**CITATION**: *Garcia v. Zaman*, 2025 ONSC 7080
**COURT FILE NO.:** CV-21-00001099-0000
**DATE:** 2025/12/17



**ONTARIO**

**SUPERIOR COURT OF JUSTIC E**

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| **B E T W E E N:** | ) | |
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| | ) | |
| Osmany Garcia | ) | |
| | ) | Kevin Mitchell-Gill, counsel for the Plaintiff |
| Plaintiff | ) | |
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| **– and –** | ) | |
| | ) | |
| | ) | |
| Rakib Zaman | ) | |
| | ) | Noura Bagh, counsel for the Defendant |
| Defendant | ) | |
| | ) | |

**HEARD:** November 13, 2025

## RULING ON MOTION

**THE HONOURABLE JUSTICE SUNIL S. MATHAI**

### A. Introduction

[1] The defendant seeks an order granting an extension of time under r. 53.03(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to deliver Dr. Karabatsos's expert Orthopaedic Assessment report.

[2] On November 13, 2025, I released an endorsement granting the motion to extend the time to deliver Dr. Karabatsos's report and ordered the defendant to pay any reasonable costs incurred by the plaintiff in obtaining an expedited reply report. In the endorsement, I advised that written reasons would be provided at a later date. These are my reasons.

## B. Background Facts

[3] What follows is a brief summary of the facts that are uncontested. In the law and analysis section of these reasons, I make factual findings on issues that are contested.

[4] The action arises out of an accident that occurred at the defendant's residence. The plaintiff issued his statement of claim on July 5, 2021. In the claim, the plaintiff seeks $2,500,000 in damages.

[5] The statement of claim alleges that in August 2019, Mr. Garcia fell backwards down a flight of stairs while moving into the defendant's basement apartment. Mr. Garcia alleges that he suffered serious injuries as a result of the fall.

[6] The defendant was noted in default in March 2022. On the consent of the parties, the noting in default was set aside.

[7] The defendant served a statement of defence and jury notice on April 9, 2024.

[8] On October 22, 2024, the plaintiff served an expert report from an orthopaedic surgeon. On December 4, 2024, the plaintiff served an expert income loss report.

[9] The plaintiff's discovery was completed on February 5, 2025. There were 16 undertakings arising from the discoveries, some of which required the production of the plaintiff's medical records. On March 1, 2025, the plaintiff served answers to a few undertakings primarily relating to the plaintiff's litigation loan and his Ontario Works file.

[10] On April 24, 2025, Mr. Mitchell-Gill emailed counsel with carriage of the file at TD Insurance ("Trial Counsel") proposing dates for a "JPT" in December 2025 and January 2026. On April 28, 2025, Mr. Mitchell-Gill sent another email to Trial Counsel advising that Calendly was now offering October 24 for a "JPT date". On the same day, Trial Counsel advised that he was in trial sittings in October and was not available on the earlier dates proposed.

[11] On July 18, 2025, Mr. Mitchell-Gill proposed additional dates for a "JPT". Trial Counsel's legal assistant wrote back and confirmed Trial Counsel's availability on August 22, 2025. As a result, Mr. Mitchell-Gill booked the August 22, 2025 date and advised that "pre-trial materials" would be sent soon.

[12] On July 22, 2025, Trial Counsel sent an email to Mr. Mitchell-Gill advising that he could not proceed with the August 22 date because a "new client" had to be appointed on the file and it

was unclear whether the "new client" was available on that date.[1] Trial Counsel asked that the August 22 date be "vacated". A similar email was sent on July 28, 2025.

[13] On July 31, 2025, Trial Counsel emailed Mr. Mitchell-Gill and advised that his client was not agreeable to proceed with the "PTC" as the defendant had not obtained any expert reports, the client was not available on August 22 and there were undertakings that remained outstanding.

[14] Mr. Mitchell-Gill refused to "vacate" the August 22 date.

[15] On August 12, 2025, the plaintiff served a pre-trial brief which included an expert engineering report. In his affidavit, Trial Counsel states that the engineering report had not been previously served.

[16] On August 18, 2025, Trial Counsel requested that Mr. Mitchell-Gill consent to an extension for the deadline for the service of expert reports until December 22, 2025. Mr. Mitchell-Gill did not consent.

[17] On August 20, 2025, Trial Counsel emailed Mr. Mitchell-Gill and advised that when the August 22, 2025 date was selected, he was under the mistaken belief that Mr. Mitchell-Gill was seeking a "To be Spoken To" or "Assignment Court" date. Trial Counsel believed that a pre-trial date would be selected at this appearance. In his email, Trial Counsel stated that he is, "a junior lawyer and ought to have realized the error before agreeing to the pre-trial conference". As a professional courtesy, Trial Counsel sought an adjournment of the pre-trial conference.

[18] On August 20, 2025, Mr. Mitchell-Gill emailed Trial Counsel and advised that he would not adjourn the pre-trial conference and that he had inadvertently failed to serve and file a trial record, which he attached to the email.

[19] On the same day, Trial Counsel emailed the trial coordinator requesting that the pre-trial conference be adjourned. Trial Counsel explained his misunderstanding and advised that he realized his error on July 18, 2025 when Mr. Mitchell-Gill stated that he would deliver "pre-trial materials". In response, the trial coordinator advised that the adjournment request could be made to the judge conducting the pre-trial conference.

[20] The pre-trial conference proceeded before Justice Fraser on August 22. Fraser J. denied the adjournment request because: (a) the action was six years old; (b) dates for pre-trial conferences are difficult to obtain; and (c) granting the adjournment would prevent the action from being placed on the January trial sitting list.

[21] On September 3, 2025, the plaintiff completed an orthopaedic assessment with Dr. Karabatsos. Trial Counsel served Dr. Karabatsos's expert report on October 8, 2025.

[22] On November 11, 2025, Mr. Mitchell-Gill served several answers to undertakings arising from the plaintiff's discovery.

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[1] By "new client", Trial Counsel meant "new adjuster".

[23] The trial is scheduled to commence during the January 2026 sittings.

## C. Law & Analysis

### *(i) Governing Principles*

[24] The applicable rules are as follows:

> ***Experts' Reports***
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> **53.03** (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
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> (2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).
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> …
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> ***Sanction for Failure to Address Issue in Report or Supplementary Report***
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> (3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,
>
> (a) a report served under this rule;
>
> (b) a supplementary report served on every other party to the action not less than 45 days before the commencement of the trial; or
>
> (c) a responding supplementary report served on every other party to the action not less than 15 days before the commencement of the trial.
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> ***Extension or Abridgment of Time***
>
> (4) The time provided for service of a report or supplementary report under this rule may be extended or abridged,
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> (a) by the judge or associate judge at the pre-trial conference or at any conference under Rule 77;
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> (b) by the court, on motion; or
>
> (c) on the written consent of the parties, except that the parties may not consent to an extension that would affect the scheduled trial date.

…

**Evidence Admissible only with Leave**

**53.08** (1) If evidence is admissible only with leave of the trial judge under a provision listed in subrule (2), leave may be granted if the party responsible for the applicable failure satisfies the judge that,

(a) there is a reasonable explanation for the failure; and

(b) granting the 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.

(2) Subrule (1) applies with respect to the following provisions:

…

5. Subrule 53.03 (3) (failure to comply with requirements re experts' reports).

[25] Rule 53.08(1) applies to a motion to extend the time for service of expert reports (*Van Belois v. Bartholomew*, 2023 ONSC 5799, at para. 14). The party seeking an indulgence must establish both that there is a reasonable explanation for missing the deadline and that granting leave would not cause noncompensible prejudice or cause a delay in the conduct of the trial.

[26] In *Agha v. Munroe*, 2022 ONSC 2508, Edwards R.S.J. reviewed the jurisprudence that led to the amendment of r. 53.08. Edwards R.S.J. found that the amendment changed the test for granting leave to file late expert reports:

> [18] Fundamentally, the aforesaid amendment, in my view, will result in a change in how trial judges will be required to consider motions that essentially ask for an indulgence resulting from the late service of an expert report and the admissibility of that evidence at trial. Where the old rule provided that leave of the trial judge "shall be granted", the new rule now is permissive using the language "may be granted".
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> …
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> [25] The new rule provides that leave "may be granted". The old rule provided that leave "shall be granted". The court, when confronted with a request for the late service of an expert's report to enable a party to call that expert at trial must be satisfied that there is a reasonable explanation for the failure to serve the experts reports within the timelines specified by the Rule.

[27] Finally, Edwards R.S.J. stated, at paras. 30 and 32:

> [30] … The purpose of the new rule is, in my view, clear and obvious. The first purpose is to send a very loud and clear message to all sides of the Bar, that expert reports are to be served in a timely manner and in accordance with the provisions of Rule 53.03(1) and (2).
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> …
>
> [32] Lawyers and litigants need to adapt to the new rule immediately. The late delivery of expert reports simply will not be rubber-stamped by the court. By shifting the onus to the party seeking the indulgence and changing the word "shall" to "may", the exercise of the court's discretion will, in my view, result in far fewer adjournments and more productive pre-trials. There will always be circumstances that are beyond the control of counsel and the parties which will fall within the definition of a "reasonable explanation" for failing to comply with the timelines for the service of expert reports. In this case, no such reasonable explanation was provided to the court.

[28] The amendment to r. 53.08 had the effect of raising the bar for when leave to file a late expert report will be granted (see *Agha*, at para. 19; *Pinchin v. Ikemoto*, 2025 ONSC 3575, at para. 58; *Vaillancourt v. R.K. Mooney Insurance Brokers Ltd.*, 2025 ONSC 6761, at para. 47). As a result, decisions under the older version of r. 53.08 must be approached with caution (see *Vaillancourt*, at para. 42).

[29] With respect to a "reasonable explanation", this court has repeatedly found that "inattentiveness" to an action is not a reasonable explanation (see *Mohamud v. Juskey*, 2023 ONSC 4414, at para. 58; *Longo v. Westin Hotel Management, L.P.*, 2024 ONSC 3676, at para. 12). However, this court has also found that "inadvertence" can constitute a reasonable excuse, though there are some decisions that have found that "inadvertence" is on the "low end" of a reasonable explanation (see *Quinn et al v. Rogers et al.*, 2024 ONSC 1967, at para. 25; *Seo v. Francis*, 2024 ONSC 4341, at para. 28; and *Rosato et al v. Singh et al*, 2025 ONSC 1798, at para. 37).

***(ii) Positions of the Parties***

[30] Ms. Bagh, who had no previous involvement in this action prior to the motion, argues that Trial Counsel missed the deadline due to inadvertence. At the time the pre-trial was scheduled, Trial Counsel did not appreciate that he had agreed to an August 22 pre-trial conference. Ms. Bagh goes on to argue that granting the motion will not cause any prejudice to the plaintiff, nor will it delay the start of the trial.

[31] The plaintiff argues that Trial Counsel's evidence is not believable.[2] The plaintiff also argues that the defendant should have obtained an expert report well in advance of scheduling the pre-trial conference and the failure to do so is evidence of "inattentiveness".

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[2] Due to time constraints, Trial Counsel was not cross-examined.

### *(iii) Application of Governing Principles*

[32] I start my analysis by resolving a factual dispute: Did Trial Counsel inadvertently schedule a pre-trial conference on July 18, 2025?

[33] The plaintiff's main challenge to Trial Counsel's evidence is two fold: (1) the acronym "JPT" does not stand for "To Be Spoken To" or "Assignment Court" and "JPT" is commonly understood within the bar as meaning a pre-trial conference; and (2) Despite claiming to have known of his error on July 18, 2025, Trial Counsel did not admit his mistake until August 20, 2025. Prior to that date, Trial Counsel proffered several other reasons for adjourning the pre-trial conference.

[34] I reject the plaintiff's first challenge to Trial Counsel's evidence. While it is plain that "JPT" could not stand for "To Be Spoken To" or "Assignment Court," there is also no term "judicial pre-trial" in the *Rules*. The *Rules* speak to "case conferences" and "pre-trial conferences" but does not contemplate "judicial pre-trials".[3] I accept that there may be some within the bar that recognize the term "JPT" as meaning a "pre-trial conference"; however, I do not accept that Trial Counsel should have known that Mr. Mitchell-Gill's use of the acronym "JPT" meant that he was attempting to schedule a pre-trial conference, as opposed to setting an appearance before a judicial officer for the purpose of scheduling a pre-trial conference as is the practice in other regions.[4]

[35] With respect to the plaintiff's second challenge to Trial Counsel's evidence, I share Mr. Mitchell-Gill's concerns. Trial Counsel should have advised Mr. Mitchell-Gill immediately upon becoming aware of his error. Despite his delay, I accept Trial Counsel's evidence that he did not appreciate that he had agreed to schedule a pre-trial conference and that he genuinely believed that he had agreed to an appearance where a pre-trial conference date would be selected. I arrive at this conclusion for the following reasons:

(a) From the defendant's perspective, it would make no sense to schedule a pre-trial conference in circumstances where: (i) an August 22, 2025 date would immediately place the defendant in breach of r. 53.03; (ii) the plaintiff had not complied with all his undertakings; and (iii) an expert report had not been prepared. The plaintiff argues that one possible interpretation is Trial Counsel did not believe a responding report was necessary. I reject this argument. The plaintiff is claiming over 2 million dollars in damages and is alleging that the plaintiff suffered serious injuries that have caused significant income loss. In this context, it is not plausible that Trial Counsel would not obtain a responding report.

(b) At the time of requesting dates for a "JPT", Mr. Mitchell-Gill had not delivered a trial record. In the absence of a trial record, Trial Counsel's belief that the "JPT" was an appearance for the purpose of scheduling a pre-trial conference is understandable; and

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[3] Judicial Pre-trials occur in criminal matters. For what it is worth, when I think of a "JPT", I think of criminal matters.

[4] For example, in Toronto, it appears that where the parties request a pre-trial conference date other than the date scheduled by the Court, then the parties must request a case conference using Calendly.

(c) Trial Counsel lacked experience and was not familiar with the trial scheduling process in the Central East Region.

[36] Resolving this issue in favour of the defendant does not determine whether a reasonable explanation has been proffered. I must go on to consider whether the defendant ought to have obtained a responding report prior to scheduling the pre-trial. As noted above, the plaintiff argues that the defendant should have obtained a responding report after the plaintiff served its orthopaedic report in October 2024. The plaintiff goes on to argue that the defendant's failure to obtain a responding report for nearly a year demonstrates that the real explanation for missing the deadline was Trial Counsel's "inattentiveness" to the file. I disagree.

[37] First, it was reasonable for Trial Counsel to wait until after the completion of discoveries to retain a responding expert. Both the plaintiff's discovery evidence and his undertakings relating to medical files would have been important information to provide a responding expert. This type of evidence is routinely provided to experts and it would make little sense to obtain an expert report only to have the expert update the report after the completion of discoveries.

[38] Second, the delay between the completion of discoveries and the scheduling of the pre-trial conference amounts to just over 5 months and does not demonstrate the type of lengthy "inattentiveness" that was found to exist in *Longo* or *Mohamud*, two cases that the plaintiff relies upon.

[39] In *Longo*, the pre-trial was scheduled: (1) two years after the discoveries were completed; (2) two years after a trial record was delivered; and (3) nearly a year and a half before the first of the plaintiff's expert reports were filed. In that case, the defendant knew at least two years prior to the pre-trial conference that the action was ready to proceed to trial. The only explanation for the failure to obtain responding reports in that two-year period was junior counsel's failure to pay attention to the file for significant periods of time. In that context, Edwards R.S.J. found that defence counsel's neglect was not a "reasonable explanation" for missing the deadline imposed by the *Rules* (see *Longo*, at paras. 7 and 11).

[40] In this case, the plaintiff had not passed a trial record nor had the parties attended a mediation. As a result, Trial Counsel was first put on notice that the plaintiff was ready to move the action to trial on April 24, 2025, when Mr. Mitchell-Gill inquired about a "JPT". At that time, Trial Counsel believed that the "JPT" would be for the purpose of *setting* a pre-trial conference. As a result of his error, Trial Counsel believed that a pre-trial conference would be scheduled some time in the future. Trial Counsel was wrong. This error was the direct cause of the defendant's failure to meet its obligation under the *Rules.* Trial Counsel's error demonstrates inadvertence, not inattentiveness.

[41] In *Mohamud*, the defendants sought an order to compel the plaintiff to attend a defence medical examination after a pre-trial conference. The defendants argued that the pre-trial conference date was scheduled by counsel's clerk without checking with counsel. The date selected made it impossible to obtain a responding report in compliance with the *Rules*. At paras. 53–56, Boswell J. found that the defendants' explanation for missing the deadline was not a "reasonable explanation":

> [53] The explanation on offer is that the defendants' clerk agreed to fix a pre-trial date without first consulting with counsel who had carriage of the file. The court is invited to draw the inference that had such a consultation occurred, counsel would have insisted on a pre-trial date farther down the road, so that defence experts' reports could be obtained and served in compliance with the *Rules*. At the very least, in consideration for agreeing to an earlier pre-trial date, defence counsel may have been in a position to negotiate concessions regarding the attendance at defence medical examinations and the late-filing of any reports generated as a result of those examinations.
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> [54] The explanation is, in my view, weak. The case went through a failed mediation and was then set down for trial. The next step in the process is a pre-trial conference. Defence counsel were aware – or ought to have been aware – that the plaintiff's counsel was beginning to seek pre-trial dates as early as April 2022. That should have triggered the realization that if defence expert reports were going to be sought, the time was nigh to go about organizing them. For reasons best known to defence counsel, they did nothing.
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> [55] Having said that, I do accept counsel's explanation regarding how and why his firm agreed to a date for a pre-trial that immediately compromised their ability to comply with r. 53.01. That was obviously an inadvertent error.
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> [56] The central question is whether one could describe the explanation as reasonable. In my view, one cannot. The explanation is understandable, but that does not make it reasonable. Certainly not when considered in the context of the culture change that the recent amendments to the *Rules* was intended to stimulate. It regrettably took almost a year and a half for the parties to obtain a pre-trial date after the plaintiff set the action down for trial. The defendants' explanation for why its expert reports were not served prior to the pre-trial turns on something that happened in December 2022. *It offers no explanation for why the defendants had not sought out defence medicals at any point between November 2021 – when the case was set down for trial – and December 2022*. [Emphasis added.]

[42] I fully agree with Boswell J.'s reasons. That said, *Mohamud* is distinguishable from the case before me. Boswell J. found that counsel's explanation was "weak" because counsel knew, as early as November 2021, that the action was ready to proceed to trial. Having known that the action was ready to proceed to trial, counsel should have obtained expert reports in the one year leading up to December 2022 when the pre-trial was scheduled. That same finding is not available in this case.

[43] As described in para. 40 above, Trial Counsel first became aware that the plaintiff was prepared to proceed to trial on April 24, 2025. At that time, Trial Counsel mistakenly believed that the pre-trial conference would be scheduled *after* the "JPT" appearance. Trial Counsel's misunderstanding explains why an expert report was not obtained during the time between when he first had knowledge that the plaintiff was prepared to proceed to trial (i.e., April 24, 2025) and July 18, 2025, when the pre-trial conference was scheduled. Again, this is inadvertence, not inattentiveness. If Trial Counsel had known that the plaintiff was seeking to schedule the actual

pre-trial on April 24, 2025, then I would have had no difficulty finding that a responding report was not obtained due to "inattentiveness". These circumstances, however, did not materialise in this case.

[44] For the reasons identified above, I accept that the defendant missed the deadline due to inadvertence and that Trial Counsel has provided a "reasonable explanation" for missing the deadline.

[45] Finally, I find that the defendant has established that granting the motion will not cause any prejudice to the plaintiff that could not be compensated for by costs. I also find that granting the motion will not cause undue delay in the conduct of the trial. I ordered the defendant to pay the reasonable costs for obtaining an expedited reply report. As a result, the trial need not be adjourned and the plaintiff will have an opportunity to respond to the defendant's expert report before trial.

[46] During oral argument, Mr. Mitchell-Gill conceded that he has not taken any steps since being served with the responding report to determine whether the plaintiff's expert can prepare a reply report in advance of the January trial sittings. As a result, there is no evidence before me that establishes that a reply report, which would not require an additional medical assessment, cannot be obtained prior to the start of the trial.[5]

[47] In light of the above, I grant the defendant's motion.

[48] The plaintiff did not seek leave to file the engineering report which appears to have been served after the deadlines imposed by the *Rules*. As such, I make no ruling or findings with respect to the engineering report.

## D. Costs

[49] While the defendant was successful on the motion, this is not a case where costs are appropriate. Mr. Mitchell-Gill's conduct and position on this motion was reasonable. As such, I order no costs.

[5] I provided a "bottom line" ruling on November 13, 2025. This ruling provided the plaintiff with at least a month and a half to obtain a reply report.

The Honourable Justice Sunil S. Mathai

**Released:** December 17, 2025