

CITATION: Roach v Stewart 2025 ONSC 6160
COURT FILE NO.: CV-20-00642795
MOTION HEARD: 20251031

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Osbourne Jacob Roach, Plaintiff

AND:

Boyce Stewart and ERB Transport Limited, Defendants

BEFORE: Associate Justice Jolley

COUNSEL: Jillian Van Allen, counsel for the lawyers for the moving party plaintiff

Glen Bushi, counsel for the responding party defendants

HEARD: 31 October 2025

REASONS FOR DECISION

A. Overview

[1] The plaintiff brings this motion for an order validating and extending the time to serve each of the defendants with the statement of claim, an order substituting the named defendant Boyce Stewart for the proper defendant Stewart Boyce (“Boyce”) with leave to amend the claim accordingly and an order extending the set down date from 19 June 2025 to 19 June 2027.

[2] There is no issue that the within action was commenced within the relevant limitation period. The parties agree that the six month time period within which to serve the statement of claim expired on 19 December 2020. The defendant ERB Transport (“ERB”) was served on 9 November 2022. The insurer for the defendant Boyce was served on 11 November 2022 and Boyce himself was personally served on 21 October 2025.

[3] The applicable rules of the *Rules of Civil Procedure* provide as follows:

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

...

2.01(1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,

(a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in whole or in part.

...

3.02(1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

- [4] The leading authority on motions to extend the time for service of the statement of claim is the decision of the Court of Appeal in *Chiarelli v. Weins*, 2000 CanLII 3904. As the court stated at paragraph 17:

The court should not fix in advance rules or guidelines when an extension should be refused. Each case should be decided on its facts, focusing . . . on whether the defence is prejudiced by the delay.

- [5] The court stated at paragraph 16:

. . . prejudice that will defeat an extension of time for service must be caused by the delay. Prejudice to the defence that exists whether or not service is delayed ordinarily is not relevant on a motion to extend the time for service. In this case the defence complains that the police officer's notes have been destroyed. However, they were destroyed within two years of the accident under a local police policy. Thus, the notes would have been unavailable to the defence even if the statement of claim had been served on time.

B. The Issues

Issue 1: Has the plaintiff provided a reasonable explanation for the delay?

- [6] I am satisfied that the plaintiff has adequately explained the delay in the serving the defendants, which was caused by the departure from the firm of the lawyer who had carriage of the file and a misunderstanding about who was responsible for that carriage thereafter. In April 2022, the firm determined that the claim may not have been served. Some six months later, it conducted MTO searches to obtain an address for ERB and Boyce.
- [7] Having received ERB's address on 26 October 2022, the plaintiff served ERB on 8 November 2022. ERB provided its insurer (who was also the insurer for Boyce) with a copy of the statement of claim on 11 November 2022, while Boyce was still in the employ of ERB. In internal correspondence between ERB and its insurer on 11 November 2022,

ERB's representative acknowledged that he is "not sure Stewart will be served as the Statement of Claim states that he resides at an unknown address. I have asked his supervisor to reach out to him directly, to ask that once he is served to let us know asap."

- [8] In January 2023, the plaintiff made efforts to obtain a police report to locate Boyce, but determined there was none. In that same month, ERB was in communication with Boyce and advised their insurer that Boyce had not yet been served.
- [9] Having not been able to locate an address for Boyce through an MTO search or an FOI request to the Peel Regional police, in September 2023 the plaintiff sought Boyce's address from the insurer, but did not receive any reply.
- [10] During the defendants' cross examination on the affidavits filed in opposition to this motion, ERB undertook to provide Boyce's last known address. It did so on 9 October 2025 and the plaintiff served Boyce shortly thereafter, on 21 October 2025.

Issue 2: Will the defendants suffer unfairness or prejudice if the motion to extend the time for service of the claim is granted?

- [11] I am satisfied that the defendants will suffer no prejudice or unfairness as a result of the delay in serving them with the statement of claim.
- [12] I find that any presumption of prejudice has been rebutted. In the unusual circumstances of this case, the parties through their respective insurers actually exchanged information about the accident and the plaintiff's alleged damages within days of the motor vehicle accident in June 2018 and continued to do so for some two years, even before the claim was issued.
- [13] By 3 July 2018 the plaintiff's insurer had provided the defendants' insurer with details of the motor vehicle accident and its position that the defendants could be fully at fault. The defendants' insurer investigated, on 4 July 2018 opened a tort file and an Auto-PD file, which it closed when it determined there was no damage to the ERB truck. The defendants' insurer requested information and documentation regarding the SABs paid to the plaintiff and a copy of any police report to assist it in determining liability. After some follow up by the plaintiff's insurer, the defendants' insurer acknowledged receipt of the documents in March 2020. By April 2024 the defendants' insurer had sufficient information to set a reserve.
- [14] ERB's accident report form required drivers to provide a "detailed statement of how [the] accident occurred" and Boyce completed that statement on 21 June 2018, the date of the accident. ERB also spoke to Boyce on 25 June 2018 and wrote down his further recollections about the alleged accident. Given Boyce denied there even was an accident, and confirmed he "did not feel, hear or see any vehicle", speculative information about weather or traffic does not seem germane. But if that was relevant, those details could have been obtained from Boyce at the time the insurer was assessing its exposure to the plaintiff's insurer's Loss Transfer claim. It advised that its driver did not agree with the

plaintiff's version of events, so was on notice at that time but there was a dispute on liability and should have considered then whether it might require further investigation.

- [15] Further, ERB confirmed through its own investigation that there was no damage to its truck. Its insurer was also apparently able to adequately investigate the claim and assess its liability for the purposes of the Loss Transfer request submitted by the plaintiff's insurer, applicable to large commercial vehicles.
- [16] The defendants also confirmed that, at the time of the accident, Boyce reviewed the dashcam and there was "nothing to see". It cannot then be realistically argued that the defendants were deprived of the opportunity to preserve the dashcam evidence, because according to the defendants, the dashcam only activates in the event of some contact and it did not activate in this situation, consistent with Boyce's evidence that there was no accident.
- [17] Absent an affidavit from Boyce, I do not give weight to a generic statement that memories fade over time, at least as far as it concerns him. He provided a contemporaneous written statement in response to a written request for a "detailed statement" and a statement to his employer by phone, which he can use to refresh his memory.
- [18] There is no evidence of any other witnesses who observed the accident. The defendants mention that they have lost the opportunity to locate the police officer who spoke to Boyce. It was open to them to obtain his evidence, particularly when they knew liability was in issue from their perspective. In any event, that evidence may be of little relevance as the officer did not see the alleged accident and could only recount his conversation with the plaintiff, who called to report the accident and his conversation with Boyce, whom he pulled over thereafter.
- [19] The plaintiff's medical records are available and have been served and he does not assert a loss of income claim.
- [20] In conclusion, I find there is a reasonable explanation for the plaintiff's delay in serving the defendants with the statement of claim. I further find that the plaintiff has satisfied its onus to show the defendants will not suffer unfairness or prejudice if the motion to extend the time for service is granted.
- [21] For these reasons, I am satisfied that it is just in all of the circumstances that the time to serve the statement of claim on ERB be extended to 9 November 2022 and service be validated as of that date. The time to serve the statement of claim on Boyce is hereby extended to 21 October 2025 and service is validated as of that date. The defendants shall have 30 days from the release of this decision to deliver a defence.

Issue 3: Misnomer

- [22] Counsel for the defendants confirmed that, in the event the plaintiff's motion was granted, Boyce would not object to the plaintiff's request that the named defendant be changed from its present iteration of "Boyce Stewart" to "Stewart Boyce" on the basis of misnomer and such relief is granted.

Issue 4: Extension of the set down date

- [23] The plaintiff seeks an order extending the time to set the action down for trial from 19 June 2025 to 19 June 2027. While I am prepared to grant that order, I require the parties to confer and, if possible, agree on a timetable for exchange of productions, examinations for discovery and mediation so that the action will be ready to be set down within this timeframe. If they are unable to reach an agreement, they are to contact my assistant trial coordinator at Christine.Meditskos@ontario.ca to arrange for a case conference with me. Absent any request, I will assume they have consensually reached a timetable.

Issue 5: Costs

- [24] The plaintiff argues that if I find the defendants unreasonably contested the motion, it would be appropriate to order them to pay the plaintiff's partial indemnity costs. Had the plaintiff brought this motion in April 2022, when counsel with carriage realized that the defendants had not been served, it may not have been reasonable for the defendants to contest this motion. But given the motion was not brought until March 2024, I find it was not unreasonable for them to argue that the delay was not excused and that the plaintiff had not rebutted prejudice. As a result, each party is to bear its own costs.

C. Conclusion

- [25] The plaintiff's motion is granted. Order to go in terms of the draft order submitted, which I have amended and signed.

Associate Justice Jolley

Date: 3 November 2025