TOO LITTLE, TOO LATE: JUDICIAL TIME CONSTRAINTS TO AMENDMENT OF PLEADINGS

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The recent cases of *Broome v Western Assurance*[1] and *Burton v Docker*[2] demonstrate a judicial trend of increasing intolerance for parties amending their pleadings years after an action has commenced. These decisions present a warning to litigants to be timely in bringing amendments to their pleadings, and indicate that the court is unwilling to push trial dates to allow for the addition of causes of action or defences.

Broome v Western Assurance

Background

In July 2011, the plaintiff in *Broome* was involved in a motor vehicle accident, and commenced an action against the accident benefits insurer in November 2013. The matter came under case management in 2021. In May 2021, the parties attended a pre-trial, with the understanding that a trial would commence in November 2022. Throughout 2022, the parties attended three case conferences. In the last case conference, the judge ordered the parties to attend global mediation in June 2023, with a trial to commence in November 2023.[3]

In the winter prior to the mediation, the plaintiff moved under Rule 26.01 of the *Rules of Civil Procedure*[4] to amend her statement of claim and add punitive damages. The defendant only received notice of the plaintiff's intention when served with the motion materials in December 2022 or January 2023.[5]

Rule 26.01 states that:

> On motion at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.

Historically, this mandatory provision has been given deference, with courts exercising little discretion.

The Parties' Positions

The plaintiff argued that on a Rule 26.01 motion the court must grant leave to amend a pleading unless prejudice will result which cannot be compensated by costs or an adjournment. The plaintiff also argued that they were entitled to protection under the *Statutory Accidents Benefits* legislation, and the defendant insurer

should have paid the plaintiff accident benefits upon receipt of updated medical reports.[6]

The defendant insurer argued that the timing of the plaintiff's motion and its proximity to the fixed trial date resulted in prejudice not only against the defendant, but also the plaintiff. This prejudice stemmed from the possibility that the trial date would be adjourned and the defendant would be seeking further discovery, productions, and perhaps more medical examinations upon the addition of punitive damages to the statement of claim.[7]

The Decision

Regional Senior Justice Edwards of the Ontario Superior Court agreed with the defendant and dismissed the plaintiff's motion to amend her pleadings.

The court reaffirmed the test for amending pleadings on a Rule 26 motion, noting that there is no absolute right for a party to amend their pleadings. The factors considered by the court when such a request is sought are:

a. An amendment should be allowed unless it would cause an injustice not compensable in costs;
b. The proposed amendment must be shown to be an issue worthy of trial and *prima facie* meritorious;
c. No amendment should be allowed which if originally pleaded would have been struck; and
d. The proposed amendment must contain sufficient particulars.[8]

Additionally, the court must grant leave to amend pleadings, unless the responding party would suffer non-compensable prejudice, and the prejudice must flow from the amendment itself.[9]

Importantly, the Ontario Superior Court followed the Court of Appeal's holding in *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.* that "at some point, the delay in seeking an amendment would be so lengthy and the justification so inadequate that prejudice to the responding party will be presumed."[10]

In *Broome*, the court held that the delay from the plaintiff was "so egregious that prejudice can be presumed. It would be inappropriate to grant the relief sought where this case is for all intents and purposes on the 'eve of trial'."[11]

The plaintiff brought the motion nine years after the issuance of the statement of claim, seven years after the close of pleadings, and five years from the last examinations for discovery.[12] Additionally, the plaintiff had no explanation for why she was amending her claim now almost a decade after the action began.[13] The plaintiff was not able to amend her pleadings and add punitive damages at such a late stage when the matter was set down for trial in November 2023, as agreed to by the parties themselves.[14]

Of note is the comment by Justice Edwards that this motion was "particularly egregious" given that the action

was case managed by him for almost two years. Despite court oversight, neither a settlement nor a trial had been achieved.[15]

Burton v Docker

Background

In *Burton*, the defendants (the "**Dockers**"), moved for leave to amend their statement of defence to plead the inevitable accident defence.[16]

The Dockers rear-ended the plaintiff in April 2017, and the plaintiff suffered allegedly catastrophic injuries. The plaintiff began an action against the Dockers in March 2019. In and around March 2020, the Dockers delivered their statement of defence, which denied all liability and negligence, but did not specifically plead the defence of inevitable accident.[17]

According to the Dockers, their examinations for discovery in July 2020 revealed the availability of the defence; namely, that a tire on their car blew causing the accident.[18] After the examinations for discovery, the plaintiff's lawyer told the Dockers that if they "were to take the position that they bore no liability" for the accident, that position should be communicated soon. The Dockers did not forewarn the plaintiff as requested in the two and a half years after oral discoveries.[19] The plaintiff set the action down for trial in May 2021, and there was an assignment court hearing scheduled for April 2023.[20] In argument, the Dockers did not dispute that if they had plead the inevitable accident defence, this would have changed the plaintiff's litigation strategy.[21]

The Court's Decision

Justice Agarwal of the Ontario Superior Court dismissed the defendants' motion to amend their pleadings.[22]

As in *Broome*, the court in Burton referred to the Court of Appeal's decision *1588444 Ontario Ltd. v State Farm Fire and Casualty Co.*, and reiterated its principles, including: "at some point, the delay in seeking an amendment will be so lengthy, and the justification so inadequate, that prejudice to the responding party will be presumed"; and "when the delay in seeking amendment is lengthy, courts will presume prejudice to the responding party and the onus to rebut the presumed prejudice lies with the moving party."[23]

The court in *Burton* also followed the Court of Appeal's ruling that "[r]equiring a party to change its entire litigation strategy late in the litigation is non-compensable prejudice."[24]

Importantly, the court in *Burton* held that "nothing in the caselaw establishes a bright-line or even a rule of thumb for how long a delay must be for it to be so lengthy that it's presumptive[ly] prejudicial."[25]

The court determined that the Dockers had no explanation for their delay in amending their statement of

defence, or why they waited just a few weeks before trial to raise the issue.[26]

The court also held that the inevitable accident defence may have changed the plaintiff's entire litigation strategy. And while that may be compensable through appropriate orders, the plaintiff "should not be put in the position of delaying the trial, which is not in the interests of justice, because the Dockers failed to plead this defence promptly."[27] Further evidence of presumed prejudice against the plaintiff was the fact that the matter was on the trial list, but the Dockers clearly were not ready for trial, as evidenced by them seeking an adjournment.[28]

Overall, the court held that the defendants' delay in seeking an amendment was "so lengthy" – four years after the action started – and the justification "so inadequate", that prejudice to the plaintiff was presumed. The defendants had not rebutted the presumed prejudice.[29] The defendants were ordered to pay the plaintiff $6000 in costs.[30]

Takeaways

While Ontario courts are generally reluctant to deny a form of relief to parties, these cases illustrate that motions to amend pleadings after years – even a mere four – after an action has started may be denied. As a result, a few practical lessons appear from the holdings in *Broome* and *Burton*:

- **Amendment of Pleadings:** The court appears to be moving towards a more circumspect view as to when pleadings can be amended, particularly when discoveries are complete, a matter has been set down to trial, and the proposed amendment would delay the trial itself. In *Broome*, the parties had already been through discovery five years prior,[31] giving counsel more than enough time to evaluate whether punitive damages should be added to the statement of claim. In *Burton*, the evidence for the defendants to amend their statement of defence to add inevitable accident was available at least two years prior, yet they took no action.[32] Defence counsel should regularly refer back to pleadings in order to ensure that they reflect a case's current factual and legal matrix.
- **Presumptive Prejudice:** There is no rule of thumb that the court will follow to determine when a delay to amend pleadings has been too long so that it is presumptively prejudicial. However, *Broome* and *Burton* provide additional authority for the proposition that prejudice may be assumed to result from any late in the game amendment of pleadings.
- **Punitive Damages:** Plaintiff's counsel will need to consider punitive damages when drafting pleadings and as the facts develop through the stages of an action. Moving to amend pleadings with little notice and on the eve of trial may not be acceptable moving forward. The outcomes in *Broome* and *Burton* may mean that more plaintiffs will include punitive damages in relief sought from the outset.

[1] 2023 ONSC 1732 [*Broome*].
[2] 2023 ONSC 1974 [*Burton*].
[3] *Broome* at paras 2-5.
[4] R.R.O. 1990, Reg. 194.
[5] *Broome* at paras 6-7.
[6] *Broome* at paras 8-10.
[7] *Broome* at para 11.
[8] *Broome* at para 12, citing *Marks v Ottawa (City)*, 2011 ONCA 248.
[9] *Broome* at para 13.
[10] *Broome* at para 13, citing 2017 ONCA 42.
[11] *Broome* at para 18.
[12] *Broome* at para 15.
[13] *Broome* at para 16.
[14] *Broome* at para 18.
[15] *Broome* at para 17.
[16] *Burton* at para 1.
[17] *Burton* at paras 4-5.
[18] *Burton* at paras 6-7.
[19] *Burton* at para 8.
[20] *Burton* at paras 10-11.
[21] *Burton* at para 5.
[22] *Burton* at para 30.
[23] *Burton* at para 16.
[24] *Burton* at para 17, citing *Horani v Manulife Financial Corporation*, 2023 ONCA 51 at para 36.
[25] *Burton* at para 24.
[26] *Burton* at paras 25-27.
[27] *Burton* at para 28.
[28] *Burton* at para 29.
[29] *Burton* at para 30.
[30] *Burton* at para 38.
[31] *Broome* at para 15.
[32] *Burton* at para 27.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.