

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Debela

AND:

Ives

BEFORE: Associate Justice Perron

COUNSEL:

Kristopher Dixon, Soloway Wright LLP, agent for the plaintiff
Annette Uetrecht-Bain, McCague Borlack LLP, for the defendant

HEARD ON: June 12, 2025

ENDORSEMENT

Overview of Litigation History

1. This is a personal injury action arising from a motor vehicle accident that occurred in August 2017. The plaintiff is 32 years old and alleges having sustained various injuries and impairments due to the motor vehicle collision. Liability for the accident is disputed.
2. The action was commenced on June 6, 2019. The defence was delivered on August 8, 2019. Draft affidavits of documents and productions were exchanged in May 2022 and examinations for discovery ultimately occurred in September 2022. The parties attended at mediation on May 8, 2024. The parties agree that mediation was not completed although they disagree on the reasons why.
3. Following mediation, the plaintiff's counsel took steps to retain a forensic accountant. The expert retainer was "firmed up" in October 2024.

4. While waiting for the report, the action was administratively dismissed for delay on December 23, 2024 by the Registrar. The five-year dismissal deadline would have been June 6, 2024 but for the extensions afforded by the suspensions during the covid-19 pandemic which extended the dismissal deadline to December 5, 2024. The Registrar's dismissal therefore occurred 18 days after the expiry of the applicable deadline.
5. The Plaintiff brings this motion seeking to set aside the Registrar's dismissal and establish a timetable for next steps in the action.

The Law

6. The plaintiff brings this motion pursuant to Rule 37.14 which provides that the Court may set aside an order of a registrar on such terms as are just.
7. The parties agree on the test and the applicable law, which I will summarize below.
8. The test to be applied on a motion to set aside an administrative dismissal for delay requires a contextual approach guided by the *Reid* factors such that the Court determines the outcome that is just in the circumstances. The *Reid* test considers the following four factors: has the plaintiff provided a satisfactory explanation for the delay, is the delay caused by inadvertence, did the plaintiff move promptly to set aside the dismissal order; and, has the plaintiff demonstrated that the defendant would not be prejudiced in presenting their case to trial. The plaintiff is not required to satisfy each factor to succeed on the motion.¹
9. In determining whether to allow the action to proceed, the Court must also balance two fundamental underlying policy considerations: a) that civil actions should, if possible, be decided on their merits rather than terminated on procedural grounds and, b) that actions should be resolved in a timely and efficient manner to maintain public confidence in the

¹ [Piedrahita v Costin, 2023 ONCA 404 at paras 8-9](#); [Scaini v Prochnicki, 2007 ONCA 63 at paras 25-26](#); [Jodha v Dineen, 2015 ONSC at para 29](#), citing *Marché d'Alimentation Denis Thériault Ltée v Giant Tiger Stores Ltd.*

administration of justice².

10. Because the Court's primary concern is the rights of litigants, "the court's preference for deciding matters on their merits is all the more pronounced where delay results from an error committed by counsel"³.

Analysis

Is there a satisfactory explanation for the delay?

11. The first criteria relates to whether or not the plaintiff has provided an "acceptable", "satisfactory" or "reasonable" explanation for the delay. On similar motions, in emphasizing that a contextual approach is warranted, the Court of Appeal has stated that the exercise is "not a "blame game", where counsel should be required or encouraged to take a defensive stance and justify their conduct of the litigation on a month-by-month basis". Appellate courts have found that it is an error to apply too exacting a standard when considering the explanations provided and that the explanations need not be compelling, convincing or cogent.⁴
12. While I will consider the overall period of time and the intermittent periods of inaction, there are two pronounced periods of delay in this action on which the parties focused their submissions.
13. The first is from December 2019 to May 2021. The context is as follows: after the close of pleadings in the Fall of 2019, there were initial communications regarding amendments to the statement of claim. The potential amendments will be discussed further below when considering prejudice. For now, suffice it to say that the plaintiff's counsel indicated that there was a typo in the statement of claim and the quantum of damages should have been indicated as \$800,000 rather than \$300,000. Communications ensued about whether the

² [H.B. Fuller Company v Rogers \(Rogers Law Office\) 2015 ONCA 173 at paras at 24-26](#); [Hamilton \(City\) v Svedas Koyanagi Architects Inc., 2010 ONCA 887 at paras 20-22.](#)

³ [H.B. Fuller Company v Rogers \(Rogers Law Office\), 2015 ONCA 173 at paras 27-28.](#)

⁴ [Kupets v Bonavista Pools Limited 2015 ONSC 7348 \(Div. Ct.\) at paras 18-20](#); [Carioca's v Canadian Pacific Railway Limited, 2015 ONCA 592 at paras 46 and 52.](#)

quantum of damages would exceed policy limits which ultimately led to plaintiff's counsel requesting to adjourn examinations in December 2019 in order to add the OPCF-44R insurer as a party to the action. There were no further communications between counsel until the defendant's counsel followed up about the potential amendments in May 2021 and then again in July and December 2021.

14. The explanation for this period of delay is that the plaintiff's counsel experienced challenges in his practice as a sole practitioner during the covid pandemic, including staffing issues and personal issues, which continued to echo into 2021.
15. The second marked period of delay is from the attempted mediation in May 2024 until the administrative dismissal of the claim in December 2024.
16. The explanation here is ultimately that the plaintiff's lawyer failed to diarize the 5-year deadline to set the action down for trial and appears to not have known about the suspensions providing parties with approximately six additional months to set matters down.
17. The bottom line is that the plaintiff's counsel takes full responsibility for the passage of time in the action. His evidence is that the plaintiff did not contribute in any way to delay.
18. In addition to that of her counsel, the plaintiff also delivered an affidavit in support of this motion. She was not cross-examined on her affidavit therefore her evidence is uncontested. Her evidence is that the action is important to her and she always intended to pursue it. She relied on her counsel to move the action forward, kept in contact with her counsel and was cooperative throughout and, although she was surprised by how long the action was taking, she assumed the delays were typical of a personal injury action.
19. The plaintiff takes the position that only the completion of mediation is required before the matter can be set down for trial. However, in the Notice of Motion, the plaintiff seeks a timetable which includes deadlines for the delivery of sworn Affidavits of documents and any outstanding productions as well as the answering of any remaining undertakings.
20. The defendant identifies numerous outstanding steps including: finalizing pleadings which may require a motion to amend the quantum of the claim and add the OPCF-44 carrier as a

party; potential addition of counsel for the defendant if the amendments to the claim exceed policy limits; potential further examinations, exchange of productions/undertakings; and, exchange of assessments and mediation.

21. The income loss report has not been finalized because the plaintiff's counsel has not been able to seek instructions since this motion was triggered. The plaintiff is awaiting the report in order to proceed with any amendment to the quantum of the claim and/or the addition of the OPCF-44 insurer. The plaintiff conceded that if the quantum of damages exceeds policy limits and she moves to add the OPCF-44 insurer (which would be opposed by the defendant), this may well result in further examinations.
22. In the circumstances, other than having to complete mediation, it is not certain what additional steps would be required before the matter can be set down if the action is permitted to continue.
23. It is unclear to me based on the parties' facts and submissions if there are outstanding undertakings but even if there are, pursuant to Rule 48.04 the parties are still required to answer undertakings even if a matter is set down for trial. Outstanding undertakings therefore do not preclude an action from being set down for trial, nor is there a requirement to serve expert reports prior to setting a matter down.
24. The defendant takes the position that the explanations for the delay are not adequate. However, in discrediting the explanations, they point to plaintiff's counsel as being responsible for the delays. The defendant therefore recognizes that, and attributes, the delays to omissions or inaction by the plaintiff's lawyer and not to the plaintiff herself.
25. Furthermore, while the defendant signaled the importance of nailing down whether the quantum of damages would exceed policy limits due to the requirement to inform the defendant and provide him with an opportunity to retain his own counsel when the issue was first raised, the parties proceeded to examinations with this issue still being in the wind. During submissions, the defendant's counsel advised that the issue was not even raised during their examination of the plaintiff.
26. Whether the defendant assumed the plaintiff no longer wanted to proceed with the

amendments or chose not to probe further on the issue, the reality is that both parties carried on with the litigation without closing the door shut on this issue. They not only conducted examinations but also attended mediation.

27. There is also no evidence before me that the defendant objected to the pace of the litigation prior to his position on this motion.
28. This is not a case where the action has been completely stagnant for long periods of delay nor is it a case where the action has not advanced past the stage of pleadings. Notwithstanding the uncertainty that remains about potential next steps if the claim is amended and whether certain steps are not completed, the matter has progressed through productions, examinations and mediation.
29. Following examinations behind the scenes, the plaintiff's counsel requested updated medical and other records in February and June 2023. The plaintiff also arranged for, and attended at, a neurological assessment in February 2024. According to the defendant, there was correspondence between counsel from April to October 2023 to schedule the mediation, which took place in May 2024. After May 2024, the plaintiff's counsel acquired his client's employment records and took steps to retain an expert to prepare an income loss report.
30. In view of the plaintiff's ongoing (and unchallenged) intention to pursue the claim, the fact that the delays in this matter are attributable entirely to the plaintiff's counsel, that both parties appeared content with the slow pace of the litigation, that the action has progressed to the point where completion of mediation may be the only step required prior to setting the matter down for trial and that at the time of setting this motion down, the action was 5 years and 7 months old, I am satisfied that the explanations for the delay are satisfactory.

Was there Inadvertence?

31. The position of the plaintiff's counsel is that he missed the deadline to set the matter down for trial through inadvertence. This explanation seems to apply to both his failure to diarize the initial set down date of June 6, 2024 and the fact that he was "not alert" to the December 5, 2024 deadline afforded by the extensions granted during the pandemic.

32. The defendant takes the position that there is some evidence of inadvertence but that the plaintiff's failure to set the action down for trial arose due to file mismanagement by plaintiff's counsel and the deliberate decision to refuse to meaningfully participate in mediation by not having engaged an expert to provide an income loss report prior to the first attempt at mediation or shortly thereafter such that the mediation could be completed before the dismissal deadline of December 2024. In his factum, the defendant concedes that the plaintiff does not appear to have acted in bad faith in delaying the action and that the blame lies with her counsel, including counsel's "intentional choice to frustrate the mediation process".
33. During cross-examinations, the plaintiff's counsel indicated that he would have regular file review meetings with his clerk and they would "do the math" to review the "issue date on the list of files and [sic] add 60 months". He went on to admit that he did not know if his clerks operated a tickler system or any other reminder method to ensure that deadlines on a file were not missed. He also admitted that he did not himself maintain such a system.
34. The Court has previously distinguished between "inadvertence" and a "systemic problem of file mismanagement" and found that failure of counsel to adequately manage and supervise the file does not support a finding of inadvertence⁵.
35. I do not find that any of the delays in this matter arose through inadvertence. Failure by counsel (not his staff) to ensure that any kind of reliable tickler system was in place with respect to the deadline to set the action down for trial, or any other deadlines applicable to the file, raises a serious concern of file mismanagement. It is not the kind of lapse or mistake that can be excused by a finding of inadvertence.
36. With respect to the allegation that the plaintiff frustrated the mediation process by not securing an expert report prior to mediation, there is no evidence that the defendant requested such a report as a condition to proceeding with mediation. This occurs routinely on files where defendants highlight the need for expert evidence on quantification of

⁵ [George Karr v Allstate Insurance Company](#), 2014 ONSC 2771 at paras 20-24. See also [Hernandez v Western Assurance Company](#), 2011 ONSC 6042.

damages before being in a position to consider settlement at mediation. Furthermore, the issue of the amendment to the quantum of damages remained in flux, and seemed to have been completely forgotten, when the parties scheduled the mediation. I make no findings on whether any one party is responsible for the failed attempt at mediation and I do not see how that determination would be relevant to the issue of inadvertence, or how any such finding could be considered as inadvertence in missing the applicable deadline.

Did the Plaintiff move Promptly to Set Aside the Dismissal Order?

37. The defendant does not take issue with any delay by the plaintiff in bringing this motion. The motion was scheduled within a month after the plaintiff learned of the dismissal therefore, I am also satisfied that the third *Reid* criteria is met.

Is the Defendant Prejudiced by the Delay?

38. The last *Reid* factor considers whether the defendant’s ability to defend the action has been prejudiced by the plaintiff’s delay and “not as a result of the sheer passage of time”⁶. Prejudice is often the key consideration on such motions⁷.
39. While a plaintiff generally has the onus of moving the action along and demonstrating that a defendant would not suffer any non-compensable prejudice, and although a defendant is not required to offer evidence of actual prejudice, the conduct of the defendant is also a factor to be considered on these motions. A defendant’s passivity or “lack of display of any sense of urgency undercuts the claim of actual prejudice”⁸.
40. Presumptive prejudice is inherent in long or inordinate delays or where a limitation period has been missed, and the presumption of prejudice increases with the length of delay. Presume prejudice may be sufficient to dismiss the action where it jeopardizes the defendant’s right to a fair trial. In the absence of presumed prejudice, after the plaintiff has

⁶ [Cedrom-Sni Inc. v Meltwater Holding, 2017 ONSC 3387 at para 6\(8\).](#)

⁷ [Chrisjohn v Riley, 2015 ONCA 713 at para 36.](#)

⁸ [Cedrom-Sni Inc. v Meltwater Holdings, 2017 ONSC 3387 at para 6.](#)

met its initial onus per the above, the defendant must show they would be actually prejudiced by the delay for the action to be dismissed.⁹

41. The plaintiff's position is that the delay in this case is not long or inordinate and that the defendant has not put forward any evidence of actual prejudice. With respect to its onus on prejudice, the plaintiff points to the fact that there are no independent witnesses to the accident and that the two parties have been examined and may refresh their memories with transcripts if needed. The plaintiff's counsel asserts that as far as he is aware, all available records remain preserved and the plaintiff has already served all documents traditionally produced in a personal injury action. He believes the proportionately relevant and necessary documents and records are preserved or available and if there are relevant documents not yet requested or delivered, he is confident this can be done in short order. As set out above, there is also evidence that updated records were requested in 2023 although those would also need to be updated.
42. The defendant's position is that the plaintiff has not met her onus, and that there would be significant prejudice to him if the administrative dismissal is set aside. In his factum, the defendant submits that I should find presumed prejudice by the fact that a limitation period was missed but during submissions, counsel could not identify what missed limitation period applied to this case¹⁰. The defendant also submits there is presumed prejudice due to the fact that the accident occurred in 2017 and that the action is now 6 years old. The defendant submits that the parties' memories and that of the investigating officers will have faded and that accident reconstruction evidence may be required. During submissions, the defendant also indicated that further productions were requested of the plaintiff prior to mediation, but conceded that there is no evidence of that in the record.
43. The defendant also submits that he will suffer actual prejudice from the plaintiff's previously stated intention to increase the quantum of damages beyond the defendant's policy limits and to add the OPCF-44 insurer. The defendant submits this may require him to retain his own lawyer which will cause further delay and costs for him to retain his own

⁹ [Ali v Fruci, 2014 ONCA 596 at paras 15-17](#); [Jodha v Dineen, 2015 ONSC 6848 at para 49](#).

¹⁰ Perhaps this argument applied initially to the period of time to add the OPCF-44 insurer, however, during submissions the plaintiff's counsel referred to caselaw that it is a demand-based limitation period such that there is no limitation period issue in the present case and the defendant appeared to accept this proposition.

lawyer and repeat steps in the proceeding (i.e. amend pleadings, reattend at examinations etc). The defendant also invites me to distinguish the Court of Appeal's decision in *Hamilton (City) v Svedas Koyanagi Architects Inc.*¹¹ on the basis that in the present case, prejudice would result from the plaintiff's failure to add the OPCF-44 insurer as there is a risk that the plaintiff could recover if that defendant is the sole liable party at trial and because the defendant could not have added the OPCF-44 insurer.

44. Turning first to the onus that lies with the plaintiff, I am satisfied that the plaintiff has established that the defendant would not suffer any non-compensable prejudice. Documents have been preserved and although expert reports and updated medical records will be required, productions have already been exchanged. The parties are the only witnesses to the accident and have already been examined. This is not a case where the delay has resulted in documents being lost or witnesses no longer being available to testify.
45. Although I do not agree with the plaintiff that the delay in issue is the six-month period from June to December 2024, I do not find that the more marked periods of delay or the overall delay (five years and 6 months), amount to the kind of delay where prejudice is presumed or where a fair trial is at risk.
46. I do not mean to suggest that it is acceptable for parties to ignore the applicable timelines set out in the Rules. To the contrary, given the strain on the court's resources, the costs of litigation and the detrimental impact that delays have on the public's confidence in the justice system, all claimants should move as expeditiously as possible to prosecute their actions and set them down within 5 years. However, in comparison to the length of time at issue in cases where inordinate delays have been found, given that this case had not previously benefited from any extensions other than the pandemic suspensions and the dismissal was triggered by the strict timeline set out in the Rules, the delay is not inordinate.
47. With respect to any evidence of actual prejudice by the defendant, I note that the defendant himself did not produce an affidavit in response to the motion. The only responding affidavit produced was from a lawyer at the firm who, when cross-examined, could not

¹¹ [*Hamilton \(City\) v Svedas Koyanagi Architects Inc.* 2010 ONCA 887.](#)

identify any actual prejudice. Despite the defendant's oral submissions that he would suffer prejudice from the amendment as his personal assets would be exposed, he may wish to retain his own counsel and he would incur costs etc, there is no such evidence in the record or any evidence of actual prejudice in the lawyer's affidavit that I can rely upon at this motion. The defendant's counsel also conceded during submissions that there was no actual prejudice in this case and that the defendant was relying only on presumed prejudice.

48. While I have already found that the delay in this case is not inordinate such that prejudice is presumed, to the extent the defendant is relying on the potential issues flowing from the contemplated claim amendments, I am not prepared to presume prejudice or infer actual prejudice.
49. First, it remains speculative that the amendment to the quantum of damages will exceed policy limits. While I assume that the defendant is now aware that this is a possibility, when the amendment issue was first raised, the defendant's counsel advised that the defendant was not informed of the risk that a claim would be made over policy limits as there was no reason to do so until the risk actually materialized and the quantum of damages claimed was confirmed. That fact along with the fact that the quantum of the potential amendment remains unknown today is evidence that it was not clear at any point in time in the action that the plaintiff would for certain claim damages above one million dollars.
50. Second, although the plaintiff's delay in proceeding with those amendments is causing significant uncertainty in this case, including what may be necessary if the action proceeds and potential further delays before the case is determined, any prejudice arising from the amendments are, in my view, primarily compensable by costs. Those costs can be dealt with at a motion dealing with the amendments or at trial.
51. Third, even considering additional delays to potentially repeat certain steps in the action, the additional delays would still not, in my view, amount to the long delays resulting in presumptive prejudice warranting dismissal of the action. Moreover, if reinstated, I would impose a strict timetable for the completion of next steps.
52. Finally, in the absence of an affidavit by the defendant himself, there is currently no

evidence that the defendant would retain (or that he even intends to retain) independent counsel which would cause him to incur costs if the quantum of damages exceeds policy limits.

Other Contextual Considerations and Conclusion

53. The delays in this case are not excused by inadvertence, but I have ultimately found, somewhat reluctantly, that the explanation for the delay is satisfactory. The periods of delay and the overall delay from the commencement of the action are not inordinate. This is a personal injury action where the plaintiff alleges having sustained injuries and as liability is contested, it is in the interest of both parties that the matter be determined on its merits.
54. In addition, in the absence of prejudice and when I consider that the plaintiff is not herself responsible for the delays and that any fault for delay lies with her counsel, on balance it is just to reinstate the action and allow it to continue.
55. The Plaintiff seeks an extension to complete mediation by November 1, 2025 and to set the action down for trial before December 31, 2025. However, given the uncertainty surrounding the potential amendments, a case conference is required to establish a timetable. Prior to attending the case conference, the plaintiff must make a decision on the amendments to her claim such that by the case conference, she is in a position to advise whether the motion seeking to amend her claim would be above the defendant's policy limits and/or necessitate the addition of the OPCF-44 insurer.
56. The motion to set aside the administrative dismissal of the registrar is granted. The action shall be reinstated, and the parties shall contact the case management office within the next 30 days in order to schedule an expedited case conference before me.

Costs

57. The plaintiff seeks costs on a partial indemnity basis of \$10,099.15 if successful. The plaintiff also submits that I should apply the general principle that the successful party is

entitled to costs and that there is no automatic rule that when a plaintiff receives an indulgence from the Court to continue with their action in similar circumstances, the plaintiff should not receive their costs of the motion if it succeeds on the motion.

58. The defendant did not upload a costs outline because he is not seeking costs of the motion if dismissed and takes the position that if the motion was successful, there should be no costs given that it was reasonable in the circumstances for the defendant to contest the motion.
59. Although the plaintiff was successful and I have found that the plaintiff herself is not to blame for the delays, the plaintiff is nonetheless receiving an indulgence from the Court to pursue her action. The action was not set down pursuant to the Rules, and this despite having benefited from the suspensions during the pandemic.
60. As there was a complete disregard by the plaintiff's counsel to properly diarize the set down date and no demonstrated interest in ensuring that the timelines in the Rules would be respected, it would seem absurd to me to reward the plaintiff with costs of the motion.
61. In the circumstances, I exercise my discretion and order that there shall be no costs of the motion and each party is to bear their own costs.

Date: June 27, 2025

Associate Justice Perron