

**CITATION:** Legree v. Origlieri, 2021 ONSC 2850  
**COURT FILE NO.:** 84/18  
**MOTION HEARD:** 20210412

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** LAURA K. LEGREE, Plaintiff

**AND:**

TONYA L. ORIGLIERI, Defendant

**BEFORE:** MILLER J.

**COUNSEL:** S. Pickering, for the Plaintiff

H. Nguyen, for the Defendant

**HEARD:** April 12, 2021

**ENDORSEMENT**

[1] The Plaintiff in this personal injury action brings a motion to strike the Defendant's Jury Notice, allowing this action to proceed virtually by a Judge alone trial as scheduled in May of 2021 or as soon after as it can be heard virtually by a Judge alone. The Plaintiff seeks an order that would provisionally strike the jury notice, such that if a jury trial is available at the point the trial can be reached, the jury notice would be automatically reinstated. The Plaintiff submits that the provisional striking of the jury notice is necessary to provide access to justice at a time when jury trials are not available to litigants due to restrictions relating to the ongoing COVID-19 pandemic.

[2] The Defendant opposes the striking of her jury notice. She submits that she is not ready to proceed to trial in the sittings beginning May 10, 2021 in any event, and that the Court should adopt a "wait and see" approach, as in *Weaver v. Clunas*, 2021 ONSC 2364, permitting the Plaintiff to renew her motion to strike the jury notice, if, when the matter is ready for trial, no jury trials are available.

Background

[3] This action arises from a motor vehicle collision on August 19, 2016.

[4] The action was commenced by Statement of Claim issued on May 9, 2018. The Defendant delivered a Statement of Defence dated June 27, 2018 and a Jury Notice dated June 6, 2018.

[5] Examinations for Discovery were completed on July 12, 2019. The Trial Record was served and filed on August 15, 2019. A Pre-Trial Conference took place on August 28, 2020.

The action was placed on the May 2021 trial sittings, with an estimated time for trial of three weeks. The Assignment Court for those sittings is April 19, 2021.

[6] The Plaintiff has obtained and served five expert reports on the issue of damages.

[7] The Defendant submits that despite the fact that the Plaintiff's expert reports were authored in March through May 2020, four of the reports were delivered in August 2020, just days before the pre-trial on August 28, 2020. Two of the reports - the Economic Loss Report and Future Cost of Care Report - were delivered as attachments to the Plaintiff's pre-trial conference brief.

[8] The trial is scheduled to proceed in Orangeville, Ontario. In the latest Notice to the Profession, the Chief Justice of the Superior Court of Ontario has determined that the earliest jury trials will resume in Central West Region will be June 7, 2021.

#### The Law on Striking a Jury Notice

[9] The Plaintiff seeks leave to bring this motion on the basis that the COVID-19 pandemic and consequent impact on court proceedings, and in particular the suspension of jury trials in Ontario, amount to a substantial or unexpected change of circumstances, as contemplated in Rule 48, since the filing of the trial record. The Plaintiff further submits that leave to bring the motion should be granted as it is in the interests of justice.

[10] The Defendant does not oppose the granting of leave to bring the motion.

[11] Leave is granted to bring the motion.

[12] The parties agree on the law as it pertains, generally, to the striking of jury notices.

[13] Rule 47.01 of the *Rules of Civil Procedure* R.R.O. 1990, Reg. 194 provides that a party may require that the issues of fact and assessment of damages be tried by a jury by delivering a Jury Notice.

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

[15] The right to trial by jury in a civil case is a substantive right. However, it has been recognized that that substantive right is a procedural entitlement that yields to the overriding interests of justice.

[16] As noted in *Cowles v Balac*, [2006] O.J. No. 4177 (C.A.) at paras 38-39, the Court has a broad discretion to determine whether justice to the parties will be better served by discharging the jury. It recognizes that the paramount objective of the civil justice system is to provide the means by which a dispute between parties can be resolved in the most just manner possible. The object of a civil trial is to provide justice between the parties, nothing more.

[17] Other principles recognized in the *Cowles v Balac* decision are that:

If a litigant is entitled to trial by jury, that right is a fundamental substantive one, and a trial judge should not interfere with it without just cause or cogent reasons;

A party moving to strike a jury notice bears the onus;

The test to strike a jury notice is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury.

[18] In *MacLeod v Canadian Road Management Company*, 2018 ONSC 2186 at para 32, the Court indicated that in exercising discretion with respect to striking a jury notice, the Court must react to the realities facing civil litigants and the civil justice system. Where systemic realities impair the court's ability to provide jury trials in an expeditious, affordable, proportionate way, these realities may impair access to civil justice. The right to a civil jury trial might therefore have to yield, in appropriate cases, in order to provide the parties with an expeditious, affordable, and proportionate means of reaching a resolution that is fair and just.

[19] There have been a number of cases in which the impact of the pandemic, and in particular delay occasioned by it, has been the central issue in decisions whether to strike jury notices. A number of courts have adopted a "wait and see" approach whereas others have granted such motions. A number of factors have been taken into consideration in these cases including, as summarized in *Solanki v. Reilly*, 2020 ONSC 8031, at para 21:

- (a) Regional or even local differences with respect to the resources available to the court;
- (b) Regional differences in how the pandemic has affected the community where the trial is to be conducted;
- (c) The date of the incident giving rise to the action;
- (d) The time between the motion to strike and the trial date;
- (e) The number of times a case has been previously adjourned; and
- (f) The specific circumstances of the parties.

[20] More recently courts have taken the provisional approach which is the relief sought by the Plaintiff, to conditionally strike the notice and order that it be automatically reinstated in the event that jury trials are available at the time the matter is called for trial.

[21] In *Louis v. Poitras*, 2020 ONCA 815, on motion to stay the order of the Divisional Court, Brown J.A. recognized that delay in obtaining a date for a civil jury trial can, by itself, constitute prejudice and justify striking out a jury notice. At paras 41-43 Brown J.A. indicated:

[41] That "rather broad discretion" currently is exercised by judges in an environment influenced by two key factors, one external to the court system and one internal to it.

[42] The external factor is the reality of COVID-19's profound effect on the means by which Ontario courts can continue to offer their services to the public.

[43] The internal factor stems from the Supreme Court of Canada's description of our court system as one marked by a mind-set of "complacency" and a willingness "to tolerate excessive delays": *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at paras. 4 and 29. In *Jordan and Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, the Supreme Court called for a "cultural shift" (*Hryniak*, at para. 2) and a "change of direction" (*Jordan*, at para. 5). While the long duration of the pandemic has many actors in the civil justice system desiring to "return back to normal", one must not forget that the "good old ways" caused unacceptable delays and are the very ways that the Supreme Court in *Hryniak* and *Jordan* has charged the court system to discard."

[22] In the appeal decision at *Louis v. Poitras*, 2021 ONCA 49 at para 22, the Court of Appeal agreed that "delay in obtaining a date for a civil jury trial can, by itself, constitute prejudice and justify striking out a jury notice." The Court of Appeal stated that due exercise of judicial discretion should take into account the differing local circumstances, including current conditions in the specific location that may limit the range of methods available for safely selecting juries and holding jury trials.

#### Prejudice to the Plaintiff if the Jury Notice is Not Struck

[23] The Plaintiff submits that the prejudice to her from delay outweighs any prejudice to the Defendant from losing her preferred mode of trial. The Plaintiff submits that a trial by a Judge alone still assures the Defendant of a just determination of the issues on their merits.

[24] In addition to the prejudice inherent to delay as recognized by the Court of Appeal in *Louis v. Poitras*, the Plaintiff submits that she will suffer particular prejudice if the trial does not proceed as currently scheduled.

[25] For the purpose of proving her damages, the Plaintiff has obtained and served five expert reports, including Neurologist, Dr. Basile dated March 12, 2020; Chronic Pain Specialist, Dr. Friedlander, dated March 11, 2020; Psychologist, Dr. Miller and Psychotherapist, Allan Walton, dated April 30, 2020; Rehabilitation Consultant, Marla Tennen, dated May 13, 2020; and Economist, Saqib Durrani, dated May 22, 2020. If the Jury Notice is not struck, the Plaintiff will have to incur the expense of updating these reports.

[26] The Plaintiff points out that as the *Insurance Act* limits past income loss claims to 70% of income losses, the injured Plaintiff will statutorily lose 30% of her income losses during any trial delay. If the Defendant were permitted to adjourn the trial for the potential, and as-yet-uncertain, possibility of a future jury trial, the injured Plaintiff would continue to lose 30% of all income loss sustained by her during that period of time and the Defendant would unfairly reap the resulting windfall.

[27] The Plaintiff is trained as a dental assistant. Since the collision, which is the subject of this litigation, the Plaintiff has found alternate employment as a part-time school bus driver. It is her position that she has suffered an income loss for the differential between the income of a dental assistant compared to a part-time school bus driver. This is causing ongoing financial distress to her and her family.

[28] In addition, the Plaintiff submits that as she has been placed in the *Minor Injury Guidelines* by her accident benefits insurer and as a result, she has not been able to get the

treatment she requires. Although she has access to up to \$5,000 as a loan to fund treatment, she has accessed only \$800 of these funds. Her counsel submits that her economic situation is such that interest on the loan is prohibitive. Delay to trial which would determine damages related to future care, and therefore her ability to access funds for treatment impacts on her ability to recover in a timely way.

[29] The Plaintiff submits that the uncertainty as to the timing of resumption of the hearing of jury trials in the province and the likelihood that criminal jury trials will be given priority when jury trials resume means that if the jury notice is not struck, there may be significant delay before this matter can be heard. Any delay is prejudicial, and significant delay will only increase the prejudice to the Plaintiff and benefit the Defendant.

#### Prejudice to the Defendant if the Jury Notice is Struck

[30] The Defendant submits that she will not be ready for trial in the sittings beginning May 10, 2021. The Plaintiff completed the Defence-requested medical assessments March 25, 2021. The Defendant submits that those reports will not be completed in sufficient time before trial to be served as required by the Rules.

[31] The Defendant further submits that her substantive right to a jury trial is particularly important because her insurance will not cover the full amount of the damages sought by the Plaintiff in this action. The Defendant's policy of insurance has third party liability limits of \$1 million. The Plaintiff's Economic Loss Report estimates the loss of income claim to be \$500,000 to \$700,000 and Future Cost of Care to be approximately \$2.4 million. The Defendant will be personally responsible for any judgment over and above \$1 million.

[32] The Defendant submits that this case is distinguishable from other cases in which jury notices were struck, as it has not been adjourned before now, the province is moving in a positive direction toward making jury trials available by advancing the vaccine program such that any delay will not be significant. The Defendant notes that this case is also distinguishable from other cases in which judges have struck jury notices where the plaintiff is elderly with deteriorating poor health condition (*Solanki v. Reilly* 2020 ONSC 8031); immediate need for attendant care assistance (*Cohan v. Declare* 2020 ONSC 7537); or the plaintiff was catastrophically impaired with decreased life expectancy (*Barikara v. Kyei* 2021 ONSC 1636).

#### Analysis

[33] The parties agree that the sole issue on this motion is whether justice to the parties would be better served in this case by the discharge of the jury.

[34] According to the Notice to the Profession of March 17, 2021, subject to further direction from the Regional Senior Justice and public health information, the Ontario Superior Court of Justice anticipates resuming new jury selection and jury trials on June 7, 2021 at the *earliest*, in the Central West Region. The Orangeville Court is part of the Central West Region.



- [35] The Orangeville Superior Court of Justice has distinct sittings. These are differentiated as between criminal and civil sittings although there can be accommodation for civil matters to be heard during criminal sittings if there is room, and *vice versa*.
- [36] This matter is on the Assignment Court list for April 19, 202, AT WHICH TIME THE COURT WILL schedule matters to be heard during the civil TRIAL sittings which run May 10-28, 2021. There are 14 available court days in those sittings due to the May 24 court holiday. The next sittings (designated as criminal) run from June 7-25, 2021; the next civil sittings after that run September 13-October 1, 2021. The next civil sittings after October 1, 2021 are in February 2022.
- [37] This matter has an estimated trial time of 15 days with a jury. Counsel for the Plaintiff estimates that a judge alone trial would take 11-12 days; counsel for the Defendant estimates that even a judge alone trial will take 15 days. I note that while a jury trial must continue with as little interruption as possible to its end, there is more flexibility to schedule a continuation of a judge alone trial if not completed in the time estimated.
- [38] If this matter can be reached in the May 2021 sittings, a jury trial is certainly not available. It is possible that a jury trial would be available from June 7, 2021, but given the length of time required for this trial, it is unlikely to be reached during the criminal sittings beginning June 7, 2021. If not heard during the May 2021 sittings it is unlikely that the trial could be heard before the sittings which begin September 13, 2021.
- [39] The constantly changing pandemic restrictions imposed by the government, as occasioned by the provincial, regional and local impacts of the pandemic, create uncertainty as to when jury trials will resume.
- [40] Even if pandemic restrictions on gatherings of people would permit it, there is uncertainty as to whether jury trials will resume in Central West Region, and in particular at the Orangeville Court, in June 2021 or even in the Fall of 2021 as there is no offsite facility for jury selection for the Orangeville courthouse. While the main courtroom for the Superior Court in Orangeville, Courtroom 204, has been reconfigured such that a civil jury could sit while physically distanced in the courtroom, there is no room large enough at the Orangeville courthouse to practically allow for jury selection while jury panel members are physically distanced. Nor are there the technical facilities to permit jury selection to occur while jury panel members are in different rooms from the presiding judge and counsel.
- [41] The incident giving rise to this action took place in August 2019. It is not the oldest of civil actions which are ready for trial, nor is it the newest. I note that there have been no previous adjournments of the trial.
- [42] In considering the particular circumstances of the parties, I have taken into account the Defendant's submission that her expert reports will not be available to be served, in advance of the trial, in accordance with the *Rules*. The time for service can, of course, be abridged or extended by the Court pursuant to Rule 53.03 (4). Counsel for the Plaintiff has indicated on the record that she would accept short service, as late as May 4, 2021 for the trial commencing May 10, 2021.

[43] I have considered that there is no formal motion for adjournment, and, taking into consideration the circumstances to date, I would not be likely to grant one. This matter was placed on the Assignment Court for the May 2021 sittings in August 2020. Even if the Defendant did not receive the Plaintiff's expert reports until shortly before August 2020, she knew that the action was scheduled for trial in May 2021. Nevertheless, she waited six months, until February 2021, to request the Plaintiff's attendance at defence medical assessments. The Defendant offers no reasonable explanation for her delay, nor was this period of delay caused by the Plaintiff.

[44] I have considered, and place considerable weight on the importance of a jury trial to the defence strategy. In particular I have considered that the Plaintiff's claim exceeds the Defendant's insurance coverage by a significant amount.

[45] I have considered the limits on the Plaintiff's past income loss claims occasioned by the *Insurance Act* as described above. I have further considered that delay in the trial means, in practical terms, delay in access to treatment funds for the Plaintiff.

[46] At this time, the number of COVID-19 cases in Ontario is rising at an alarming rate. There are significant delays reported in the rollout of the vaccine in the province. There is no certain date on which jury trials are certain to resume. Unless the jury notice is struck, this matter cannot proceed as scheduled in May 2021. Any date for resumption of the hearing of jury trials thereafter is uncertain, as discussed earlier.

[47] I have considered the Defendant's submission that the motion should be dismissed at this time but with leave to the Plaintiff to re-argue the motion if, when the matter is ready to be heard, a jury trial is still not available due to the pandemic restrictions. I view this option as one that would cause both parties to incur additional legal costs and consume further court resources unnecessarily.

[48] On balance I find that justice to the parties would be better served by the discharge of the jury, on a provisional basis, such that if, when the matter is ready to be tried, a jury trial is available, the jury notice will be automatically reinstated.

[49] It is therefore ordered that the Jury Notice filed by the Defendant dated June 6, 2018 is struck, allowing the trial of this action to be heard by judge alone. It is ordered that if jury trials are restored before the trial in this matter is heard, the Jury Notice will be reinstated automatically, without the requirement of a motion.

[50] Costs of the motion are reserved to the trial judge.



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MILLER J

**Date:** April 16, 2021