

report, particularly as it is this report that is the medical basis for the plaintiff's proposed increased damages.

- [5] Mr. Stewart resists the defendant's motion on the basis that no reasonable explanation has been provided for the defendant's failure to meet the deadline for delivery of his expert reports. Further, the plaintiff argues that he will suffer prejudice and the trial will be delayed if the defendant's motion is granted.
- [6] For the reasons that follow, I find that the defendant has provided a reasonable explanation for the delayed request. I do not agree that Mr. Stewart will suffer any non-compensable prejudice or that the trial will be delayed if I grant the indulgence requested by the defendant.
- [7] As a result, I order Mr. Stewart to attend a medical assessment with the defendant's medical expert, Dr. Duhamel, on October 21, 2025. I grant leave to the defendant to serve Dr. Duhamel's report by November 30, 2025.
- [8] I also grant the plaintiff leave to amend the prayer for relief in the statement of claim.

Legal Framework

- [9] Pursuant to s. 105(2) of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, the court has the discretion to order a plaintiff to attend a defence medical examination "where the physical or mental condition of a party to a proceeding is in question." Such an examination allows the defendant to meet the case advanced by the plaintiff: *LaForme v. Paul Revere Life Insurance Co.*, (2006) 84 O.R. (3d) 634 (ON SCDC), at para. 14. A defence medical examination also assists the court at trial by furnishing expert evidence that is subject to the adversarial process: *Godin v. Goncalves*, 2014 ONSC 7297, at para. 25.
- [10] Rule 33.02(2) of the *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194 provides that the court may order further examinations under s. 105 of the *Courts of Justice Act* on such terms as are just.
- [11] Subrules 53.03(1) and (2) require that the plaintiff and defendant deliver their expert reports not less than 90 days and 60 days prior to the pre-trial, respectively. Leave to extend the time for delivery of expert reports may be granted under r. 53.03(4).
- [12] In determining whether leave should be granted, r. 53.08 provides that the court must be satisfied that:
 - a. there is a reasonable explanation for the failure; and
 - b. granting leave would not,
 - i. cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or
 - ii. cause undue delay in the conduct of the trial.

- [13] Experts cannot testify at trial without leave if their report is not filed in accordance with the Rules: r. 53.03(3). The extension of time to comply with r. 53.03(1) and (2) is therefore the functional equivalent of granting leave to adduce late-delivered expert's reports into evidence at trial. Extending the deadline by which a party must serve their expert report effectively cures any non-compliance with r. 53.03: *Mohamud v. Juskey*, 2023 ONSC 4414, at para. 26.
- [14] Under r. 26.01, the court shall allow an amendment of a pleading at any stage of an action unless prejudice would result that cannot be compensated for by costs or an adjournment.

Analysis

Issue 1: Defence Medical and Late Service of Report

- [15] There is no question that Mr. Stewart has placed his mental condition in question in this action and is relying on expert opinions to prove that he sustained psychological, emotional, and cognitive impairment as a result of the accident. Thus, s. 105(2) of the *Courts of Justice Act* is engaged.
- [16] There is also no dispute that Mr. Rice did not abide by the timelines set out in r. 53.03(2) for service of his neuropsychological expert report. He first requested a neuropsychological assessment six weeks before the deadline for service of his expert reports.
- [17] The following summary of events is useful for assessing the length and seriousness of the defendant's delay:
- a. In support of his claims, the plaintiff has undergone numerous assessments by medical professionals and has served seven expert reports, all before the r. 53.03(1) deadline.
 - b. Specifically, on August 2, 2023, the plaintiff served his initial neuropsychology report by Dr. Fulton, which was based on an assessment he conducted in January 2023. Dr. Fulton concluded that Mr. Stewart was partially but permanently disabled. In terms of future care, Dr. Fulton stated that occupational therapy and psychiatric support "might be of benefit."
 - c. Between August 14, 2024, and October 8, 2024, the plaintiff served three other experts' reports regarding future care, cognitive functional capacity, and economic loss (collectively, the "Future Care Reports"). In addition to occupational therapy and psychiatric support, these experts recommended "medications, equipment and assistive devices, medical and rehab services, audiology, neuro-optometry, SLP, psychological counseling, physio and massage therapies, kinesiology rehab, chronic pain management clinic, [and] case management." These reports support an additional \$400,000 in future care costs and housekeeping damages over what the plaintiff originally claimed.

- d. Dr. Fulton prepared an updated commentary report in August 2024 in which he stated his “complete agreement with all of the recommendations” set out in the Future Care Reports. Dr. Fulton’s report was served on the defendant on October 15, 2024.
 - e. Two weeks later, the defendant requested that the plaintiff attend at a defence neuropsychological assessment with Dr. Duhamel on January 21, 2025.
 - f. In response, the plaintiff neither agreed nor refused to attend. Instead, plaintiff’s counsel inquired as to whether the defendant would prefer to have Dr. Duhamel’s assessment prior to mediation scheduled for December 3, 2024.
 - g. Dr. Duhamel’s assessment could not be scheduled before December 3, 2024. The mediation proceeded but did not result in a settlement.
 - h. Defence counsel sent three more letters to plaintiff’s counsel asking for confirmation of the plaintiff’s attendance at the defence assessment on January 21, 2025. Plaintiff’s counsel responded on December 17, 2024, the day after the expiration of the deadline for service of defence expert reports, indicating that since the deadline had passed the plaintiff should not be compelled to attend the assessment with Dr. Duhamel.
 - i. The pre-trial conference proceeded on February 14, 2025, at which time Horvat J. scheduled a special appointment for argument of the within motion.
 - j. At the assignment court held on April 25, 2025, the trial of the action was scheduled for the long trial sitting on March 30, 2026.
- [18] Mr. Rice submits that he made a strategic decision not to request an assessment in response to Dr. Fulton’s original 2023 report because only two recommendations – occupational therapy and psychiatric support – flowed from the diagnosis of partial disability and a mild traumatic brain injury.
- [19] The defendant further submits that he did not immediately seek an independent medical examination following receipt of the Future Care Reports because their extensive recommendations were not supported by the existing medical foundation (i.e.: Dr. Fulton’s original report). Even if the defendant had done so, the last of the plaintiff’s Future Care Reports was not served until October 8, 2024. Thus, the defendant’s request could not have been made significantly earlier.
- [20] Dr. Fulton’s commentary report, served on October 15, 2024, endorsed the extensive services and supports recommended in the Future Care Reports. It is this endorsement that the defendant characterizes as a significant change of opinion, one that leads to almost doubling the plaintiff’s future care costs.

- [21] The plaintiff argues that the Future Care Reports did not change the landscape of the litigation, only the quantum of damages sought, and that the defendant could have arranged a neuropsychological assessment a year earlier.
- [22] Each party relies on several cases in support of their position. They agree on the applicable principles of necessity, reasonable explanation and prejudice. Ultimately, every case turns on its own facts.
- [23] Necessity was not vigorously contested. I find that the defendant's proposed neuropsychological assessment is directly responsive to the plaintiff's expert reports and is not duplicative of other independent assessments. The only defence assessment to date was conducted by an orthopedic surgeon.
- [24] The focus of argument at the hearing was the reasonableness of the defendant's explanation for his failure to request the neuropsychological assessment sooner.
- [25] While it is true that Dr. Fulton's original neuropsychological report was served in August 2023, it is reasonable for the defendant to have decided against demanding a defence neuropsychological assessment at the time, given the few services and supports recommended in the report. Defendants must be "strategic in the selection and timing of their assessments, since they do not have a limitless right to examinations": *McGlinchey v. MacKay*, 2025 ONSC 1046, at para. 20.
- [26] I find that Dr. Fulton's commentary report did materially change the plaintiff's damage claim, both in terms of quantum and the type of future care needs for which he claims compensation. Until Dr. Fulton's commentary report and the Future Care Reports were served, it was reasonable for Mr. Rice to proceed without a responding neuropsychological report. It is now understandable that he seeks to exercise his substantive right to respond to a plaintiff's expert report, as a matter of trial fairness: *Bonello v. Taylor*, 2010 ONSC 5723, at paras. 15 and 22.
- [27] The plaintiff suggests that the defendant delayed asking for an independent assessment to avoid incurring the costs associated with obtaining expert reports until the last minute in the hopes of settling the matter at mediation or at the pretrial. I decline to draw such an inference. The defendant obtained and served a defence psychiatry report before the r. 53.03(2) deadline and requested the neuropsychological assessment before either the mediation or the pretrial took place. In this way, the facts before me are distinguishable from *Awua v. Singh Virk*, 2025 ONSC 3164, on which the plaintiff relies.
- [28] I do not find that the defendant was inattentive to the file. The authorities cited for the proposition that inattentiveness to the file is not a reasonable explanation, therefore, are not dispositive: *Longo v. Westin Hotel Management. L.P.*, 2024 ONSC 3676; *Mohamud v. Juskey*.
- [29] The case at bar is also distinguishable from other recent cases in which leave to file late expert reports was denied. The defendants in *Nykilchuk v. 2244301 Ontario Inc. et al*, 2024 ONSC 5025, took no steps to get any independent medical examinations before the pre-

trial. In contrast, Mr. Rice served one report and requested a second examination months before the pre-trial.

- [30] Similarly, the defendants in *Van Belois v. Bartholomew*, 2023 ONSC 5799, requested three independent medical examinations *after* the expiry of the deadline to serve expert reports. They also had “volumes” of independent medical examinations and would suffer “minimal” prejudice in not securing the requested assessment (at para. 28). In contrast, Mr. Rice requested only one examination approximately six weeks *before* the expiry of the deadline and there is no independent neuropsychological evidence other than that of Dr. Fulton.
- [31] Having found that the defendant has a reasonable explanation for the delay, I must also consider whether there would be non-compensable prejudice to the plaintiff or undue delay in the conduct of the trial: r. 53.08(1)(b).
- [32] Mr. Stewart submits that he would suffer prejudice in having to attend an examination and prepare a responding report to Dr. Duhamel. Further, another expert will occupy additional time at trial.
- [33] Mr. Rice submits that Mr. Stewart has only had to attend one defence medical examination, and that attending a second one is not onerous or prejudicial. Mr. Rice also submits that the costs associated with preparing a responding report or additional trial time are compensable. In contrast, Mr. Rice argues he will be prejudiced by not having a fair opportunity to respond to the plaintiff’s evidence, particularly when the plaintiff now seeks to increase the damages in his prayer for relief to an amount that exceeds the limits of the insurance policy.
- [34] I agree with Mr. Rice that the plaintiff will not suffer any prejudice that cannot be compensated for by costs.
- [35] Moreover, the trial date is not in jeopardy. Defence counsel advised the court that Dr. Duhamel’s report will be completed within a month of the October 21, 2025, examination date. This is more than five months prior to trial. Mr. Stewart will have sufficient time to prepare a response.
- [36] Finally, I am also persuaded that granting the defendant’s request will assist the trial judge. Dr. Fulton’s assessment of the plaintiff took place in January 2023. At the time of trial, that assessment will be more than three years old. The court will benefit from an updated examination.
- [37] For these reasons, the defendant’s motion to compel Mr. Stewart to attend an assessment with Dr. Duhamel on October 21, 2025, is granted. The defendant is granted leave to serve Dr. Duhamel’s report by November 30, 2025.
- [38] I would also have granted an order abridging the time for service of any reply report by the plaintiff, but I received no submissions on this point. The defendant conceded in his factum that such an order would resolve any prejudice arising from late service of Dr. Duhamel’s

report. Accordingly, I expect that the parties will be able to agree to late service of a reply report.

Issue 2: Amending the Statement of Claim

- [39] The plaintiff seeks to increase the quantum of damages in his prayer for relief from approximately \$1.5 million to \$2.1 million. The defendant does not oppose the plaintiff's request for leave to amend the statement of claim, so long as he has the right to further discovery regarding the increases.
- [40] The onus is on the party who opposes an application for an amendment to show that prejudice will result if the amendment is allowed: *1588444 Ontario Ltd. v. State Farm Fire and Casualty Company*, 2017 ONCA 42, 135 O.R. (3d) 681, at para. 25.
- [41] The defendant did not specifically argue any prejudice. In his factum, he "notes" that the amendment to the plaintiff's claim for damages exceeds the defendant's insurance limits.
- [42] Plaintiff's counsel correctly observed that the potential for personal exposure on the part of a defendant is not a prejudice that justifies denial of a pleading amendment: *Hall v. Hogarth*, [2000] O.J. No. 778 (ONSC), at paras. 9-11.
- [43] Although the court in *Hall* granted the amendment with a term that the defendant was entitled to further discovery on the facts supporting the increased damage claim, I find that additional discoveries are not necessary in the circumstances of this case. The defendant has been granted leave to file his own neuropsychological expert report. The report will presumably address the various recommendations in the Future Care Reports that account for the increased damages claim. The defendant will know the case he has to meet.
- [44] Accordingly, I grant leave to amend the prayer for relief in the statement of claim, without terms.

Orders

- [45] The defendant's motion and the plaintiff's cross-motion are granted.
- [46] The plaintiff is ordered to attend the assessment with Dr. Duhamel on October 21, 2025. The defendant is granted leave to serve Dr. Duhamel's report by November 30, 2025.
- [47] The plaintiff is granted leave to amend the statement of claim to increase the quantum of damages claimed.
- [48] I encourage the parties to resolve costs. If they cannot do so, the defendant shall deliver his written submissions up to five pages in length by August 18, 2025. I note that he has already

filed his bill of costs. The plaintiff shall deliver his written submissions of no more than five pages, and his bill of costs, by August 25, 2025.

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Jasminka Kalajdzic

Justice

Released: August 6, 2025

CITATION: Stewart v. Rice, 2025 ONSC 4564
COURT FILE NO.: CV-22-000040 (Sarnia)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

TAD STEWART

and

BRIAN CLIFFORD RICE

ENDORSEMENT

Kalajdzic J.

Released: August 6, 2025