

CANADA / JUDGMENT

Ladouceur v. Howarth

[1974] SCR 1111

COURT

Supreme Court of Canada

DECIDED

27 August 1973

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Report

[1974] SCR 1111

Judges

Abbott, Douglas Charles; Judson, Wilfred; Spence, Wishart Flett; Pigeon, Louis-Philippe; Laskin, Bora

On appeal from

Ontario

Subjects

Action

Decision Content

Supreme Court of Canada

Ladouceur v. Howarth, [1974] S.C.R. 1111

Date: 1973-08-27

Paul Ladouceur (Plaintiff) Appellant;

and

Robert Norman Howarth (Defendant) Respondent.

1973: May 24; 1973: August 27.

Present: Abbott, Judson, Spence, Pigeon and Laskin JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Practice—Writ of summons—Error in style of cause—Claimant misnamed—Expiry of limitation period—Amendment permitted—Mere misnomer—Opposite party not misled—R. 136(1) (Ont.).

An automobile owned and operated by Conrad Joseph Ladouceur came into collision with an automobile owned and driven by the defendant. The said Conrad Joseph Ladouceur sustained no personal injuries but the vehicle which he drove was damaged. His son Paul, the plaintiff, was his passenger in the vehicle at the time of the collision and he did sustain personal injuries.

Following considerable correspondence with the defendant's insurer with respect to settlement of the plaintiff's claim, the plaintiff's solicitor issued a writ of summons against the defendant. However, due to an error in the solicitor's office, the writ named Conrad Joseph Ladouceur, for whom the solicitor had never acted, as plaintiff.

On March 12, 1970, which was after the expiry of the limitation period, the local master at Ottawa, on an ex parte application, made an order permitting the plaintiff to amend the style of cause by deleting the words "Conrad Joseph" from the plaintiff's name and inserting the name "Paul" for the plaintiff's Christian name. Upon being served with the writ and a statement of claim on April 20, 1970, the solicitors for the defendant moved before the local master to set aside his own ex parte order of March 12, 1970, and to set aside the service of the document purporting to be a writ of summons, statement of claim and jury notice. The local master made such order and an appeal therefrom was dismissed by Stewart J. A further appeal was dismissed by the Court of Appeal and the plaintiff then appealed to this Court.

[Page 1112]

Held: The appeal should be allowed.

This was simply a case of a misnaming of the person who was claiming and was a typical example of being a misnomer. Such misnomer could be corrected under Rule 136(1) of the Ontario Rules of Practice. The defendant had not been misled, or substantially injured by the error.

Williamson v. Headley, [1950] O.W.N. 185; Dill v. Alves, [1968] 1 O.R. 58, applied; Davies v. Elsby Bros., Ltd., [1960] 3 All E.R. 672; Chretien v. Herrman and Plaza, [1969] 2 O.R. 339, referred to.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from an order of Stewart J., whereby an appeal from a master's order which set aside an earlier ex parte order allowing an amendment to a writ of summons was dismissed. Appeal allowed.

D.W. Scott, for the plaintiff, appellant.

D.G. Casey and K.G. Evans, for the defendant, respondent.

The judgment of the Court was delivered by

SPENCE J.—This is an appeal from the judgment of the Court of Appeal for Ontario pronounced on January 27, 1971. By that judgment, the Court of Appeal for Ontario had dismissed an appeal from the order of the Local Master at Ottawa pronounced on May 6, 1970.

On February 14, 1969, an automobile owned and driven by Conrad Joseph Ladouceur came into collision with an automobile owned and driven by the defendant Robert Norman Howarth in the City of Vanier, in the Province of Ontario. The said Conrad Joseph Ladouceur sustained no personal injuries but the vehicle which he drove was damaged. His son, Paul Ladouceur, was his passenger in the vehicle at the time of the collision and he did sustain personal injuries.

The defendant Robert Norman Howarth, in his affidavit, swore that claims were asserted

[Page 1113]

against him by Conrad Joseph Ladouceur and Paul Ladouceur for damages arising out of the said collision.

The solicitor for the appellant has testified in his affidavit that he was consulted by Paul Ladouceur as to his personal injuries and instructed to claim compensation on his behalf. The solicitor further testified that he had opened a file in the matter in the name of Paul Ladouceur and had entered into considerable correspondence with an insurance company which carried a policy on Mr. Howarth with respect to settlement of Paul Ladouceur's claim. The solicitor retained by Paul Ladouceur never was retained for or purported to act for Conrad Joseph Ladouceur, the owner and driver of the automobile, who, as I said, sustained no personal injuries but whose automobile suffered property damage.

On December 17, 1969, the insurance company representing Robert Norman Howarth wrote to the solicitor acting for Paul Ladouceur and on the same day the said solicitor issued a writ from the Local Office of the Supreme Court of Ontario at Ottawa, being #974/69, the endorsement upon such Writ of Summons was as follows:

The Plaintiff's claim is against the Defendant for injuries and damages sustained as the result of a collision which occurred on the 14th day of February, 1969 at Hannah Street and Deschamp Street, in the City of Vanier, in the Regional Municipality of Ottawa-Carleton which collision was caused solely as the result of the negligence of the Defendant.

The solicitor for the appellant has testified that in drafting the endorsement for the writ of summons he referred to Paul Ladouceur's injuries as the claim was against the defendant for injuries and damages and Conrad Joseph Ladouceur was not injured in the said accident. However, the style of cause set out in that writ was between Conrad Joseph Ladouceur, plaintiff, and Robert Norman Howarth, defendant. The writ was not then served upon the defendant. The appellant's solicitor further testified that on February 20, 1970, he received a further

[Page 1114]

letter from the same insurance company inquiring as to the possible settlement of the case. This must have moved the solicitor for the appellant to direct that the writ of summons be served and when about to serve it he noticed the error in the style of cause and he made ex parte application to the Local Master at Ottawa. Such application was made by notice of motion dated March 6, 1970, but it does not seem to have been served upon any one and it was for an order permitting the plaintiff to amend the style of cause by deleting the words "Conrad Joseph" from the plaintiff's name and inserting the name "Paul" for the plaintiff's Christian name. By his order made on March 12, 1970, the Local Master at Ottawa did permit such substitution of the name "Paul" for the name "Conrad Joseph" as the Christian name of the plaintiff appearing in the style of cause on the writ of summons. The appellant's solicitor then made such amendment on the writ and served the writ and a statement of claim upon the defendant Robert Norman Howarth on April 20, 1970.

The solicitors for the defendant Robert Norman Howarth promptly moved before the Local Master to set aside his own ex parte order of March 12, 1970, and to set aside the service of the document purporting to be a writ of summons, statement of claim, and jury notice. The Local Master made such order on May 6, 1970, evidently without delivering any written reasons. Mr. Justice Stewart dismissed an appeal from that order of the Local Master on May 22, 1970, again apparently without written reasons. The Court of Appeal for Ontario dismissed an appeal from the order of Mr. Justice Stewart by its judgment of January 27, 1971.

Rule 136(1) of the Consolidated Rules of Practice of the Supreme Court of Ontario provides:

136. (1) The court may, at any state 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

[Page 1115]

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.

(The italics are my own.)

Aylesworth J.A., giving the reasons for judgment for the Court of Appeal for Ontario, noted that the effort to achieve the substitution of plaintiffs was made after the expiration of the Statute of Limitations, that is, more than a year after the accident had occurred on February 14, 1969. Continuing, the learned justice on appeal said:

Admittedly, the only ground for making it would be that the naming of Conrad Joseph as the plaintiff in the writ was a mere misnomer. We think it was not and we do not think it comes within any reasonable description of that word.

The learned justice on appeal considered the case of *Davies v. Elsby Bros., Ltd.*[2], a decision of Devlin J. upon a similar issue, who had set out the test as follows:

Would he say, if a defendant, “this must be myself who is meant, but I have been named wrongly”, or would he be put to inquiries beyond the contents of the document to ascertain what was meant? Would he say, if a defendant, “this plaintiff in the writ is so named by mistake—I have no dealings with him”?

Dill v. Alves[3] and *Chretien v. Herrman and Plaza*[4] were both distinguished.

With respect, I am of the opinion that this is simply a case of a misnaming of the person who was claiming and is a typical example of being a misnomer. The solicitor who issued the writ

[Page 1116]

knew he was claiming for personal injuries and he knew that the son and the son alone sustained such personal injuries. He knew that he did not act for the father. It is, in my view, most significant that not only did the solicitor for Paul Ladouceur have this knowledge but the insurance company with whom that solicitor had been dealing had the same knowledge and that such insurance company continued to negotiate with the said solicitor for the settlement of compensation for Paul Ladouceur’s personal injuries right up to the time when the writ was served showing, of course, the amendment, and showing that the amendment was made after the date the Statute of Limitations had lapsed. I view as much more important than any knowledge of the defendant Howarth the knowledge of his insurer and I ask what would the mind of the insurance company representative be when he received this writ. Surely, he would say, answering Devlin J.’s test, “this plaintiff in the writ is so named by mistake. I had no dealings with him”. At any rate, he would say, “I had no dealings with him as to personal injuries and I had no dealings with him through the solicitor who acted not for Conrad Joseph Ladouceur but for the son Paul Ladouceur”.

It is true that *Williamson v. Headley*[5] is a decision of a single judge but there Kelly J. quoted Middleton J. in an earlier case as setting out the prime principle in dealing with irregularities in the style of cause: “The general principle underlying all the cases is that the court should amend, where the opposite party has not been misled, or substantially injured by the error.”

The circumstances in *Dill v. Alves*, *supra*, resemble, to a degree, those in the present case. An automobile was owned by a father Edward Dill and driven by his son Edwin R. Dill with the father Edward Dill as a passenger. There was a collision; the father, the passenger, was injured. The writ was issued in the name of the

[Page 1117]

son Edwin R. Dill. Aylesworth J.A. again gave the judgment of the Court and permitted an amendment in the style of cause to show the plaintiff as Edward Dill when the application for such amendment was made after the Statute of Limitations had run against the claim. At p. 59, the learned justice on appeal said:

With respect, we disagree with that conclusion. The test is whether or not the naming of the plaintiff in the writ and proceedings which are sought to be amended was a misnomer. Clearly on the facts here we think it was a misnomer.

I would apply that statement exactly to the facts in the present case.

I would, therefore, allow the appeal and restore the order of the Local Master as it was first made permitting an amendment of the writ of summons to show the plaintiff as Paul Ladouceur. The order of the Local Master which was made on the second occasion, that is, his order of May 6, 1970, also included a paragraph reading:

It is further ordered that the service of documents herein effected on the 20th day of April, 1970, be and the same are hereby set aside.

It is said that clause had reference to a faulty form of the copy of the writ served upon the defendant. The matter was not dealt with in the Court of Appeal nor in this Court and I think it sufficient to order that the plaintiff be permitted to amend the style of cause in the writ to show the name of the plaintiff as Paul Ladouceur and then leave the plaintiff to make an application to the Local Master for leave to serve the writ upon the defendant despite the fact that more than a year has passed since the issuance thereof.

I am somewhat concerned about the question of costs. Certainly the defendant should be entitled to the costs of the application before the Local Master to strike out his ex parte order; even if the Local Master had refused to so order, he would, in all probability, have granted

[Page 1118]

costs to the defendant. After that order, the defendant has been brought into three courts, that is, before the learned judge of the High Court, before the Court of Appeal, and before this Court, all on the appeals by the present appellant, and in view of the original fault being that of his solicitor, I think the proper disposition of costs would be to make no order as to costs except that in favour of the defendant before the Local Master.

Appeal allowed.

Solicitors for the plaintiff, appellant: Binks, Chilcott & Co., Ottawa.

Solicitors for the defendant, respondent: Gowling & Henderson, Ottawa.

[1] [1972] 1 O.R. 488, 23 D.L.R. (3d) 408.

[2] [1960] 3 All E.R. 672.

[3] [1968] 1 O.R. 58.

[4] [1969] 2 O.R. 339.

[5] [1950] O.W.N. 185.

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