CITATION: Belton v. Spencer, 2020 ONSC 5327
COURT FILE NO.: 12-35170
DATE: 20200904

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: JOHN BELTON, Plaintiff/Moving Party

AND:

KATIE SPENCER, Defendant/Responding Party

BEFORE: JUSTICE L. SHEARD

COUNSEL: James Page and Laura Hillyer for the Plaintiff/Moving Party

Todd J. McCarthy and Olivier Guillaume for the Defendant/Responding Party

HEARD: In Writing

DECISION ON MOTION

Overview

[1] The plaintiff moves for an order striking the defendant's civil jury notice and directing that the action be heard by judge alone. The grounds for the motion are that because of COVID-19, there are serious concerns that if this action proceeds before a jury, the trial will be delayed by one year – or possibly as long as 18 months – and justice would be better served by striking out the jury notice.

[2] The defendant opposes the order sought. The defendant says that the delay of the trial caused by COVID-19 is unknown at this time and that the court should adopt a "wait and see" approach and leave it to the trial judge to determine if the jury notice should be struck. The defendant also asserts that the plaintiff's conduct delayed his action from being ready for trial and the plaintiff ought not to be permitted to now claim a fear of delay caused by COVID-19 as a reason to strike out the defendant's jury notice.

Leave Required

[3] As a preliminary matter, since the plaintiff had set his action down for trial, he requires the leave of this court to bring this motion. The defendant does not dispute that leave should be granted on the basis that Regional Senior Justice Arrell had implicitly authorized the plaintiff to bring the motion. I need say nothing more on this issue and grant the plaintiff leave to bring the motion to strike the jury notice.

Disposition: Motion to Strike the Jury Notice

[4] For the reasons explained below, I order that the defendant's jury notice be struck and that the trial proceed by way of judge alone.

Background

[5] The plaintiff's claim arises from injuries he sustained on May 21, 2010, when he was kicked by a horse owned by the defendant. Liability and damages are in dispute.

[6] Set out below is a chronology of the events in this litigation:

(a)	2010 May 31:	plaintiff suffered injuries when he was kicked by a horse owned by the defendant;
(b)	2012 May 30:	statement of claim is issued;
(c)	2012 December 7:	statement of defence and jury notice are delivered;
(d)	2013 July 10:	examinations for discovery take place;
(e)	2017 May 23:	plaintiff sets the action down for trial by delivering a Trial Record;
(f)	2017 June 21:	plaintiff serves an expert report from an equine expert;
(g)	2017 August 10:	parties consent to pre-trial date of August 8, 2018 and to the action being placed on the trial list for the sittings of November 28, 2018;
(h)	2018 April 25:	defendant serves a report from equine specialist;
(i)	2018 May 8:	defendant arranges for plaintiff to undergo a defence medical;
(j)	2018 May 9:	plaintiff's counsel advises that he has just learned plaintiff has been experiencing "significant cognitive deficits" and that this aspect of the injury had perhaps been overlooked, and that a neuropsychological evaluation of the plaintiff was required. As plaintiff's counsel did not expect this expert report to be ready 90 days before the August 8, 2018 pre-trial date, the plaintiff asked the defendant either to agree to late service of this report or to agree to postpone the pre-trial and trial date;
(k)	2018 May 16:	defendant consents to an adjournment of the pre-trial

and trial on certain conditions, including that the plaintiff submit to a continued examination for discovery;

(l) 2018 June 22: at the plaintiff's request and on consent, order granted, traversing the action from the November 26, 2018 trial sittings list to the trial sittings commencing May 21, 2019;

(m) 2018 June 20: continued examination for discovery of the plaintiff;

(n) 2019 January 9: counsel for the defendant advises that the defendant could not attend trial in May 2019 due to new travel plans and asks that the trial be adjourned to the sittings of November 2019 while keeping the April 2019 pre-trial date;

(o) 2019 January 17: order made traversing the action from the May 21, 2019 trial sittings to trial sittings of November 18, 2019;

(p) 2019 January 29, 30: plaintiff serves two reports from its equine experts;

(q) 2019 March 29: defendant serves supplementary expert reports from its equine specialist;

(r) 2019 April 17: pre-trial takes place, at which the plaintiff advises that he intends to call 8 witnesses at trial and estimates the trial would take between 5 and 10 days. Defendant also intends to call 8 witnesses but estimates the trial would take between 10 to 15 days. Pre-trial Master concludes that the trial by jury would take 12 days. It is scheduled for the November 18, 2019 trial sittings;

(s) 2019 September 24: defendant's lawyer expresses concerns about whether the trial can be completed within the three weeks available in the November 2019 sittings. Defendant's counsel now advises that the defendant intends to call 16 witnesses and that, combined with the witnesses that the plaintiff expected to call, it appeared that the action would need to be traversed to the March 2020 long trial sittings;

(t) 2019 October 4: plaintiff's counsel confirmed that the plaintiff expects to need 8 days for his case and that if the defendant's counsel anticipates that the action needed to be placed on the long trial list, it was unlikely that the matter would be heard in March 2020 but might be reached in October 2020. Plaintiff's counsel advised that he was not available in the March 2020 sittings;

(u) 2019 October 8: defendant's counsel confirmed that given the number of witnesses identified by both parties, the action would take longer than three weeks and that the matter would have to be placed on a long trial sitting. Defendant agrees to traverse the matter to the October 2020 sittings;

(v) 2019 October 23: parties complete the Long Trial Sittings Intake Form in which they confirm that the action is to be tried by a jury; the plaintiff intends to call nine witnesses; the defendant intends to call 17 witnesses; the trial is estimated to take between 30 to 33 days with 10 to 11 days for the plaintiff's case and 20 to 22 days for the defendant's case; and the parties wish to be added to the long trial team sittings for October 2020.

(w) 2019 November 13: conference call with RSJ Arrell who ordered the action be placed on the long trial sittings commencing October 5, 2020 for a trial by jury estimated to take six weeks. The pre-trial scheduled for September 10, 2020;

(x) 2020 March 31: plaintiff serves his economic loss report;

(y) 2020 June 19: conference call with RSJ Arrell re: pretrial dates. Counsel confirm that the trial is expected to take between 5 and 6 weeks. RSJ Arrell advises that, due to the COVID-19 pandemic, civil jury trials would not likely take place in 2020 and that it would be likely that the trial of this action would be delayed by one year to 18 months. RSJ Arrell also expressed the view that if the matter proceeded by way of a judge alone, it also would not proceed on October 5, 2020 but could likely be heard in late 2020; and

(z) 2020 June 30: defendant serves an expert report from Forensic Climatology Consulting Inc.

Impact on Court Operations as a result of COVID-19

[7] As a result of COVID-19, effective March 17, 2020 the Superior Court of Justice suspended in-person court operations. As of that date, criminal and civil jury selection and jury trials were suspended until September 2020. Only urgent criminal, family and civil matters continued to be heard. On June 25, 2020, Chief Justice Morawetz issued a Notice to the Profession announcing a phased return to in-person hearings. The John Sopinka Courthouse in Hamilton, Ontario was expected to have at least one courtroom in operation for the Superior Court of Justice by July 6, 2020.

[8] As of the writing of this decision, there have been no new announcements detailing how and when the courts in this Judicial Region will be able to resume conducting civil jury trials. This pandemic-driven uncertainty has created the need for physical and procedural changes to courthouses – plexiglass barriers, seating allocations, cleaning stations, etc., as well as a need to find or create additional space for the jurors to use during a trial. The solution to that latter challenge is a work in progress.

[9] Other pandemic-created concerns include whether it will be possible to secure sufficient jurors to meet demand? The pandemic has had an impact on the pool of prospective jurors who may need to be excused from jury duty. Reasons include: age and/or underlying health concerns may make certain prospective jurors particularly susceptible to COVID-19; prospective jurors may be caring for or share a "bubble" with such at-risk persons; or prospective jurors may be parents, who must be at home to supervise children not in school or daycare due to the pandemic.

[10] Other concerns come to mind: if a juror becomes infected with or exposed to COVID-19, what impact will it have on the jury trial? Will other members of the jury or court staff, etc. need to be quarantined? Will that lead to a mistrial? Many of these concerns are of heightened importance in a long trial, such as is the case here.

[11] The concerns and challenges of COVID-19 are new, and, prior to 2020, likely unimaginable to most of us. To an extent, the defendant is correct that one may only speculate as to whether any or all of the COVID-19 concerns will occur here. However, in this case, we need not speculate about whether requiring a jury will delay the trial by at least one year. That is the evidence on this motion.

The Law

[12] While the laws and jurisprudence that govern the issue in this motion may not specifically address pandemics, both offer guidance.

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

[14] Rule 47.02 (2) provides that a motion to strike out a jury notice may be made on "the ground that the action ought to be tried without a jury."

[15] In her decision in *Rolley v. MacDonell*, 2018 ONSC 508, 22 C.P.C. (8th) 152, Justice Corthorn outlined the law on the legal test to be applied on a motion to strike a civil jury. The relevant paragraphs are reproduced below:

> [15] A decision frequently cited with respect to the test on a motion of this kind is the Ontario Court of Appeal decision in *Cowles v. Balac* (2006), 2006 CanLII

34916 (ON CA), 83 O.R. (3d) 660, 216 O.A.C. 268. The principle or test to be taken from paragraph 37 of that decision is:

> a) The factors to be considered include the legal and/or factual issues to be resolved, the evidence at trial, and the conduct of the trial; and
>
> b) The overriding test is whether the moving party has shown that justice to the parties will be better served by the discharge of the jury.

[16] The plaintiffs acknowledge that they bear the onus of demonstrating that they satisfy the test to be met on the motion.

[17] In deciding whether to make an order that the jury notice be struck, the trial judge has "considerable discretion" (*Kempf v. Nguyen*, 2015 ONCA 114, 124 O.R. (3d) 241, at para. 44). In a number of its recent decisions, the Ontario Court of Appeal addressed the manner in which a trial judge is to exercise his or her discretion on a motion to strike the jury notice:

> • This discretion must not be exercised arbitrarily or on the basis of improper principles (*Kempf*, at para. 44); and
>
> • The right to a jury trial is not to be taken away lightly (*Hunt (Litigation guardian of) v. Sutton Group Incentive Realty Inc.* (2002), 2002 CanLII 45019 (ON CA), 60 O.R. (3d) 665, 162 O.A.C. 186, at para. 73).

[16] In *MacLeod v. Canadian Road Management Company,* 2018 ONSC 2186, 79 C.C.L.I. (5th) 314, Myers J. also referred to *Cowles v. Balac* for the basic principles to be applied by the court on a motion to strike a jury notice. The principles set out below are borrowed from paras. 23-24 of *MacLeod*:

> (a) The court must decide whether the moving party has shown the justice to the parties will be better served by the discharge of the jury;
>
> (b) The object of a civil trial is to provide justice between the parties, nothing more; and
>
> (c) A judge may strike a notice even before the trial has begun if the judge considers that there is no advantage to beginning the trial with the jury because the situation makes it apparent that the case should not be tried with a jury.

[17] As noted by Myers J., "since…the seminal decision of the Supreme Court of Canada in *Hryniak*[1], we also know that to be just a civil resolution of a dispute must not either take too long or be too expensive." (*MacLeod*, at para. 30)

[18] I repeat and adopt the excerpts from *Hyriniak* as paraphrased by Myers J. in *MacLeod*[2] that

- 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; and
- prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice.

[19] Recently, in *Girao v. Cunningham*, 2020 ONCA 260, 2 C.C.L.I. (6th) 15, the Court of Appeal confirmed that the principles governing the discharge of the jury remain as set out in *Kempf* and that "the question for the trial judge is simply this: will justice to the parties be better served by dismissing or retaining the jury?"

[20] At paragraph 171, Lauwers J.A. states: "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."

[21] As neither statute, nor jurisprudence, in the province of Ontario has specifically addressed or applied the above-referenced principles to the pandemic situation now confronting the parties and the court, the moving party asked the court to consider a recent decision of Master Muir in *Vacchiano v. Chen*, 2020 BCSC 1045 (CanLII). Both parties were granted leave to file supplementary materials that addressed *Vacchiano*.

[22] In *Vacchiano*, Master Muir considered whether the jury notice should be struck, which would allow the trial to proceed before a judge alone; or to preserve the jury notice, which would likely result in a two-year adjournment of the trial.

[23] The Master observed that the *Supreme Court Civil Rules*[3] (the "BC Rules") were not formulated with a pandemic in mind and ought to be looked at in a "purposive manner" consistent with the ultimate object of those rules [Rule 1-3 (1) and (2)] to secure a "just, speedy and inexpensive determination of a proceeding on its merits" while balancing prejudice to achieve a just result (at para. 28).

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[1] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.
[2] *MacLeod*, at para. 30.
[3] B.C. Reg. 168/2009.

[24] Rule 12-6 (5)(a) and (b) (iii) of the BC Rules provide guidelines on when a civil jury notice should be struck. It provides that a motion to strike the jury may be brought on the ground that "the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action." There is no equivalent provision under r. 47.02 of Ontario's Rules of Civil Procedure[4] (the "*Rules*").

[25] In *Vacchiano*, Master Muir applied the strict wording in Rule 12-6 (5)(a) (iii) and concluded that the jury notice should be struck. He found that there would be extra time and costs incurred as a result of a two-year adjournment, including additional costs for updated expert examinations and reports, and additional examinations for discovery. The Master further considered that a two-year delay for a trial involving a motor vehicle collision that was already five years old ran the risk of decaying memories and could affect the ability of the parties to have a "just" proceeding on the merits. The Master also considered the psychological and financial condition of the plaintiff as a "cost" that might be inflicted on her by such a delay. The Master concluded that while a significant amount was claimed, it was outweighed by the additional time and cost of awaiting a jury trial.

Law in Ontario

[26] While there are differences, similar to the BC Rules, the *Rules* were also not formulated with a pandemic in mind. As advocated by Master Muir, I am also of the view that the *Rules* ought to be looked at in a "purposive manner" and note the stated objective found in r. 1.04 of the *Rules*, reads:

> INTERPRETATION
>
> *General Principle*
> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[27] As explored later in this decision, it the objectives set out under r.1.04 (1) found in the jurisprudence, both historic and recent, that guide and govern the administration of justice in this court.

Positions of the parties

[28] The defendant submits that *Vacchiano,* and a second decision to which the Master referred in *Vacchiano,*[5] both wrongly assumed that a judge alone trial could be reached sooner than a trial before a judge and jury. The defendant submits that the Supreme Court of Canada in *R. v. Jordan*[6] has required this court to prioritize criminal matters over civil trials, and, as a result, there will

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[4] R.R.O. 1990, Reg. 194.
[5] *Cheung v. Dhaliwal*, 2020 BCSC 911.
[6] *R. v. Jordan*, 2016 SCC 27, [2016] 1 SCR 631.

always be a scarcity of judicial resources available for civil trials, whether by judge alone or judge and jury.

[29] The defendant also submits that the case law recognizes the need to follow a "wait and see" approach and to leave it to the trial judge to decide whether to strike out the jury notice as the trial judge is in the best position to decide whether justice between the parties requires the striking of the jury notice.

[30] The defendant also asks the court to distinguish *Vacchiano* on its facts. In *Vacchiano,* the court was concerned with fading memories whereas in this case, 18 lay witnesses have provided statements in advance of trial; the parties have been examined for discovery on multiple occasions, including as recently as July 2020, and the remaining witnesses will be relying on documentation and/or their own "expert" reports. For those reasons, the defendant submits that the risk of fading memories has been minimized or even neutralized, and that the concern in *Vacchiano* that a delay would result in additional costs for updated expert examinations and reports do not apply here.

[31] The defendant further submits that in *Vacchiano,* the court did not consider the conduct of the parties prior to the plaintiff's motion to strike the jury notice. The defendant submits that it would be unfair for this plaintiff, who the defendant alleges was responsible for five years of delay, to now point to the possible delay caused by the pandemic as a reason to remove the defendant's substantive right to trial by jury.

[32] The plaintiff submits that the facts in *Vacchiano* are similar in that: the injury occurred many years earlier; the plaintiff suffered physical and psychological injuries and had a past and future income loss claim; a jury trial was set for July 20, 2020 (here the jury trial was set for October 2020); similar to Ontario, on March 18, 2020 all regular hearings in BC were adjourned indefinitely; courts were resuming operations in a phased-in way; as of June 3, 2020 all civil jury selections were cancelled up to September 2020; and, if adjourned, the trial would not be heard by jury until January 2022.

Analysis

[33] The plaintiff closed his submissions with the oft-stated aphorism "justice delayed is justice denied." That observation may have its source in Lord Denning in *Allen v. Sir Alfred McAlpine & Sons Ltd.,* [1968] 2 WLR 366, CA. At page 369 of that decision, Lord Denning describes the rampant delay in the case's procedural history as "intolerable" and "[lasting] so long as to turn justice sour" and, at page 370, he states: "The delay of justice is a denial of justice."

[34] Remedying delay in Canadian civil justice has repeatedly been identified by the Supreme Court of Canada as an issue of paramount importance. Justice Bastarache observed in *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at para 140, for example, that:

> Unnecessary delay in judicial and administrative proceedings has long been an enemy of a free and fair society. At some point, it is a foe that has plagued the life of almost all courts and administrative tribunals. It's a problem that must be brought under control if we are to maintain an effective system of justice, worthy of the confidence of Canadians.

[35] More recently in *Hryniak,* Justice Karakatsanis called for "[a] necessary culture shift" in Canadian civil justice. Writing for a unanimous court, Karakatsanis J. began her judgment stating that "[e]nsuring access to justice is the greatest challenge to the rule of law in Canada." She went on to observe at para. 24 that "undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes" and "[deny] ordinary people the opportunity to have adjudication." At para. 25, she noted that "[p]rompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice." In other words, as Karakatsanis J put it at para 28, "a fair and just process … is illusory unless it is also accessible – proportionate, timely and affordable."

[36] This court must apply these entrenched principles to the reality it now faces. As observed by Williams J. in *Klassen v. Klassen*, 2020 ONSC 4835, at para. 47:

> Times have changed, … and I cannot ignore the reality or the effects of the Covid-19 pandemic which shut down Ontario's non-virtual courtrooms for almost 4 months, creating a significant case backlog and great uncertainty about what the criminal, family in civil trials of the future will look like and how far into the future they will be scheduled.

[37] I have considered the arguments put forth by the defendant and address them now.

[38] Firstly, the defendant suggests that the generally accepted and preferred procedural route is a "wait and see" approach. By that, I understand the defendant to suggest that it should be up to the trial judge to decide whether to strike the jury notice. The difficulty with that position is that the trial judge will not be appointed until the Friday afternoon prior to the Monday commencement of the long trial. Therefore, if a "wait and see" approach is taken, the delay in the scheduling of the trial that the plaintiff seeks to avoid, will have already occurred. For that reason, I find that the "wait and see" approach to be unsuitable.

[39] The defendant submits that the plaintiff himself has caused a delay in bringing his action to trial and ought not now to be permitted to use delay as a means to deprive the defendant of her substantive right to a jury trial.

[40] I do not accept the defendant's submissions on that issue. I do not have evidence from which I could reasonably conclude that because the plaintiff did not set his action down until 2017, he was engaging in delay. There may be many reasons why plaintiffs do not set their actions down for trial. Without evidence, no assumptions can be made as to those reasons.

[41] I also do not accept the defendant's submissions that an adjournment requested by the plaintiff's counsel - who was concerned that the plaintiff may have developed a new condition, secondary to the original injury - can be characterized as "delay."

[42] Finally, the defendant was also responsible for a significant delay in the scheduling of the trial by reason of the defendant's holiday, which interfered with the previously-scheduled trial date.

[43] The defendant also submits that the pandemic and associated delays will affect all civil litigation proceedings equally, both jury and non-jury. The evidence before me does not support that submission. The parties were told by RSJ Arrell in June 2020 that if the action proceeded by judge alone it might be scheduled in late 2020 or early 2021, but if it was to be heard by jury, the trial would not likely be scheduled for at least a year and possibly 18 months.

[44] The defendant submits that the witness statements already taken, the recent examinations for discovery and the existing expert reports will minimize or even neutralize any risk of fading memories. Thus, the potential prejudice to the defendant to strike out the jury notice outweighs any risk that a fair trial cannot take place by reason of delay. While I do give some weight to that argument, I conclude that justice to the parties would be better served if this matter is brought to trial sooner, rather than later.

[45] The parties are ready for trial. But for the pandemic, the trial would have proceeded in October 2020. The events that gave rise to the action are already a decade old. The defendant's right to a trial by jury, is outweighed by the need to provide the plaintiff with more timely access to justice.

[46] I accept the defendant's submissions that the scheduling of criminal jury trials will take precedence over civil jury trials. Indeed, that is one factor contributing to the anticipated delay in being able to schedule a long civil jury trial in this action.

[47] COVID-19 has created additional challenges to ensuring access to justice, which, in this case, requires the court to strike the defendant's jury notice in order to do what is possible to ensure an earlier and more efficient and more affordable trial.

Costs

[48] As the successful party on this motion, the plaintiff is presumptively entitled to his costs. However, while I have not decided the point, given the unusual circumstances, it would appear reasonable for the costs to be in the cause, fixed by this court.

[49] I would urge the parties to attempt to agree on costs but if they cannot do so, then costs submissions may be made as follows:

1. Within 21 days of the date of the release of this decision the plaintiff/moving party shall serve and file his written costs submissions, not to exceed 3 pages, double-spaced, together with his draft bill of costs and copies of any pertinent offers.

2. The defendant/responding party shall serve and file her responding submissions of no more than 3 pages, double-spaced, together with her draft

bill of costs and copies of any pertinent offers, within 14 days of the service upon her of the Respondent's costs submissions.

[50] If no submissions are received within 35 days of the date of the release of this decision, the parties will be deemed to have resolved the issue of the costs and costs will not be determined by me.

L. Sheard J.

Justice L. Sheard

Date: September 4, 2020

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

John Belton

Plaintiff/Moving Party

- and –

Katie Spencer

Defendant/Responding Party

REASONS FOR DECISION

LS:js

Released: September 4, 2020