CITATION: Ramlingum v. Doe, 2025 ONSC 535
COURT FILE NO.: CV-20-00641427-0000
DATE: 20250127

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Audrianna A. Ramlingum

AND:

John Doe and Co-Operators General Insurance Company

BEFORE: J.T. Akbarali J.

COUNSEL: *Michael Giordano*, for the plaintiff

Hugh G. Brown, for the defendant Co-Operators General Insurance Company

HEARD: January 24, 2025

ENDORSEMENT

Overview

[1] The plaintiff moves for an order amending her claim to continue this action under the simplified procedure, which will necessitate striking the jury notice filed by the defendant. The defendant resists the order, arguing it will be prejudiced if it loses its right to a jury trial, and that in any event, the trial will require significantly more time to be heard than the five-day limit prescribed by the simplified procedure rules.

Background

[2] The plaintiff was involved in a motor vehicle accident on October 6, 2018, caused by an unidentified driver. Liability is not an issue at trial.

[3] The defendant Co-Operators General Insurance Company underwrote the plaintiff's insurance policy. She has claimed against Co-Operators pursuant to the unidentified vehicle portion of the policy.

[4] The statement of claim was issued on May 25, 2020 under the ordinary procedure, seeking damages of $1,000,000.

[5] Co-Operators filed a statement of defence, crossclaim, and jury notice on January 27, 2021. Among other things, the defence pleads that the claim should have been commenced under the simplified procedure.

[6] The plaintiff was examined for discovery on June 21, 2021 in less than three hours. No other examinations were conducted, as the defendant driver remains unidentified.

[7] A mediation proceeded on February 9, 2022, but the matter did not resolve.

[8] On February 15, 2022, the plaintiff advised of her intention to transfer the action into the simplified procedure. She states that following examinations and receipt of productions to satisfy her undertakings, and in preparation for the mediation, the plaintiff reassessed her claim and determined that her damages fall within the simplified procedure limits. She also notes that her examination for discovery was conducted within the time limits prescribed by the simplified rules, albeit by chance.

[9] The defendant originally indicated it was unopposed to the transfer, but thereafter advised that it was opposed on the basis that the trial would take longer than the five days permitted under the simplified rules. As I have noted, it also seeks to preserve its right to trial by jury.

[10] The defendant conducted surveillance of the plaintiff, both before discovery and after. Some of the surveillance, conducted on December 20, and 21, 2022, was in error conducted on the plaintiff's sister, who is similar in appearance. Most recently, surveillance of the plaintiff was conducted in February 2023. Although the defendant argues there are hours of surveillance, it is apparent from the reports in the record that the surveillance video that actually shows the plaintiff is brief.

[11] This action has not yet been set for trial. No pre-trial date has been set. No expert reports have been exchanged.

[12] On consent, the plaintiff amended her statement of claim to bring her claim within the monetary limits of the simplified procedure. She seeks general and special damages in the amount of $200,000. The claim pleads that the plaintiff sustained a significant loss of income, a significant loss of competitive advantage in the workplace, and a significant reduction of future earnings. It alleges she will require medical and rehabilitative treatment, and as such will incur ongoing health care expenses. It also alleges a compensable inability to participate in household activities.

[13] By endorsement of March 12, 2024, Chalmers J. made it clear that the order permitting the amendment of the claim to reduce the amount claimed to $200,000 did not include a provision transferring the matter to the simplified rules. Whether the action should be transferred, which as I have noted also requires that the defendant's jury notice be struck, is the subject of this motion.

Amendment of the Claim to Continue under the Simplified Procedure

[14] Under r. 26.01, the court "shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment."

[15] Under r. 76.02(7), an action that is not commenced under the simplified procedure is continued under the simplified procedure: (i) on consent; (ii) where no consent is filed, but the plaintiff's pleading is amended under r. 26 to comply with r. 76.02(1) and all other claims,

counterclaims, crossclaims and third party claims comply with the rule; or (iii) a jury notice delivered in accordance with subrule 76.02.1(2) is struck out.

[16] Here, there is no consent. The plaintiff's pleading has already been amended to reduce the amount claimed to bring it within the monetary limits of the simplified procedure. However, the jury notice has not been struck out. If the motion to amend the pleading to continue the action under the simplified rules is granted, the consequence is that the action cannot be tried by jury, and the jury notice must be struck: r. 76.02.1; see also *Lightfoot v. Hodgins et al.*, 2021 ONSC 1950, at para. 51.

[17] There are two issues raised by this motion:

a. Would permitting the amendment of the claim to continue the proceeding under the simplified rules result in prejudice to the defendant that cannot be compensated for by costs or an adjournment because it will limit the trial to five days?

b. Would permitting the amendment of the claim to continue the proceeding under the simplified rules result in prejudice to the defendant that cannot be compensated for by costs or an adjournment because it will require the jury notice to be struck?

Trial Length

[18] The plaintiff argues that a summary trial can be completed within five days. At the hearing of this motion she undertook to call only one expert witness, a physiatrist. In addition, she expects to call a friend or family member, and her employer, in addition to her own evidence. If the trial is conducted under the simplified procedure, all the witnesses will lead evidence in chief by affidavit.

[19] The defendant argues that the time required for trial is greater than five days. In its motion materials, the defendant notes that the plaintiff claims physical and emotional injuries as a result of the accident. The defendant's affiant deposed that the defendant would thus require at least two experts: a physiatrist or orthopaedic surgeon to address the plaintiff's physical injuries, and a psychologist or psychiatrist to address her emotional injuries.

[20] The defendant's affiant also noted that the plaintiff claims loss of income, loss of competitive advantage, a reduction in future earnings, ongoing medical and rehabilitative treatment expenses, and a compensable inability to participate in household activities. The defendant thus anticipated requiring expert evidence in relation to the income loss claim, the medical rehabilitation claim, and the housekeeping claim.

[21] However, in view of the plaintiff's undertaking to call only one expert, the physiatrist, at the hearing of the motion the defendant agreed that it would need only one responding expert physiatrist.

[22] In addition to the experts, the defendant anticipates calling the investigator who undertook the surveillance of the plaintiff. Further surveillance may be obtained. The defendant estimates a

day will be required for examination in chief of the investigator, and a half day for cross-examination. I do not accept this estimate. The surveillance footage showing the plaintiff is brief. I can see no reason why the investigator's evidence would take anywhere near a day and a half, even if further surveillance were obtained. Moreover, I see no reason why the examination in chief of the investigator could not be led effectively by affidavit.

[23] Defendant's counsel advises that the investigator also investigated the plaintiff's social media activity, and that investigation needs to be updated. The update may be conducted by the same, or a different, investigator. Counsel advised that the evidence in chief of the social media investigator would be led by affidavit, and then hastened to add that it would be led orally if the trial proceeded under the ordinary rules. In my view, counsel's original statement is consistent with my own view, that there is no reason why the investigator's evidence could not be led by affidavit.

[24] The defendant, in its material, estimates cross-examination of the plaintiff will take at least one day. Its examination for discovery of the plaintiff, done after the defendant had obtained two rounds of surveillance, lasted less than three hours when it proceeded under no time restriction. I do not accept that her cross-examination at trial would require a full day.

[25] The defendant also anticipates a threshold motion.

[26] In total, the defendant's evidence is that the trial will take, at minimum, eight days, and more likely ten to fifteen days.

[27] The plaintiff argues that the time required for trial is properly addressed at the pre-trial conference, and is not grounds to prohibit the amendment to the claim to proceed under the simplified procedure.

[28] I disagree. If a fair trial cannot realistically be completed within five days, an action is not suitable for transfer to the simplified procedure.

[29] However, in view of the plaintiff's undertaking to call only one expert, and two lay witnesses in addition to her own evidence, I see no reason why this trial could not be completed within five days. I agree with Chalmers J. who said, in his endorsement of November 24, 2023 in this action, that with some trial management by the trial judge, a straightforward motor vehicle action in which there is no claim for future care costs, and limited claims for loss of income can be tried in five days.

[30] The fact that case management can be employed to properly manage a trial in the simplified procedure has been recognized by this court. In *Borkowski v. Karalash et al.*, 2023 ONSC 6274 Rashiah J. struck a jury notice and continued a proceeding under the simplified rules, in a proceeding involving five experts, participant health care providers, lay witnesses, seven hours of surveillance footage and over 1200 pages of medical records. In considering the defendant's argument that the trial would take longer than five days, she held, at para. 77:

> While there are a number of witnesses and videos to content with, there are many mechanisms that can be discussed/used to narrow oral testimony including but not limited to preparation of affidavits and/or agreed statements of fact. Examination in chief by affidavit and restrictions on cross-examination can reduce the amount of time needed. Further directions can be placed by a judge including but not limited to the filing of joint exhibit books, excerpts of videos, and/or service of requests to admit facts and/or documents that could shorten the trial evidence.

[31] I conclude that, with proper trial management, this trial of this action can be fairly and efficiently heard within the time limits provided in the simplified procedure. Limiting the trial to five days will not cause the defendant non-compensable prejudice.

Jury Notice

[32] The defendant argues that it will suffer non-compensable prejudice if it is denied the right to proceed to trial by jury. It argues it has developed its litigation strategy and resources based on its reasonable expectation that this trial would be heard by a jury in the ordinary procedure, not a five-day summary trial. It refers to the surveillance it conducted, and its social media investigation.

[33] In *Louis v. Poitras*, 2021 ONCA 49, at para. 17, the Court of Appeal for Ontario held that, while a court should not interfere with the right to a jury trial in a civil case without just cause or compelling reasons, a judge considering a motion to strike a jury notice has broad discretion to determine the mode of trial.

[34] In a motion to strike a jury notice, the onus is on the party seeking to strike the jury notice to show that there are features in the legal or factual issues to be resolved, in the evidence, or in the conduct of the trial, which merit the discharge of the jury: *Cowles v. Balac*, 2006 CanLII 34916 (ONCA), at para. 30; see also *Thomas v. Aviva*, 2022 ONSC 1728, at para. 51.

[35] Section 108(3) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 gives the court the discretion, on motion, to order that issues of fact or damages be tried without a jury.

[36] Rule 1.04(1) of the *Rules of Civil Procedure* provides that the *Rules* should be liberally construed to secure the just, most expeditious, and least expensive determination of every civil proceeding on its merits.

[37] In *Borkowski*, Rasiah J. noted that preparation for a civil jury trial is more extensive than for a judge-alone trial, and that a jury trial takes longer to complete than a judge-alone trial. She noted that motor vehicle accident cases are not among those which r. 76 acknowledges may require trial by jury. Rather, she held, that there is "no specific functional litigation disadvantage to the defendant in having the case adjudicated by an impartial and independent judge instead of an impartial and independent jury": para. 58. Rasiah J. found that, based on the amount in dispute and the complexity of the issues, the proportionate result supported striking the jury and ordering the case to be tried under the simplified procedure: para. 65.

[38] In *MacLeod v. Canadian Road Management Company*, 2018 ONSC 2186, Myers J. noted that the right to a civil jury trial might have to "yield in appropriate cases in order to provide the parties with an expeditious, affordable, and proportionate resolution that is fair and, especially, one that is 'just' as we currently comprehend that term": para. 32.

[39] At the same time, the court has recognized that the right to a jury trial is a substantive right, "not absolute, but important": *Andres v. Rasheid*, 2022 ONSC 3317, at para. 18. In *Andres*, D. Wilson J. (as she then was) declined to strike the jury notice and continue the proceeding under the simplified procedure when doing so would delay the proceeding, in which a trial date had been set, and the request to do so appeared motivated by tactical reasons: paras. 14, 18.

[40] Implicit in the defendant's argument that its litigation strategy was developed for a jury trial is the idea that surveillance evidence or social media evidence will have more sway with a jury than a judge. I disagree. Rather, I agree with Rasiah J. that there is no specific functional litigation disadvantage to the defendant in proceeding to trial by judge alone than proceeding to trial by jury.

[41] At para. 33 of its factum, the defendant enumerates the prejudice it alleges it will suffer if it is denied a jury trial. Many of the points it raises come from a 1996 report of the Ontario Law Reform Commission on civil jury reform. For example, the prejudice alleged includes that, by denying a defendant the right to a jury trial, it will be "deprived of the 'law of the land' which is 'not broken but instead working as intended.'" I disagree that denial of a jury trial deprives a defendant of the law of the land. Judges administer the law of the land too. Denial of a jury trial deprives a defendant of a jury, a decision that lies within the broad discretion of the court to make, and in connection with which a court may consider the process that will best provide the parties with "an expeditious, affordable, and proportionate resolution that is fair and, especially, one that is 'just.'"

[42] Read as a whole, the 29-year old report from which the defendant draws generic statements of what it claims is prejudice by having to proceed by judge alone, supports reform of the civil jury system. Moreover, it is based on statistics from 1992 and 1993. Its value as a resource in today's civil justice system is questionable.

[43] In my view, striking the jury notice and requiring this matter to be heard by judge-alone trial does not result in non-compensable prejudice. Rather, the defendant would be able to adduce the same evidence before a judge alone, and receive a fair trial on the merits. The process would be more proportionate having regard to the amount in issue and the complexity of the trial.

[44] My conclusion that there is no non-compensable prejudice to the defendant is consistent with the defendant's own pleading that the action should have been commenced under the simplified procedure.

[45] Moreover, continuing the proceeding under the ordinary procedure will add delay and expense, both of which will prejudice the plaintiff, and the defendant, when the simplified procedure is adequate to try the action fairly.

Conclusion

[46] The trial shall proceed under the simplified procedure. The jury notice is struck.

Costs

[47] Prior to the hearing of the motion, I directed the parties to upload costs outlines and any relevant offers to settle. I suggested that I would proceed to determine costs based on the materials uploaded, without further submissions, after I reached a decision on the merits of the motion. The parties made brief submissions on costs and the hearing, and otherwise agreed with my suggestion. That is the process I have followed.

[48] The plaintiff is the successful party and is presumptively entitled to her costs. The plaintiff's costs outline supports partial indemnity costs, all inclusive, of $7,371.27. The defendant's costs outline supports partial indemnity costs of $13,164.05.

[49] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330, at para. 22.

[50] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (Ont. C.A.), at para. 38. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[51] In considering the quantum of the plaintiff's fair and reasonable costs, I note the following:

a. The plaintiff's costs are significantly lower than the defendant's costs, and as such, are within the defendant's reasonable expectations;

b. Both parties' costs were increased as a result of the plaintiff's error in originally bringing this motion to be heard by an Associate Justice. However, the work done was largely repurposed into the materials for this motion, so the costs thrown away are minimal;

c. Another error led to a case conference before Chalmers J. that would have otherwise been unnecessary;

d. This motion was not particularly complex.

[52] In these circumstances, I find that costs of $6,500, all inclusive, are fair and reasonable. The defendant shall pay the plaintiff's costs within thirty days.

Summary of Orders

[53] In summary, I make the following orders:

a. The plaintiff's motion to amend her pleading to continue this proceeding under the simplified procedure is granted.

b. The jury notice shall be struck.

c. The defendant shall pay to the plaintiff her costs fixed at $6,500 within thirty days.

J.T. Akbarali J.

Date: January 27, 2025