

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
GRANT A. MILLER)
) S. Pickering for the Plaintiff
Plaintiff)
)
– and –)
)
AHMAD PANAHI)
) D. Delaney, for the Defendant
Defendant)
)
)
)
) HEARD: April 1, 2021

2021 ONSC 2693 (CanLII)

REASONS FOR DECISION ON MOTION

Casullo J.

Overview

- [1] The plaintiff brings this motion for an order striking the defendant’s jury notice pursuant to r. 47.02 of the *Rules of Civil Procedure*, R.S.O. 1990, Reg. 194, with a view to having the matter tried, judge-alone, during the Central East Region’s Spring Sittings, which commence on May 17, 2021.
- [2] As the plaintiff has set the action down for trial, leave of the court is required: r. 48.04(1). The defendant does not object to leave being granted.
- [3] It will come as no surprise to the reader that the magnitude and duration of the pandemic represents a substantial and unexpected change in circumstances. Leave is granted to the plaintiff.
- [4] Ontario finds itself in the grips of a third wave of the COVID-19 pandemic. On April 3, 2021, the Ontario government imposed a province-wide emergency brake, which was expected to be in place for at least four weeks. As the related news release advised “[w]e are facing a serious situation and drastic measures are required to contain the rapid spread of the virus, especially the new variants of concern.”

[5] However, on April 7, 2021, Premier Doug Ford declared a third state of emergency:

“The COVID-19 situation is at a critical stage and we must act quickly and decisively to stay ahead of these deadly new variants,” said Premier Ford. “By imposing these strict new measures we will keep people safe while allowing our vaccination program to reach more people, starting with our high risk population and identified hot spots. Although this is difficult, I urge everyone to follow these public health measures and together we will defeat this deadly virus.”¹

[6] A second, province-wide Stay-at-Home order took effect April 8, 2021, which is anticipated to be in place for at least four weeks. This order requires everyone to remain at home except for essential purposes.

[7] Chief Justice Morawetz released a Notice to Profession and Public regarding court proceedings – April 8, 2020¹ UPDATE, confirming that, as an essential service, the courts will remain open; however, only the most serious matters (child protection, urgent family, and critical criminal), will be held in-person. Whether a matter falls into one of these categories will be determined based on the local public health situation, and the positions of the parties. Jury trials remain suspended.

[8] In an earlier update (Notice to the Profession and Public Regarding Court Proceedings – March 17, 2020¹ UPDATE), jury trials were anticipated to resume on June 7, 2021, at the earliest, in the Central West, Central East, Central South and East regions. These dates were contingent on the public health situation in each region being stable.

Background

[9] This matter arises out of a collision occurring on June 16, 2017, in which the plaintiff, who was driving a motorcycle, was injured. His efforts to return to work as a firefighter have not proven successful.

[10] The policy limits of \$65,000 for medical and rehabilitation benefits under the plaintiff's accident benefits claim will soon be exhausted.

[11] The action was commenced by statement of claim issued on December 8, 2017. The statement of defence and jury notice are dated May 14, 2018. Examinations for discovery of the parties were conducted on October 15, 2018.

¹ Office of the Premier, *Ontario Enacts Provincial Emergency and Stay-at-Home Order* (2021), online: Ontario Newsroom <www.ontario.ca>.

[12] The plaintiff served the trial record on October 16, 2018. A pre-trial was held on September 26, 2019. At trial scheduling court in December 2019, the matter was placed on the May 2020 trial sittings. With the advent of COVID, no jury trials were held in 2020.

Positions of the Parties

Plaintiff

[13] The plaintiff submits that there is a real and substantial prejudice inherent in waiting for a jury trial. The matter could be five years or older by the time it is heard. The parties are ready for trial, and the matter has been adjourned once before.

[14] The plaintiff has retained nine experts. The cost of obtaining updated reports if the matter is not reached in 2021 would be expensive.

[15] The plaintiff has essentially depleted his funding for treatment.

[16] The plaintiff has been unable to return to work. With each passing day his future income loss is converted to past income loss, and past income loss is subject to a 30% reduction pursuant to ss. 267.5(1)2 and 267.5(1)3 of the *Insurance Act*, R.S.O. 1990, c. I.8.

[17] What does this represent to the plaintiff in real dollars? If his matter is heard in May of 2022 instead of May of 2021, the plaintiff stands to lose \$33,930. If the matter is not heard until November 2022, his potential loss increases to \$50,895.45.

Defendant

[18] The defendant submits that there is insufficient evidence of prejudice that would justify interfering with his substantive right to a trial by jury.

[19] The adjournment from the 2020 sittings does not reflect unreasonable delay. There is no date set for a trial, so the plaintiff's motion is not being sought to preserve an existing date. Further, there is no evidence that striking the jury notice will advance the trial date.

[20] The plaintiff is not facing any pressing financial concerns, as he settled his long-term disability claim in early 2020 for a significant sum.

[21] The defendant has been preparing for trial with a view to challenging the plaintiff's credibility, and the veracity of his complaints, before a panel of jurors.

[22] Finally, applying the "wait and see" approach applied in other motions to strike is more appropriate than taking away his right to a jury at this stage, given the positive outlook for overcoming the pandemic in the foreseeable future. Vaccination rollouts and other measures taken by the government to reduce public health risks suggest that the COVID-19 crisis may be controlled by the end of the year, which will likely accommodate jury trials in a courtroom setting.

Discussion

- [23] The right to a jury trial is a substantive one that has long been recognized. A party moving to strike a jury notice bears the onus of showing 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. In the end, a court must decide whether the moving party has shown that justice to the parties will be better served by the discharge of the jury: *Cowles v. Balac*, (2006) 83 O.R. (3d) 660 (C.A.), at para. 37.
- [24] Judges considering motions to strike have broad discretion to determine how the trial will proceed: *Cowles*, at para. 38.
- [25] In his pre-pandemic decision, *MacLeod v. Canadian Road Management Company*, 2018 ONSC 2186, Justice Myers held that on motions to strike, the court must engage in a search for the process that most justly resolves the litigation: at para. 28. In so holding, Myers J. elucidated the following principles, at para. 30:
- Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.
 - Undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes.
 - The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
- [26] In *Louis v. Poitras*, 2021 ONCA 49, the Court of Appeal provided guidance to judges hearing motions to strike jury notices. In particular, at para. 3, the panel found that there is no “one size fits all” provincial solution as to when jury notices should be struck:
- [l]ocal conditions will necessarily impact the choice of effective solutions. However, what must remain consistent across the province is that motion and trial judges have the discretion to respond to local conditions to ensure the timely delivery of justice.
- [27] The return of civil jury trials in Central East is fast becoming an elusive spectre. As McCarthy J. held in *MacKenzie v. Pallister*, 2021 ONSC 1840, at para. 14:
- No person familiar with what has been the reality on the ground for some time in this region [Central East] could disagree that since the Supreme Court’s decision in *Jordan*, civil jury trials have taken a back seat to criminal jury trials when it comes to the allocation of judges and courtrooms. There is no reason to suspect that the reality will change anytime soon. In fact, a dire forecast that many civil jury trials which would otherwise be ready to proceed will be

postponed or delayed into late 2022 or even 2023 might prove sadly prophetic.

- [28] Justice Healey provided a further update on the stark reality of jury trials in Central East in *Frye v. Pattenden*, 2021 ONSC 2373. In particular, at para. 18:

On the day of the motion I spoke with the RSJ to confirm the most up-to-date information, which is:

(a) Once jury trials are no longer suspended (currently June 7, 2021 at the earliest in accordance with the March 31, 2021 provincial Notice to the Profession and Public Regarding Court Proceedings), resources will be allocated to the backlog of criminal trials;

(b) The final decision as to whether to conduct jury trials after June 7, 2021 will rest with the RSJ, who will make the decision based on public-health guidance;

(c) There is only one courtroom in Barrie that will be available to permit “socially distanced” jury trials to be conducted;

(d) Even once mass vaccination levels rise to acceptable levels to permit other courtrooms to be used, those courtrooms will be allocated to criminal and family matters;

(e) While no one has “crystal ball” insight, the best prediction is that there will be no civil jury trials conducted until late 2022, and possibly later.

- [29] While there is concrete evidence of financial loss to the plaintiff the longer it takes to reach trial, I need not base my decision on financial prejudice alone. As Brown J.A. held, when granting the plaintiff Louis’ motion to stay the Divisional Court’s ruling pending appeal: “delay in obtaining a date for a civil jury trial can, by itself, constitute prejudice and justify striking out a jury notice”: *Louis v. Poitras*, 2020 ONCA 815, at para. 33.

- [30] There may once have been cause for the optimism advanced by the defendant, but no longer. COVID-19 continues to fester and mutate, killing some unfortunate enough to contract the virus or its variants. Matters go from bad to worse in a matter of days. For example, just two days ago, when I released *Treiers v. Kmith*, 2021 ONSC 2605, the province was subject to an “emergency brake.” Less than 48 hours later the province was placed in a full lockdown.

- [31] I disagree with the defendant’s submission that striking the jury notice will not advance the trial date. Quite the opposite is true. Pursuant to the Notice to Profession – Central East Region – May 2021 Civil Sittings Trial List (the “Notice”), this matter falls within one of the classes of cases eligible to be placed on the trial list:

- All cases that were listed to be heard in either the May or November 2020 sittings

- [32] If the plaintiff's motion is granted, Ms. Pickering will seek approval to be placed on the Spring Sittings Trial List. This can be done on consent pursuant to the Notice. If this request is opposed, there is a specified process to follow, and a triage judge will determine whether the matter should be placed on the list.
- [33] Even if the matter is not reached during the Spring Sittings, the parties can apply to be placed on the Central East Running Trial List, scheduled to recommence following the sittings. This may be done automatically if each party consents. Once again, if a party does not consent, a triage judge will make the final determination.
- [34] Of course, the parties could also agree to be adjourned to the fall sittings, although a final determination as to whether they will be held has not been made.

Conclusion

- [35] The right to a jury trial is not sacrosanct. As the Court of Appeal held in *Girao v. Cunningham*, 2020 ONCA 260, 2 C.C.L.I. (6th) 15, at para. 171:

While I recognize that the right to a jury trial in a civil action has been recognized as fundamental, it is not absolute and must sometimes yield to practicality.

- [36] The practical reality in Central East is that the plaintiff faces a wait of at least one year, and possibly two, if the jury notice is not struck. Conversely, if the jury notice is struck, his matter can be tried appreciably sooner than 2022.
- [37] The plaintiff's motion is granted, and the jury notice is struck.

Costs

- [38] Counsel are encouraged to agree on the costs of the motion. If they are unable to do so, they may arrange a short costs hearing, before me, through the Trial Coordinator. Concise briefs are to be filed at least two days prior to the hearing. If no arrangements are made within 30 days for an appointment to speak to costs, there will be no order for costs.

CASULLO J.

Released: April 9, 2021