

**Lynch v. Catholic Women's League of Canada (c.o.b. Peterborough
Diocesan Council of the Catholic Women's League of Canada), [2014] O.J.
No. 1314**

Ontario Judgments

Ontario Superior Court of Justice

D.S. Gunsolus J.

Heard: March 10, 2014.

Judgment: March 13, 2014.

Court File No. 282/12SR

[2014] O.J. No. 1314 | 2014 ONSC 1649

RE: Virginia Ann Lynch and Deborah Marie Lynch, Plaintiffs, and The Catholic Women's League of Canada, operating as the Peterborough Diocesan Council of the Catholic Women's League of Canada, Defendant

(24 paras.)

Case Summary

Civil litigation — Civil procedure — Parties — Adding or substituting — After expiry of limitation period — On own motion — Pleadings — Amendment of — Statement of claim — After expiry of limitation period — Motion by plaintiffs to add defendant allowed — Plaintiffs alleged that McKinnon, representing herself as president of Peterborough Diocesan Council of Catholic Women's League of Canada, sent letter accusing them of forgery — Plaintiffs named CWLC as defendant — CWLC advised after expiry of limitation period that it was separate entity and did not accept responsibility for Council's conduct — Plaintiffs moved to add McKinnon as defendant — Plaintiffs conducted appropriate corporate search and named only known corporate defendant, as identified in letter.

Statutes, Regulations and Rules Cited:

Criminal Code of Canada, [R.S.C. 1985, c. C-46, s. 366\(1\)](#)

Limitations Act, 2002, [S.O. 2002, Chapter 24, Schedule B, s. 4](#), s. 21

Rules of Civil Procedure, Rule 5.04(2), Rule 26.02(b)

Counsel

David O'Neill, counsel, for the plaintiffs.

Angelo Sciacca, counsel for the defendant.

ORDER**D.S. GUNSOLUS J.****Nature of the Motion**

1 The plaintiffs, Virginia Ann Lynch and Deborah Marie Lynch, are asking the court to add Anne McKinnon as a party defendant to this action pursuant to Rule 26.02(b) and 5.04(2) of the *Rules of Civil Procedure*.

2 The proposed defendant, Lynch, takes the position that the motion is barred by sections 4 and 21 of the *Limitations Act*¹ as the plaintiff's allegedly should have known and could have known with reasonable diligence, that the proposed defendant, McKinnon, was a proper party to the proceeding prior to the expiration of the applicable two year limitation period. It was after the expiration of the limitation period that The Catholic Women's League of Canada asserted that it was a separate entity from the Peterborough Diocesan Council of The Catholic Women's League of Canada. The plaintiffs take the position that they did not discover that the action should have included Anne McKinnon, as being an individual person responsible for the act which is the subject of this action, until after the passage of the limitation period.

3 Counsel, on behalf of the proposed defendant, McKinnon, argues that counsel for the plaintiffs did not conduct sufficient due diligence until the limitation period was within a couple of weeks of expiring, and thus did not undertake reasonable due diligence to determine appropriate defendants within the limitation period. Counsel further argued that ultimately, the properly named defendant, The Catholic Women's League of Canada, may be determined to be liable for the actions of the defendant, McKinnon.

Background Facts

4 On or about November 22, 2010 it is alleged that McKinnon authored and sent a letter to the plaintiffs, representing herself as the president of The Peterborough Diocesan Council of The Catholic Women's League of Canada ("CWL"). The contents of that letter allege that the plaintiffs had engaged in a forgery, contrary to s. 366(1) of the *Criminal Code of Canada* and further requested that the Lynch's resign as members of the CWL, failing which legal action was threatened.

5 The letter was written on letterhead of the "Peterborough Diocesan and Council". McKinnon signed as Peterborough president. The letter included an assertion that "The Peterborough Diocesan and Catholic Women's League of Canada" required the immediate resignation of the Lynch's from their position within Our Lady of Mount Carmel Catholic Women's League of Canada.

6 Counsel for the plaintiffs performed a corporate search for the purposes of properly naming the defendant in this matter. The results of that search confirmed that "The Catholic Women's League of Canada" was a without share corporation, incorporated federally on December 12, 1923. Allegedly, the local Peterborough group is not a separate legal entity but is associated with the Catholic Women's League of Canada.

7 After the passage of the limitation period, counsel for the CWL wrote to the plaintiffs advising that the CWL was a national organization and accepted no responsibility for the conduct of the local council.

8 In the result, counsel for the plaintiffs brought this motion originally returnable June 14, 2013 which was adjourned on consent to August 16, 2013 seeking an order to, amongst other things, add McKinnon as a party defendant.

The Law

9 Justice Bielby in the case of *Tomescu et al vs. Sarhan et al*² set out the applicable test for discoverability as being a "low one" requiring only that the court:

...Examine the evidentiary record before it to determine if there is an issue of **fact** or of **credibility** on the discoverability allegation. If the court determines that there is such an issue, the defendant should be added with leave to plead a limitations defence.³

10 The test for the plaintiff to establish that the proposed defendant could not have been identified with due diligence within the limitation period is a very low one. To quote Master Dash in the decision of *Wakelin v. Gourley*:

The question is how much evidence must the plaintiff put in at the pleading amendment stage to establish that the proposed defendants could not have been identified with due diligence within the limitation period? The short answer is: not very much.⁴

11 The court must also have regard to Rule 5.04(2) of the *Rules of Civil Procedure* which states "*at any stage of a proceeding the court may by order, add, delete or substitute a party, or correct a name of a party, incorrectly named, on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.*" In that case, Master Dash made it clear that the appropriate step was to allow the moving party to add the new defendant and to grant leave to the added defendant to plead the *Limitations Act*.⁵

12 As long as the plaintiff puts in evidence, steps taken to ascertain the identity of the tortfeasors and gives a reasonable explanation on proper evidence as to why such information was not obtainable with due diligence, then that will be the end of the inquiry and the defendants will normally be added, with leave to plead a limitations defence. Again, this is not a high threshold.⁶

13 If there is any doubt whether the steps taken by the plaintiff could not amount to due diligence, then this is an issue that must be resolved on a full evidentiary record at trial or on summary judgment. The strength of the plaintiff's case on due diligence and the opinion of the master or judge hearing the motion as to whether or not the plaintiff will succeed at trial on the limitations issue, is of little or no concern on the motion to add the defendants. The only concern is whether a reasonable explanation as to due diligence has been provided such as to raise a triable issue.⁷

[12] It is only if the court is convinced on the evidence before it that the essential facts were actually known at an earlier date or that there is no issue of fact or credibility on discoverability, that the amendments would normally be denied.⁸

[13] The onus on this motion is clearly and solely upon the plaintiffs. Motions of this nature are "fact driven".⁹ A motion to add defendants can rarely be defeated at this stage on the basis of absence of due diligence, rather than proof of actual knowledge.¹⁰

Discussion

14 In the matter before the court, counsel for the plaintiffs conducted an appropriate corporate search and identified the appropriate defendant to be The Catholic Women's League of Canada. This was the incorporated entity to which the letter written by McKinnon referred.

15 While the Statement of Claim was issued only a few weeks before the expiration of the limitation period, I cannot, as counsel for McKinnon would urge me, find "that the issuance of the claim at the last minute" equates to a lack of due diligence in this matter.

16 It was not until after the limitation period expired that counsel for The Catholic Women's League of Canada took

Lynch v. Catholic Women's League of Canada (c.o.b. Peterborough Diocesan Council of the Catholic Women's League of Canada), [2014] O.J. No. 1314

the position that it was not responsible for the actions of the local chapter and in particular, of McKinnon, who purported to be writing on behalf of both the Canadian Group and the local chapter.

17 As soon as counsel for the plaintiffs received this information, they began the appropriate steps in order to bring this motion and seeking to add of McKinnon as a defendant "with leave to plead the *Limitations Act*¹¹ defence".

18 Counsel for the proposed defendant could not provide the court with any concrete evidence that the plaintiff had failed to exercise due diligence. To the contrary, the appropriate corporate search was undertaken and the only known corporate defendant was named as the defendant in this matter, as identified in the letter written by McKinnon to each of the plaintiffs. It is not clear to me what else the plaintiffs could have done in order to determine the identification of the appropriate tortfeasors.

19 I believe that the plaintiffs provided a reasonable explanation in that:

- (1) The letter that they received from McKinnon was purportedly written by her on behalf of The Catholic Women's League of Canada (as well as the local chapter);
- (2) A corporate search undertaken by counsel for the plaintiffs confirmed that no separate local body existed and only the main Canadian body was a legal entity;
- (3) Post expiration of the applicable limitation period, counsel for the plaintiffs were advised that the CWL both denied responsibility for the actions of McKinnon and that she was writing on its behalf;
- (4) Is it appropriate for a proposed defendant to hide behind their own misleading actions in purporting to write on behalf of an entity for which, it is subsequently determined, they had no authority to do? This is similar to the circumstances as set out in 1194388 Ontario Inc. vs. the TD Bank¹²;
- (5) The issue as to whether or not the plaintiffs undertook sufficient due diligence is really a question of fact and credibility which must be determined after a full evidentiary record is available for the court to review;
- (6) Counsel for proposed defendant could not indicate what further steps the plaintiffs could have taken which would have allowed them to discover that McKinnon should have been named as a party defendant in this matter.

20 In short, it would be inappropriate for this court, on this motion and partial evidentiary record, to determine questions of fact and credibility as to whether or not the plaintiff will succeed at trial on the limitations defence. Rather, the court must determine whether or not the plaintiff has provided a reasonable explanation that could "on a generous reading"¹³ amount to due diligence.

21 I am satisfied that the plaintiffs have provided a reasonable explanation as to why McKinnon was not named a defendant within the limitation period. It was not until the Statement of Claim had been issued and served and the limitation period had passed, that The Catholic Women's League of Canada put the plaintiffs on notice that it considered itself a separate entity and not responsible for the actions of McKinnon and/or the local council.

22 There is at least a triable issue as to when the plaintiffs ought to have, with proper diligence, discovered that they had a cause of action against McKinnon.

Order

23 The plaintiffs may add Anne McKinnon as a party defendant to this action with leave to Anne McKinnon to plead the *Limitations Act*.

24 As to costs, if the parties are unable to agree on costs, counsel may seek an appointment to make oral

Lynch v. Catholic Women's League of Canada (c.o.b. Peterborough Diocesan Council of the Catholic Women's League of Canada), [2014] O.J. No. 1314

submissions before me. If an appointment to argue the issue of costs is not sought from the office of the Trial Coordinator within 21 days, the parties will be deemed to have settled the issue of costs as between themselves.

D.S. GUNSOLUS J.

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- 1 *Limitations Act, 2002, S.O. 2002, chapter 24, Schedule B.*
 - 2 *Tomescu et al v. Sarhan*, [2013 ONSC 1358](#), [115 O.R. \(3d\) 396](#).
 - 3 *Tomescu et al v. Sarhan et al*, *supra*, p. 399.
 - 4 *Wakelin v. Gourley*, [76 O.R. \(3d\) 272](#), [\[2005\] O.J. No. 2746](#), p. 5.
 - 5 *Wakelin v. Gourley*, *supra*, p. 5.
 - 6 *Wakelin v. Gourley*, *supra*, p. 5.
 - 7 *Wakelin v. Gourley*, *supra*, p. 5.
 - 8 *Pepper vs. Zellers*, [\(2006\), 83 O.R. \(3d\) 648](#), ONCA, at para. 18.
 - 9 *Hansen vs. Strone Corporation*, [2013 ONSC 7130](#), page 7.
 - 10 *Wakelin v. Gourley*, *supra*, para. 1 & 9.
 - 11 *Limitations Act*, *supra*.
 - 12 *1194388 Ontario Inc. vs. the TD Bank*, [\[2014\] O.J. No. 297](#), p. 8-10.
 - 13 *Wakelin v. Gourley*, *supra*, p. 5.