties.<sup>50</sup> In these cases a conceptual argument can often be made that a statute barred claim is being set up. Almost invariably, however, the new or old defendant will suffer no actual prejudice for typically he has become aware, through notice received prior to the running of the statute, that an attempt is being made to assert a particular claim against him. Some fine distinctions appear in the cases and they are often difficult to reconcile. In the final analysis the outcome of any particular case usually depends upon which factor the court gives most weight to—the fact that the old or new defendant will suffer no actual prejudice, or the argument that conceptually the requested amendment will involve the addition out of time of a new party. However, there now appears to be emerging a dichotomy between the older and the more recent cases—the latter giving much greater effect to the functional consideration of lack of actual prejudice. Indeed, in two recent decisions<sup>51</sup> the Supreme Court of Canada has moved in the direction of making the presence or absence of actual prejudice the basic test.

(i) *Amendments Objected to as Involving a Change of Plaintiffs.*

The common factor among nearly all of the reported cases dealing with a change of plaintiff is that they involve nothing more than a non-prejudicial error in naming the original plaintiff. Unlike the cases involving a change of defendant, attempts to bring in total strangers as plaintiffs to the litigation, by amendment are rare.<sup>52</sup> Typically what occurs is that after the com-

---

<sup>50</sup> Or some other merely technical defect in the proceedings. See, e.g., the "capacity" and "nullity" cases discussed, *infra*; text following footnote 92.

<sup>51</sup> See the cases discussed, *infra*, text at footnotes 64 and 66.

<sup>52</sup> But see *Saskatchewan v. Buskas*, [1973] 3 W.W.R. 4 (Alta S.C.) (Personal injury action by A against B. B counterclaimed attempting to join C, his passenger and who was not a co-defendant, as a co-plaintiff by

mencement of the action it becomes apparent that the plaintiff's legal advisors were mistaken in their description of the plaintiff, or made a mistake as to which of several closely related legal entities actually possessed the title to sue. Subsequently, when an amendment is sought to correct the error by changing the style of cause the defendant objects: he argues that, the limitation period having expired, such a step would involve the setting up of a statute-barred claim.

Essentially, the outcome has depended upon the court's characterization of the nature of the plaintiff's error and the effect of the requested amendment. If it concludes that A, someone who lacked the necessary title to sue, was wrongly chosen as plaintiff and an attempt is now being made to substitute B as plaintiff, the amendment has usually been refused. However, if the court is satisfied that the intention throughout was that A should be plaintiff but he has been in some way misnamed, an amendment to correct the "misnomer" is permitted.

The 1962 Ontario decision in the *Western Freight Lines*<sup>53</sup> case is representative of the courts' handling of the problem in situations where they have concluded that the case is one of choosing the wrong plaintiff. In *Western Freight Lines*, litigation was commenced to recover for the damage done to a police car in an automobile accident, the action being brought in the name of the "Board of Commissioners of Police of the Corporation of the Township of London" as owners of the car. It was later discovered that the Board of Police Commissioners were mere bailees of the car which was in fact owned by the Township Corporation, and the defendants denied the right of the Police Commissioners to bring the action. In response, the plaintiffs moved to amend, after the expiration of the statutory period, to change the name of the plaintiff to the "Corporation of the Township of London". A majority of the Court of Appeal took the position that since it was clear from affidavit evidence that the Board of Commissioners had been deliberately (though mistakenly) chosen as plaintiff the case was not one of misnomer,

---

counterclaim after the limitation period had expired. Held: C's counterclaim must be struck out as not authorized by the Rules). *Cf.*, *Makarchuk v. Pollard* (1957), 13 W.W.R. 617 (Alta App. Div.) where the same conclusion, on slightly different facts, seems unjust. There, the counterclaim had been asserted *before* the expiry of the limitation period. Consequently C had attempted to commence an action, and A had clear notice of the claim, within the limitation period.

<sup>53</sup> *Board of Commissioners of Police of the Corporation of the Township of London v. Western Freight Lines Ltd.*, [1962] O.R. 948, 34 D.L.R. (2d) 689 (C.A.).

as to which an amendment might be had.<sup>54</sup> Rather, it was a clear attempt to substitute one party for another and this was not permissible after the expiration of the limitation period. Furthermore, they held, if the present plaintiffs were to attempt to recover by alleging or proving that they were bailees rather than owners, they would be stopped from so doing because that also would involve the setting up of a new cause of action now statute barred. A vigorous dissent from the majority opinion was presented by MacKay J. A. He denied that the amendment would set up a new cause of action. The action, he insisted, remained the same. It was still one for damages for injury to the very same automobile. The amendment requested was merely one as to the name of the owner of the vehicle and this he felt should clearly be granted under the broad general amendment power<sup>55</sup> bolstered here by the specific power given to the court by the rules in respect of the change of parties in the case of a *bona fide* mistake.<sup>56</sup>

---

<sup>54</sup> It is submitted that the court's attitude to this affidavit, and the conclusion they drew from it, are most unfortunate. The purpose for which the affidavit (made by the plaintiff's solicitor) was filed seems quite clear; it was to show that a mistake had been made and how they had come to make it. The affidavit deposed that the solicitor had understood, at the time the action was commenced, that the Police owned the car but subsequently they had discovered the vehicle had been purchased by, and was owned by the Township, and the Police were mere bailees. From this reasonable straightforward document Laidlaw J. A. drew the conclusion that "it is perfectly apparent . . . that [the solicitor] recognized the existence of two separate and distinct legal entities" one of which was the real owner and the other a mere bailee. He then stated that this "fact was known or ought to have been known to the solicitors" (emphasis added) who prepared the writ. After thus recognizing the solicitor's knowledge might at best be constructive he stated "it must be concluded that the [Board of Commissioners of Police] was *deliberately chosen* by the solicitors to be the plaintiff in the action and likewise that the [Township] should not be named as a party plaintiff" (emphasis added). With respect it is submitted that, at the very least, this is a strained interpretation of the document. For instance, the document said nothing about recognizing two separate entities *at the time the writ was issued*. It also said nothing about choice, certainly not deliberate choice. It merely stated that at the relevant time, the issue of the writ, the solicitor understood the Police owned the car and subsequently they found out the true facts—that they had made a mistake, and the Township and not the Police owned the car. This lengthy analysis of this aspect of *Western Freight*, and how the court came to lay emphasis on the aspect of choice rather than that of mistake, seems necessary in view of the fact that recently, in *Witco Chemical Co., Canada Ltd. v. Town of Oakville* (1974), 43 D.L.R. (3d) 413 (S.C.C.), Spence J. saw fit to distinguish this case, relying on the conclusions of Laidlaw J.A. just discussed, rather than to overrule it. See *infra*, text at footnote 67.

<sup>55</sup> Ont. Rules of Practice, r. 185, reproduced in part *infra*, text at footnote 129.

<sup>56</sup> Ont. Rules of Practice, r. 136, reproduced *infra*, footnote 59.

In his opinion the amendment should have been granted since the defendants were at all times fully aware of the nature of the claim being made against them and were not misled or prejudiced in their defence by the misnaming of the owner of the motor car.

It is interesting to note that in two subsequent cases courts have found little difficulty in dealing differently with amendment issues very similar to those faced by the court in the *Western Freight Lines* case.<sup>57</sup> However, the disposition of many, but not all, of the cases where the wrong person has been mistakenly chosen as plaintiff has been similar to that in *Western Freight Lines*.<sup>58</sup> Though the claim in such cases remains exactly the same

<sup>57</sup> *Canada Malting Co. Ltd. v. Burnett Steamship Co. Ltd.*, [1965] 2 Ex. C.R. 257 (Dist. Ct Judge in Admiralty) (Action in respect of damage to cargo, brought by the shipper. Amendment granted, to add as a plaintiff the real owner of the cargo at the time it was damaged. In the judgment reference is made, with approval, only to the dissenting judgment of McKay J.A. in *Western Freight*); *Thorne v. MacGregor*, *supra*, footnote 26 (Mere bailee permitted to add a claim for property damage to his claim for personal injuries).

<sup>58</sup> For cases in accord, involving similar facts see, *McPhee v. Ahern* (1964), 49 W.W.R. 189 (B.C.S.C.) ("Sicks Brewery Ltd." named as plaintiff. Amendment to change description of plaintiff to "Sicks Breweries (Alberta) Ltd.", a subsidiary of the original plaintiff, refused); *Dietrich Collins Equipment Ltd. v. Ed Huss Logging Co. Ltd.* (1969), 68 W.W.R. 366, 5 D.L.R. (3d) 87 (B.C.S.C.) (Action commenced in the name of D.C.E. Ltd. In between the date on which the cause of action arose and the date of the commencement of proceedings D.C.E. Ltd. amalgamated with P.E. Ltd. An amendment to substitute P.E. Ltd. as plaintiff, refused); *Crozier v. O'Connor*, [1960] O.W.N. 352 (C.A.) (After the commencement of a motor vehicle action it appeared that the plaintiff's son, not the plaintiff, owned the vehicle in question. Motion to add the son as a plaintiff, refused as involving the addition of a party out of time); *Frank G. Rainsford Ltd. v. Longland Bros. Logging & Trucking Co.* (1969), 72 W.W.R. 399 (B.C.S.C.) (Contract action commenced by F.G.R. Ltd., a "one man company". When it later became apparent that debt was owed, not to the company, but to F.G.R. in person, a requested amendment to substitute F.G.R. for the company as plaintiff was refused); *Ferguson v. Bryans* (1904), 15 Man. R. 171 (K.B.). See also the decisions of the Ontario Court of Appeal, later reversed by the Supreme Court of Canada, in *Ladouceur v. Howard*, [1972] 1 O.R. 488, and *Witco Chemical Co. Can. Ltd. v. Oakville*, [1973] 2 O.R. 467. In the following cases the defendant's argument that the named plaintiff lacked title to sue, or that the plaintiff should be prevented from amending was rejected. *U.M. Sales v. Scottish Metro. Assur. Co.* (1922), 22 O.W.N. 327 (H.C.); *Blair v. Official Administrator* (1964), 49 D.L.R. (2d) 478 (B.C.S.C.); *Jonasson v. Royal Transportation Ltd.*, [1936] 3 W.W.R. 540 (Man. C.A.) (Late filing of father's consent to act as infant plaintiff's next friend held not to involve assertion of a statute-barred claim); *Canning v. Avigdor*, [1961] O.W.N. 59 (C.A.) and *Betoma Nth. American Ltd. v. Barrett Spun Concrete Poles Ltd.*, [1970] 1 O.R. 72 (H.C.) (Equitable assignor permitted to be joined as co-plaintiff by post-limitation amendment).

one as was timely asserted by the original plaintiff, so that the defendant has been in no way actually prejudiced by the requested joinder or substitution, the courts have generally given weight to the conceptual argument that a party is being added out of time, and refused the amendment. One might expect that the conceptual argument used in these cases would have little chance of success in view of the specific power given to the courts, by the rules, to grant an amendment changing the parties in the case of a *bona fide* mistake:<sup>59</sup> particularly since this power is supported by a sweeping general directive on the subject of amendment.<sup>60</sup>

The outcome of the amendment issue has usually been different, however, where the court has characterized the mistake as merely one of misnaming the plaintiff rather than one of choosing the wrong plaintiff.<sup>61</sup> If the court is satisfied that all times it was intended that a particular person should be the plaintiff but a mistake has been made as to the name of the plaintiff (a "mere

---

<sup>59</sup> "The court may, at any stage of the proceedings, order that the name of a plaintiff or defendant improperly joined be struck out, and that any person who ought to have been joined or whose presence is necessary in order to enable the court effectually and completely to adjudicate upon the questions involved in the action, be added or, where an action has through a *bona fide* mistake been commenced in the name of the wrong person as plaintiff or where it is doubtful whether it has been commenced in the name of the right plaintiff, the court may order any person to be substituted or added as plaintiff". Ont. Rules of Practice, r. 136 (1). For similar, though not identical, provisions, see *e.g.*, B.C., Supreme Court Rules 1961, O.16, r. 11; Sask., Queen's Bench Rules 1961, r. 40.

<sup>60</sup> Ont. Rules of Practice, r. 185, quoted in part in the text *infra*, footnote 129. See footnote 1, *supra*, for citations of similar rules in the other provinces. See also Ont. Rules of Practice, r. 186.

<sup>61</sup> *Pacific Lime Co. Ltd. v. Vancouver Tug Boat Co. Ltd.*, [1955] Ex. C.R. 142 (B.C. Adm. Dist.) (Plaintiff, whose real name was Pacific Lime Co., Ltd., issued a writ showing its name as Pacific Coast Lime Co. Ltd.—there being no such company. Amendment granted as being mere correction of a misnomer); *Chisholm v. Wodlengor* (1913), 5 W.W.R. 793 (Man. K.B.); *A.G. v. Patterson*, [1946] 3 W.W.R. 279 (Alta App. Div.) (Suit by the federal government in which plaintiff was described as the "Dept. of Nat'l Defence for the Dominion of Canada" rather than the "A.G. of Canada". Appellate court divided equally on the question and lower court's order granting the amendment thus allowed to stand); *Dill v. Alves*, [1968] 1 O.R. 58, 65 D.L.R. (2d) 416 (C.A.) (Action for personal injuries in which the son, Edwin R. Dill, the driver of the car, was mistakenly named as plaintiff rather than the father, Edward Dill, a passenger in the car who sustained damages both personal and to the car. Amendment allowed as a mere misnomer which did not, in the circumstances, mislead the defendant). But contrast the Ontario cases, *infra*, footnote 72, refusing leave to amend where the misnomer has been of a sole proprietor suing as plaintiff. For cases involving the misnomer of defendants see *infra*, footnotes 82 *et seq.*

misnomer") then an amendment will be allowed, even though the effect appears to be the substitution of another as plaintiff after the limitation period. While this misnomer principle can be thus stated quite simply, in practice it has often proved to be an elusive and difficult one to apply with any confidence as to its outcome.<sup>62</sup> However, in two recent cases<sup>63</sup> the Supreme Court of Canada (unanimously reversing decisions of the Ontario Court of Appeal and granting leave to amend) has clarified the principle. In so doing the court put forward an essentially functional test for the application of the principle, one that should prove relatively easy to apply.

Both these cases had caused difficulty for the lower courts primarily because the basic facts of each more closely resembled the mistaken choice of plaintiff than the misnomer cases; in both of the cases there were two existing and distinct legal entities who could have been named as plaintiff, and in each case the wrong entity was originally named. In the first of the two cases, *Ladouceur v. Howard*,<sup>64</sup> a father (Conrad Joseph L.) and son (Paul L.) had been driving together in a car involved in a collision with the defendant. Although his car was damaged, the father suffered no personal injuries whereas the son did. However, by mistake the son's lawyer issued the writ, claiming damages for personal injuries, in the father's name. An amendment was sought to substitute the son for the father as plaintiff. In granting leave to amend Spence J., speaking for the court, looked at all the circumstances surrounding the case. These revealed that throughout the defendants' insurer had negotiated only with respect to the personal injuries claim of the son. Consequently, on receipt of the writ, the defendant would have realized the mistake in the style of cause. And since the "prime principle" in such cases, stated Spence J.,<sup>65</sup> "is that the Court should amend, where the opposite party has not been misled or substantially injured by the error" the amendment should be allowed, for here there was a lack of any evidence that the defendant had been misled or substantially injured.

<sup>62</sup> For evidence of this, one need only compare the judgments in *Western Freight Lines*, *supra*, footnote 53, *Chretien v. Hermann and Plaza*, [1969] 2 O.R. 339 (C.A.), *Dill v. Alves*, *supra*, footnote 61, *Ladouceur v. Howarth and Witco Chemical Co. v. Oakville*, *supra*, footnote 58, all decisions of the Ontario Court of Appeal given in the last decade. The major difficulty encountered has been determining just when a plaintiff has been merely misnamed as opposed to wrongly chosen, and formulating a coherent and consistent test for making that determination.

<sup>63</sup> See, *infra*, text at footnotes 64 and 66.

<sup>64</sup> (1973), 41 D.L.R. (3d) 416.

<sup>65</sup> *Ibid.*, at p. 420.

The second case is *Witco Chemical Co., Canada Ltd. v. Town of Oakville*.<sup>66</sup> There the difficulty was that one day before the issuing of the writ naming Witco as plaintiff, that company had amalgamated with the Argus Chemical Canada Ltd., under the latter name, a fact which at the time was unknown to the lawyer handling the litigation. Subsequently, after the passage of the very short limitation period, the lawyer became aware of the amalgamation and sought leave to correct the style of cause to name the new amalgamated company as plaintiff. As in *Ladouceur* Spence J., again writing the judgment of the court, looked at all the circumstances surrounding the case and stressed the broad language of the Rules<sup>67</sup> governing amendment. He concluded that here the solicitor's error was clearly a *bona fide* mistake within the meaning of the rule relating to a change of parties. Moreover, the basic principle (reflected in the amendment rules) was "that the Court should amend where the opposite party has not been misled or substantially injured by the error". Spence J. concluded that, in the circumstances, "the defendant could not have been in any way misled or prejudiced" by the plaintiff's error, and leave to amend was granted.

In both of these cases the Supreme Court of Canada stressed that the important question was whether, in the circumstances, the opposite party had been misled or substantially injured by the error. This is a sound approach to the problem. Moreover, it is submitted that the above test is a sufficient test, one which if applied alone and without further qualification could provide a satisfactory resolution of all cases involving a misdescription of the parties. But unfortunately in his judgment in *Witco* Spence J. introduced a qualification. Regrettably he saw fit to distinguish, rather than to over-rule, the Ontario Court of Appeal's earlier decision in *Western Freight Lines*.<sup>68</sup> By so doing he appears to have preserved the dichotomy between the mistaken choice of plaintiff cases (for instance, *Western Freight Lines*) and the misnomer cases.

With respect, it is submitted that there is no meaningful difference in principle between the two types of case. To continue to differentiate these cases only perpetuates injustice and prolongs

<sup>66</sup> (1974), 43 D.L.R. (3d) 413. Contrast *Dietrich Collins*, *supra*, footnote 58 not referred to by the Supreme Court in *Witco*.

<sup>67</sup> Quoted, *supra*, footnote 59 and text at footnote 130, *infra*.

<sup>68</sup> Discussed *supra*, text at footnote 53. Spence J. distinguished *Western Freight* on the ground that there the solicitor issuing the writ knew of the existence of both the Township and the Police and chose to name the latter as plaintiff (see discussion *supra*, footnote 54) whereas the solicitor in *Witco* exercised no choice because he only knew of one company, Witco Chemical Co.

confusion.<sup>69</sup> In one situation the plaintiff is mistaken as to who has title to sue and in the other he is mistaken as to the correct name of the plaintiff. Admittedly the cases *can* be distinguished; on the basis that in one the solicitor intended (albeit mistakenly) to name the original plaintiff, whereas in the other he intended all along to name a particular person as plaintiff. But, it is submitted, this distinction is, or should be, of no consequence. In any event, it is one that breaks down if the cases on misnomer of plaintiffs *and* defendants are viewed together.<sup>70</sup> In both types of case the plaintiff has laboured under a mistake.<sup>71</sup> Provided the opposing party has not been misled or injured by the error in such a way as to be now prejudiced in defending on the merits, the courts should be unconcerned with the nature of the plaintiff's error.

It is to be hoped that in the future the courts will abandon this distinction between misnomer and the mistaken choice of plaintiff. It is also to be hoped that with the decisions in *Ladouceur* and *Witco* we will see the demise of the unjust doctrine, developed by the Ontario Court of Appeal, that an action mistakenly brought in the name of a sole proprietor is a nullity and incapable of being cured by amendment.<sup>72</sup>

<sup>69</sup> Reference has already been made to the difficulty the courts have experienced in distinguishing between cases of misnomer and those involving a mistaken choice of plaintiff, see *supra*, footnote 62.

<sup>70</sup> Quite properly the courts assume that the "misnomer" cases, whether of a plaintiff or of a defendant should all be governed by the same principles (see, e.g., *Witco*, *supra*, footnote 66). In fact, however, this is not so. On close analysis, while the change of plaintiff cases are arguably consistent with the "deliberate choice of the wrong party" versus "the mere mistake in naming the party" distinction (compare the cases referred to in footnotes 58 and 61, *supra*), the cases involving a change of defendant are not. For example in the *Chretien* case, (discussed, *infra*, footnote 87, cited with approval in *Witco*) the court characterized the mistake as one of misnomer and granted leave to amend. Yet in that case what the plaintiff had done was directly analogous to what had been done in *Western Freight Lines*, and similar cases, where leave to amend was refused: *i.e.*, he deliberately chose X as defendant because he believed, mistakenly, that X enjoyed a particular status—that he was owner of the car. See also the *Gaytee* case, discussed, *infra*, footnote 87. It is submitted that the true common factor among the decided cases granting amendment on the basis of a misnomer is not that they involved a mere mistake in naming the party, rather than a deliberate choice of the wrong party, but simply that in all of the cases no prejudice would result from granting the amendment.

<sup>71</sup> See the discussion *supra*, footnote 54. As we shall see, *infra*, Part III, even the mistake element should not be considered essential. The crucial question should be, mistake or no mistake, will the defendant suffer actual prejudice as a result of the amendment.

<sup>72</sup> The Ontario Rules make no provision for an action by a sole proprietor to be brought in the firm name, and the courts have held that it is improper to do so. In a number of early cases sole proprietors who sued in the firm's name had been given leave to amend, *Lang v. Thompson*



The cases discussed in this section up to this point have merely involved requests to substitute another plaintiff for the one originally named, rather than the actual addition of an extra plaintiff. But requests to add, by post-limitation amendment, another plaintiff while retaining the original party, have occurred though such cases are less common. A unifying element among these cases is that they all involve situations where the claim is one that would normally be enforceable by a single plaintiff, but through some circumstance, or rule of law, the presence of more than one plaintiff is necessary to enforce the total claim.

The most numerous of these cases involve personal injury actions brought by married women suing alone. In such cases the wife has been met with the argument that, to the extent that she seeks to recover expenses which are necessities, these are the legal responsibility of the husband and only he may sue for them. In his absence, it is argued, these expenses are not recoverable.<sup>73</sup> To overcome this difficulty married women have requested leave to amend to add their husband as co-plaintiff. Where the limitation period has expired at the time of the request it has been argued that such an amendment cannot be permitted. In two British Columbia cases this argument has been accepted and leave to amend refused.<sup>74</sup> However, in a recent Ontario

---

(1895), 16 P.R. 516; *Standard Leather Co. v. Smith Transport Ltd.*, [1940] O.W.N. 500 (Master). And see also *Cadesky v. Dover*, [1945] O.W.N. 138 (Master) and *Lloyd and Co. v. Scully* (1912-1913), 4 O.W.N. 1404 (Master). However, in 1948 the Ontario Court of Appeal held that an action by a sole proprietor brought in the firm name is a nullity (unless, so it would appear, the sole proprietor's name forms part of the firm's name) and incapable of amendment. *Kaltenback v. Frolic Industries*, [1948] O.R. 116, [1948] 1 D.L.R. 689. Eight years later when asked to reconsider this question the court declined to do so: *Robertson and Son v. Blonski*, [1956] O.W.N. 642 (C.A.). The *Kaltenback* case, and a subsequent decision, recognize an exception to the rule where the sole proprietor's name forms part of the firm name: *O. C. Couch Plumbing v. Target Textiles*, [1969] 1 O.R. 735 (C.A.). With *Kaltenback* contrast *B.C. Furniture Co. v. Tugwell* (1900), 7 B.C.R. 36, (C.A.) and *Skyline Associates v. Small*, [1975] 1 W.W.R. 385 (B.C.S.C.) and cases there cited.

<sup>73</sup> This argument has been accepted in numerous cases, see, e.g., *Oliveren v. Mills* (1964), 50 D.L.R. (2d) 768 (B.C.S.C.) and cases there cited; *Hallier v. Keren* (1968), 66 D.L.R. (2d) 750, 63 W.W.R. 204 (B.C.S.C.); *Accaputo v. Simanovskis*, [1973] O.R. 368 (H.C.). However, in several recent cases the difficult situation in which this rule places the married woman suing alone has been alleviated by holding that the wife can herself recover the expenses, if she can show that she assumed the legal liability to pay for them, or did in fact pay for them: *Lang v. Gambareri*, [1968] 2 O.R. 736 (H.C.); *Andrews v. Arnot* (1972), 27 D.L.R. (3d) 49 (B.C.S.C.); *Gagnon v. Ryland* (1972), 28 D.L.R. (3d) 504 (B.C.S.C.).

<sup>74</sup> *Hallier v. Keren*, *ibid.*; *Fraser v. Harrison* (1968), 65 W.W.R. 624 (B.C.S.C.).

case<sup>75</sup> Galligan J. refused to follow these decisions and granted leave to add the husband. Galligan J. pointed out that the defendant had received timely notice that the wife was injured by his negligence and he must have known that there would likely be expenses arising from those injuries. Accordingly, the interests of justice required that the husband be added as a party notwithstanding the expiry of the limitation period. In an earlier Ontario case<sup>76</sup> a similar, sensible, approach had been taken where the problem was the analogous one of the father's absence from a suit by an infant for personal injuries. In order to permit the recovery of the child's medical expenses the father was added as a plaintiff though the limitation period had expired.

The same type of functional approach is also evident in two further recent cases,<sup>77</sup> again from Ontario, where the addition of a new party plaintiff might be considered "more extreme" than in the foregoing cases. Both involved actions by the Ontario Hospital Services Commission (O.H.S.C.), which is empowered to sue for expenditures it has made on behalf of injured persons, if such persons do not themselves institute actions within a certain time. After such actions had been commenced by O.H.S.C., and after the expiry of the limitation period, the injured person sought to join in the actions to claim for his *own* damages. In both cases the court held, aided by special legislative provisions, that the joinder was proper notwithstanding the expiry of the limitation period. The essence of the court's reasoning, in the face of the argument that this involved the setting up of statute-barred claims, was that in the circumstances there was but one cause of action—in negligence for personal injury to the injured person<sup>78</sup>—and the timely issuance of the writ by the O.H.S.C. informed the defendant that an action was being brought in respect of the personal injuries. Consequently, the defendant could not contend that he would be prejudiced by having to now meet the claim of the injured person for his own damages.<sup>79</sup>

<sup>75</sup> *Accaputo v. Simanovskis*, *supra*, footnote 73 (and see also the earlier case of *Silic v. Ottawa Transport Commission*, [1963] 2 O.R. 477 (H.C.)). In *Accaputo* it was stressed, however, that the husband could recover only expenses and could not assert any claim "of his own", such as for consortium.

<sup>76</sup> *Curran v. Rudyk*, June 29th, 1970 (H.C.) unreported but discussed in *Accaputo*, *supra*, footnote 73.

<sup>77</sup> *Ont. Hosp. Services Comm. v. Reg. of Motor Vehicles*, [1969] 1 O.R. 666 (H.C.); *Ont. Hosp. Services Comm. v. Barsoski*, [1973] 3 O.R. 720 (C.A.).

<sup>78</sup> Similar reasoning was used (in different factual contexts) in *Cahoon v. Franks*, *supra*, footnote 26, *Accaputo*, *supra*, footnote 73, and in *Curran v. Rudyk*, *supra*, footnote 76.

<sup>79</sup> See, *infra*, footnote 179 for a criticism of these two cases.

(ii) *Amendments Objected to as Involving the Addition of a Defendant.*

Cases involving a change of defendants out of time fall into two distinct categories: those where the plaintiff seeks to draw into the litigation someone who was until then unconnected with it, and those where the plaintiff, having initially in some way misnamed his defendant, seeks to rename the party. Obviously the functional considerations differ in the two types of case. Where a person has heretofore been unconnected with the litigation there is a real likelihood of prejudice if joinder is permitted. But this is not usually so where the plaintiff merely seeks to correct a misdescription of his defendant. Although a functional analysis is not always apparent in the cases, the courts' handling of these cases reflects this dichotomy: leave to amend is refused in the first category but is generally granted in cases in the second category.

It has already been observed that in the case law relating to change of plaintiff, attempts to bring in parties who were, up to that point, unconnected with the litigation are rare. With regard to attempts to add defendants, however, the situation is otherwise. Not infrequently plaintiffs have sought to add as defendants, by post-limitation amendment, persons who were total strangers to the litigation. Typically, this has occurred in negligence actions when the plaintiff belatedly discovers that someone other than the named defendant may be liable (for instance, a repairer or the authority charged with maintaining the road), or that the named defendant is not who the plaintiff supposed him to be (for instance, the owner of the car, or the manufacturer of the tires of the car that struck him). In these cases the courts have not hesitated to consistently apply prohibition against joinder out of time.<sup>80</sup> Probably the person sought to be added in

<sup>80</sup> *McCormick v. Morrison, Tacoma Petroleum Ltd. et al* (1970), 73 W.W.R. 86, 13 D.L.R. (3d) 474 (Man. Q.B.) (Automobile negligence action: post-limitation amendment to add G. and S.—on the theory that they rather than one of the original defendants F., manufactured the defendant driver's tires—refused); *Heppel v. Stewart*, [1968] S.C.R. 707, 69 D.L.R. (2d) 88 (Motor vehicle case: application to add the repairer of defendant driver's brakes refused upon a determination that the Highway Traffic Act's one year limitation period, which had expired, applied. The decision in *Lucyk v. Gushowaty*, [1972] 1 W.W.R. 67 (Man. Q.B.) appears to have been reached in ignorance of the *Heppel* decision); *McMurphy v. G.M. Can. Ltd.* (1969), 5 D.L.R. (3d) 170 (B.C.S.C.) (Unsuccessful attempt to add seller to an action against manufacturer of defective automobile); *Owens v. Calgary Farmer and Calgary Weekly Farmer*, [1927] 3 W.W.R. 62 (Alta S.C.) (Request to add another newspaper as a party defendant to a libel action, refused); *Figueroa v. Waine*, [1968] 2 O.R. 755

these cases would have been prejudiced by the amendment, in the sense that they had no notice of the plaintiff's claim before

(C.A.) (Registrar of Motor Vehicles, sued in respect of the negligence of an unidentified motorist, may not be added after the limitation period. *Jones v. Rapkoski*, [1967] 1 O.R. 407, which held to the contrary, overruled. But contrast *Scott v. Whitworth*, [1974] 6 W.W.R. 740 (Alta App. Div.); *B.C. Airlines Ltd. v. The Queen*, [1972] F.C. 64 (Amendment to add air traffic controllers as defendants in an action against the Crown based on their negligence, refused); *Williams v. Davis* (1969), 70 W.W.R. 684 (Man. Q.B.) (Motor vehicle case. After expiry of limitation period plaintiff learned that defendant was not the owner of the vehicle. Application to add the owner refused); see also *Lere v. Hartford Accident and Indemnity Co.* (1968), 69 D.L.R. (2d) 704 (B.C.C.A.); *Arnold Lumber Ltd. v. Vodoukis*, [1968] 2 O.R. 478 (Master).

In Quebec, under art. 2231 of the Civil Code, the situation is apparently different, see *Martel v. Hotel-Dieu-St. Vallier* (1969), 14 D.L.R. (3d) 445 (S.C.C.) (Personal injury action against a hospital and doctor. On discovery it was learned that the wrong doctor had been sued. Application to add the proper doctor as defendant, granted, despite the expiry of the limitation period).

In numerous cases attempts have been made to join persons as defendants, or as third parties or both, after the limitation period, pursuant to the provisions of the Ontario Negligence Act (see now Negligence Act, R.S.O., 1970, c. 296). S. 6 of the Act provides for the joinder of persons not already parties, as defendants or third parties, if it appears that they may be wholly or partly responsible for the damages claimed. It has been held that this section does not permit either a plaintiff (see *Lattimor v. Heaps* (1931), 40 O.W.N. 580 (C.A.) and also *Beaulieu v. Lavoie* (1973), 38 D.L.R. (3d) 157 (N.S. App. Div.)) nor a defendant (see *Adams v. W. J. Hyatt*, [1954] O.W.N. 895 (H.C.); *Kane v. Haman*, [1971] 1 O.R. 294 (H.C.)) to add a person as a *party defendant* after the limitation period has expired. But because of s. 9 of the Act (and see also the Highway Traffic Act, *supra*, footnote 37, s. 146 (3)) a person may be added as a *third party*, notwithstanding the expiry of the limitation period: see *A.G. Ontario v. Kibrick*, [1974] 4 O.R. (2d) 313 (C.A.); *Black v. Horseman*, [1974] 4 O.R. (2d) 188 (Div. Ct); *Ont. Northland Trans. Comm. v. New*, [1974] 4 O.R. (2d) 56 (Master); *Judson v. Vasilaras*, [1971] 1 O.R. 290 (H.C.); *Adams v. W. J. Hyatt*, *supra*; *Baker v. Bundy*, [1972] 4 W.W.R. 632 (Man. Q.B.). On the whole question see Watson, Borins and Williams, *Canadian Civil Procedure: Cases and Materials* (1973), pp. 617-618. As to the situation in British Columbia, cf. *Johnson v. Vancouver Gen. Hosp.*, [1974] 1 W.W.R. 239 (B.C.C.A.), *Uhryn v. B.C. Telephone Ltd.*, [1973] 5 W.W.R. 758 (B.C.S.C.) and *B.C. Hydro v. Kees van Weston*, [1974] 3 W.W.R. 20 (B.C.S.C.). But a *defendant* may not use the guise of a third party claim for contribution and indemnity to add in an independent, statute-barred, claim (e.g., for his own injuries) against the third-party, *Lardner v. Canada Permanent Trust Co.* (1969), 6 D.L.R. (3d) 628 (Man. Q.B.).

A total stranger may, however, be joined after the normally applicable limitation where he is brought in as a defendant by counterclaim and the provisions of The Highway Traffic Act, *supra*, s. 146(3) apply: *Broadhurst v. Sartisoehn*, [1972] 1 O.R. 567 (H.C.).

the limitation period expired.<sup>81</sup> Invariably however, the reason for refusing leave to amend is simply that the application is out of time, rather than that actual prejudice would result to the defendant.

Cases in which it has been sought by amendment to correct a misdescription of a party defendant have been approached by the courts in much the same way as cases involving a misdescription of the plaintiff. Amendment has been permitted provided the court is satisfied that it will merely "correct a misnomer" and will not involve the addition of a new party out of time. However, on their facts some of the cases are not easily reconciled with the case law on misnomer of plaintiffs. In many of the cases it is quite clear that all the plaintiff is doing is correcting a misdescription of the defendant who is already before the court. (A good example are the numerous cases arising out of actions against governmental agencies<sup>82</sup> an area in which it is not uncommon for the plaintiff to encounter difficulties in ascertaining the responsible legal entity,<sup>83</sup> or its

---

<sup>81</sup> For a glaring exception see *Greig v. Toronto Trans. Comm.*, [1958] O.W.N. 480 (C.A.), rev'ing, [1958] O.W.N. 389 (H.C.).

<sup>82</sup> In addition to the cases cited in the following footnotes see, *Collins v. Haliburton*, [1972] 3 O.R. 643 (H.C.) (District Health Unit named as defendant. Proper defendant was Board of Health of the district health unit. Amendment permitted); *Fleming v. Foote*, [1973] 6 W.W.R. 48 (B.C.S.C.) (Plaintiff sued a named individual as "Official administrator for the County of Vancouver, etc.". In fact the named defendant no longer existed as a suable entity and the office had been assumed by the Public Trustee. Amendment to substitute Public Trustee permitted); *Sabourin v. Canada Permanent Trust Co.*, [1974] 1 W.W.R. 519 (Man. Q.B.) (Plaintiff sued the estate of S. naming the G.T. Co. as the official administrator. Subsequently, it was discovered that the official administrator of the estate was in fact the C.P.T. Co.. Amendment allowed substituting the latter company as defendant).

Misnaming the defendant in actions against governmental agencies has been a pervasive problem in the United States, see Byse, *Suing the "Wrong" Defendant in Judicial Review of Federal Administrative Action: Proposals for Reform* (1963), 77 Harv. L. Rev. 40. Professor Byse's proposals led to the enactment of special provisions to deal with the problem. See now, the United States Federal Rules of Civil Procedure, Rule 15(c), *infra*, Appendix, item 1.

<sup>83</sup> See *e.g.*, *Durham v. West*, [1959] O.W.N. 169 (C.A.) (Action against a school board was commenced against the individual trustees of the board: an amendment to substitute the statutory name of the school board permitted); *Doherty v. Flagstaff Municipal District* (1962), 38 W.W.R. 364 (Alta S.C.) (Action commenced against the "Municipal District of Beaver" at a time when it had become the County of Beaver, amendment permitted).

correct title,<sup>84</sup> and where the relevant legislation may confuse rather than clarify the situation.)<sup>85</sup> In these cases, where there is actually no change in the parties before the court, the judges have been very sensitive to the fact that the defendant has not been misled or prejudiced and an amendment has invariably been permitted.<sup>86</sup>

But a number of cases, while treated by the courts as instances of misnomer, have quite clearly involved the addition or substitution of a different and new party defendant,<sup>87</sup> and

<sup>84</sup> See, e.g., *Sleeman v. Foothills School Division No. 58*, [1946] 1 W.W.R. 145 (Alta S.C.) (Defendant was named as the "Foothills School Division No. 58" rather than "Board of Trustees of" etc. Amendment allowed).

<sup>85</sup> In the *Sleeman* case, *ibid.*, the court noted the great ambiguity in the relevant legislation. See also *Perepelytz v. Dept. of Highways for Ontario*, [1958] S.C.R. 161 (Action for non-repair of a highway. The relevant legislation was extremely confusing as to the proper name of the defendant. Amendment eventually allowed, but only after an appeal to the Supreme Court of Canada).

<sup>86</sup> In addition to the governmental agency cases, cited above, see *Williamson v. Headley*, [1950] O.W.N. 185 (H.C.) (Writ named as defendant Howard Edward Headley. Real name of the defendant, who had been duly served, was Harold Headley. Amendment permitted); *Russell v. Diplock-Wright Lumber Co.* (1910), 15 B.C.R. 66 (Plaintiff named as defendant "Diplock-Wright Lumber Co. Ltd." but later discovered that the defendants were not an incorporated company but a registered partnership. Amendment granted). See also *De Laval Co. Ltd. v. Milhoborski*, [1926] 1 W.W.R. 305 (B.C.D.C.) and *Jackson v. Bubela*, [1972] 5 W.W.R. 80, 28 D.L.R. (3d) 500 (B.C.C.A.).

<sup>87</sup> *Clark v. Thomas Gaytee Studios Inc.*, *supra*, footnote 8 (Plaintiff mistakenly named as defendant an individual (T.J. Gaytee) whereas the legal person actually liable to him was an existing "one-man" corporation of a similar name (T.J. Gaytee Studios Inc.). Amendment granted to substitute the corporation for the individual defendant. An employee of the corporation had misled the plaintiff as to who should be the defendant. Also the court was satisfied that the corporation was well apprised of the litigation when the individual defendant was served with the writ); *Chretien v. Herrman and Plaza*, *supra*, footnote 62 (An automobile negligence action in which an individual, Jose Plaza, was named as the defendant owner, whereas the true owner was Jose Plaza Co. Ltd.—a company controlled by the individual of that name. Amendment allowed to substitute the company as defendant. At the time of the accident the driver of the car had told the police that Jose Plaza was the owner of the vehicle. The individual, Jose Plaza, had been duly served with the writ); *Kirkpatrick v. Slasor*, *supra*, footnote 8 (Plaintiff was injured while driving as a passenger in a car driven by Richard H. Slasor (R.H.S.). Acting on police information indicating that R.H.S. was the owner of the car, the plaintiff instituted an action against R.H.S. as both owner and driver of the car. Subsequently, it was discovered that the R.H.S. who drove the car was not also the owner. Rather the owner was his father, also called R.H.S. Held, that in the peculiar and unusual circumstances of the case an amendment should be allowed to permit the plaintiff to sue both R.H.S.'s, since both had in fact

are not really reconcilable with the supposed state of the law with regard to misnomer of plaintiffs.<sup>88</sup> However, in all of these cases the persons added by amendment were not total strangers to the litigation. They were closely related in interest to the defendant originally named. It could be shown or reasonably assumed that they had received timely notice of the plaintiffs claim and in the circumstances they could not argue that they would be actually prejudiced in defending on the merits. Moreover, in most of the cases the new defendant had in some way misled the plaintiff and contributed to his mistake in naming the original defendant. Though more liberal in outcome<sup>89</sup> the reasoning in these cases has not always been as broad and functional as in the recent cases on the misnomer of plaintiffs.<sup>90</sup>

---

been served within the limitation period and neither could be said to have suffered injury); *Jackson v. Bubela*, *ibid.* (Plaintiff was injured in a collision with a car owned by B and driven by a man whose identity could not be discovered. Therefore, on the eve of the limitation period, she issued a writ against B as owner and "John Doe" as driver of the vehicle. On discovering the real name of the driver (who was the owner's brother) the plaintiff was granted leave to substitute his name for that of John Doe. In granting leave the court pointed out (a) that driver had failed to make a police report and to give his name to the plaintiff at the scene of the accident, as he was bound to do, and (b) the defendant driver could be no way prejudiced by the amendment since he was sued within time and described in a way that clearly identified him). Contrast with *Chretien*, *supra*, footnote 62, and *Jackson, Lere v. Hertford Accident Co.* and *Williams v. Davis*, *supra*, footnote 80.

<sup>88</sup> See the discussion *supra*, footnote 70, and accompanying text.

<sup>89</sup> *Cf.* the decision in *Western Freight*, *supra*, footnote 53, and the cases referred to in footnote 58, *supra*, with the decisions in *Chretien*, *supra*, footnote 62, and *Gaytee*, *supra*, footnote 8. See also the discussion *supra*, footnote 70.

<sup>90</sup> For example, the exact basis and scope of the decision in *Chretien*, *supra*, footnote 62, is not altogether clear. Given the courts' reasoning, would the decision have been different, for instance, had the company controlled by Jose Plaza been called Industrial Associates Ltd.? Also many of the decisions place considerable weight on the defendant's role in misleading the plaintiff. While undoubtedly a relevant consideration when present, the absence of this factor should not, as a matter of principle, prejudice the case for amendment. This is of particular importance in cases where a plaintiff mistakenly sues the wrong defendant in a situation in which the proper defendant is another company closely related in its interests and activities with the named defendant, *e.g.*, the plaintiff sues the parent company rather than a subsidiary. These cases, though not to date evident in the reported Canadian case law are common in the United States: see *e.g.*, Note, Federal Rule of Civil Procedure 15(c): Relation Back of Amendment (1972), 57 Minn. L. Rev. 83, at p. 90. In such cases the fact that neither defendant has actively misled the plaintiff should be irrelevant, and the amendment should be granted provided the new defendant had notice and will not be prejudiced.

It is to be hoped that in the future the simple, liberal test suggested by the Supreme Court of Canada in *Ladouceur* and *Witco*<sup>91</sup>—has the opposite party been misled or substantially injured by the amendment?—will be applied *simpliciter* both to cases involving a change of plaintiff and a change of defendant.

(iii) *Cases in Which Amendment Has Been Refused on the Ground that the Proceedings as Constituted Were a Nullity.*

To complete this survey of the Canadian case law reference must be made to one further group of cases. For the most part these are cases involving mistakes in the naming of parties, or situations where the plaintiff lacks the capacity in which he purports to sue. A unifying factor in these cases is that the defendant has successfully argued that the defect renders the proceedings a nullity and therefore incapable of amendment. As a result the plaintiff is left in a situation where his initial action cannot proceed and the statute of limitations prevents the institution of a new action. (In some of the cases discussed earlier this argument has been made, sometimes with success.)<sup>92</sup> The cases are generally characterized by reasoning which is extremely conceptual, functional considerations being completely eschewed, and typically the results are most unjust since usually the defendant would suffer no prejudice if the plaintiff were allowed to amend and proceed.

Leaving aside for a moment those involving a lack of capacity, the remainder of the cases mainly have to do with actions by or against deceased persons or their estates. In *Gonzales v. Reid*,<sup>93</sup> and several similar cases, what appeared on the surface to be a straightforward and well constituted action turned into disaster for the plaintiff when it subsequently turned out that, unbeknown to him, the defendant had died shortly before the issue of the writ. By holding an action against a dead person to be a nullity, and incapable of amendment, in all of these cases the courts thwarted the plaintiffs' attempt to reconstitute their actions against

<sup>91</sup> Discussed *supra*, text at footnotes 64 and 66.

<sup>92</sup> *E.g.*, in the cases relating to actions brought by sole proprietors in their firm's name, *supra*, footnote 72. Also the argument was successful, for example, in the Ontario Court of Appeal, though not in the Supreme Court of Canada, in *Perpelytz*, *supra*, footnote 85.

<sup>93</sup> [1969] 1 O.R. 81, 1 D.L.R. (3d) 432 (H.C.). Accord; *Kulesa v. Hefford*, [1972] 1 O.R. 740 (C.A.); *Dredge v. Greer*, [1961] O.W.N. 185 (Master); *C.P.R. Co. v. Pierce*, [1928] 3 W.W.R. 585 (Alta S.C.). See also *Gooderham v. Moore* (1899), 31 O.R. 86 (H.C.).



the deceased person's estate.<sup>94</sup> Similar results have occurred where, unknown to the solicitor issuing the writ, the plaintiff had died prior to the commencement of the action.<sup>95</sup>

In *Mantle v. McIntyre*<sup>96</sup> the situation was somewhat different. There the plaintiff had the initial advantage of knowing that the person who injured him was dead. But, unfortunately, the search he had had made in the Surrogate Court Office to determine whether letters probate or of administration had been granted produced incorrect information. He was led to believe neither had been granted, and so he applied to the court for the appointment of an administrator *ad litem* and commenced suit against him. Subsequently, the truth was discovered: that the deceased's executor, who knew full well of the plaintiff's claim, had earlier taken out letters probate. To overcome the difficulty the plaintiff applied to substitute the executor for the administrator *ad litem*, alas, without success. There being an executor in existence, the court order appointing the administrator *ad litem* was held to be void *ab initio*. Consequently, the plaintiff's action was a nullity and the executor "could not be added as a defendant because you cannot add something to nothing". Similarly, it has been held that to name "the Estate of" a deceased person, rather than his administrator as defendant renders the proceedings a complete nullity and incapable of amendment.<sup>97</sup> In one very recent case<sup>98</sup>

---

<sup>94</sup> Now in Ontario (as in England) the legislature has stepped in and specifically dealt with the problem, see The Trustee Act, R.S.O., 1970, c.470, s.38, as am. by 1971, c.32, s.2, empowering a judge to make an order validating the writ. See also the Alberta legislation, *infra*, Appendix, item 3, s.61(c) and compare the Saskatchewan legislation, *ibid.*, item 4.

<sup>95</sup> In *Rakha Ram v. Tinn* (1911), 16 B.C.R. 317, 1 W.W.R. 35 (B.C.S.C.) the substitution of the deceased plaintiff's executor was permitted. However, in *Sleigh v. Coleman* (1951), 1 W.W.R. (N.S.) 239 (B.C.S.C.) the court refused to follow this case and, applying two English decisions, *Clay v. Oxford* (1866), L.R. 2 Ex. 54, and *Telov v. Orel Ltd.*, [1920] 2 Ch. 24, held the action to be a nullity and incapable of amendment. Note that the curative Ontario and English legislations referred to in the preceding footnote *does not* extend to actions brought in the name of deceased persons.

<sup>96</sup> [1965] 2 O.R. 130 (C.A.).

<sup>97</sup> *Buteau v. Public Trustee*, [1972] 2 W.W.R. 177, 24 D.L.R. (3d) 503 (Alta App. Div.), though this was only one of several blunders by the plaintiff and it is likely that the requested amendment would have prejudiced the defendant. But now, contrast *Smith v. Estate of Orville Peter Smith*, [1973] 3 O.R. (2d) 231 (H.C.) holding (without referring to *Buteau*) that such a defect is a mere irregularity and amendable. While the actual holding in *Smith* is a sound one, the reasoning relied upon by the court is, with respect, highly conceptual and confused.

<sup>98</sup> *Wallace v. Antoine*, [1973] 6 W.W.R. 481 (B.C.C.C.). In two other recent cases the court rejected the defendant's argument that the proceed-

a court has even held that merely to make the error of entitling the proceedings "in the County Court of Duncan" where the proper name is the "County Court of Nanaimo", renders the proceedings an absolute nullity and incapable of amendment even though the writ in the action was issued out of the County Registry at Duncan which is where the County Court of Nanaimo sits.

Surely these decisions are, to use Singleton L.J.'s apt description, "a blot on the administration of justice".<sup>99</sup>

Equally unjust in their result are a series of cases (brought under the Fatal Accidents Act or Trustee Act and analogous legislation)<sup>100</sup> where the plaintiff has lacked the capacity of a personal representative in which he purported to sue. In these cases the courts have held that, if at the time he institutes the action the plaintiff lacks the representative capacity, the proceedings are a nullity and incapable of amendment<sup>101</sup> notwithstanding that

---

ings were a nullity: *Rempel v. Peterson, Howell and Heather (Can.) Ltd.*, [1973] 4 W.W.R. 649, 38 D.L.R. (3d) 142 (B.C.C.A.) (Action brought in wrong County Court); *Lesik v. Miller Cartage and Contracting Ltd.*, [1972] 6 W.W.R. 385 (B.C.C.C.) (Inaccuracies in the text and caption of the writ).

<sup>99</sup> *Finnegan v. Cementation Co. Ltd.*, [1953] 1 Q.B. 688, at p. 699. While the rules give the court express power to treat defects in proceedings as irregularities and to grant leave to amend, see *e.g.*, Ont. Rules of Practice, r. 186 (and also r. 185), and despite the general amendment principle (that provided the other party will not be prejudiced, defective proceedings can be cured by amendment), the courts have constructed a category of defects, called nullities, which are incapable of amendment: see Williston and Rolls, *op. cit.*, footnote 3, Vol. 1, pp. 496-509. It is submitted that this distinction is basically unsound and one that is likely to, and in fact does, mislead the court. In view of the mandate of Ont. r. 185 and similar rules directing the court to grant amendments, the conclusion that a defect is incapable of amendment (*i.e.* is a nullity) is one that, logically, should only be arrived at after first confronting the issue of whether or not it would in the circumstances be fair and reasonable, or prejudicial to the opposing party, to permit an amendment. But the courts frequently refuse an amendment by making an initial characterization that a defect is a nullity, without ever asking the question whether it would be fair and reasonable and non-prejudicial, to allow an amendment. Consequently, in the final analysis the nullity-irregularity distinction is quite unhelpful and merely leads courts to overlook the real issue: is this defect one which, in all circumstances, should in fairness to the parties be amended? In the U.K. the rule makers have directed that the nullity-irregularity distinction should be abandoned: see, U.K., Rules of the Supreme Court 1966, O.2. On the whole question see Watson, Borins and Williams, *op. cit.*, footnote 80, pp. 396-416.

<sup>100</sup> See, *e.g.*, The Fatal Accidents Act, R.S.O., 1970, c.164, and The Trustee Act, *supra*, footnote 94, s.38(1).

<sup>101</sup> *Last v. Ashworth* (1946), 14 W.W.R. 279 (Alta App. Div.); *Bodnaruk v. C.P.R.*, [1947] 1 W.W.R. 279 (Alta App. Div.); *Public Trustee v. Larsen* (1964), 49 W.W.R. 416 (Alta App. Div.); *Burlington v. G.T.P.*

(a) the plaintiff is in fact a member of the class of persons intended to be benefited by the legislation, or (b) he subsequently acquires<sup>102</sup> the capacity alleged before trial and before the expiry of the limitation period, and (c) irrespective of the fact that the defendant would be in no way prejudiced by the amendment. The principles developed by the Canadian courts in this area, strongly influenced by English decisions,<sup>103</sup> have as their basis, reasoning which is exclusively conceptual. The decisions are

*Rlwy Co.*, [1923] 4 D.L.R. 334 (Sask. C.A.); *McEllistrum v. Etches*, [1954] O.R. 814, [1954] 4 D.L.R. 350 (C.A.) but see, *infra*, as to the disposition of this case, on appeal, in the Supreme Court of Canada.

While the action under the Trustee Act is given only to the personal representative, under the Fatal Accidents Act the action may be asserted either by the personal representative or by the dependants of the deceased. Consequently, in those cases where the plaintiffs, suing as personal representative but lacking that capacity, were in fact dependants, they have sought to save the action under the Fatal Accidents Act by striking out the reference in the writ to administrative capacity. The courts' response to such requests has turned on the particular wording of the writ. Where the writ stated that the plaintiff sued "personally and as administrator" the plaintiff has been permitted to amend and continue the action as a dependant suing personally: *McEllistrum v. Etches*, *ibid.*, and *infra*. But where the writ alleges only that the plaintiff sued "as administrator" amendment has been refused on the ground that it would involve the setting up of a new cause of action after the limitation period: *Last v. Ashworth*, *supra.*; *Bodnaruk v. C.P.R.*, *supra.*

On appeal to the Supreme Court of Canada in the *McEllistrum* case, [1956] S.C.R. 787, 6 D.L.R. (2d) 1, the court managed in the circumstances to rescue the whole of the plaintiff's action, but the reasoning used is narrow in its scope and would not have helped the plaintiffs in the other cases. The court expressly declined to pass on the correctness of the cases holding that an action brought in an administrative capacity by someone who lacks the capacity is a nullity. For the purposes of the case the court assumed, without deciding, their correctness.

<sup>102</sup> A number of early Ontario cases had held that the subsequent acquisition of the capacity would relate back to save the action. In recent years, however, Canadian courts have declined to follow these decisions, see *McEllistrum v. Etches*, *ibid.* (Ont. C.A.); *Burlington v. G.T.P. Rlwy Co.*, *ibid.*

<sup>103</sup> E.g., *Ingall v. Moran*, [1944] K.B. 160 (C.A.); *Hilton v. Sutton Steam Laundry*, [1946] K.B. 65 (C.A.); *Finnegan v. Cementation Co. Ltd.*, *supra*, footnote 99. By an amendment to the rules in 1965 the English law on this subject has been changed, albeit slightly. Under Rules of the Supreme Court, O.20, r. 5(3) (see *infra*, Appendix, item 2) the court may grant an amendment changing the capacity in which the plaintiff sues (even after the expiry of the limitation period) provided the capacity to be newly alleged is one that the plaintiff possessed at the commencement of the action. Stated shortly, the effect of this rule is that, in general, it will allow proceedings under the Fatal Accidents Act to be saved but not proceedings under the Trustee Act. This rule has also been adopted by the Federal Court of Canada (General Orders and Rules, r. 426) and in Nova Scotia (Civil Procedure Rules, r.15.02). Contrast the Alberta legislation, *infra*, Appendix, item 3, s.61(b).

unjust and, one would have thought, quite unnecessary. They give no weight to the beneficent purpose of the legislation or to the realities of the situation—that the defendant has been timely informed of the plaintiff's claim and will in no way be prejudiced by the granting of an amendment or other requested relief.

### III. *A Functional Analysis of the Problem.*

The foregoing review of the Canadian case law presents a mixed picture. On the one hand it reveals that, in many instances, the manner in which the courts have dealt with the problem of the post-limitation amendment of proceedings has been unsatisfactory, and productive of great injustice. In this respect there have been at least two basic difficulties underlying the courts' handling of the issue over this century. Firstly, too often they have failed to recognize that the problem is one that involves a direct conflict between competing legal rules—the statute of limitations and the power of amendment. Moreover they have been insensitive to the fact that this conflict requires a balancing: that it cannot be satisfactorily resolved by giving blind preference to the statute of limitations. Secondly, the courts have often fallen into the trap of believing that the problem can be solved by the manipulation of what are, in the final analysis, meaningless concepts (for instance, that the proceedings are a nullity).

On the other hand the present day picture is, fortunately, more promising. In recent years, by increasingly adopting a more functional approach to the issue, the courts have substantially reduced the incidence of injustice. Yet, even the modern cases have never expressly taken the step which appears to be essential to a resolution of these problems. It is, to attempt to fully understand and articulate the purposes of the underlying and conflicting legal norms.

The proposition that legal rules can be understood only with reference to the purposes they serve would today scarcely be regarded as an exciting truth. The notion that law exists as a means to an end has been common place for at least half a century. There is, however, no justification for assuming, because this attitude has now achieved respectability, and even triteness, that it enjoys a pervasive application in practice. Certainly there are even today few legal treatises of which it may be said that the author has throughout clearly defined the purposes which his definitions and distinctions serve. We are still all too willing to embrace the conceit that it is possible to manipulate legal concepts without the orientation which comes from the simple inquiry: toward what end is this activity directed? Nietzsche's observation, that the most common stupidity consists in forgetting what one is trying to do, retains a discomfiting relevance to legal science.<sup>104</sup>

<sup>104</sup> Fuller and Perdue, *The Reliance Interest in Contract Damages* (1936), 46 *Yale L.J.* 52.

Faced with a problem involving a direct conflict between competing legal rules an inquiry into the purposes sought to be achieved by those rules becomes imperative. Such an inquiry will likely point out both the need for a balancing of interests and the possible balance that will produce a reasonable solution. It is to this inquiry that we now turn.

A. *The Purposes of the Procedural Devices Involved.*

(i) *Statutes of Limitations.*

One leading text on the subject states that the *purpose* of limitation periods is "that litigation shall be automatically stifled after a fixed length of time, irrespective (for the most part) of the merits of a particular case".<sup>105</sup> But in truth this is no more than a statement of the *effect* of limitation periods. Such an analysis is of little assistance when we are faced with the problem of how to reconcile the prescription of a statute of limitations with another competing principle of our law, that is, the broad power of amendment. In such a context we need to know what are the interests sought to be protected by such statutes. A rule which cuts off actions at a specified time for no reason at all would be senseless. Statutes of limitations are, of course, not such rules. Rather they are based on sound reasons and have as their object the attainment of important procedural and social objectives.

The primary consideration underlying such legislation is undoubtedly one of fairness to the defendant. There comes a time when he ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim when "evidence has been lost, memories have faded and witnesses have disappeared".<sup>106</sup>

The policies underlying such statutes are designed to safeguard the interests of the defendant in two ways. Firstly, they seek to protect his interest in at some time being able to rely on the fact that he no longer will have to preserve or seek out evidence to defend claims against him.<sup>107</sup> Secondly, they grant

---

<sup>105</sup> Franks, *Limitation of Actions* (1959), p. 4.

<sup>106</sup> *Developments in the Law—Statutes of Limitations* (1950), 63 *Harv. L. Rev.* 1177, at p. 1185. A further reason, which would seem to be of less consequence particularly in the content of amendment is the "protection of courts from the burdens of state claims", James, *Civil Procedure* (1965), p. 174. For general discussions of the purposes of statutes of limitations see the *Harvard Law Review* article and James, *supra*, and also Note, *op. cit.*, footnote 90, at pp. 84-85.

<sup>107</sup> Note, *ibid.*, at p. 84: "[T]he primary purpose of the statute is to compel the exercise of a right of action within a reasonable time so that a defendant will have a fair opportunity to prepare an adequate defense. Otherwise the belated institution of an action might prejudice defendant's preparation of evidence."

him protection "from insecurity, which may be economic or psychological, or both";<sup>108</sup> at some point in time he ought to be made secure in his reasonable expectation that contingent liabilities will no longer be asserted by legal action to disrupt his finances and affect his business and social relations.<sup>109</sup>

Since these are the interests of the defendant which the limitation period seeks to protect, he should be entitled to rely on them after the period has run.

(ii) *Pleadings and Amendments.*

While pleadings perform a number of functions,<sup>110</sup> clearly their most important purpose is to give the adversary fair notice of the case alleged against him so that he will be able to prepare his own. The purpose of the endorsement on the writ is similar,<sup>111</sup> though in cases where the writ is generally endorsed the type of notice given will often be extremely general.

But in modern procedure the device of pleadings does not stand in isolation. An integral and very important aspect of the rules relating to pleadings, and the constitution and conduct of a law suit generally, are the rules relating to amendment. It was against the background of the formalism of common law procedure, whose limitation on the power of amendment caused great injustices, that the procedural reformers of the nineteenth century drew up our modern procedural code.<sup>112</sup> The past experience prompted them to give the court broad powers, cast in the form of a directive, to amend proceedings whenever this appeared necessary to a determination of the real issues. These broad amendment powers are a central and essential feature of modern procedure. Their purpose is primarily twofold. Firstly, to permit the correction of non-prejudicial errors that occur in the constituting or conduct of proceedings. Secondly, to permit

<sup>108</sup> James, *op. cit.*, footnote 106, p. 174.

<sup>109</sup> "Second, the statute relieves the defendant from the otherwise endless psychological fear of litigation based upon events in the distant past." Note, *op. cit.*, footnote 90, at p. 84. Also "a limitations period avoids the disruptive effect of unsettled claims upon commercial intercourse. For example, creditors may more accurately determine a person's financial status if his former outstanding debts have been extinguished by the running of the statute of limitations", *ibid.*, at p. 85.

<sup>110</sup> See, James, *op. cit.*, footnote 106, pp. 54-61.

<sup>111</sup> See, *Cairns v. Grigg*, [1945] O.W.N. 497 (Master).

<sup>112</sup> Tidd's Practice (9th ed., 1828), pp. 696-715 contains an extensive discussion of the common law attitude to amendment: The practice was considered liberalized by statute in the 19th century (and earlier), see, Archbold, *New Common Law Practice* (1853), p. 268 *et seq.*; Archbold's Practice (13th ed., 1879), Vol. 2, p. 1237 *et seq.*

an action to be reshaped as it develops so that ultimately it will be decided on the merits on the basis of the real issues between the parties.<sup>113</sup>

### B. *Matters Giving Rise to a Need for Balancing.*

Given the purposes of the conflicting legal norms involved therein, any satisfactory resolution of the problem of post-limitation amendment *per se* requires a balancing of interests. But in the contemporary context certain characteristics of modern day litigation when coupled with the nature of the problem, reinforce this need to strike a balance between the application of limitation periods and the application of the power to amend proceedings.

First, while the broad amendment power vested in the court signifies a rejection of procedural formalism, that is, of the notion that harmless error may not be corrected, procedural formalism has re-entered our system through the back door. A not insignificant proportion of modern litigation is now governed by very short limitation periods: one need only mention actions arising out of highway traffic accidents,<sup>114</sup> actions against doctors<sup>115</sup> and public authorities,<sup>116</sup> and libel and slander,<sup>117</sup> and fatal accident proceedings.<sup>118</sup> In such actions, errors and imperfections in the proceedings will often only be discovered after the short limitation periods have expired. Yet the existing body of case law has sometimes denied curative amendment of even merely formal defects because the limitation period has expired. As a result amendments have been refused which would be granted without a second thought if the limitation period had not expired.

The second characteristic of contemporary procedure which is important in this context are the rules relating to discovery. A major purpose of modern discovery is to avoid surprise at the trial by aiding the pre-trial development of the case. It does this by enabling a party to discover information which otherwise

---

<sup>113</sup> In the present context it is important to note that the basic amendment directive is sufficiently broadly framed so as to include corrections in the naming of parties or the adding of parties, and is reinforced by a wide rule specifically dealing with a change of parties.

<sup>114</sup> *E.g.*, The Highway Traffic Act, *supra*, footnote 37, s.146(1) (twelve months).

<sup>115</sup> *E.g.*, The Medical Act, R.S.O., 1970, c.268, s.48 (one year).

<sup>116</sup> *E.g.*, The Public Authorities Protection Act, R.S.O., 1970, c.374, s.11 (six months).

<sup>117</sup> *E.g.*, The Libel and Slander Act, R.S.O., 1970, c.243, s.6 (three months).

<sup>118</sup> *E.g.*, The Fatal Accidents Act, R.S.O., 1970, c.164, s.5 (twelve months).

he might never know about<sup>119</sup> or learn of only at trial when it is too late. Such information may relate to a party's own case or that of his adversary. Not infrequently discovery will lead a party to amend his pleadings. This is a desirable state of affairs, for it maximizes the likelihood that the eventual trial will concern itself with the real matters in issue and judgment will be given "according to the very right and justice of the case". But in actions which are subject to a short limitation period this desirable objective may be thwarted. As statistics indicate<sup>120</sup> it is common in cases governed by short limitation periods for discovery to take place only after the limitation period has expired. Hence, when a plaintiff seeks to amend the proceedings to take into account information obtained on discovery, leave may be refused on the ground that time has run against him. In consequence, much of the utility of modern discovery is lost in such cases. To refuse to allow a case to be reshaped after discovery seems quite unnecessary unless the interests of the defendant sought to be protected by the limitation period would actually be infringed by the requested amendment.

Third, is the fact that generally the need to amend the proceedings does not arise from any fault on the part of the plaintiff personally. Usually the necessity for amendment can be traced to the acts or omissions of the plaintiff's lawyer. Sometimes the lawyer may have been negligent<sup>121</sup> but often he will have acted quite reasonably and with due care. (In these latter cases the need to amend may be no one's fault and arises simply from the imperfect nature of the world or of our litigation process.)<sup>122</sup> But in reading the decided cases one is often left with the impression that the court has been callously blind to the fact that the plaintiff's predicament is not of his own doing. Too frequently courts have proceeded as if there were no obligation on their part to see that the procedural system operates reasonably and justly for individuals who have the misfortune to become embroiled in it. This is surely an undesirable and an unnecessary

<sup>119</sup> Or which he would otherwise find out about only after considerable expenditure of time, effort and money.

<sup>120</sup> Professor Linden in *The Report of the Osgoode Hall Study on Compensation for the Victims of Automobile Accidents* (1965) indicates that in more than 65% of automobile accident cases, discovery does not take place until after the one year limitation period: see Ch. V, p. 19.

<sup>121</sup> *E.g.*, cases in which the plaintiff purports to sue in a specified capacity but in fact lacks the capacity.

<sup>122</sup> A good example are the cases where, unknown to the plaintiff's lawyer, the defendant has died shortly before the issue of the writ. It has been held that this does not involve negligence on the part of the lawyer. *Grima v. MacMillan*, [1972] 3 O.R. 214.



state of affairs.<sup>123</sup> Irrespective of the extent to which a party should be bound by his lawyer's mistakes in other contexts, where a post-limitation amendment is requested to overcome a lawyer's error the court should strive to grant it to the extent that to do so will not actually endanger the interests of the defendant sought to be protected by the limitation period.

Finally, we need to appreciate the full significance of the fact—present in all these cases—that an action has been timely commenced by the plaintiff. This is significant for two reasons. First, it demonstrates that the plaintiff is diligent and is concerned with observing the limitation statute. Second, it always brings into play the broad amendment power contained in the rules. These two considerations should be kept in mind in determining the manner in which the statute of limitations is applied. The fact that such statutes are applied automatically in some contexts, irrespective of the merits of a plaintiff's case or the reasons for delay, is not necessarily a reason for making their automatic operation universal. This is particularly so when the statute of limitations comes into direct conflict with another legal rule—the broad power of amendment.

### C. *A Suggested Approach to the Problem.*

In light of the foregoing analysis and observations what approach should the courts adopt to amendments after the expiration of the limitation period? What principles can be formulated to govern the resolution of such questions?

In exercising the amendment power the goal must be to strike a balance between the plaintiff's interest in fully developing the action he has diligently commenced and the interests of the defendant which the limitation period seeks to protect. As we

---

<sup>123</sup> Contrast the attitudes now being taken, and clearly expressed, by many courts in the context of the closely analogous issue of the post-limitation renewal of a writ. See, e.g., *Simpson v. Sask. Govt. Ins. Office* (1968), 65 D.L.R. (2d) 324, at p. 333, 61 W.W.R. 741 (Sask. C.A.) per Culliton C.J.S.: "In an application to renew a writ of summons the basic question which faces the Court is, what is necessary to see that justice is done? That question must be answered after a careful study and review of all the circumstances. If the refusal to renew the writ would do an obvious and substantial injustice to the plaintiff, while to permit it is not going to work any substantial injustice to the defendant or prejudice the defendant's defence, then the writ should be renewed. This should be done even if the only reason for non-service is the negligence, inattention or inaction of the plaintiff's solicitors and notwithstanding that a limitation defence may have accrued if a new writ was to be issued." See also *Estate of McDonald v. Ellard* (1973), 43 D.L.R. 581 (N.S.S.C. App. Div.).

have already seen the policies underlying statutes of limitations seek to protect two interests of the defendant through the device of timely notice of the plaintiff's claim. The first is that the defendant need no longer preserve or seek out evidence to use in defence of the claim. The second is that he need no longer fear the insecurity that his business and social activities will be disrupted by the reactivation of claims which he reasonably believes are dead. To the extent consistent with the protection of these interests the plaintiff should be entitled to freely amend his action.

Hence, where a plaintiff seeks leave to amend after the expiration of the limitation period, then (irrespective of whether analytically it may involve the addition of a new cause of action, a change of parties or the curing of a nullity) the amendment should be allowed whenever the defendant has received such timely notice that he will not be prejudiced by an actual infringement of either of the interests sought to be protected by the limitations statute. As to the "evidentiary interest" the amendment should only be refused when the defendant can show that through lack of notice the change sought will require the use of evidence now unavailable to him but which would have been available had the action been constituted in this manner at the outset. With regard to his "interest in security" the amendment should be permitted unless the defendant can show that through lack of notice of the claim now sought to be asserted he actually changed his position, to his detriment, in reasonable reliance on the fact that the claim now sought to be asserted was dead.

It will be observed that, while giving a plaintiff broad scope for amendment, two requirements are contained in this suggested approach. The first is timely notice to the defendant. Notice is the device by which the interests sought to be protected by the statute of limitations are protected in the ordinary course and this is retained. But here the concept of notice should not be restricted merely to formal notice of the kind given by the writ or the statement of claim. As many courts have already done in the context of amendments after the limitation period,<sup>124</sup>

<sup>124</sup> See, e.g., *Can. Motor Sales Corp. Ltd. v. "The Madonna"*, *supra*, footnote 24 in the cases cited *supra*, footnote 46 (correspondence); or *Ladouceur v. Howarth*, *supra*, footnote 58 (negotiations). In some circumstances the courts have been prepared to *infer* that the defendant had such notice that he would not be prejudiced by the amendment, see the cases cited, *supra*, footnote 47.

and analogous situations,<sup>125</sup> all sources of notice formal and informal (for instance, correspondence or discovery) should be taken into account.

The second requirement is that an amendment will not be permitted if it can be shown that actual prejudice to the defendant will result from his lack of timely notice. This requirement assures that the legitimate interests of the defendant sought to be protected by the statute of limitations remain inviolate—but beyond this, amendments should be freely allowed. It is also explicit in the above formulation that the burden of proving the existence of actual prejudice should be placed on the defendant. This seems reasonable and is in accord with the general principle that where the facts necessary to establish a proposition are peculiarly within the knowledge of one of the parties, that party should bear the burden of proof.<sup>126</sup> If the amendment will cause actual prejudice to the defendant, he is in the better position to prove it. Generally, the plaintiff will not know whether the defendant is prejudiced or not, and if the burden were placed on him he will be faced with the difficulty of establishing a negative proposition.

In Part IV below a proposed rule of practice embodying the approach here suggested is put forward. By this, however, it is not meant to suggest that the implementation of a change in approach must await a reform of the rules.<sup>127</sup> Quite the contrary.

---

<sup>125</sup> The problem of post-limitation renewal of an expired writ of summons is, in many respects, closely analogous to the problem discussed in this article. (For a description of the courts' handling of the renewal problem see Watson, Borins and Williams, *op. cit.*, footnote 80, pp. 254-269). Many courts now take the position that they have a discretion to renew an expired writ, notwithstanding the expiration of the limitation period: *Ibid.* In exercising this discretion courts look at all the circumstances of the case, but the most important factor appears to be whether or not the defendant had notice, prior to the expiry of the writ, that the plaintiff was asserting a claim against him: *Ibid.*, at p. 263. Since in all these cases the basis of the problem is that the writ has not been served within the appropriate time period, any notice received by the defendant will be *informal* notice of some kind. The courts have in this context considered various forms of notice to be effective *e.g.*, negotiations for settlement: *Willson v. Fed. Mutual Ins. Co.*, [1962] O.W.N. 193 (H.C.); filing of proof of loss in respect of an insurance claim: *Simpson v. Sask. Govt Ins. Office*, *supra*, footnote 123.

<sup>126</sup> Cross, *Evidence* (3rd ed., 1967), pp. 79-80; McCormick, *Evidence* (2nd ed., 1972), p. 287; Cleary, *Presuming and Pleading: An Essay in Juristic Immaturity* (1959), 12 *Stan. L. Rev.* 5, at pp. 11-14.

<sup>127</sup> However, it should be noted that a full judicial implementation of the approach here suggested may be difficult at one point—with regard to the addition or substitution of defendants—without some change in the rules. This is because the rules often provide that “the proceedings as against (an

The case for its application by the judiciary, without awaiting legislative intervention, is a strong one. In origin the rule was judicially created in *Weldon v. Neal*. Subsequently it has been extended, judicially, into many areas in which functionally it makes little sense and creates injustice. On the other hand of late we see many courts, including the Supreme Court of Canada, moving in the direction here suggested.<sup>128</sup> In this sense the adoption of this approach would be in keeping with the general trend of modern decisions rather than a break with it. Also, it should be noticed, as some courts have recently come to recognize and develop,<sup>129</sup> that the original formulation of the rule in *Weldon v. Neal* itself specifically provided for exceptions. Moreover, it can be forcefully argued that the approach here advocated is consistent with the existing rules of court, when closely and reasonably read. After all the basic amendment rule does *direct* that:

A proceeding shall not be defeated by any formal objection, but all necessary amendments *shall be made . . .* to secure the advancement of justice, the determining of the real issues in dispute, and the giving of judgment according to the very right and justice of the case.<sup>130</sup>

The approach outlined here will do nothing more than implement this mandate. Indeed one cannot help but speculate that in adopting this approach the courts would be doing just what the original drafters of the rule intended. It seems highly debatable that they ever intended the glosses that have been placed on this rule by much of the progeny of *Weldon v. Neal*.

#### IV. *A Proposed Model Rule on Amendment After the Expiry of the Limitation Period.*

By using the approach outlined above it is believed that the courts themselves could go a long way towards adequately and justly dealing with the range of problems presented by requests for post-limitation amendments. However, it is preferable that a new rule be passed dealing expressly with the subject. At the very minimum such a new rule is more likely to ensure a change

---

added or substituted defendant) shall be deemed to have begun only at the time when they are added", see, e.g., Ont. Rules of Practice, r. 136(3). While this provision, apparently, caused the court no difficulty in *Chretien v. Herrman*, *supra*, footnote 62 (a case of substitution after a misnomer) it has led to the refusal of an amendment in other situations, see, e.g., *Greig v. Toronto Trans. Comm.*, *supra*, footnote 81.

<sup>128</sup> See, *supra*, text at footnote 20 and footnote 64 *et seq.* See also *Cooney v. Ottawa-Carleton Reg. Transit Comm.*, [1974] 5 O.R. (2d) 92 (H.C.), and also *Roe v. F. A. Buskard and Son, Ltd.*, *supra*, footnote 26.

<sup>129</sup> See the discussion, *supra*, at footnotes 8 and 20.

<sup>130</sup> Ont. Rules of Practice, r. 185 (emphasis added).

of attitude, where necessary, and to produce a consistent approach to the problem by the courts. What form should a new rule take? Various models exist since rules or legislation on the subject have been enacted in the United States, Alberta, Saskatchewan, England, Nova Scotia and the Federal Court of Canada.<sup>131</sup>

While on reflection all but one of these provisions appear to be inappropriate as models in drafting a legislative solution to the problem, the others are useful in pointing out approaches to be avoided.

It seems desirable that a rule on the subject should avoid either one of two extremes. At one end of the spectrum is the approach (illustrated by the Alberta legislation and the English—Nova Scotia—Federal Court of Canada rule) which, while retaining the general prohibition against post-limitation amendment, provides that amendment may be granted in specified circumstances, notwithstanding the expiry of the limitation period: the specified circumstances in which amendment is allowed being based upon certain "types" of situation which have caused difficulty in the past (for instance, misnomers, cases involving dead persons, and so on). Such an approach is too narrow since it gives the court no scope to adequately deal with new situations as they arise<sup>132</sup> and thus to do justice in all cases. It may even tie the courts' hands, as would appear to be the situation in England,<sup>133</sup> and arrest their own development of a more enlightened solution to the problem.

<sup>131</sup> See Appendix for the text of these provisions. The English, Nova Scotia and the Federal Court of Canada rules are virtually identical. Also included in the Appendix is the recommendation made in 1969 by the Ontario Law Reform Commission. It should be noted that the U.S. Federal Rule of Civil Procedure on the subject, r. 15(c) (see Appendix, item 1) has been adopted by, or influenced the legislation, in many states of the U.S.A.

<sup>132</sup> The Alberta legislation, *infra*, Appendix, item 3, illustrates this point. That legislation deals only with amendments changing the parties and concerns itself merely with three types of situations that have caused difficulty in the past, *i.e.* mistakes as to the owner of a motor vehicle, lack of capacity and suing a dead defendant. By adopting this narrow approach the legislation failed to provide the Alberta courts with the tools to deal easily or adequately or both with such cases as *Basarsky v. Quinlan*, *supra*, footnote 8 (alleged change in the cause of action) or *Buteau v. Public Trustee*, *supra*, footnote 97 (an action against "the Estate of" a named deceased)—both cases arising subsequently to the passage of the Alberta legislation. The U.K., Nova Scotia, Federal Court of Canada rules, *infra*, Appendix, item 2, while more comprehensive in approach than the Alberta legislation, also suffer from over-concern with situations already encountered in the case law: see next footnote.

<sup>133</sup> See, *e.g.*, *Braniff v. Holland and Hannon and Cubitts (Southern) Ltd.*, [1969] 3 All E.R. 959 (C.A.). In England there has been a sharp division

At the other end of the spectrum is the extremely general rule (illustrated by the Saskatchewan legislation) simply giving the court an unfettered discretion to grant an amendment despite the passage of the limitation period.<sup>184</sup> The danger with this type of rule is that in failing to give the court any direction as to how the power is to be exercised, either of two consequences may result. It may lead courts to be unnecessarily restrictive in refusing leave to amend, or it may lead them to grant amendments which it was never intended should be permitted since they would be unjust to the defendant. In this latter regard it must be kept in mind that if limitation periods are to serve their intended purposes then defendants should be given, in advance, some meaningful indication of the limits of the amendment power. Otherwise we might find ourselves in a situation where the new amendment power abrogates the statute of limitations itself.

A model rule, then, should on the one hand avoid simply dealing with previously identified types of situation. On the other hand it should give the court, and defendants, guidance as to how the amendment power is to be exercised, while ensuring that the court has the necessary scope to deal with new situations as they arise and to do justice in all cases.

In formulating a model rule it will be convenient to deal separately with amendments changing the plaintiff's claim and those involving a change of parties.

---

of opinion as to the scope and effect of the new English rule. Lord Denning has taken the view that, since the passage of the new rule, the *Weldon v. Neal* principle should be discarded and amendments allowed whenever it appears just to do so, notwithstanding the expiry of the limitation period: *Chatsworth Investment Ltd. v. Cussins (Contractors) Ltd.*, [1969] 1 All E.R. 143, at p. 145; *Sterman v. E.W. and W.J. Moore Ltd.*, [1970] 1 All E.R. 581, at p. 585. This view has received support from Salmond L.J. (see *Sterman, supra*) and from Sachs L.J. (see *Brickfield Properties Ltd. v. Newton*, [1971] 3 All E.R. 328, at p. 338). But other members of the Court of Appeal, relying on a literal reading of the rule, have taken the position that the *Weldon v. Neal* principle remains in force, and that the rule simply allows amendments to be granted in certain, narrowly specified circumstances; see, e.g., Edmund Davies and Cross L.J.J. in *Brickfield Properties Ltd.*, *supra*; Widgery L.J. in *Braniff, supra*. In the Federal Court of Canada, Collier J. in *Can. Motor Sales Corp. Ltd. v. "The Madonna"*, *supra*, footnote 24, preferred the view of Lord Denning as to the effect of the new rule. See also the discussion in *B.C. Airlines Ltd. v. The Queen*, *supra*, footnote 80.

<sup>184</sup> The Saskatchewan legislation gives the court an unlimited discretion with regard to amendments changing the cause of action. Note, however, that it imposes severe restrictions on amendments changing the parties. The provision recommended by the Ontario Law Reform Commission, see *infra*, Appendix, item 5, would give the court a general power without direction as to how it is to be exercised.

### A. Amendments Changing The Plaintiff's Claim.

On this aspect of the subject the United States Federal Rules of Civil Procedure provide a satisfactory model on which to build. The English rule (now also adopted in Nova Scotia and by the Federal Court of Canada) while similar to the United States rule, is less happily worded.<sup>135</sup> At the other extreme, the power given by Saskatchewan legislation<sup>136</sup> is so broad as to give no direction to the courts, or warning to the defendant.

The United States Federal Rule of Civil Procedure 15(c) provides that an amendment will be permitted, notwithstanding the expiry of the limitation period, whenever the new claim,

arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings . . .<sup>137</sup>

In policy terms this seems a sound approach to the problem. After the passage of the rule, the defendant must realize that once an action is commenced the plaintiff is entitled to amend to include any claim arising out of the underlying conduct, transaction or occurrence, and so on, and that he should treat all claims arising out of these as still potentially contingent, not dead.<sup>138</sup> In so doing, it is to be noted that the rule represents

<sup>135</sup> The text of these rules is set out in the Appendix, item 2. Under these rules amendment may be granted if the new claim "arises out of the same facts or substantially the same facts" as the original claim. By contrast under the U.S. rule the operative phrase is that the claim arose out of the same "conduct, transaction or occurrence". While the former rules have to date received a reasonably broad interpretation see, e.g., the *Brickfield Properties* case, *supra*, footnote 133, the wording of the U.S. rule is, it is submitted, desirably broader in intent and less susceptible to a narrow interpretation. See the discussion, *infra*, footnote 141 and *cf.* Goodman, *Problems of Limitation* (1969), 119 *New L.J.* 814, at p. 815 suggesting that the *Marshall* and *Batting* cases, discussed *infra*, footnote 141, would still be decided the same way under the English rule. The editors of *The Supreme Court Practice* (1970), believe these two cases "may [now] be decided differently" but that *Weldon v. Neal* itself would still be decided the same way under the English Rule: at pp. 20/5-8/13.

<sup>136</sup> See Appendix, item 4, and text at footnote 134, *supra*. The same criticism applies to the Ontario Law Reform Commissions proposal, see footnote 134, *supra*. The Alberta legislation, Appendix, item 3, contains no provision dealing with a change in the cause of action.

<sup>137</sup> The full text of r. 15(c) is set out in the Appendix, item 1. This rule uses the terminology, in general use in the United States in the context of post-limitation amendment, of amendments "relating-back to the date of the original pleading". This difference from the Canadian—English practice is one merely of terminology and not of substance. See footnote 174, *infra*.

<sup>138</sup> The consistency of this approach with the policies underlying limitation periods is eloquently described in James, *op. cit.*, footnote 106, pp. 174-175.

an advance over the "common law" functional approach developed above. It does away, at least initially, with the need for an inquiry as to whether the defendant received actual notice of the new claim sought to be added,<sup>139</sup> since, by the rule itself all defendants are notified in advance that, if necessary, all aspects of the underlying occurrence may be fully litigated notwithstanding the passage of the limitation period.<sup>140</sup> This gives the plaintiff scope for amendment which will permit him to fully develop all aspects of the action he has timely commenced. The limits of the rule are that the plaintiff may not add claims which are unrelated to his original claim, that is those which do not arise out of the same conduct, transaction or occurrence.<sup>141</sup> This limitation represents an eminently reasonable balancing of the interests involved.<sup>142</sup>

<sup>139</sup> A similar approach is already apparent in some of the decided cases in Canada, e.g., the recent decision in *Cooney v. Ottawa-Carleton Reg. Transit Comm.*, *supra*, footnote 128.

<sup>140</sup> "Limitation is suspended by the filing of a suit because the suit warns the defendant to collect and preserve his evidence in reference to it. When a suit is filed in a federal court under the Rules, the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be, and that the form of the action or the relief prayed or the law relied on will not be confined to their first statement." *Barthel v. Stamm* (1944), 145 F. 2d 487, 491, cert. den. 324 U.S. 878 (C.A. 5th Cir.). But in borderline cases, particularly those presenting difficult questions of characterization as to whether the new claim does arise out of some transaction or occurrence, it will be of assistance to ask whether the defendant had such notice of the claim that he will not be prejudiced by the requested amendment.

<sup>141</sup> However, it is important to note that the test embodied in the rule is a considerably broader one than that which has been applied to date in several cases, in determining whether an amendment states a "new cause of action" (a phrase which has been deliberately avoided in formulating a new rule). A number of cases, mostly following *Batting v. L.P.T.B.*, [1941] 1 All E.R. 228 (C.A.) and *Marshall v. L.P.T.B.*, [1936] 3 All E.R. 83 (damage action for negligent driving of a tram—no amendment allowed to allege breach of statutory duty to maintain tramlines and adjoining road as cause of injuries) have held that a new cause of action is stated, and thus amendment should be refused, where the amended claim involves "quite new considerations, quite new sets of facts, and quite new causes of damage and injury" (*Ibid.*, at p. 88): see, e.g., *Kiselewsky*, *supra*, footnote 18 (change in theory as to cause of the accident); *City Construction*, *supra*, footnote 15, (change from negligence to contract as the theory of recovery); *Weston*, *supra*, footnote 18; but contrast *Cooney*, *supra*, footnote 128. Under the model rule here proposed, amendment would be granted in such cases, notwithstanding that new considerations, facts, etc., are involved because in each case the new claim arose out of the same conduct, transaction or occurrence. It is likely that under the model rule all of the cases cited *supra*, footnotes 12 to 31, refusing amendment, would be decided differently.

<sup>142</sup> See the analysis referred to *supra*, footnote 138.



Adopting the model of the United States Federal Rules of Civil Procedure, with certain modifications necessitated by differences in Canadian practice, the proposed rule reads as follows:

Rule XXX *Amendments to Proceedings After the Expiration of the Limitation Period.*

(a) *Amendments Changing the Claims Asserted.*

The court may allow an amendment changing the claims asserted in an action, notwithstanding that since the commencement of the action a relevant limitation period has expired, whenever the claim sought to be added by amendment arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading or writ.

The application of the rule calls for little comment beyond what has already been written. In practice it should prove to be relatively easy to apply. By deliberately avoiding any reference to "cause of action" the proposed rule obviates the need to struggle with what is in this context the difficult, imprecise and highly conceptual inquiry as to whether or not a new cause of action is stated by the amendment.<sup>143</sup> Instead, the relevant question is the more manageable one of whether the new matter asserted by the amendment arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading or writ. Interpreted with constant attention to its benevolent purpose the rule can deal justly with any request by plaintiffs to amend their claims after the running of the limitation period.<sup>144</sup> Although the rule states that the amendments there described "may be granted", the intention is that, *prima facie*, all such amendments shall be granted. The court should only exercise its discretion, within the rule to refuse leave

---

<sup>143</sup> A profuse U.S. literature, dating from the 1920's and 30's, as to the true meaning of the term "cause of action" points up graphically the desirability of avoiding the use of the term in procedural rules: see, e.g., Clark, *The Code Cause of Action* (1924), 33 *Yale L.J.* 817; McCaskill, *Actions and Causes of Action* (1925), 34 *Yale L.J.* 614; Harris, *What is a Cause of Action?* (1928), 16 *Calif. L. Rev.* 459; Gavit, *The Code Cause of Action: Joinder and Counterclaims* (1930), 30 *Col. L. Rev.* 802; Thurman Arnold, *The Code "Cause of Action" Clarified by the United States Supreme Court* (1933), 19 *A.B.A.J.* 215; Gavit, *A "Pragmatic Definition" of the "Cause of Action"* (1933), 82 *U. of Pa. L. Rev.* 129; Clark, *The Cause of Action*, *ibid.*, at p. 354; Gavit, *The Cause of Action—A Reply*, *ibid.*, at p. 695. The U.S. Federal Rules now deliberately avoid the use of the term "cause of action", see James, *op. cit.*, footnote 106, pp. 76, 446 *et seq.*, and instead generally use the "transaction or occurrence" standard: cf. *Ont. Rules of Practice*, rs 66 and 67.

<sup>144</sup> In addition a considerable body of United States case law exists to assist and guide the courts. See generally Wright and Miller, *op. cit.*, footnote 10, p. 482 *et seq.*; Moore, *Federal Practice* (1969), Rule 15(c).

to amend, where the amendment will prejudice the defendant in some way that is unconnected with the expiry of the limitation period, or will defeat the actual interests of the defendant sought to be protected by the limitation period.<sup>145</sup>

#### B. *Amendments Changing the Parties to the Action.*

On the subject of amendments involving a change of parties, or their capacity, none of the existing rules or legislation seems entirely satisfactory as a model. Again, however, the United States Federal Rule 15(c) provides a suitable basis on which to build.

The English rules, now also adopted by the Federal Court of Canada and in Nova Scotia,<sup>146</sup> are simply too restrictive. They attempt to deal with the subject through two provisions: one dealing with change of capacity, the other with the correction of mistakes in the naming of a party. The provision concerning alteration of the capacity in which a party sues<sup>147</sup> only permits an amendment if he enjoyed the capacity, in which he now wishes to sue, at the date the writ was issued.<sup>148</sup> Since there is no justification in functional terms for such a restriction it would be unwise to adopt this provision as a cure for problems of change of capacity. Indeed, a rule in this form would, still lead to a refusal of leave to amend to alter capacity in certain cases where it would clearly be just to permit amendment.<sup>149</sup>

<sup>145</sup> *E.g.*, if the defendant can show that the change in the plaintiff's case will, through lack of timely notice, require him to use evidence now unavailable to him. However, such cases will be rare because the rule itself notifies the defendant that, in effect, he should retain all evidence relating to any claim arising out of the underlying transaction or occurrence.

<sup>146</sup> See Appendix, item 2. The approach of the Alberta legislation (see Appendix, item 3) is too narrow, simply providing for amendment in three specific types of situations—mistake as to the owner of a motor vehicle, lack of capacity, and actions against dead persons: see the discussion, *supra*, footnote 132. The Saskatchewan legislation (see Appendix, item 4) appears to be primarily concerned with amendments changing the cause of action and not with changes as to parties. The Ontario Law Reform Commission proposal (see Appendix, item 5) would clearly permit a change of parties but uses language which is so broad as to give the court no direction as to when and how to exercise the power: see the discussion *supra*, footnote 134.

<sup>147</sup> U.K., Rules of Supreme Court 1965, O.20, r. 5(4), see Appendix, item 2.

<sup>148</sup> See, The Supreme Court Practice (1970), pp. 318-319; Goodman, *op. cit.*, footnote 135, at p. 815.

<sup>149</sup> In particular in cases where administrative capacity, while essential, is not possessed by the plaintiff at the date the writ is issued but is subsequently acquired, *e.g.*, actions under the Trustee Act: see footnotes 101 and 102 *supra*.

The English provision<sup>150</sup> dealing with the correction of mistakes in the naming of a party is likewise too narrow in scope to allow justice to be done in all cases. The wording used is likely to lead to restrictive interpretations. For instance, the use of the term "substitution" would likely lead to the conclusion that the court has no power to *add* an additional party to the proceedings, as was done in *Accaputo v. Simanovskis*<sup>151</sup> where a husband was added to his wife's action to permit recovery of special damages. Moreover, the reference to "genuine mistake" that is "not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued" is all too likely (as was probably the drafters' intention) to lead to an interpretation restricting the rule to the mere correction of misnomers. Indeed this has already occurred in one English case<sup>152</sup> holding that the rule did not permit an amendment to add the executor where the plaintiff had unwittingly sued a dead defendant. So interpreted this rule would not permit amendment in a variety of circumstances, which have already arisen in Canada, and where it would seem clearly just to do so: for instance, cases holding the proceedings to be a nullity,<sup>153</sup> and cases where it could be said that there is a reasonable doubt as to the identity of the person intending to sue or be sued, but where such doubt would not cause actual prejudice to the defendant.<sup>154</sup>

The foregoing observations suggest that a rule concerned with change of parties, if it is to permit justice to be done in all the various situations that can arise, should have a minimum of criteria and these should be broad and functional. Criteria concerned with past events (for instance, mistake, absence of reasonable doubt as to identity) should be avoided or kept to a minimum. Instead emphasis should be placed on timely notice to the defendant and on whether, in the circumstances, he will be actually prejudiced by the amendment.

In this regard the approach of the United States Federal Rule 15(c) is preferable. The rule (which, however, deals only

---

<sup>150</sup> U.K., Rules of Supreme Court 1965, O.20, r. 5(3), see Appendix, item 2.

<sup>151</sup> *Supra*, footnote 73. See also *Curran v. Rudyk*, *supra*, footnote 76.

<sup>152</sup> *Dawson (Bradford) Ltd. v. Dove*, [1971] 2 W.L.R. 1 (Q.B.). See also *Braniff v. Holland and Hannen and Cubitts*, *supra*, footnote 133.

<sup>153</sup> See, e.g., the *Kaltenback and Robinson* cases, *supra*, footnote 72, involving actions by a sole proprietor brought in the firm name, *Mantle v. McIntyre*, *supra*, footnote 96, and generally the cases discussed *supra*, in Part II B (iii).

<sup>154</sup> See, e.g., *Western Freight Lines*, *supra*, footnote 23; *McPhee v. Ahern*, *supra*, footnote 58; *Accaputo v. Simanovskis*, *supra*, footnote 73.

with changes of defendants)<sup>155</sup> has as its major requirement that the defendant should have "received such notice of the institution of the action that he will not be prejudiced in maintaining his defence on the merits".<sup>156</sup> The proposed rule, modelled after Federal Rule 15(c), but with a number of modifications, is as follows:

(b) *Amendments Adding or Substituting a Plaintiff.*

The court may allow an amendment adding or substituting a plaintiff, or changing the capacity in which a plaintiff sues, notwithstanding that since the commencement of the action a relevant limitation has expired, if

- (i) the claim to be asserted by the new plaintiff, or by the original plaintiff in his new capacity, arose out of the conduct transaction or occurrence set forth or attempted to be set forth in the action as originally constituted, and
- (ii) the defendant has, within the limitation period plus the period provided by law for the service of process, received such formal or informal notice that he will not be prejudiced in maintaining his defence on the merits, and
- (iii) the court is satisfied that the addition or substitution of the new plaintiff is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the action.

(c) *Amendments Adding or Substituting a Defendant.*

The court may allow an amendment adding or substituting a defendant, or changing the capacity in which a defendant is sued, notwithstanding that since the commencement of the action a relevant limitation period has expired, if

- (i) the claim to be asserted against the new defendant, or against the the original defendant in his new capacity, arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the action as originally constituted, and
- (ii) the party to be brought in by amendment has, within the limitation period plus the period provided by law for the service of process, received such formal or informal notice that he will not be prejudiced in maintaining his defence on the merits.

The aim of the proposed sub-rules is to give a plaintiff, who has demonstrated his diligence by commencing his action within the

<sup>155</sup> For the other requirements under this rule see the text of the rule while r. 15(c) does not expressly deal with amendments changing plaintiffs, the principles contained in the rule apply by analogy to such cases see, Advisory Committee's Note to Federal Rule of Civil Procedure 15(c) (1966), 39 Fed. Rules Dec. 82.

<sup>156</sup> But the Advisory Committee on the Federal Rules has indicated that, *infra*, Appendix, item 1. The working of the present r. 15(c) in respect of a change of parties (which is the product of an amendment made in 1966) has given rise to a number of problems of interpretation. These are fully discussed in Note, *op. cit.*, footnote 90.

limitation period, the fullest scope to amend the proceedings as to parties that is consistent with the upholding of the interests of the defendant sought to be protected by the statute of limitations. The rules proceed on the basis, justified earlier in Part III, that generally it is reasonable to allow an amendment changing the parties or their capacity whenever the defendant, or person sought to be added as defendant, has received such timely notice that he will suffer no actual prejudice in being called upon to defend the action as amended.

Before turning to an elaboration of the requirements of these proposed rules, something more must be said by way of justification of them. In view of the position taken in the rules as to when an amendment changing parties will or will not be allowed, two questions obviously arise and need to be answered.

The first question is concerned with the fact that the model rule destroys the universal approach presently adopted with regard to the operation of limitation periods. As a consequence of the proposed rule, D (a potential defendant) will now be treated differently depending on whether the plaintiff has (a) failed to sue anyone within the limitation period, or (b) he has sued someone other than D. Thus the proposed rule destroys the unity of my approach to the operation of limitation periods, since it remains true that the plaintiff—if he has sued no one within the limitation period—cannot escape the bar of the statute and sue D, simply by showing that D had notice of his claim and will not be prejudiced in having to defend against it. How can this state of affairs—the different treatment of D in the two situations—be justified? Why not deal with the problem at a more basic level by a general legislative provision empowering the court to relax the bar of the limitation period in all circumstances (whether they be cases of non-commencement or of amendment to a timely commenced action) where the purpose of the statute of limitations has been satisfied, that is, whenever the defendant has received such notice that he will not be prejudiced in having to defend? The response to this question is twofold. Firstly, my concern here is with the plight of the diligent plaintiff who has timely commenced his action and, invoking the amendment power, seeks the aid of the court in fully developing, stating and enforcing that action. As a general matter this is a situation calling for much greater concern than that of the plaintiff who has never commenced an action within time. Secondly, in situations where no action has been commenced at all within the limitation period there is much to be said for the automatic operation of limitation periods: the clear objective rule governing such cases

encourages diligence on the part of litigants and, particularly, lawyers. Put the other way round, a relaxation of the automatic operation of limitation periods in the non-commencement cases may lead to an unacceptable change in diligence in commencing actions. Of course, this implies no criticism of recent beneficial legislation permitting the post-limitation commencement of an action where the plaintiff has been ignorant within the limitation period of the fact that he had a cause of action.<sup>157</sup>

The second question is: why choose cases where there is notice and a lack of prejudice to the defendant as the only cases in which a post-limitation amendment changing the parties should be permitted? Why not a narrower rule, or a broader one, for instance, allowing an amendment in all cases where the defendant cannot show prejudice, irrespective of whether or not he had notice? Enough has already been said as to why a narrower rule should not be adopted. Justifying the rejection of the broader test is, perhaps, more difficult. But it is important to recognize that, once it is decided to relax the strict approach in relation to post-limitation amendments, no watertight logic indicates just where the line should be drawn. In the final analysis that must be a policy decision. On balance it seems reasonable (certainly until a more general relaxation of the rigorous and automatic operation of limitation periods is instituted) to allow post-limitation amendments only where the interests of the defendant sought to be protected by the statute of limitations are protected in the same way the statute protects them, that is, through notice. Moreover, retaining notice as a requirement (rather than abandoning it in favour of a simple "lack of prejudice to the defendant" test) has the advantage of giving structure to the inquiry as to whether amendment should be allowed, and may produce fairer results than the broader alternative. If the defendant can be shown to have had timely notice it can safely be presumed that, *prima facie*, there will be a lack of prejudice and place the burden on him to show otherwise. This is not the case where he has had no notice of the claim. He may or may not be prejudiced in such circumstances but it will frequently be difficult to establish this one way or the other.

I shall now, turn to an elaboration of the requirements of the model rule as to change of parties and a discussion of their intended application.

<sup>157</sup> See, e.g., *Limitation Act (U.K.)*, 1963, c. 47, and *The Limitation of Actions Act, R.S.M.*, 1970, c. L150, s.15.

(i) *Requirement that the Amendment Relate to the Same Conduct, Transaction or Occurrence as Originally Relied On.*

Under each of the two sub-rules the first requirement is that the claims to be asserted by the new plaintiff, or against a new defendant, must be ones that arose out of the same conduct, transaction or occurrence relied upon in the action as originally constituted. This requirement, which is to be found in United States Federal Rule 15(c), is a straightforward and rather obvious one. It ensures that any amendment changing the parties also satisfies sub-rule (a), and does not alter the basic subject matter of the litigation. The model rule is designed to assist a plaintiff, who has timely commenced an action in respect of a particular transaction or occurrence, in perfecting that action. However, the rule is not intended to enable such a plaintiff to convert his action by amendment into one relating to a different transaction when a new action in respect of the latter transaction would be statute barred.

(ii) *Requirement of Timely Notice and Lack of Prejudice.*

As already indicated the basic and most important requirement of both the sub-rules permitting a change of parties is that the new or old defendant, as the case may be, have received such timely notice that he will not be prejudiced in maintaining his defence on the merits to the action as amended. Several aspects of this composite requirement call for comment.

*a. Nature of the "Notice" Required.*

The United States Federal Rule specifically requires notice of the "institution of the action". This requirement has led some American courts to hold that before a new defendant may be added it must be shown that he had actual notice of the *commencement of the action*.<sup>158</sup> But notice short of actual notice of the institution of the action may, in many circumstances, be quite sufficient to avoid prejudice to the new defendant (for instance, where he has received informal notice that the plaintiff is asserting a claim against him through negotiations aimed at settling the claim). Consequently, the model rule avoids any such term as "notice of the institution of the action". Moreover, the rule intentionally refrains from specifying the nature of the required notice apart from indicating that it may be formal or

---

<sup>158</sup> *E.g.*, *Craig v. U.S.* (1969), 413 F. 2d 854 (9th Cir.) and other cases cited in Wright and Miller, *op. cit.*, footnote 10, p. 1498, and Note, *op. cit.*, footnote 90, at pp. 97-98. But the decisions on this point are far from unanimous and other courts have held notice short of actual notice of the commencement of the action to be sufficient.

informal and that it must be such that the defendant will not be prejudiced in defending on the merits. It is felt that, beyond this, what is sufficient notice is best left to be determined by the court, within the framework of the policy of the rule and its specific requirements, in the circumstances of each individual case. It is very difficult, and probably impossible, to prescribe in advance for all cases what will or will not be adequate notice to insure that the defendant will not be prejudiced in having to defend.

In practice, in most cases where a change of parties is requested notice will present little problem and will frequently amount to notice of the commencement of the action. For instance, those cases where an amendment is sought requesting a change of plaintiff are typically ones where the claims asserted against the defendant remain the same as for instance, in *Western Freight Lines*<sup>159</sup> and the married women's special damage cases.<sup>160</sup> Here the notice given the defendant by the action as originally constituted will be sufficient to avoid any prejudice to the defendant. In situations where the new plaintiff asserts a different claim to that alleged by the original plaintiff as in *Ladouceur*,<sup>161</sup> notice beyond that given by the action as originally constituted may be necessary to avoid prejudice to the defendant, and may be supplied by informal notice of the plaintiff's claim conveyed through settlement negotiations.

Similarly, in the majority of commonly encountered situations where a plaintiff seeks to add a new defendant, notice should present little problem. In the true misnomer situation—where the plaintiff intended to sue X but has misdescribed him—the party intended to be sued (and “added”) has usually been served, is before the court and will have clear notice of the claim. Even in cases where the plaintiff intended to sue only X (and not Y), but now seeks to add or substitute Y as a defendant, sufficient notice to Y may be present. Here the courts can and should make use of rebuttable presumptions to aid in the resolution of the notice issue. In certain situations (generally referred to as “estoppel” cases in the United States),<sup>162</sup> the plaintiff will have wrongly named X rather than Y as a defendant as a result of having been given wrong information or having been misled as in *Chretien*<sup>163</sup> and *Gaytee*<sup>164</sup>. In such cases there will frequently be a substantial

<sup>159</sup> *Supra*, footnote 23.

<sup>160</sup> *Supra*, text at footnote 75.

<sup>161</sup> *Supra*, footnote 58.

<sup>162</sup> See, Wright and Miller, *op. cit.*, footnote 10, § 1500.

<sup>163</sup> *Supra*, footnote 62.

<sup>164</sup> *Supra*, footnote 8.



personal or business relationship between X and Y. Where this is so it would be reasonable for the courts to employ a rebuttable presumption that the new defendant, Y, has received sufficient notice.<sup>165</sup> In other situations (referred to in the United States as "identity of interest" cases<sup>166</sup>) the plaintiff will have named X rather than Y as defendant where X and Y are closely related business entities, for instance, where X and Y are a parent company and a wholly owned subsidiary, or related corporations with common directors, or the past and present form of some enterprise which has undergone merger or amalgamation. Here again the court should make use of a rebuttable presumption that notice to X in fact brought notice of the action to the attention of Y.

It is chiefly in situations where the new defendant has had no prior direct relations with either the plaintiff or the original defendant that notice will present a significant problem. In such cases if the new defendant is genuinely a stranger to the litigation and ignorant of it (as might well occur in situations where a personal injury plaintiff failed to initially join the actual manufacturer of his car tires, or the seller in an action against the car manufacturer<sup>167</sup>), the notice requirement is unsatisfied and the amendment will be refused. However, in all cases if the new defendant had received some timely notice of the proceedings, or of the plaintiff's claim, the court must decide whether in the circumstances the notice is sufficient to ensure that the defendant will not be prejudiced in having to defend on the merits.

*b. Timeliness of Notice.*

On first reading, the provisions of sub-rules (b) and (c) as to the time within which the defendant or the party to be added as defendant must receive notice may appear extremely radical, since they provide in effect that notice is timely though received only within twelve months *after* the expiry of the limitation period. However, it is believed that this provision is both consistent with the policy and operation of limitation periods and necessary to do justice in all cases.

The United States Federal Rule 15(c) provides that the defendant must have received notice *within* the limitation period.

---

<sup>165</sup> See, Wright and Miller, *op. cit.*, footnote 10, §1500.

<sup>166</sup> *Ibid.*, §1499.

<sup>167</sup> See the cases cited *supra*, footnote 80. But note that even in this type of case (where up until the time of attempted joinder the new defendant has been a stranger to the litigation) the proposed rule may assist a plaintiff because of the extended time period for notice: see discussion, footnote 187, *infra*.

But one United States court,<sup>168</sup> supported by law review writing,<sup>169</sup> has pointed out that this formula is too restrictive. While it is the issue of the writ that stops the running of the limitation period, since the rules of court provide that a writ may be served at any time within twelve months of its date of issue,<sup>170</sup> even in the normal non-amendment context the law merely guarantees that the defendant will receive notice within the limitation period plus the time permitted for service (that is, twelve months). Thus the specification in sub-rules (b) and (c) as to when notice will be timely merely adopts the standard already existing under the general law relating to the operation of limitation periods.

An example will illustrate both the need for the extended time period and the operation of the proposed rule.<sup>171</sup> Assume that an automobile accident occurs on April 1st, 1973, and that P commences an action against D, for personal injuries suffered in the accident, on March 1st, 1974 (within the twelve month limitation period applicable to such actions). In June 1974 he attempts to serve the writ on D. At this time he discovers that D died in October 1973. He now wishes to substitute D's administrator as the party defendant. If prior to March 31st, 1974, D's administrator had received no notice of the action then, under the time formula embodied in the United States Federal Rules no amendment would be allowed.<sup>172</sup> Yet, had the action been brought against the administrator initially, it would have been perfectly good (provided the writ had been issued within the limitation period) even though he had never received any notice of the action until June, 1974, when the writ was served upon him, well outside the limitation period. (Indeed, the action would be quite validly constituted if service took place at any time up until March, 1975.)

Proposed sub-rules (b) and (c) take this factor into account by specifying that notice is timely<sup>173</sup> provided it is received by the

<sup>168</sup> *Martz v. Miller Bros. Co.* (1965), 244 Fed. Supp. 246, at p. 254, n.21 (D.C. Del.).

<sup>169</sup> Note, *op. cit.*, footnote 90, at pp. 100-106, 131-132.

<sup>170</sup> See, e.g., Ont. Rules of Practice, r. 8(1).

<sup>171</sup> The example given approximates, in its essentials, with what took place in *Gonzales v. Reid*, *supra*, footnote 93. The problem under discussion can, of course, arise in any type of case.

<sup>172</sup> As was held, for example, in *Janus v. J.M. Barbe Co.* (1972), 57 Fed. Rules Dec. 539 (D.C. Ohio); *Simmons v. Fenton* (1973), 480 F.2d 133 (7th Cir.); *Munetz v. Eaton Yale* (1973), 57 Fed. Rules Dec. 476 (D.C.E.D. Pa.).

<sup>173</sup> Assuming, as will always be so in cases to which the proposed rule is applicable, that a writ has been issued within the limitation period. It is to be kept in mind that the proposed rules are only available to plaintiffs who have demonstrated their diligence by the timely issuing of a writ.

defendant, or the person to be added as defendant, within the extended period in which he might have become aware of a valid and timely commenced action against him, that is, within the limitation period plus twelve months.

*c. Meaning of "Prejudice".*

It must be stressed that the mere fact that if the amendment is granted the defendant will lose his technical defence of the statute of limitations, does not amount to "prejudice in maintaining his defence on the merits" as that phrase is used in sub-rules (b) and (c). It is the very purpose of these rules to preclude the defendant from objecting to an amendment simply on this ground alone, and to prevent the setting up of such a defence to the action as amended.<sup>174</sup>

But, while the mere loss of the limitation defence is not encompassed within the term prejudice in the proposed rule, the interests of the defendant which the limitation period seeks to protect—particularly the fair opportunity to gather evidence to meet the claim—are the central factors to be considered in determining whether prejudice will result from an amendment changing the parties to the action.

What constitutes prejudice in maintaining a defence on the merits will vary from case to case and will depend upon the factual situation before the court. Despite this, two general observations can be made. First, in each case the court must satisfy itself, as the rule indicates, that the defendant<sup>175</sup> "has received such notice that he will not be prejudiced in maintaining his defence on the merits". Usually this will reduce itself to a question of whether the notice received by the defendant was such as to alert him to collect and prepare his evidence. Moreover prejudice, or the possibility of

<sup>174</sup> This is obviously the purpose, indeed the whole purpose, of the proposed rule. The U.S. Federal Rule, see Appendix, item 1, makes this obviously clear (in the context of the analagous U.S. rule) by stating that the amendment "relates back to the date of the original pleading" (*i.e.* writ). In drafting the proposed rule, I did not use this language, merely in deference to the fact that it is not (as it is in the U.S. and has been for years) in common usage in Canada. I believe the U.S. terminology is, in fact, clearer and the proposed rule would be improved by its inclusion.

<sup>175</sup> Either the new or original defendant, as the case may be. The ensuing discussion is primarily directed to cases involving the addition of a new defendant under sub-rule (c). In such cases the possibility of prejudice to the proposed new defendant may be a very real one. By contrast amendments changing or adding a plaintiff, or changing his capacity under sub-rule (b) are, as a general matter, much less likely to involve a risk of prejudice to the defendant, due largely to requirement (iii) of sub-rule (b), coupled with the fact that the original plaintiff's writ or pleading will usually have informed the defendant of any claim to be asserted by the new plaintiff.

prejudice, will normally be a function of the type of notice received by the defendant: the more informal and less specific the notice the greater the likelihood of prejudice to the defendant in having to defend on the merits.<sup>176</sup>

Second, in dealing with the question of prejudice it is important that courts avoid stating bare conclusions without careful factual investigation (as has been the approach of many United States courts).<sup>177</sup> The requirement is one that necessitates, in fairness to both plaintiffs and defendants, close factual analysis. But this does not mean that courts cannot make use of reasonable evidential presumptions. Generally, where a defendant has received notice of the claim, it will be reasonable to call on him to establish prejudice.<sup>178</sup>

(iii) *Requirement that the Addition of a New Plaintiff Must be Necessary to the Effective Enforcement of the Claims Originally Asserted.*

With regard to amendments adding a plaintiff, sub-rule (b) imposes a further requirement.<sup>179</sup> In such cases it must be shown, even where the defendant has had such notice that he will not be

<sup>176</sup> Note, *op. cit.*, footnote 90, at p. 117. For a discussion of the whole question of what may or may not amount to prejudice see also Wright and Miller, *op. cit.*, footnote 10, p. 510 *et seq.*

<sup>177</sup> Note, *ibid.*, at p. 115.

<sup>178</sup> See the discussion *supra*, text at footnote 126.

<sup>179</sup> United States Federal Rule 15(c) imposes yet a further requirement as a pre-condition to the adding of a new defendant. Under the U.S. rule, in addition to notice and lack of prejudice, it must appear that the new defendant "knew or should have known that, but for a mistake covering the identity of the proper party, the action would have been brought against him". On balance, it is felt it is unnecessary to include a similar provision as a separate and specific requirement in the proposed model rule. It is difficult to see how this further requirement would, in most cases, really add anything to the notice—lack of prejudice requirement, and in those cases where it does add anything the wisdom of so further limiting the plaintiff's ability to add a defendant is open to question. Where a new defendant can show that he lacked the knowledge required under Federal Rule 15(c) (*i.e.* that, but for the plaintiff's mistake, he would have been sued initially) then such lack of knowledge may well indicate that the defendant would be prejudiced in having to defend. If so, then under the proposed model rule he will not be added because of the prejudice that would result. But where, despite his lack of knowledge, the defendant would suffer no prejudice in having to defend it is difficult to see why he should not be joined. It is interesting to note that in the U.S., the courts have paid little attention to the "knowledge" requirement of Rule 15(c). See Note, *op. cit.*, footnote 90, at p. 117. But, contrary to the position here taken, the Note argues that the "knowledge" requirement of Federal Rule 15(c) is necessary to fully uphold the policy of the statute of limitations in protecting defendants from stale claims: *ibid.*, at pp. 117-120, 127-133.

prejudiced in defending on the merits, that the addition of the new plaintiff is necessary or desirable to ensure the effective enforcement of the claims originally asserted in the action. This provision is designed to prevent a would-be plaintiff, who has not been diligent and is out of time, using the amendment rule to take advantage of the fact that another plaintiff has diligently commenced an action in respect of an occurrence which the new, would-be plaintiff, was also involved in. A simple example will illustrate the point. Assume driver A was injured in a collision and timely commences an action against D. Subsequently, after the expiry of the limitation period B, A's co-passenger, who suffered injuries in the accident but who has never informed D that he had or was making a claim, seeks to be added as a plaintiff in order to recover damages for his own injuries. Absent the third requirement of sub-rule (b), the rule might be taken to authorize the addition of B in such a case. Since the purpose of the rule is only to aid diligent plaintiffs in perfecting actions they have timely commenced, a request by someone in B's position to be added should be excluded from the operation of the rule. B is simply a non-diligent plaintiff who has failed to commence an action within the limitation period, and the addition of his claim is unnecessary to insure the effective enforcement of A's original claims.<sup>180</sup>

In conclusion, several further matters should be briefly mentioned. First, the proposed model rules should ideally form part of the rules of practice rather than of some statute such as the Judicature Act or the Limitations Act. It is simply more logical and convenient if this can be done: the general provisions dealing with the court's power to amend proceedings are found in the rules

---

<sup>180</sup> But this third requirement will be satisfied in those situations, already encountered in the case law, where justice requires amendment, *e.g.*, the married woman—special damage cases, infant—special damage cases and those involving “nullities”, assignment, misnomer and mistaken choice of plaintiff, since in all such cases all the amendment will seek to do is to “ensure the effective enforcement of the claim originally . . . asserted” in the action.

However, because of this third requirement of sub-rule (c) the result in the *Ont. Hosp. Services Comm.* cases, *supra*, footnote 77, would be different after the adoption of the model rule, unless the outcome of those cases flows from the special statutory and regulatory provisions applicable to them, (on this point see the discussion in *Ont. Hosp. Services Comm. v. Barsoski*, *supra*, footnote 77, at p. 728). These cases are, in reality, cases in which the injured person has not been diligent and has simply failed to commence his action within the limitation period. Under the proposed rule an amendment adding the injured person as a party to Ontario Hospital Services Commission's action would be refused because it could not be said that the addition of such a party “is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the action”.

and the proposed model rules are an integral part of that power. Questions may arise, however, as to whether the relevant rules committees have under their present enabling statutes the power to enact rules which deal so intimately with statutory limitation periods.<sup>181</sup> The English<sup>182</sup> rule on the subject and the United States Federal Rule 15(c)<sup>183</sup> have withstood challenges that they are *ultra vires* and it is believed that the model rule here proposed can be similarly supported. However, if any serious doubts exist as to the present power of rules committees to enact the proposed rule, enabling legislation should be sought expressly granting them the necessary power.

Second, in enacting the proposed model rule a provision should be added making it clear that the term "plaintiff" includes the plaintiff in third-party proceedings and a plaintiff by counterclaim, and that the term "defendant" includes a defendant in third-party proceedings and a defendant by counterclaim.

Finally, there is one type of situation that is not completely and adequately dealt with by the proposed model rule and which calls for a separate legislative solution. It is the situation where a plaintiff sues the person he believes to be the owner of a motor vehicle which has occasioned damage to him, relying on the fact that the named defendant was registered as the owner of the vehicle. It subsequently turns out, however, that someone other than the registered owner who is named as defendant is the actual owner of the vehicle.<sup>184</sup> Where the actual owner in fact receives timely notice of the plaintiff's claim he can be added as a defendant under the model rule. But where he has not received timely notice the rule will be of no assistance to the plaintiff. This result seems quite unjust. Even when he has not received timely notice there seems no good reason why the actual owner of the vehicle should in these circumstances be permitted to escape liability by relying on the limitation period. The only reason he was not originally named as defendant was his failure to register as owner as required by the legislation. What is called for here is special legislation,

<sup>181</sup> Doubts of this kind may have led to the enactment of the Saskatchewan and Alberta provisions (see Appendix) in the form of legislation rather than as Rules of Practice.

<sup>182</sup> See, *Rodriguez v. Parker*, [1967] 1 Q.B. 116 and *Mitchell v. Harris Engineering Co. Ltd.*, [1967] 2 Q.B. 703 (C.A.).

<sup>183</sup> See, *Wright and Miller, op. cit.*, footnote 10, p. 534; *Holmes v. Penna New York Cent. Transp. Co.* (1969), 48 Fed. Rules Dec. 449 (D.C. Ind.); *Meredith v. United Air Lines* (1966), 41 Fed. Rules Dec. 34 (D.C. Calif.).

<sup>184</sup> See, *Lere v. Hartford Acc. & Ind. Co.*, *supra*, footnote 80 and also *Williams v. Davis, supra*, footnote 80.

similar to that in Alberta,<sup>185</sup> providing that in such circumstances a plaintiff may add the actual owner<sup>186</sup> notwithstanding both the expiry of the limitation period and the lack of any timely notice to the actual owner.<sup>187</sup>

<sup>185</sup> See, Appendix, item 3, s.61(1) a.

<sup>186</sup> To meet the problem presented in the *Lere* case, *supra*, footnote 80, it may be necessary to go further and allow the plaintiff to sue the actual owner, in a new action, out of time.

<sup>187</sup> Note, however, that the proposed model rule greatly increases the plaintiff's prospects of adding the actual owner even without the intervention of special legislation. Since under the model rule notice is timely if received within the limitation period *plus* 12 months, if the plaintiff discovers within that time span that someone other than the registered owner is the actual owner he can immediately notify him of the action and apply under the model rule to substitute the actual for the registered owner. Unless the actual owner can show prejudice in having to defend, the court may, under the proposed rule, add him as a defendant. The extended time period for notice under the proposed model rule may also go somewhat towards dealing with another troublesome problem. It is the somewhat anomalous situation (see the discussion footnotes 49 and 80, *supra*) resulting from the operation of statutes such as the Negligence Act, *supra*, footnote 80, s.9, and the Highway Traffic Act, *supra*, footnote 37, s.146(3) which permit a defendant to add as a third-party a person against whom a claim by the plaintiff would be statute-barred: *e.g.*, P sues D for damages for personal injury suffered in a collision; by his statement of defence, delivered after the limitation period, D raises the defence that the accident was caused or contributed to by a defect in his car tires; absent the model rule, P may not join the tire manufacturer (M) as a defendant, but under the above legislation D may add the manufacturer as a third-party. The situation is anomalous because though P cannot claim directly against M, M is drawn into the litigation by being a third-party and under the rules regarding third-party practice he is fully entitled to (and frequently will) contest P's claim against D and D's claim against him (*i.e.*, M). In so doing M will typically rely on the very same evidence he would have used to defend the main action had he been made a defendant thereto. P is in no real difficulty provided D is found to be partly at fault because under the Negligence Act, in such circumstances D is primarily liable to P for all of the damages. However, serious consequences follow for P if D (or M) successfully establish that M was solely responsible for P's injuries; P's action against D will be dismissed and he will be entitled to no recovery against M because the latter was not a defendant to P's action: *Beaulieu v. Lavoie*, *supra*, footnote 80. In the above type of situation the wisdom of relieving D from the limitation period in respect of his claim against M while still leaving P subject to the limitation period in respect of a claim by him against M, may be questioned. The proposed model rule will probably go a long way towards easing the situation, principally as a result of the extended period in which notice may be timely, *i.e.* the limitation period *plus* 12 months. Provided P serves his writ and statement of claim on D with any sort of promptness he will receive D's statement of defence well within the limitation period *plus* 12 months. If the statement of defence reveals a potential co-defendant—third-party, the plaintiff can promptly notify this person, within the limitation period *plus* 12 months, and apply to add him as a defendant under the proposed rule. If the notice is given

## APPENDIX

*Rules and statutes from various jurisdictions dealing with the amendment of proceedings after the expiration of the limitation period.*

1. *United States Federal Rules of Civil Procedure, Rule 15(c).*

(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.

2. *United Kingdom, the Federal Court of Canada and Nova Scotia.*

United Kingdom, Rules of the Supreme Court 1966, Order 20, rule 5. Virtually identical provisions appear in the Rules of the Federal Court of Canada (General Orders and Rules) and in the Nova Scotia Civil Procedure Rules, rule 15.02. (The numbers of the equivalent Federal Court Rules are indicated in the margin.)

Rule 420: 5.—(1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

Rule 424: (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.

Rule 425: (3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought

in this manner and the defendant cannot show that he will be prejudiced in having to defend on the merits the court may allow the amendment. All the above, coupled with the relatively short time period provided by the rules for serving a third-party notice (and the attitude of the courts in enforcing that time limit)—see Ont. Rules of Practice, r. 167(3) and the cases collected under that rule in Holmsted and Gale, *op. cit.*, footnote 3—will mean that the instances in which a defendant can add a person as a third-party where the plaintiff cannot make the person a defendant will be greatly reduced and perhaps rare.



to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

Rule 426: (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

Rule 427: (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same fact. Or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

3. *Alberta: The Limitation of Actions Act, R.S.A., 1970, c.209.*

S.61:

(1) Where an action to which this Part applies has been commenced within the time allowed by or under this Part, the court, upon application, may authorize an amendment to any pleading or proceeding therein that will result in a change of parties to the action:

(a) where the action is one against the registered owner of a motor vehicle alleged to have occasioned the damages sustained and thereafter the plaintiff learns that the registered owner was not the actual owner of the vehicle at the time the damages were sustained, if the court is satisfied that there was sufficient and reasonable excuse for the failure of the plaintiff to learn of the existence of the actual owner and if the change is only the substitution of the actual owner;

(b) where the action is one on behalf of a person under disability or the estate of a deceased person and the action was brought by or in the name of a person not entitled under law to bring an action on behalf of the person under disability or the estate of the deceased person, if the court is satisfied that no affected person has been misled as to the true nature of the action and if the change is only the substitution of the proper persons to bring the action;

(c) where the action is one brought against a person who was in fact deceased at the time the action was commenced against him, if the court is satisfied that the action is one which under *The Administration of Estates Act* could, at the time, have been maintained against the estate of a deceased person and if the change is only the substitution of the estate of the deceased person;

notwithstanding that the time limited by this Part for commencing that class of action had lapsed between the time the action was commenced and the time of the application for the amendment.

(2) An amendment authorized under subsection (1) may only be made within three months after the authorization is granted.

4. *Saskatchewan: The Queen's Bench Act, R.S.S., 1965, c.73.*

S.44(11): Where an action is brought to enforce any right, legal or equitable, the court may permit the amendment of any pleading or other proceeding therein upon such terms as to costs or otherwise as it deems just notwithstanding that, between the time of the issue of the writ and the application for amendment, the right of action would, but by reason of action brought, have been barred by the provisions of any statute; provided that such amendment does not involve a change of parties other than a change caused by the death of one of the parties.

5. *Ontario: Recommendation of the Ontario Law Reform Commission.*

In 1969 the Ontario Law Reform Commission in its Report on Limitation of Action, p. 115 recommended that:

In any action, the court should be able to allow the amendment of any pleading or other proceedings, or an application for a change of party, upon such terms as to costs or otherwise as the court deems just, notwithstanding that, between time of the issue of the writ and the application for amendment or change of party, a fresh cause of action disclosed by the amendment or the cause of action against the new party would have been barred by a limitation provision.

No steps have as yet been taken to implement this recommendation.

---