CITATION: Ainsley v. Allstate Insurance Company of Canada, 2025 ONSC 6144
COURT FILE NO.: CV-16-00000930-0000
DATE: 2025 10 31

SUPERIOR COURT OF JUSTICE – ONTARIO
7755 Hurontario Street, Brampton ON L6W 4T6

RE: AINSLEY, Gordon, Plaintiff

AND:

ALLSTATE INSURANCE COMPANY OF CANADA, Defendant

BEFORE: JUSTICE WILKINSON

COUNSEL: SHARMA, Anju, for the Plaintiff

MATTHEWS, Linda, for the Defendant

HEARD: August 19, 2025 and October 20, 2025 by Video Conference

ENDORSEMENT

[1] The Defendant, Allstate Insurance Company of Canada, brings a motion to dismiss the action of the Plaintiff, Gordon Ainsley, for delay. The Plaintiff brings a cross-motion to restore the action to the trial list, and for the Defendant to attend examinations for discovery.

[2] For the reasons that follow, the Plaintiff's action is restored to the trial list. However, the Defendant is not required to attend an examination for discovery.

Background

[3] The Plaintiff's action arises from a motor vehicle collision that occurred on May 31, 2006. The Defendant does not dispute that as a result of the collision the Plaintiff suffered a brain injury, was hospitalized, and then sent to a rehabilitation facility. There is no dispute that following the collision the Plaintiff was declared to be catastrophically impaired by his accident benefits insurer, as his Glasgow Coma Score reading was initially less than 9. The Plaintiff submits that he remains unable to manage his own affairs and make decisions, and requires caregivers to this day.

[4] A case manager and occupational therapist were assigned to assist the Plaintiff, and attendant care services for the Plaintiff were put in place. The occupational therapist eventually determined that the Plaintiff no longer required attendant care services. The insurer then refused to fund these services for the Plaintiff.

[5] The Plaintiff first retained counsel in late 2013, more than seven years after he was first injured.

[6] After counsel was retained the Plaintiff applied for mediation through the Financial Services Commission of Ontario ("FSCO") to dispute the Defendant's termination of his attendant care services and other denials made by the insurer.

[7] The mediation was conducted on December 3, 2015. The mediation did not resolve the issues in dispute. The mediator's report listed the following issues as having been mediated: payment of weekly benefits, attendant care benefits, rehabilitation benefits, housekeeping and home maintenance benefits, costs of examinations, and interest.

[8] The Plaintiff filed a Statement of Claim against Allstate on February 26, 2016. The Statement of Claim alleged that the Defendant was required to pay the Plaintiff attendant care benefits at the rate of $5,833.43 per month from October 31, 2007 and ongoing, and various claims for rehabilitation services dating back to 2014.

[9] The Plaintiff also claimed payment for non-earner benefits at the rate of $185 per week from May 31, 2006, and the cost of examinations totaling $1,979.36. The Plaintiff also made claims against the Defendant for aggravated damages for mental distress relating to its alleged breach of contract, and breach of the Defendant's duty to deal with the Plaintiff in good faith. The Plaintiff also claimed punitive and exemplary damages, pre-judgment interest, and costs.

[10] The Defendant delivered its Statement of Defence on November 7, 2016.

[11] Examinations for discovery of the Plaintiff were begun on September 11, 2008, but were not completed.

[12] The full accident benefits file was provided to the Plaintiff's previous lawyer in 2014.

[13] On February 5, 2021, the Plaintiff obtained an order extending the time to set the action down for trial, which required the trial record to be filed by January 19, 2022. The order also included a timetable, whereby both parties were ordered to serve their affidavit of documents and Schedule A productions by April 30, 2021.

[14] On January 26, 2022, the Plaintiff obtained a second order extending the deadline by which the action must be set down for trial, which provided that the action must be set down by January 16, 2023. The order also required both parties to serve an affidavit of documents and Schedule A productions by February 28, 2022.

[15] The action was set down for trial on January 9, 2023, which was within the required time frame.

[16] On March 30, 2023, the Plaintiff obtained an order from Justice Doi which again compelled the Defendant to serve its affidavit of documents and Schedule A productions within 30 days.

[17] The Plaintiff's examination for discovery was completed on April 20, 2023. The Defendant has not yet been examined for discovery.

[18] The Defendant served its draft affidavit of documents on May 29, 2023. The same day, the parties attended Assignment Court, and were assigned a Pre-Trial date for November 14, 2024, and a date for the trial to commence on May 12, 2025.

[19] The lawyer having carriage of the file for the Defendant left his law firm in September 2024. At that time the Defendant had still not served a sworn affidavit of documents on the Plaintiff, despite being required to do so by three separate court orders.

[20] The parties attended the Pre-Trial conference on November 14, 2024. The matter did not resolve. Justice LeMay adjourned the conference to December 12, 2024. At the continuation of the Pre-Trial, the Plaintiff was represented by new counsel. The Plaintiff asked that the action be struck from the trial list to permit the Plaintiff to serve expert reports that had not previously been contemplated. The Plaintiff maintains that the Defendant consented to this action. The Defendant denies consenting to this, and submits that it took no position. The Pre-Trial endorsement is silent regarding the position of the Defendant regarding the Plaintiff's request to strike the matter from the trial list.

[21] The Plaintiff provides affidavit evidence that his new lawyers did not receive his file from his previous counsel until January 2025. The Plaintiff provided a copy

of correspondence from Allstate dated March 7, 2025, in which it enclosed a copy of the Plaintiff's accident benefits file.

[22] On March 18, 2025, counsel for the Plaintiff requested dates from the Defendant for a motion to restore the action to the trial list. On March 19, 2025, the Defendant scheduled the motion to dismiss the Plaintiff's action for delay for June 12, 2025.

[23] On April 29, 2025, the Plaintiff submitted a new Form 1 completed by an occupational therapist, claiming that the Plaintiff currently requires ongoing attendant care services, at a cost of $5,942.66 per month using family members being paid minimum wage as caregivers, as opposed to professional caregivers. This report was served on the Defendant in June 2025.

[24] In support of this claim, on January 7, 2025 the Plaintiff had previously served the Defendant with a report from McKellar Structured Settlements dated December 11, 2024 that provided the total value of past benefits being claimed including interest, plus the present value of ongoing benefits being claimed.

[25] The Defendant's sworn affidavit of documents was finally served on the Plaintiff in August 2025, just prior to the first day of argument for this motion.

Position of the Defendant

[26] The Defendant submits that the Plaintiff's delay in moving the litigation forward has been inordinate, inexcusable, and prejudicial to the Defendant, such that it gives a substantial risk that a fair trial of the issues will no longer be possible. It therefore submits that the Plaintiff's action should be dismissed.

[27] The Defendant submits that it is highly prejudicial to the Defendant to allow the Plaintiff to, in its words "change tactics", by serving a revised Form 1 claiming retroactive attendant care needs at the rate of $5,942.66 per month, particularly when the motor vehicle collision happened 19 years previously.

[28] The Defendant submits that it will be prejudiced if this action is permitted to be restored to the trial list. It argues that the Plaintiff's delay in moving the case forward have undermined its ability to mount a fair defence, as memories have faded, witnesses may no longer be available, and medical records are outdated and possibly destroyed. It argues that the Plaintiff has the onus to establish that medical records are still available and that witnesses have not died, and that the Plaintiff has produced no evidence to establish there is no prejudice to the Defendant regarding these issues.

[29] The Defendant also maintains that it has raised limitation defences from the time that it first responded to the mediation application filed by the Plaintiff through

FSCO. It submits that some of the benefits now being claimed were denied as early as November 2007.

[30] The Defendant also submits that the Plaintiff has failed to provide sufficient evidence to prove the merits of his claim. In particular, the Defendant highlights that the Plaintiff has not provided any new medical records since 2008, apart from some treatment plans in 2014.

[31] The Defendant's arguments that the Plaintiff's claims have no merit, and are statute-barred, are issues that are separate and apart from the issue before me. There is no motion before me to determine if the Plaintiff's action is statute-barred, or to dismiss the action for disclosing no genuine issue requiring a trial.

Position of the Plaintiff

[32] The Plaintiff submits that his action should be restored to the trial list, and that the Defendant's motion to dismiss his action for delay should be dismissed.

[33] The Plaintiff also seeks an order that the Defendant be compelled to produce a representative to be examined for discovery. However, the Plaintiff also submits that if his action is restored to the trial list, he is prepared to waive the portion of his motion seeking an order compelling the Defendant to attend a discovery, if it is found that such action would delay the trial.

[34] The Plaintiff takes the position that the delay leading to the action being set down for trial was not caused by the Plaintiff himself, but by his former lawyer, and also, the former lawyer for the Defendant. He points out that previous counsel for the Defendant had still not served a sworn affidavit of documents by September 2024, despite have served a Statement of Defence almost eight years earlier, and despite three separate court orders requiring him to do so.

[35] The Plaintiff submits that the Defendant has failed to produce any evidence establishing any actual prejudice it has suffered because of the delay thus far, and that the presumption of prejudice is rebutted because the Defendant has always been aware that that the Plaintiff intended to proceed with the litigation.

[36] The Plaintiff takes the further position that there was “an agreement” between counsel to strike the matter from the trial list at the pre-trial to permit the Plaintiff to obtain additional expert reports. The Plaintiff states that all expert reports have now been produced, and that the matter is ready to proceed to trial.

[37] The Plaintiff submits that any delay that he demonstrated in moving the litigation forward was not intentional or abusive. The Plaintiff also points out that the Defendant did not bring this motion to dismiss the action for delay until after the Plaintiff had requested dates to hear the motion to restore the action to the trial list.

The Law

[38] Subrule 24.01(1)(e) of the *Rules of Civil Procedure* states that a defendant who is not in default under the *Rules* may move to have an action dismissed for delay where the plaintiff has failed to move for leave to restore an action that has been struck off a trial list to the trial list, within 30 days after the action was struck off.

[39] The test for dismissing an action for delay is whether the delay is inordinate, inexcusable, and prejudicial to the defendants such that it gives rise to a substantial risk that a fair trial of the issues will not be possible: *Ticchiarelli v. Ticchiarelli*, 2017 ONCA 1 at para.12. In making this determination, the Court of Appeal for Ontario set out two main factors to be considered in *Ticchiarelli* at paras. 15 and 16.

a) the length of time from the commencement from the proceeding to the motion to dismiss; and

b) an examination must be undertaken of the reasons for the delay, including an assessment of the individual parts of the delay, the overall delay, and whether the explanations are reasonable and persuasive when viewed together.

[40] The court in *Ticchiarelli* also stated that “prejudice is presumed once inordinate delay is established”, and that the burden shifts to the Plaintiff to rebut the presumption of prejudice: paras. 28 and 29.

[41] Rule 48.11 permits an action to be restored to the trial list after having been struck from the trial list with leave of the court.

[42] A refusal to restore an action to the trial list is tantamount to a dismissal of the action. The Court of Appeal for Ontario has set out a two-part test that must be considered when determining if an action should be restored to the trial list: *Carioca’s Import & Export Inc v. Canadian Pacific Railway Limited*, 2015 ONCA 592 at para. 36. On a balance of probabilities, the Plaintiff must establish the following two-part test to successfully restore an action to the trial list:

a) That there is a reasonable explanation for the litigation delay; and

b) That the Defendant would suffer no non-compensable prejudice if the action were allowed to proceed.

[43] While the Plaintiff bears the primary responsibility for advancing the litigation, the conduct of the Defendant is also a relevant factor in determining the acceptability of the delay: *Toscano v. Anselmo*, 2019 ONSC 5420, at para. 16.

[44] If the Defendants have been passive and have not displayed any sense of urgency in moving the matter forward, that passivity is inconsistent with the

presence of prejudice: *Peakovic v. Ford Motor Company of Canada*, 2019 ONSC 6763, at para. 28.

[45] The presumption of prejudice may be rebutted if there is evidence that all documentary evidence has been preserved, and that the issues in the lawsuit do not hinge on the recollection of witnesses, or if all necessary witnesses remain available and capable of providing detailed evidence: *Armstrong v. McCall et al*., 2006 CanLII 17298 (ONCA), at para. 11.

[46] In determining if a matter should be restored to the trial life, the court will consider the steps taken by the Plaintiff after the matter was removed from the trial list, and the timing of the motion to restore the action to the trial list. The court does not demand a standard of perfection: *Toscano*, at para. 20.

Analysis

Has there been inordinate delay?

[47] The Statement of Claim was filed nine years ago. The Defendant has not yet been examined for discovery, and the Plaintiff has only recently served expert reports. There has most certainly been inordinate delay in this case. However, it cannot be said that the Plaintiff is solely responsible for the delay. The evidence is clear that the lack of action on the part of the Defendant's former counsel greatly contributed to the delay.

[48] The Plaintiff provided affidavit evidence that his former counsel wrote to the former counsel for the Defendant multiple times to first obtain a Statement of Defence, and then to receive a sworn affidavit of documents. As noted above, the Plaintiff brought motions to compel the Defendant to produce a sworn affidavit of documents, resulting court orders in 2021,2022, and 2023. Still, only an unsworn affidavit was served by the Defendant in May 2023. The Defendant's sworn affidavit of documents was not served until August 2025.

Is the delay excusable?

[49] The delay in this matter is excusable. Counsel for both the Plaintiff and the Defendant contributed to the delay in bringing this litigation forward, but the evidence suggests that if anything, it was counsel for the Defendant who was the greater cause of the delay. It is excusable that it was counsels, and not the Plaintiff himself, who caused the delay. This factor is particularly significant in this case, where the Plaintiff had been deemed catastrophically impaired from a brain injury.

[50] I also note that after this matter was struck from the trial list in December 2024, the Plaintiff contacted counsel for the Defendant three months later seeking dates for a motion to restore the action to the trial list. This circumstance distinguishes the facts before me from the facts in *Ever Fresh Direct Foods Inc. v. Jamia Islamia Canada Ltd*., 2022 ONCA 185 relied upon by the Defendant. In

Ever Fresh, the Plaintiff waited over a year to restore the action to the trial list, and the Plaintiff had not yet been examined for discovery.

Has the delay caused non-compensable prejudice to the Defendant?

[51] The merits of the action and defences available to the Defendant are not factors to be considered in determining if an action should be dismissed for delay, or restored to a trial list. The main focus of the analysis is if the Plaintiff can rebut the presumption that the Defendant has suffered prejudice as a result of the Plaintiff's delay in moving the matter forward. Based on the evidence before me on this short motion, I find that the Plaintiff has done so.

[52] As was found in *Peakovic*, the passivity displayed by the Defendant until recently is inconsistent with the presumption of prejudice. I also note that the Defendant did not raise any concerns about delay until its counsel was contacted by counsel for the Defendant seeking dates for the motion to restore the action to the trial list.

[53] I am not persuaded by the Defendant's argument that it is prejudiced because it does not have medical records for many of the years for which the Plaintiff now seeks accident benefit funding. The Plaintiff's recent occupational therapy report was prepared after having reviewed the available medical records. The Defendant has the right to obtain its own responding occupational therapy

report which can consider the same medical records that were reviewed by the Plaintiff's expert.

[54] If there is a lack of medical records to support the claims being made by the Plaintiff, this issue can be explored by the Defendant at the trial. There is no evidence before me that there are lost medical records, or that there is witness evidence that is required to determine the issues in dispute that is no longer available because of the delay in bringing this case to trial.

[55] I also reject the Defendant's argument that it has been prejudiced by the Plaintiff "changing tactics". The Plaintiff is making the same claims now that he has been making since the Statement of Claim was issued. It is not a change in tactic for the Plaintiff to obtain an expert report in support of his claims.

[56] The overall circumstances of the action before me demonstrate a clear intention on the part of the Plaintiff to proceed with the litigation once the Statement of Claim was issued, and the absence of non-compensable prejudice to the Defendant. Conversely, the Plaintiff will be irrevocably prejudiced if his action is dismissed.

Is the Plaintiff permitted to examine a representative of the Defendant for discovery?

[57] Allowing the Plaintiff to examine a representative of the Defendant risks further delay in restoring this action to the trial list. Given the lengthy delay in this litigation to date, no further delays will be tolerated. No explanation was provided by the Plaintiff as to why the Defendant has not yet been examined for discovery, in a case that is over nine years old. The Plaintiff has forfeited his right to examine the Defendant for discovery.

Conclusion

[58] The Plaintiff's motion to restore the action to the trial list is granted. The Defendant's motion to dismiss this action for delay is dismissed.

[59] The Plaintiff's motion to compel a representative of the Defendant to be examined for discovery is dismissed.

[60] The parties shall attend assignment court on November 17, 2025 to set a date for a further pre-trial conference, and a trial date. The trial office shall provide notice of this attendance to the parties to ensure they receive the Zoom link.

Costs

[61] The parties are encouraged to agree upon costs. The Plaintiff was predominantly successful on the motion. The Bills of Costs submitted by both parties are very similar. Costs for the motion are set on a partial indemnity scale at $7,500 plus HST = $8,475. If there are offers to settle made by the Plaintiff that may impact the scale of costs awarded, the Plaintiff may prepare a cost submission addressing the scale of costs, to be served on the Defendant by November 10, 2025. The Defendant may serve a responding cost submission on the Plaintiff by November 18, 2025. All cost submissions must be no longer than two pages double-spaced, not including any Bills of Costs or offers to settle. The parties shall ensure that all cost submissions are uploaded to Case Center, and sent to my attention at scj.csj.general.brampton@ontario.ca.

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Wilkinson J.

Released: October 31, 2025