

CITATION: Stekel v. Toyota Canada Inc., et al., 2011, ONSC 2211
COURT FILE NO.: 06-CV-309553
DATE HEARD: 2011-01-12

In attendance: T.P. Charney, for plaintiffs
T. Pinos/J. Beitchman, for Toyota Motor Corporation

Decision Released: April 6/11

By the Court:

[1] The plaintiffs, Karen and Maurice Stekel, move for leave to add Toyota Motor Corporation, as a party defendant herein.

[2] On April 21, 2005, Karen Stekel sustained injury in the State of Florida, while operating a leased 2004 Lexus 330 vehicle. The vehicle had been leased for her, in Ontario, by her husband (Maurice Stekel). Mrs. Stekel alleges that her vehicle hesitated and, then, accelerated and lurched forward, climbing the curb and crashing into a tree.

[3] Toyota Canada Inc. is the Canadian distributor of vehicles manufactured by Toyota Motor Corporation. In their claim, issued April 12/06, the plaintiffs erroneously plead that Toyota Canada Inc., and *not* Toyota Motor Corporation, manufactured the vehicle operated by Mrs. Stekel in April 2005.

[4] The plaintiffs' evidence is that they first retained Arnold Recht of the law firm Danson, Recht, Voudouris to represent them in this litigation. They spoke with him by telephone in April 2006 and met with him in May 2006. They provided him with those documents in their possession that were relevant to their claims, i.e. maintenance records and the vehicle lease. The evidence of Mr. Stekel is that he does not recall Mr. Recht having raised or addressed the issue of who it was that manufactured the Lexus vehicle at issue.

[5] Mr. Stekel's evidence is that the plaintiffs did not turn their mind to who manufactured the vehicle; and, neither did they know who manufactured the vehicle when the accident occurred.

[6] The claim was drafted by an associate with Mr. Recht's firm (now no longer in the firm's employ). The associate identified the wrong corporate entity as manufacturer of the vehicle, Toyota Canada Inc., and did so without any consultation with the plaintiffs. Of interest are paragraphs 4 and 12 of the statement of claim. Toyota Canada Inc. is identified as a party in the

business of manufacturing, servicing and selling automobiles and is alleged to be the "manufacture" (*sic*) of the plaintiffs' vehicle (paragraph 4). All of the defendants are alleged to have been negligent in having, *inter alia*, "...designed, manufactured and distributed an unsafe vehicle" (paragraph 12).

[7] In its statement of defence, paragraph 1 (i.e. the second paragraph 1), Toyota Canada Inc. pleads a general denial of paragraphs 4 and 12 of the statement of claim. While it identifies itself in paragraph 3 (incorrectly numbered as paragraph 2) as "...the exclusive distributor of Toyota automobiles and accessories", there is no express affirmative defence by Toyota Canada Inc. informing the plaintiffs that it was Toyota Motor Corporation, and not it, that manufactured Mrs. Stekel's vehicle. Further, notwithstanding that it was not the manufacturer of the Lexus, Toyota Canada Inc. specifically denies and addresses, with affirmative defences, the allegations of negligent manufacture in its statement of defence. In fact, at paragraphs 30 and 32 (incorrectly numbered as paragraphs 29 and 31), all of the defendants address, without qualification, the design and manufacture of the vehicle at issue.

[8] In April 2007, the plaintiffs changed law firms and retained Mr. Charney's firm. In the Fall of 2008, examinations for discovery took place. The plaintiffs say that they then learned, for the first time, that they had erred in identifying Toyota Canada Inc. as the manufacturer of the Lexus driven by Mrs. Stekel.

[9] R. 5.04(2) provides that, at any stage of the proceeding, the court may add, delete or substitute a party or correct the name of a party incorrectly named, on such terms as are just—unless prejudice would result that cannot be compensated for by costs or an adjournment. The question I must ask myself in applying the subrule, Mr. Charney says, is whether a reasonable person receiving the claim would say "they mean me [or a person related to me] but they got my [or that person's] name wrong". If so, he says, there is a case for misnomer. Relying on *Ormerod, et al. v. Strathroy Middlesex General Hospital, et al.* (2009), 97 O.R. (3d) 321 (C.A.), the plaintiffs submit that it is sufficient if the lawyer, insurer or claims administrator for, or an entity related to, Toyota Motor Corporation knew or ought to have known that the plaintiffs had erred in their identification of the Lexus' manufacturer.

[10] In the case at bar, notice was originally given to Lexus Canada and Scarborough Lexus Toyota, *only*, that a claim was going to be commenced for damages arising from "...a mechanical defect, known to both [*sic*] the manufacturer, the distributor and the dealer..."—this in June/05. A response to that letter was sent on Toyota Canada Inc. letterhead by Ms. Nicola Biggs, Senior Counsel in the Toyota legal department. In her response, Ms. Biggs does not take issue with the fact that the June 2005 letter, referencing the manufacture of the vehicle, was not sent to Toyota Motor Corporation. She purports to address all issues raised in the notice letter on behalf of those under the Toyota umbrella who may be affected. She asks that all relevant documents be produced to her and that "Toyota" be permitted an opportunity to inspect the vehicle in its

"unrepaired and unaltered" state. An inspection of the vehicle was conducted by Toyota Canada Inc., seemingly on behalf of all interested potential defendants (see August 15/05 letter from Ms. Biggs to Mr. Recht).

[11] When efforts to amicably resolve the plaintiffs' complaints failed and the plaintiffs elected to commence an action, Ms. Biggs accepted service of the claim on behalf of Toyota Canada Inc. (the company in which she maintained her office), Scarborough Lexus Toyota and Toyota Credit Canada Inc. Outside counsel, Cassels Brock (now acting for Toyota Motor Corporation on this motion), notified Mr. Recht in February 2007 that the correct corporate name of Toyota Credit Canada was Toyota Credit Inc., and not Toyota Credit Canada Ltd., as identified in the statement of claim. At no time, were the Stekels and/or their counsel told that anyone other than those whom they had put on notice of their claims and those named in the statement of claim needed to be contacted or served, notwithstanding that Ms. Biggs and Cassels Brock knew that a claim was being asserted for negligent manufacture.

[12] Further, and importantly (as discussed above), the defendants joined issue with the allegations of negligent manufacture. Then too, it is noteworthy that none of the documents produced by them in the litigation identify which specific company manufactured the vehicle at issue (or that Toyota Motor Corporation did). The plaintiffs say, and I accept, that they were thus lulled into a false sense of security that they had sued the correct corporate entities.

[13] It is true, as Toyota Motor Corporation submits, that this Lexus was not the first such vehicle driven by the plaintiffs. Mr. Stekel has admitted to having leased 5 Lexus vehicles in 10 years. It is also true that Mr. Stekel inspected the vehicle operated by his wife, after her accident. And, it is true that there was a compliance label on the door of the vehicle and an owner's manual for the vehicle identifying the manufacturer of the vehicle as Toyota Motor Company. All that being so, ought the plaintiffs' motion to fail? I say no.

[14] Mr. Stekel's evidence is that neither he nor his wife gave any thought to who manufactured the vehicle at the time that it was leased. He says that the owners' manual and any manual supplements were in the glove compartment of the vehicle and that he did not review either (if, in fact, he or his wife even received a manual supplement). His evidence also is that he never read or noticed the vehicle compliance label. Given the circumstances under which Mr. Stekel's inspection of the vehicle took place, his evidence is credible. His wife was injured and her vehicle had been rendered a total loss. It is understandable if his focus was on other than a careful review of what was written about and on the car.

[15] Had the owner's manual been listed in the parties' respective affidavits of documents, I would be less sympathetic (or, perhaps, not at all sympathetic) to the plaintiffs' position on this motion. And, while I acknowledge, as Mr. Pinos posited, that a report prepared by an expert on behalf of Toyota Canada Inc. included a photograph of the compliance label, taken on August

4/05, that report (and that photograph) were not produced until 2010. Had these been produced earlier, Toyota Motor Corporation's position on this motion would be significantly bolstered.

[16] Further, and as Mr. Charney points out, there is no evidence before me suggesting that Toyota Motor Corporation did not know of the Stekels' claims as at the time that they were first asserted or at any time before this motion was brought. In fact, it is more credible than not, he submits, that it did know (or, at least ought to have known) of them, given that transmission shift issues and their impact on the Lexus image were being addressed within the Toyota group of companies at or about the time of Mrs. Stekel's accident and thereafter. The evidence proffered by the plaintiffs supports his submissions in this regard.

[17] Then too, the defendants herein (or at least some of them) are closely related to Toyota Motor Corporation. I say this because Toyota Credit Canada Inc. is a wholly-owned subsidiary of Toyota Motor Corporation. Further, Toyota Canada Inc. is a 50/50 joint venture between Toyota Motor Corporation and Mitsui & Co. Ltd.; and, its business operations "...are integrated with those of Toyota [Motor Corporation]" (see *Toyota Motor Corp. (Re)* (2003), 26 OSCB 6084 (OSC)). And, Toyota Motor Corporation's lawyers on this motion are those who act and have always acted in this litigation on behalf of the Toyota defendants named at first instance by the Stekels. Mr. Charney says, persuasively, that the defendants thus knew or should have known that a mistake had been made by the Stekels in their identification of the Lexus' manufacturer and that the "litigating finger" was clearly being pointed by the Stekels at Toyota Motor Corporation.

[18] Mr. Pinos argues that because the plaintiffs do not wish to substitute Toyota Canada Inc. with Toyota Motor Corporation but seek to have both corporate entities named as parties defendant, it cannot be said that the plaintiffs are simply correcting the misnaming or misdescription of a party within the meaning of s. 21(2) of the *Limitations Act*. In my view, the fact that Toyota Canada Inc. was sued at first instance *qua* manufacturer and distributor does not mean that the Stekels ought to be precluded from correcting their misdescription or misnomer (this, despite an elapsed limitation period).

[19] Toyota Canada Inc. was named as a party wearing two hats. The Stekels have now learned that it wore one hat only and that the second hat was worn by another entity related to and easily confused, in the particular circumstances here at play, with Toyota Canada Inc. The plaintiffs ought to be permitted to correct their error. This is particularly so given that there is nothing before me to suggest that Toyota Motor Corporation was in any way misled by the plaintiffs or did not, before this motion was brought, know of the plaintiffs' claims.

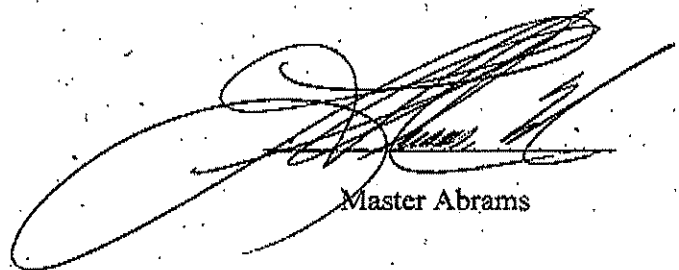
[20] The fact that the plaintiffs made clear from the outset their intention to sue for negligent manufacture, the fact that Toyota Canada Inc. and a lawyer from its legal department responded to claims for negligent manufacture, and the fact that Toyota Canada Inc. specifically defended

the plaintiffs' claims for negligent manufacture—all without disabusing the plaintiffs of their mistaken belief that the manufacturer of Mrs. Stekel's vehicle was Toyota Canada Inc.—militate in favour of my exercising my discretion to grant the plaintiffs the relief that they seek on this motion. Then too, while I acknowledge that the limitation period herein has elapsed, there is no evidence before me of real and non-compensable prejudice to Toyota Motor Corporation in the form of the death or departure of a person with knowledge of the matters at issue or the loss or destruction of documents. Further and in any event, while there has been some delay in the bringing of this motion, I do not think it inordinate.

[21] The plaintiffs erred; but, in all of the circumstances, I am persuaded that their error is understandable and excusable. For the reasons set out above, I am permitting them to correct the misnaming of the manufacturer, pursuant to R. 5.04(2), as requested.

[22] Failing agreement as to the issue of costs, I may be spoken to.

[23] A new set down date must now be set. Counsel are to confer and to notify me in writing, by May 13/11, as to what deadline they would have me impose. Failing agreement, I may be asked (also by May 13/11) to assist with timetabling.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and flourishes, positioned above the name 'Master Abrams'.

Master Abrams