CITATION: CHEKHOVTSOVA v. MUTSCHLER, et al., 2025 ONSC 4077
COURT FILE NO.: CV-17-74162
MOTION HEARD: 20250624

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TATIANA CHEKHOVTSOVA, Plaintiff

- and –

PETER MUTSCHLER, ANITA BERGMANN, and COACHMAN INSURANCE COMPANY, Defendants

BEFORE: Associate Justice Kamal

COUNSEL: Kristopher Dixon, agent for Mr. Binavince, counsel for the Plainitff
Evan Kopiak, for the Defendant Anita Bergmann

REASONS FOR DECISION
MOTION TO SET ASIDE REGISTRAR'S DISMISSAL ORDER

OVERVIEW

1. In legal proceedings, it is **not** better to ask for forgiveness rather than permission.
2. The Court must not endorse the culture of delay created by counsel and parties. Appellate authorities have encouraged us all to effect a culture shift to change the indifference to delay.
3. The Plaintiff seeks an Order setting aside the Registrar's Order dismissing the action for delay dated June 12, 2024, and an Order extending the deadline for setting the matter down for trial to May 1, 2026, or such other deadline as this Honourable Court may direct.

4. The Defendant, Anita Bergmann, opposes the motion due to an insufficient explanation from the Plaintiff and due to the prejudice associated with the delays. Ms. Bergmann asks that the Registrar's Dismissal Order remain in place.
5. This motion surrounds the following key considerations:
    a. The Plaintiff's lawyer mistakenly understood that when administrative dismissals returned on May 13, 2024, there would be an *additional* period of 182 days afforded to actions, corresponding to the *COVID-19 Suspension*. The Court must consider whether this mistake is a reasonable explanation for the delay.
    b. The Court must consider whether the Plaintiff led satisfactory evidence to explain that she always intended to prosecute the action within the applicable time limits, but failed to do so through inadvertence. As of the date of the Registrar's Dismissal Order, no dates for Discovery were set (despite requests), no dates for Mediation were set (despite requests), and a Litigation Timetable extending the set-down date was not in place. There is no evidence to suggest that a plan was in place that was thwarted by the COVID-19 pandemic.
    c. The Court must also consider whether there is prejudice to this Defendant as a result of the delay, particularly in light of documentary evidence potentially being destroyed and witnesses passing away.
6. The parties agree that the Plaintiff demonstrated that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.
7. For the reasons that follow, I find that the Plaintiff has not satisfied the legal test for setting aside a registrar's order dismissing an action for delay. As a result, the Plaintiff's motion seeking to set aside the Dismissal Order is hereby dismissed.

FACTUAL AND LITIGATION BACKGROUND

8. This action arises from a motor vehicle accident. On April 13, 2016, the deceased defendant, Peter Mutschler, was operating a motor vehicle owned by the other defendant, Ms. Bergmann, which collided with the Plaintiff's motor vehicle.
9. The Plaintiff commenced this action on October 4, 2017 against Mr. Mutschler and Ms. Bergmann.
10. The Plaintiff moved to the USA in 2017 and has resided there ever since.
11. The Plaintiff was advised by Intact Insurance in January 2018 that Mr. Mutschler was an excluded driver and that insurance coverage was not extended to either Defendant.
12. In March 2018, Ms. Bergmann filed her Statement of Defence and pleaded that her vehicle was taken by Mr. Mutschler without her knowledge or consent.
13. She issued a third-party claim against Intact Insurance under her policy of motor vehicle liability insurance for a defence and indemnity under that policy. Intact delivered its Defence to the Third-Party Claim in April 2018.
14. The dispute between Ms. Bergmann and Intact delayed examinations for discovery.
15. Due to these issues, in June 2018, the Plaintiff amended her Claim to add her own insurer, Coachman Insurance, to the action pursuant to the uninsured/underinsured provisions of her motor vehicle liability policy.
16. The Examinations for Discovery of all parties were tentatively scheduled for November 19 and 20, 2018, but ultimately did not proceed, and no discoveries have been conducted to date.

17. A Summary Judgment Motion in the third-party action was scheduled for October 17, 2019.

18. The Plaintiff's lawyer requested a case conference, which proceeded on May 27, 2019. The Court ordered that the parties complete Examinations for Discovery by March 1, 2020.

19. The Third-Party action was resolved in November 2019. On November 15, 2019, a Notice of Change of Lawyers was served on all parties, indicating Ms. Vaughan was now acting for Ms. Bergmann.

20. For the next two years, the Defendants followed up with Mr. Binavince's office in an effort to schedule Examination for Discovery dates.

21. In the summer of 2021, the Defendants again reached out to the Plaintiff's lawyer to push the matter to discoveries. This was accompanied by a renewed request for the Plaintiff's productions.

22. The Plaintiff, through her lawyer, spent considerable time and resources accusing various parties of being in conflict, of breaching ethical rules, of impropriety, and conspiring to invent a consent defence narrative, notwithstanding that it was pled in Ms. Bergmann's defence in March 2018.

23. By October 2021, Ms. Vaughan confirmed that any conflict was raised and waived by Ms. Bergmann and requests were made again for productions and to schedule Examinations for Discovery, including a timetable.

24. The Plaintiff's lawyer advised in September 2022 that they wished to move the matter to *Simplified Rules*. Consent from all parties was obtained by February 2023. No action in this regard was taken until April 2024

25. The matter was dismissed by the Registrar on June 12, 2024.

26. This Plaintiff now seeks to set aside the Registrar's dismissal.

LAW AND ANALYSIS

General Principles

27. The within action was dismissed for delay under Rule 48.14 (1)1 because it was not set down for trial or terminated by any means by the fifth anniversary of its issuance, being October 4, 2022. The action was dismissed on June 12, 2024.

28. Rule 48.14(10) provides that a "dismissal of an action under subrule (1) may be set aside under Rule 37.14."

29. Under Rule 37.14(1), a party that is affected by an order of a registrar may move to set aside the order by a notice of motion that is served forthwith after the order comes to the person's attention.

30. On a motion under Rule 37.14(1), the court may set aside or vary the order on such terms as are just. A motion under Rule 37.14(1) to set aside an order of a registrar may be made to a judge or associate judge.

31. There is no dispute that the test to be applied on this motion to set aside a dismissal order includes the following factors:

    (a) Has the plaintiff provided a satisfactory explanation for the litigation delay?

    (b) Has the plaintiff led satisfactory evidence to explain that she always intended to prosecute the action within the applicable time limits, but failed to do so through inadvertence?

(c) Has the plaintiff demonstrated that she moved forthwith to set aside the dismissal order as soon as the order came to her attention?

(d) Has the plaintiff convinced the court that the defendant has not demonstrated any significant prejudice in presenting his case at trial due to the plaintiff's delay or because of steps taken following the dismissal of the action? See: *Piedrahita v. Costin*, 2023 ONCA 404 at para. 8; and *Reid v. Dow Corning Corp.*, 2002 CarswellOnt 5899

32. The parties agree that the Plaintiff demonstrated that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.

33. These factors must be considered and weighed contextually. See *Scaini v. Prochnicki*, 2007 ONCA 63, at para. 25.

34. The Plaintiff is not required to satisfy each of the factors separately to succeed. See *Scaini v. Prochnicki*, 2007 ONCA 63 at para. 26.

35. In *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887, Laskin J.A. observed that the overriding objective is to achieve a result that balances the interests of the parties and takes account of the public's interest in the timely resolution of disputes. The four factors provide a structured approach to achieving this result.

36. The Court must weigh two underlying principles: (1) civil actions should be decided on their merits; and (2) civil actions should be resolved in a timely and efficient manner to maintain public confidence in the administration of justice. See *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173 (CanLII), at para. 26.

37. The Court's preference in that regard tends toward deciding matters on their merits rather than terminating rights on procedural grounds. See *H.B. Fuller Company v. Rogers (Rogers Law Office)*, 2015 ONCA 173 (CanLII), at para. 27.

38. The Court of Appeal for Ontario (in *Barbiero v. Pollack*, 2024 ONCA 904) recently recalled that the party-prosecution character of our current civil court adjudication system imposes on the party who initiates a claim the burden of moving a proceeding to its final disposition on the merits. As a result, the consequences of any dilatory regard for the pace of litigation falls on the initiating litigant, absent resistance from a defendant to proceed to a final disposition on the merits (of which there is no evidence on the facts of this case): *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544, at paras. 28 and 29.

39. The Supreme Court of Canada, in *Hryniak v. Mauldin*, 2014 SCC 7, singled out an unhealthy characteristic of the contemporary Ontario civil justice system: its indifference to delay. In calling for a "culture shift" in the civil justice system, the court in Hryniak stated at para. 25:

> Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice.

40. Effecting a culture shift requires not only changing the entrenched culture of indifference to delay manifested by far too many litigants and their counsel, but also identifying and changing those judge-created rules or interpretative glosses that do not promote – and in some cases impede – the "prompt judicial resolution of legal disputes". See *Barbiero v. Pollack*, 2024 ONCA 904.

41. I echo these comments and use this direction in considering the legal analysis below.

Satisfactory Explanation

42. The delay must be considered as a whole from the issuance of the Claim, in this case on October 4, 2017, to the date of the registrar's dismissal order, almost seven years later, on June 12, 2024.

43. The key question to be answered on this part of the test is whether the Plaintiff has adequately explained the delay in the progress of the action from commencement on October 4, 2017, to dismissal on June 12, 2024.

44. Approximately seven years elapsed between the commencement of the action and the dismissal. Despite this passage of time, the Plaintiff took only minimal steps to move the action forward. This includes focusing on tangential issues and providing very limited productions.

45. The Plaintiff argues that there is a satisfactory explanation for the litigation delay. The basis of the Plaintiff's explanation is a misunderstanding that her lawyer had regarding the suspension of administrative dismissals during the COVID-19 pandemic.

46. Administrative dismissals in the Ontario Superior Court of Justice were suspended from March 16, 2020, to May 13, 2024, due to the impact of the COVID-19 pandemic. That period included an initial 182-day period from March 16, 2020 to September 13, 2020, when the Court had suspended all procedural timelines.

47. The administrative dismissal in this case occurred about one month after the Court resumed dismissals.

48. The Plaintiff's lawyer mistakenly understood that when administrative dismissals returned on May 13, 2024, there would be an *additional* period of 182 days afforded to actions, corresponding to the *COVID-19 Suspension*. He did not advert to the fact that as of May 13, 2024, any action started before November 12, 2018—which included his client's action—would be immediately subject to dismissal. He believed he had time to negotiate a timetable with opposing counsel and take the Plaintiff's action through the reduced steps of simplified procedure. He takes ownership of this error, as well as responsibility for contributing to the delay in his client's action.

49. The Plaintiff submits the following:

    a. While she appreciated that Court matters can take a long time, she understood that there was some delay associated with the other issues (including a coverage issue) or the unfortunate death of Mr. Mutschler.

    b. The Plaintiff argues that in no way did she contribute to any delay in her action.

    c. She remained interested in the status and outcome of her claim. She kept in contact with her lawyer by text and telephone.

    d. The Plaintiff relied on her lawyer to move her claim forward and to let her know about any important developments.

    e. Subsumed within the Plaintiff's explanation for delay in this matter is her lawyer's explanation. The Plaintiff's lawyer takes responsibility for contributing to the delay. COVID-19 caused a great deal of disarray in his practice as essentially a sole practitioner. It had echoing effects for the next couple of years as he dealt with law clerk turnover, often directly related to COVID-19 and/or

measures to manage it. He found it to be a very difficult time in his practice to advance matters.

f. The Plaintiff's lawyer also associates substantial delay to an issue he raised regarding a conflict issue with the Defendant's counsel, notwithstanding his view that his concerns were sincere and righteous. He regrets the amount of time and energy he devoted to this issue, but believes he was obligated to investigate it in his capacity as a lawyer to his client and as an officer of the Court.

g. This is not a case where the lawyer put the file in abeyance and intentionally and stubbornly refused to proceed with the action, nor where the delay was intentional.

h. The Plaintiff's lawyer also attributes meaningful delay to preliminary procedural issues related to a coverage dispute. It took six months for Mr. Yegendorf to deliver Ms. Bergmann's statement of defence. It was not until November 15, 2019, that the third-party claim was settled such that the Bergmann defence could start in earnest. That was two years from the date of service on October 14, 2017.

50. The Plaintiff's explanation for the delay must be reasonable, acceptable, or satisfactory. It does not have to be cogent, convincing, or compelling. See *Kupets v. Bonavista Pool Limited*, 2015 ONSC 7348, at paras. 18 and 19.

51. The process involved in evaluating a delay explanation is not a matter of attributing blame *per se* and forcing parties (and/or their lawyers) to justify their conduct of the litigation on a month-by-month basis. Instead, the Court should consider the overall conduct of the litigation.

52. The Defendant submits the following:

a. Neither Plaintiff nor her lawyer has adequately explained the delay to this court at all, and in fact, on a contextual approach, the conduct of the Plaintiff and her lawyer can reasonably be concluded as deliberately not advancing the litigation.

b. The Plaintiff's evidence fails to provide any explanation for the delay. She periodically corresponded with her lawyer, from every couple of months to a couple of times per year. She was surprised at the length of time that had passed, and equivocated about the dispute between Ms. Bergmann and Intact, as well as Mr. Mutschler's death. This is a catalogue and not an explanation.

c. Nowhere in Ms. Chekhovtsova's Affidavit does she explain why nothing was done, what inquiries she made of her lawyer, what instructions she gave about moving the matter to Trial, if she ever even thought to ask why the matter was taking so long and what could be done to move it to Trial, or what she did to ensure that documents and other evidence were preserved.

d. Ms. Chekhovtsova's "best foot forward" does not provide the court with evidence of any steps she took to advance the action. She left Canada in 2017. Beyond instructing counsel to issue a Claim, she appears to simply be a passive observer. Mr. Binavince's evidence similarly fails to provide any credible explanation for the delay.

e. To evaluate whether there is a satisfactory explanation for the delay, the delay must be considered as a whole from the issuance of the Claim, in this case on October 4, 2017, to the date of the registrar's dismissal order, almost seven years later, on June 12, 2024.

f. The party who commences the proceeding bears primary responsibility for its progress and is responsible for the consequences of a dilatory regard for the pace of litigation. See *1196158 Ontario Inc. v. 6274013 Canada Ltd.*, 2012 ONCA 544 at para. 28.

g. The Plaintiff in this case is expected to reasonably and rationally explain, not merely catalogue, the delay, and is expected to demonstrate diligence in dealing with and advancing the action to Trial. See *Jadid v Toronto Transit Commission*, 2016 ONSC 1176 at para. 9, rev'd on other grounds in *Jadid v Toronto Transit Commission*, 2016 ONCA 936.

h. She must satisfy the Court that steps were being taken to advance the litigation towards Trial, and if she or her lawyer made a deliberate decision not to advance the litigation towards Trial (including putting the file in abeyance or otherwise), then the motion must fail. See *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited*, 2007 ONCA 695 at paras. 12 – 13.

53. The Defendant asked me to look at the puzzle from above in considering the delay. The Defendant pointed out that the action is still in the pleadings stage, 7 years after the commencement of the action, because of Peter Mutscheler's death, and nothing significant has occurred since the claim was commenced.

54. Having considered the entirety of the submissions made by both parties, the explanation provided is not satisfactory. While this is not a case where the Plaintiff did not do anything after issuing the claim, the evidence before me is that the Plaintiff and her counsel pursued tangential issues without moving the litigation forward.

55. There were requests from the Defendant to schedule discoveries – this did not happen.

56. There were requests from the Defendant to set up mediation – this did not happen.

57. A Litigation Timetable extending the set-down date was not in place.

58. In my view, rather than taking steps to move the action forward, the Plaintiff (through her counsel) devoted energy to other activities, none of which qualify as a "reasonable explanation" for the delay occasioned in moving the action forward.

59. Counsel did not agree on the standard for the explanation. The Plaintiff submitted that the standard is "what is reasonable, acceptable and satisfactory". The Defendants submitted that the Plaintiff must present cogent evidence to support explanations for the delay.

60. The Plaintiff relies on *Kupets v. Bonavista Pool Limited*, 2015 ONSC 7348, at paras. 18, which states that the language of reasonable, acceptable, or satisfactory explanation, not a "cogent" explanation, needs to be used.

61. The Defendant relies on the recent case of *Reid v. Town of Bracebridge and Tatham*, 2025 ONSC 2535 to state that parties are expected to put their best foot forward and present cogent evidence to support explanations for delay. Bald assertions or delays caused by a party's own actions are insufficient to discharge the onus.

62. I note that the *Kupets* decision relied on by the Plaintiff is not with respect to a motion to set aside a Registrar's dismissal, but rather a dismissal for delay following a status hearing. Conversely, the recent case of *Reid* is a motion to set aside a Registrar's dismissal.

63. I agree with Justice Mathai, who stated in *Francis v Schneider*, 2025 ONSC 2491, that the key question is whether the Plaintiff has adequately explained the delay in the progress of the action.

64. By any measure, whether it is “reasonable, acceptable and satisfactory”, “adequate” or the higher standard of “cogent explanation”, in my view, the explanation provided does not satisfy any of the standards.

Intention to Prosecute the Action within the Applicable Time Limits

65. The Plaintiff submits that she never changed her intention to pursue her action, and she relied completely on her lawyer in that regard.

66. She expected him to move her claim forward and to let her know about any important developments.

67. While I do not expect a represented litigant to follow up with their lawyer weekly or even monthly, there must be evidence that the litigant and their counsel are making active efforts to move the matter forward.

68. The Plaintiff’s lawyer missed the deadline to have the matter set down for trial as it approached. The Plaintiff’s lawyer explained that he was mistakenly under the impression that when the administrative dismissals were set to resume in May 2024, there would be an additional period of 182 days afforded to actions, corresponding to the COVID-19 suspension. He believed he had more time to negotiate a timetable and have his client’s matter move through the reduced steps of the simplified procedure. He did not advert to the fact that any action started before November 12, 2018 –including the Plaintiff’s—was immediately subject to administrative dismissal as of May 13, 2024.

69. The Defendant argues this prong of the test to the exact opposite – the Defendant submits that there is evidence of a deliberate choice on the part of the Plaintiff not to move the action forward.

70. First, the Defendant submits that the Plaintiff's counsel's actions were a deliberate attempt not to move the action forward. This includes counsel's accusations of a conspiracy, an allegation that Ms. Bergmann was going to commit a crime (perjury), Ms. Bergmann's previous counsel behaved unethically and provided inappropriate legal advice in exchange for financial gain and made threats to submit reports to the Law Society to benefit his client's case and/or advance motions that he suggested would be personally embarrassing for Defence Counsel.

71. Secondly, the Defendant submits that there is no evidence to account for the delay. The Defendant says there is zero explanation at this stage as to why no action was taken to move the matter forward by way of discoveries, Mediation, or any other substantial steps required to get the matter to Trial.

72. Thirdly, the Defendant submits that the Plaintiff has not led satisfactory evidence to explain that they always intended to prosecute this action within the time limit set out in the rules or a court order, but failed to do so through inadvertence. As of the date of the Registrar's Dismissal Order, no dates for Discovery were set, no dates for Mediation were set, and a Litigation Timetable extending the set-down date was not in place. There is no evidence to suggest there was a "game plan" in place that was thwarted by an unforeseen obstacle.

73. Finally, the Defendant submits that there is no "air of reality" to the Plaintiff's counsel's excuse about his mistaken understanding of the suspension of administrative dismissals.

74. I do not agree with the Defendant that the Plaintiff's counsel's actions were a deliberate attempt not to move the action forward. However, I do agree that the Plaintiff's counsel action focused on other tasks that did not move the action forward.

75. I agree with the Defendant that there is no evidence to account for the delay, the Plaintiff has not led satisfactory evidence to explain that they always intended to prosecute this action and that there is no "air of reality" to the Plaintiff's counsel' excuse about his mistaken understanding of the suspension of administrative dismissals.

76. Delays caused by a party's own actions are insufficient to discharge the onus of explaining the delay in prosecuting the action. See *Reid v. Town of Bracebridge and Tatham*, 2025 ONSC 2535 at para. 62. The evidence before me is that the Plaintiff's counsel caused considerable delay in this action.

77. While the failure of the solicitor to act diligently may be considered an explanation, this must be as long as neither the solicitor nor the plaintiff deliberately decided not to pursue the action. *Hernandez v Western Assurance Company*, 2011 ONSC 6042 at para. 5.

78. The evidentiary requirement at this stage of the test is discussed by Justice Dunphy in *Jadid v Toronto Transit Commission*, 2016 ONSC 1176 at para. 74:

> The evidence should have shown me that the plaintiff was busy completing the steps necessary to set the matter down for trial and was derailed by some unanticipated obstacle. There should have been a pre-existing game plan that was inadvertently thwarted. If it couldn't be followed, there should be reasons why this was so that could have been explained.

79. In my view, the Plaintiff has not explained why, as of the date of the Registrar's Dismissal Order, no dates for Discovery were set (despite requests), no dates for Mediation were set (despite requests), and a Litigation Timetable extending the set-down date was not in place. There is no evidence to suggest there was a "game plan" in place that was thwarted by an unforeseen obstacle (in this case, the COVID-19 pandemic).

80. With respect to the Plaintiff's counsel's explanation regarding his misunderstanding of the suspension of administrative dismissals, I agree with the Defendant that there is no air of reality to this explanation. During oral argument, I asked the Plaintiff's counsel on the motion for any evidence that explains why or how the Plaintiff's counsel would misunderstand the Notice to the Profession and Public. I was not pointed to any evidence.

81. The regulation suspending limitations and procedural time periods was revoked in September 2020, after which, normal procedural timelines resumed. This Court published a Notice to the Public and Legal Profession Resuming Administrative Dismissal Notices and Orders in February 2024, which clearly stated that administrative dismissals were returning effective May 13, 2024 including issuing dismissal notices and orders that have been on hold since March 16, 2020. There is no ambiguity. In the absence of evidence explaining why or how the Plaintiff's counsel misunderstood the notice, I am not satisfied that there is a reasonable explanation.

82. Overall, the Plaintiff was the primary cause of the delay, and that conduct cannot be interpreted to amount to inadvertence. The matter remained stagnated at the pleadings stage until the Registrar dismissed this action. The actions or omissions of a lawyer do not excuse the Plaintiff's failure to set the matter down for trial. See: *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited*, 2007 ONCA 695 at paras. 27 – 32.

Any Significant Prejudice

83. The Plaintiff has the onus to prove to the court that the Defendant has not demonstrated any significant prejudice in presenting their case at trial as a result of the Plaintiff's delay.

84. The test is conjunctive, not disjunctive. Even if the Plaintiff can provide a satisfactory explanation for the delay, the action will be dismissed if there is prejudice to the defendant. And if the Plaintiff is not able to provide a satisfactory explanation for the delay, it is still open to the judge to dismiss the action, even if there is no proof of actual prejudice to the defendant. See: *1196158 Ontario Inc. v. 6274013 Canada Limited*, 2012 ONCA 544 at para. 32.

85. Prejudice may be presumed when there is a long delay. In some cases, such presumptive prejudice based on inordinate delay is sufficient to dismiss the action. The Plaintiff must first rebut the presumption to shift the onus to the defendant to establish actual prejudice. *Bagus v. Telesford*, 2014 ONSC 3512, at para. 23.

86. A Plaintiff can overcome the presumption of prejudice by leading evidence that all relevant documents have been preserved, that key witnesses are available, or that certain aspects of the claim are not in issue. *Bagus v. Telesford*, 2014 ONSC 3512, at para. 34.

87. In assessing prejudice within this arm of the test, the prejudice at issue is that which arises *due to the Plaintiff's delay*, not merely the passage of time. *Cedrom-Sni Inc. v. Meltwater Holding*, 2017 ONSC 3387 at para. 6(8).

88. There is no onus on the Defendant to demonstrate "actual prejudice" to satisfy this factor. See *Town of Bracebridge and Tatham,* 2025 ONSC 2535 at paras. 74 and 79.

89. The ONCA's recent decision in *Barbiero* is a complete repudiation of the tolerant culture with respect to delay under the previous regime. See *Barbiero v. Pollack*, 2024 ONCA 904 at paras. 8 – 16.

90. There is an automatic presumption of prejudice in actions that are found to have an "inordinate" delay. See *Barbiero v. Pollack*, 2024 ONCA 904 at para. 15.

91. The Defendant submits that in this case, the Defendant is prejudiced due to the following:

    a. Memories of witnesses have faded, and at least one party, Mr. Mutschler, has died without providing any sworn evidence or providing any other known out-of-court statements regarding the accident or the issue of consent.

    b. There are documents relevant to the Plaintiff's claims which can be safely presumed to be destroyed or lost, or which are at real and substantial risk of loss or destruction due to the delay in prosecuting this matter. Specifically, the Plaintiff did not present any evidence that the following documents have been preserved or secured:

        i. Decoded OHIP summary from 2013 – June 24, 2018 (including the ability to identify treating medical practitioners in this time);

        ii. Medical records from all doctors, pharmacies, specialists, treatment providers, and walk-in clinics who were last seen in 2013 – June 24, 2015;

        iii. Employment files and any financial documentation predating the Plaintiff's move to the USA in 2017;

        iv. Medical records from all doctors, pharmacies, specialists, treatment providers, and walk-in clinics from June 24, 2015 – 2017, when the Plaintiff left to live in the USA.

        v. Statutory Accident Benefits File from the Plaintiff's insurer.

92. The Plaintiff submits that Mr. Mutscheler died and would not have been at trial. While Mr. Mutscheler could have been subject to discoveries, the Plaintiff says that window is theoretical because Ms. Vaughan wanted discoveries after the Intact motion was heard. When motion settled, it was only a 3-month window before Mr. Mutscheler died.

93. The Plaintiff submits she has rebutted the presumption of prejudice. I respectfully disagree. The Plaintiff's evidence in support of this motion should have "identified the important witnesses and should indicate whether the witnesses remain available to give evidence, or whether evidence, including important documentary evidence, has been preserved." *Town of Bracebridge and Tatham*, 2025 ONSC 2535 at para. 78.

94. The parties agreed that the OHIP summaries are only available 7 years prior to the request. Both parties agreed that this would cause prejudice to the Defendant. As the Court discussed in *Patel v Patel* 2023 ONSC 6565 at para. 22, this has deprived the Defendants of material evidence and information regarding the Plaintiff's medical history, condition, and treatment, which is required to properly defend themselves against the Plaintiffs' claims. This raises a risk of trial unfairness and may have a material impact on the court's ability to properly adjudicate this action.

95. The Plaintiff led no evidence that the documents have actually been preserved. The evidence of the Plaintiff's counsel was that he is confident that documents are still available. This is not sufficient to satisfy me whether evidence, including important documentary evidence, has been preserved.

96. In *Smith v. Toronto (City)*, 2023 ONSC 4298, a case relied on by both parties, the Court states that the failure to tender proper evidence on document retention is significant, particularly given the presumption of prejudice. It is the obligation of the Plaintiff to tender evidence on whether the documentary evidence is, in fact, retained and the status of those records. She did not do so.

97. Evidence is required that the documents were actually preserved. The Plaintiff acknowledged that they did not tender evidence that the documents were actually preserved.

98. In my view, in the absence of concrete evidence that the documents have actually been preserved, I am not satisfied that the Plaintiff has rebutted the presumption of prejudice.

99. Furthermore, the parties agree that with Mr. Mutscheler and at least the OHIP summary no longer being available, there is demonstrated prejudice. This has also not been rebutted.

Conclusion

100. I appreciate the desire in the case law to have matters heard on their merits rather than terminating rights on procedural grounds. However, this must also be balanced with the responsibility on parties to move a proceeding forward towards its final disposition.

101. In my view, the legal test has not been met.

102. This case highlights a further issue: our court does not condone a choice of tactics using threats and intimidation to attempt to settle a claim. If an action is commenced, counsel and the Plaintiff must be moving the matter forward while trying to reasonably resolve the claim, not use inappropriate distractions to try to settle the claim while the litigation process languishes.

103. For the foregoing reasons, I hereby dismiss the Plaintiff's motion and confirm the Registrar's dismissal order dated June 12, 2024.

104. If the parties are not able to agree on costs, the Defendant may file costs submissions of no more than 3 pages plus a costs outline and any offers to settle within 20 days of the

release of this decision, and the Plaintiff may file responding costs submissions on the same terms within a further 15 days. The Defendant's Reply, if any, is limited to one page, to be filed within a further 5 days.

_____

Associate Justice Kamal

DATE: July 9, 2025