BY FRANK GRANDE & SIMMY YU

LIMITING LIABILITY: *Costs of* Keeping Parties In

Acting for a plaintiff is not a simple endeavor.

A plaintiff bears the onus to prove both liability and damages at trial. Even before litigation is commenced, determining who to sue is crucial. During litigation, decisions on who to maintain your lawsuit against, and at what risk, come up which are also important. These issues are navigated on a case by case basis, and sometimes the answer is not clear. Making sense of it all calls for several considerations, guided by the Courts, case law and the actions of the parties along the way.

The question of who to sue could be a simple one or an extraordinarily complex one. In simple motor vehicle accidents, determining who to sue could include getting a motor vehicle accident report, police notes and witness statements, and then requesting driver's licence and plate searches of each at-fault driver and owner.

You should always speak to your client and get your client's version of what occurred in the accident, in case there are errors in the police report. You should also request the liability limits of automobile insurance policies and whether or not there are any coverage issues for all parties you intend to sue.

If there are any coverage issues or insufficient policy limits, you may need to sue an insurer, pursuant to the uninsured, unidentified or underinsured/ OPCF44R provisions. A motor vehicle accident involving an unidentified driver may also affect who you include in a lawsuit. However, that is a complex issue worthy of its own article.

In other personal injury matters, such as slip or trip and fall incidents, it is extremely important to put all the parties you identify at first instance on notice. Run property searches, conduct corporate searches, and send notice letters right away, requesting each and every potential defendant to identify other potential parties, such as any maintenance contractors, property managers, security companies, tenants, and any other party that might share responsibility for the loss. These are parties which may be liable and which can only be identified by information provided by a co-defendant.

You may wish to do some research on your own, including going to a slip and fall location in person. Even a Google

search may uncover a potential party. Once you start writing to potential parties, they will likely advise you if there are other parties you've missed and some may even admit jurisdiction.

Occasionally, the issue of proper parties can be resolved before a Statement of Claim is issued. Of course, litigation is often not that simple where all the pieces fall together nicely and every party admits the facts they ought to admit from the outset.

The question becomes, what happens when you've made your enquiries and commenced your lawsuit without the benefit of any liability admissions. Perhaps, your enquiries have revealed several potentially liable parties. It may be prudent for a plaintiff to include all of these potentially liable parties in a lawsuit. In fact, this course of action was discussed in *Cantlon v. Timmins (City)*,[1] in which the Court stated that *"it is reasonable for a plaintiff to sue all persons who might reasonably be thought to be potentially negligent"*. At some point, sometimes pre-discoveries, you receive correspondence from a defendant indicating that their client is not liable and they will be seeking costs if not released from the action immediately. Meanwhile, your own investigation and the position of the co-defendants is that this party may be liable (in fact, often there are crossclaims). This is where it becomes tricky. If you don't sue a party (or if you release a party), it may turn out that they're responsible. If you sue a party and they're not liable, you may face cost consequences. It can seem like a lose-lose situation.

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In these instances, it may be that conducting examinations for discovery are necessary in order to uncover further information about proper parties. In a motor vehicle accident for instance, the driver of a vehicle involved in the accident may give evidence that a co-defendant driver made a sudden maneuver which either caused or contributed to the accident, and which perhaps was not revealed in the police report. In other situations, such as in a slip and fall incident, documentary evidence produced during the discovery process may be critical in determining whether or not to release a party, such as the maintenance log notes of a contractor or a maintenance contract in place as between parties regarding a loss location. If co-defendants have brought crossclaims against each other, there may be further facts revealed during the discovery evidence to support these claims, or even undermine them. The discovery process is therefore often a point in the litigation in which the roles of the parties are made clearer when it comes to determining liability. After all, it's called discoveries.

For some claims, the identity of the defendant can impact the decision to release. In a claim involving an injury on a sidewalk or roadway where one of the defendants is a municipality, a plaintiff needs to not only prove negligence against the defendant municipality, but gross negligence. What constitutes gross negligence is the subject of extensive case law. If you feel that the evidence would not lead to a finding of gross negligence against a city, you may wish to consider whether or not a finding of negligence could be made against one of the other defendants instead. If so, and if there's no prospect of succeeding against a municipality, you may wish to release the city, with your client's instructions. Late in a proceeding, you should consider the feedback of a pre-trial judge to assist with that determination.

The Courts have discretion to allocate the responsibility of the payment of costs, especially to those whose actions resulted in the incurring of costs.

We had a trial involving a slip and fall on a city sidewalk where this issue arose. The defendants in that case were an adjacent Starbucks, the landlord of the Starbucks as well as the City of Toronto. There was a likelihood that the jury would find that the fall occurred on the city sidewalk, but it would have been difficult to prove gross negligence on the part of the city. In that case, we chose to release the City of Toronto and to only proceed against the Starbucks on the basis of the Starbucks being an "occupier" of the portion of the sidewalk leading to their patio entrance. It turned out to be the right decision, although not an easy one to make.

If the decision to release a defendant from an action is ultimately made, this defendant may sometimes still seek costs. The Courts and case law provide some guidance in these instances.

In *Ferrari v. Hanse*,[2] there was a motion by one group of defendants (Mullett, Keats) in a motor vehicle accident against the plaintiffs (Ferrari) and co-defendant (Hanse) for costs on a substantial indemnity basis. The plaintiffs and the defendant Hanse had agreed to release Mullett and Keats from the action at a case conference after discoveries.

Two days before mediation, on October 27, Mullett and Keats served an offer to settle for a dismissal without costs if accepted by October 28, and thereafter with costs. The offer was not accepted and mediation proceeded. The plaintiffs were prepared to let Mullett and Keats out of the action, and were willing to restrict their claims to Hanse's policy limits if Hanse would admit liability. Hanse refused to admit liability until after discoveries. By this point, Mullett and Keats were unwilling to exit the action without costs.

Master Dash, in his endorsement, made it clear that Hanse would be responsible for the bulk of the costs incurred by Mullett and Keats in the action. He ordered that the plaintiffs pay 50 percent of the costs until October 27, and Hanse was responsible to pay 50 percent of the costs until October 27 and all costs after.

The Courts have discretion to allocate the responsibility of the payment of costs, especially to those whose actions resulted in the incurring of costs. Bullock and Sanderson orders are two similar orders that can be made to alleviate the injustice that could arise from the traditional cost apportionment of the losers paying the winners' costs.

A Bullock Order originates from *Bullock v. London General Omnibus Co.*,[3] and requires an unsuccessful defendant in a multi-defendant case to reimburse the plaintiff for the successful defendant's costs.

A Sanderson Order originates from *Sanderson v. Bluth Theatre Co.*,[4] and demands that the unsuccessful defendant in a multi-defendant case pay the successful defendant's costs directly, without the plaintiff acting as an intermediary.

However, Sanderson orders are often inappropriate in cases where an unsuccessful defendant did nothing to cause the co-defendant to be added to the action, and did not try to shift blame to this other defendant.

The test for granting a Sanderson or Bullock order can be found in the Court of Appeal case of *Moore v. Wienecke*.[5]

The Test:

Step 1: Threshold

Was it reasonable to join the defendants together in one action?

Step 2: Discretion

If the answer to part 1 is yes, then the Courts must use their discretion to determine whether a Sanderson order (or Bullock order) would be just and fair in the circumstances. The consideration are:

1. Whether or not the defendants attempted to shift responsibility onto each other

2. Whether the unsuccessful defendant caused the successful defendant to be added as a party
3. Whether the two causes of action were independent of each other
4. Ability to pay costs

While similar in nature, the Courts may decline to make a Sanderson order where there is a real risk that the successful defendant will not be able to get costs from an unsuccessful defendant (who may be impecunious).

As evident above, the difference between the two orders is whether or not the unsuccessful defendant pays the defendant's costs directly, or whether the unsuccessful defendant reimburses to the plaintiff costs paid by the plaintiff to the successful defendant. Both orders are to help avoid unjust costs results. Keeping these orders in mind can help plaintiffs with litigation strategy once there is evidence of liability against certain defendants.

The task of determining which parties to include in an action and which parties to release during the course of litigation is not an easy one. Often, a plaintiff may not have much evidence to rely on early in the action, or may be faced with conflicting evidence or finger-pointing between the defendants later on. Thankfully, there is a body of helpful case law and the Courts also have discretion to alleviate the injustice of typical costs orders by assessing the actions of the parties in the apportionment of costs. There is always an element of risk in litigation, but by considering the theory of your case, the evidence at hand, and by trusting your own knowledge and instincts, you can minimize that risk and plan your trial strategy accordingly.

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NOTES

[1] [2006] O.J. No. 1918
[2] [2004] O.J. No. 5632
[3] [1907] 1 KB 264
[4] [1903] 2 K.B. 533
[5] 2008 ONCA 162