CITATION: Kumari v. Clark, 2022 ONSC 833
COURT FILE NO.: CV-18-0001305
DATE: 20220204

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Sajimon Madhavan Pillai Kumari, Plaintiff

AND:

Jamie Clark, Defendant

BEFORE: Justice H.A. Rady

COUNSEL: C. Martin, for the Plaintiff

N. Wine, for the Defendant

HEARD: January 21, 2022

ENDORSEMENT

Introduction

[1] There are two motions before me, the plaintiff's motion to strike the jury notice filed by the defendant; and the defendant's motion to compel the plaintiff to attend a defence psychiatric examination. For the following reasons the plaintiff's motion is granted on terms and the defendant's motion is dismissed.

Background

[2] This is a personal injury action arising from a motor vehicle accident on April 4, 2017 at the intersection of Windermere Road and Adelaide Street in London. The plaintiff's vehicle was stopped when it was struck from the rear by the defendant.

[3] The action was commenced on June 21, 2018. The plaintiff claimed damages for injuries including chronic pain syndrome and mood disorders such as depression, anxiety, adjustment disorder and post-traumatic stress disorder.

[4] The defendant delivered a Jury Notice on July 13, 2018 and a Statement of Defence on August 2, 2018. Examinations were complete by January 9, 2019 and the Trial Record delivered on January 5, 2021. The case was pre-tried by Justice Grace on November 30, 2021. The trial is scheduled for four to five weeks, commencing March 7, 2022.

Motion to Strike Jury

[5] As a result of the pandemic, jury trials have been suspended from time to time by order of the Chief Justice, most recently on December 17, 2021. Jury trials, both criminal and civil, are postponed until February 7, 2022 at the earliest.

[6] The plaintiff is very concerned that the March trial date is imperilled if it must be heard by a jury. Without a jury, there is at least a reasonable prospect that the trial could proceed. A delay of the trial would result in real prejudice to the plaintiff given the operation of the 70% of income rule pursuant to s. 267.5 of the *Insurance Act*, R.S.O. 1990, c.I.8. The rule limits past wage loss to 70% of gross income.

[7] The defendant resists the motion. He stresses that trial by jury is a substantive and statutory right that is not to be interfered with absent compelling reasons or just cause. He submits that there is no confirmation that a judge alone trial would proceed any sooner than a jury trial. He emphasizes that the jury notice was delivered for strategic reasons and the defence has been conducted in anticipation of the trial being heard by a jury. It is said that juries are particularly well suited to evaluate credibility.

[8] As a preliminary matter, there is no question that leave to bring this motion should be granted pursuant to Rule 48.04(1) of the *Rules of Civil Procedure*. The defence does not suggest otherwise. COVID-19 is self evidently a substantial and unexpected change in circumstance.

[9] I do not propose to review the substantial body of case law that has developed on whether a jury should be struck given the exigencies caused by the pandemic.

[10] The principles are quite clear. The substantive right to a jury is not unqualified. A motion judge has a broad discretion and the "paramount objective…is to provide the means by which a dispute between parties can be resolved in the most just manner possible": *Louis v. Poitras,* 2021 ONCA 49 at para. 17.

[11] The court can also "look beyond the parties' interests and consider the broader interests of the administration of justice": *Louis v. Poitras, supra* at para. 25.

[12] The many decisions on the issue are highly fact specific and influenced by the particular features of the case as well as local circumstances.

[13] In that regard, the decision of my colleague Justice Grace from March 2021 in *Weaver v. Clunas,* 2021 ONSC 2364 is instructive. He provided the following comments respecting London court operations:

- in London, criminal and civil trial lists are blended. Criminal trials – jury and non-jury take precedence which has enormous implications on the court's ability to conduct civil trials, independent of the pandemic (para.19);

- remote judge-alone civil trials have occurred and are occurring London (para. 29);

- from a scheduling perspective, the access of the civil bar to judicial resources have rarely, if ever, been this good (para. 29);

- the moment the suspension of jury trials ends, the long line of criminal cases will push through the courthouse doors, long before the participants in civil matter are even able to view them from afar (para. 29);

- in the fall of 2020, the London courthouse was only able to accommodate one jury case at a time. That capacity has not yet increased (para. 30);

- London is a Unified Family Court site. It is exceedingly likely that the UFC judges will need help in dealing with the sea of cases that have been slowed by the pandemic when they re-commence hearing trials in September 2021. That is likely to further limit the availability of judicial resources for civil matters for a period of months (para. 31); and

- the likely reality is that if not reached for trial, a civil jury action will not be tried until the second quarter of 2022 at the earliest (para. 32).

[14] Justice Grace's comments remain true almost one year later. To his observations, I will add that I think it exceedingly unlikely that civil jury work will be undertaken before the fall or winter of 2022 and that is no doubt optimistic, perhaps unduly so. The criminal jury backlog has been exacerbated by the most recent suspension of jury trials. As far as I am aware, no civil jury trials have proceeded in London since March 2020. The London courthouse has now been retrofitted to accommodate two jury cases simultaneously but even that is unlikely to substantially ameliorate the growing backlog.

[15] On the other hand, London has been able to accommodate a good number of civil cases, heard virtually by a judge sitting without a jury. Indeed, one is proceeding as I write this decision. This is because of a practice that seems to have developed in London, and which I adopt here, the conditional striking of the jury notice. See *Weaver v. Clunas, supra; Reilly v. Frosst et al.*, 2022 ONSC 8344; and *Reati v. Elzainy et al.*, 2021 ONSC 8273. Provided the matter is called to trial during the weeks of March 7 or 14, 2022, which is the local approach in relation to running list cases, the jury notice will be struck. If the trial coordinator is not able to do so, the jury notice shall be maintained. The plaintiff is at liberty to renew the motion in future, depending on the circumstances at the time of the re-scheduled trial date.

[16] The defendant's contention that the jury notice was part of a defence strategy is unpersuasive. The jury notice was delivered within four weeks of the Statement of Claim. It is hard to imagine what legitimate defence strategy had been developed at that early stage.

[17] In conclusion, the defendant's right to a civil jury trial must yield to the realities facing the court and litigants as a result of COVID-19. The interests of timely justice demand it.

Defence Medical

[18] The defendant wishes to have the plaintiff examined by a psychiatrist of his choosing. The plaintiff will not agree to attend given the proximity of the trial date. A date had been arranged last month but could not proceed until the court ruled on this motion. However, the doctor is said to have flexibility in scheduling a new date and can generate a report promptly. The defendant also advised that it will not object if the plaintiff delivers a late response.

[19] In order to understand why the defendant's motion must be dismissed, a brief chronology of key dates is helpful.

[20] As already noted, the Trial Record was passed on January 5, 2021. The case was scheduled to be spoken to in the Assignment Court in March 2021 to set a pre-trial and trial date.

[21] On March 9, 2021 and in advance of the Assignment Court, the parties agreed to a litigation timetable. Their exchange was captured in several emails in February and March. On February 17, 2021, defence counsel wrote to the plaintiff's counsel advising that he did "not anticipate any further defence medicals". The plaintiff had been seen by then by Dr. Berbreyer, a physiatrist.

[22] The timetable provided that the plaintiff expected to deliver the following expert reports 90 days before trial: "physiatry, accountant, vocational expert, future care cost, psychology and psychiatry". The defence anticipated delivering its physiatry report 60 days before trial. Reply reports would follow within 30 days.

[23] It appears that the clinical notes and records of the plaintiff's treating physicians and experts have been delivered throughout the course of the litigation and were updated from time to time. Reports from a physiatrist, two psychologists were produced, and functional and vocational evaluations were served, as well as a Future Care Needs and Cost Analysis. Answers to undertakings were also provided.

[24] On August 30, 2021, the plaintiff served a psychiatric report and an economic loss report. In her psychiatric report, Dr. Ross diagnosed the plaintiff with depressive and anxiety disorders on Axis I "due to another medical condition (chronic pain due to central sensitization mechanisms)". On Axis III, she diagnosed WAD II and "chronic pain due in part to sensitization mechanisms", post-traumatic headaches, which were a "manifestation of the central sensitization process".

[25] The pre-trial was scheduled for November 30, 2021. All of the plaintiff's expert reports were delivered by 90 days before that date, with the exception of the present value calculation report. Further updated reports followed the pre-trial.

[26] The defendant raised the prospect of a defence psychiatric assessment for the first time in his pre-trial memorandum. The issue was discussed with the pre-trial judge. The plaintiff's objected, noting that it was not contemplated by the timetable and had the potential to derail the trial date. This motion followed.

[27] The first issue is whether leave should be granted to bring the motion pursuant to Rule 48.04(1). Has there been a substantial and unexpected change in circumstances? Does the justice of the case require leave to be granted? I am not persuaded that there has been such a change nor does the interest of justice favour the defendant.

[28] The defendant complains that a significant volume of expert reports were served after the Trial Record was passed and this is a change in circumstance. However, all of those reports were delivered either during the course of the litigation as is customary or in accordance with the timetable to which the parties agreed. The plaintiff specifically noted as of February 2021 that a psychiatric report was anticipated. Furthermore, even having received the plaintiff's psychiatric report at the end of August 2021, the defendant did not raise the prospect of a defence psychiatric report until it delivered his pre-trial memo, some three months later. Clearly, the defendant did not consider the delivery of the psychiatric report to be a "game changer", at least not until November.

[29] Accordingly, leave to bring the motion is refused.

[30] However, if I were to have granted leave, I would not grant the defendant's request.

[31] Motions for defence medical examinations are common. Accordingly, a substantial body of caselaw has developed to assist the court in exercising its discretion pursuant to s. 105 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 and Rule 33. The decisions are largely fact driven.

[32] An often cited decision is *Bonello v. Taylor,* 2010 ONSC 5723. Justice Brown (as he then was) articulated a number of principles to be considered, which I paraphrase as follows:

- the moving party must demonstrate that the request is warranted, legitimate and not made to delay the trial;
- the request may be legitimate if the party's condition has changed or deteriorated; a more current assessment is required; new reports were served after the defendant had conducted its own assessments; or some of the plaintiff's injuries were beyond the first assessor's expertise;
- "matching reports" are not necessarily required but courts should be reluctant to deny a defendant the opportunity to respond;
- there must be sufficient evidence that a further examination is warranted and it would otherwise be unfair to the defendant;
- the court should consider whether an undue burden is placed on a plaintiff.

[33] In this case, in February 2021, the defendant's counsel said that no other defence reports were being contemplated. In March 2021, the defendant agreed to a timetable that specifically provided that the plaintiff intended to deliver a psychiatric report at least 90 days before trial. Even upon receipt of Dr. Ross' psychiatric report, the defendant took no steps to request or arrange a defence psychiatric assessment in advance of the pre-trial.

[34] The plaintiff's complaints of chronic pain and psychological issues have been a dominant feature of the case since its outset. In his several reports, Dr. Sequeira, a physiatrist, has commented on the plaintiff's emotional impairments. He considered that psychological treatment might be beneficial.

[35] In April 2019, Dr. MacDonald, a psychologist, diagnosed somatic symptom disorder consistent with chronic pain disorder; major depressive disorder; and general anxiety disorder.

[36] Dr. Lee, the treating psychologist, made the same diagnosis. Repeated reports of psychological issues are contained in a number of other reports as well.

[37] It is noteworthy that the defendant did not seek to have an independent psychological assessment even in the face of these reports. I do not agree that the reference in the psychiatric report to "chronic pain due to central sensitization mechanisms" has somehow tilted the playing field. It echoes what the psychologists have reported.

[38] Since the *Bonello* decision, the court has repeatedly emphasized the need to adhere to the timelines imposed by the Rules. See, for example, *Matic v. Timpani,* 2019 ONSC 1392; *Prabaharan v. RBC General Insurance Company,* 2018 ONSC 1186; and *Younan v. Persaud,* 2011 ONSC 2129. There is good reason. Late delivered reports frequently derail trials. A pre-trial is unlikely to be productive or conducive to meaningful settlement discussions. It is time wasted. Court time is an increasingly precious commodity.

[39] In *Prabaharan,* the plaintiff had delivered her expert reports in advance of the pre-trial. The defendant attempted to arrange defence medical assessments one week before the scheduled pre-trial. The plaintiff refused to attend.

[40] The court declined to grant the defendant's motion to compel the plaintiff's attendance, and observed at para. 12:

> The defendant's failure to serve its expert reports on a timely basis – or even to take any steps in furtherance of this obligation – was a flagrant breach of the requirements set out in rule 53.03(1) and (2). An experienced litigant such as the defendant, cannot defer indefinitely its duty to provide responding expert reports. Indeed, it smacks of unfairness for such a party to, on the one hand, require the plaintiff to provide medical evidence to meet the requirements of O. Reg. 461/96 as amended by O. Reg. 381/03, yet be unprepared to disclose its case on that fundamental issue in response.

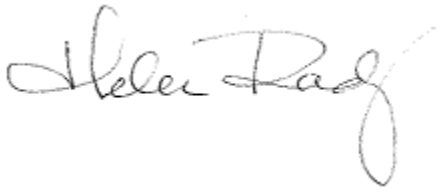
[41] The problem of late reports has become sufficiently concerning that amendments to the Rules are anticipated to ensure compliance with the deadlines for the delivery of expert reports and reduce late requests to adjourn trial.

[42] I recognize that the defendant has said he will not object to a late served reply. However, the trial is just over one month away. The date would undoubtedly be jeopardized even with the defendant's concession.

[43] In my view, the prejudice to the plaintiff significantly outweighs any occasioned to the defendant. The trial would almost certainly be postponed for an indeterminate period of time. The delay of the trial has the potential to cause real economic disadvantage to the plaintiff.

[44] I also recognize that the case has not been previously adjourned. However, that alone is not a reason to accede to the defendant's request. It would punish a plaintiff who has moved the case along to trial and is ready to proceed.

[45] The defendant's motion is dismissed. If the parties cannot agree on costs, I will receive brief written submissions, not exceeding three pages plus Bills of Costs by February 26, 2022.



Justice H.A. Rady

Date: February 4, 2022