

CITATION: Khan v. Baburie, 2021 ONSC 1683
COURT FILE NO.: 25/15 and CV-15-3052-00
(Walkerton)
DATE: 2021 03 05

SUPERIOR COURT OF JUSTICE - ONTARIO

Court File No.: 25/15

BETWEEN: SEAD AGHA SEAD, FAIDULLAH AHMADDI and ARIAN
KHADIM v. ROMAN BABURIE and RICHARD PARKER

Court File No.: CV-15-3052-00

AND BETWEEN: WAQAR AHMAD KHAN and NAHEED v. ROMAN BABURIE,
SEAD AGHA SEAD, RICHARD PARKER AND DEANNE
MUSCLOW and DESJARDINS GENERAL INSURANCE
COMPANY

BEFORE: Daley J.

COUNSEL: Kevin Wolf, for the Plaintiff, Khadim

Muhammad Alam, for the Plaintiffs, Khan and Naheed

Andrew Yolles, for the Defendants, Baburie and Sead

Peter Festeryga, for the Defendant, Parker

RULING ON DEFENDANTS' MOTION TO ADJOURN TRIAL

INTRODUCTION:

[1] These actions both arise from a motor vehicle accident which occurred on June 29, 2014. The plaintiffs in both actions namely Waqar Ahmad Khan ("Khan") and Arian Khadim ("Khadim") allege that they have sustained very serious personal injuries resulting in long-term and permanent damages.

[2] These actions were ordered to be tried together by the order of Kurz J. of November 28, 2018 and they are presently scheduled to proceed to trial in Owen Sound before a judge and jury starting on March 22, 2021.

[3] The trial is expected to take between 8 and 10 weeks.

[4] Counsel for all parties requested a fixed trial date given the anticipated length of the trial of these actions and so in September 2019, the court set the trial date as a fixed start date, rather than having these cases proceed at a regular sitting of the court in Owen Sound or Walkerton.

[5] Given the continuing Covid-19 pandemic, counsel have been advised that these cases cannot proceed as a jury trial, as had been scheduled. Counsel for the plaintiffs, who wish to proceed with the trial of the actions, on the scheduled trial date before a judge alone, have motions returnable on March 9, 2021, seeking an order striking the jury notices and directing that the trial proceed as currently scheduled without a jury.

[6] Counsel for the defendants Roman Baburie and Sead Agha Sead ("the Moving Defendants") bring the present motion seeking an order adjourning the trial. This motion is supported by counsel for the defendant Richard Parker and opposed by counsel for the plaintiffs in both actions.

[7] The basis for the Moving Defendants' motion is that they assert that they cannot properly and fairly proceed with the trial as the plaintiffs in both actions have recently served additional expert reports contrary to the service provisions in the Rules of Civil Procedure and as there are outstanding productions and late served productions and clinical notes and records which have only been recently produced, contrary to the Rules.

LEGAL FRAMEWORK:

[8] This motion for adjournment of the trial is grounded on two principal basis, namely the plaintiffs' failure to comply with their post-discovery duties to produce updated records and secondly because of their failure to comply with the service requirements in respect of expert reports.

[9] In considering a motion for adjournment the court must weigh both the interests of the parties, including the potential for resulting prejudice and as well the interests of the administration of justice in conducting civil trials in a timely and orderly fashion: *La Belle v. Lewis Motor Sales*, [2007] O.J. No. 1432 at para 32; *Khimji v. Dhanni*, [2004] O.J. No. 320 (C. A.) at para 14.

[10] The Moving Defendants bear the onus in establishing that the granting of an adjournment in all the circumstances is warranted.

[11] In *Khimji* the Court of Appeal stated several factors that the court should consider on a motion for an adjournment including:

- (I) the overall objective of civil proceedings: a just determination of the real matters in dispute;
- (II) prejudice that may be caused by refusing or granting an adjournment;
- (III) the length of the adjournment requested and disruption of the court's trial schedule.

[12] Rule 53.08 (1) provides that in circumstances where evidence is admissible only with the leave of a trial judge under the circumstances listed in sub rule (2), leave shall be granted on such terms as are just and with an adjournment if necessary, unless to do so will cause prejudice to the opposite party or will cause undue delay in the conduct of the trial.

[13] As to the adjournment of the trial, rule 52.02 provides that the court may adjourn a trial to such a time and place and on such terms as are just.

[14] The Rules relating to the disclosure and production of documents provide that each party must disclose every document relevant to any matter in issue in an action and where a party comes into possession or control of a non--privilege document that party must serve a supplemental affidavit of documents and similarly where a party has been subjected to an examination for discovery and they later determined that an undertaking remains unanswered or they discover that the answer previously given is no longer accurate that party must provide the information in writing to every other party. See Rules 30.02 (1), 30.07, 30.08 (2) (c), 31.07 (4) and 31.09 (1).

[15] As to the service of reports from expert witnesses, where a party intends to call an expert witness to trial that witness' expert report must be served no less than 90 days prior to the pretrial conference, as provided for in Rule 53.03 (1). Further, a party who intends to call an expert witness at trial to respond to another expert witness' report shall no less than 60 days before the pretrial conference, serve such a responding report as provided for in rule 53.03 (2).

[16] As was stated by the Court of Appeal, given the mandatory language in rule 53.08 (1) the trial judge must grant leave to a party intending to proffer a late served expert report, unless to do so would cause prejudice that could not be overcome by an adjournment or costs: *Marchand v. The Public General Hospital Society of Chatham*, [2000] O.J. No. 4428 at para 81.

ANALYSIS:

[17] As both actions must be tried together before the same court whether composed of a judge alone or judge and jury, the contextual analysis of the considerations on this motion necessarily overlaps between these two cases.

[18] With respect to the Khadim action, the Moving Defendants take the position that this court should exercise its discretion in granting an adjournment based on that plaintiff's failure to serve specific expert reports within the time required by the Rules. Specifically, it is submitted that the following reports have been late served and as such the Moving Defendants require an adjournment to properly respond to these reports by obtaining additional expert opinions:

- (i) report of Elaine Vegotsky of E. V. Litigation & Financial Services, dated October 3, 2019;
- (ii) report of Dr. Sree Harsha Malempati, orthopedic surgeon, dated August 12, 2020;
- (iii) report of Dr. Andy Cancelliere, neuropsychologist, dated January 21, 2020;
- (iv) report of Clara Um, occupational therapist at Rehab Resource Management Inc., dated November 17, 2020;
- (v) future care costs valuation report of Elaine Vegotsky of E.V. Litigation & Financial Services dated December 15, 2020.

[19] A joint pretrial conference in both actions was conducted pursuant to Rule 50 on August 9, 2019. A further pretrial was conducted by me on September 21, 2020, as these actions had been provided with a fixed trial date prior to that time and such pretrial was scheduled at the instance of the court also for the purpose of conducting trial management. A trial management conference was also held on January 22, 2021.

[20] As to the service requirements under the Rules given that the pretrial conference schedule pursuant to the requirements of the Rules took place on August 9, 2019, all expert reports were required to have been served 90 days prior to that date namely by May 13, 2019. There is no basis whatsoever for the

submission that the timeline for the service of expert reports is based on the pretrial conference I conducted in September 2020. The first pretrial which was conducted in August 2019, pursuant to Rule 50, is the pretrial conference event which engaged the timelines for service of expert reports.

[21] Thus, all the above-mentioned reports in paragraph 18 were served in noncompliance with Rule 53.03 (1).

[22] With respect to the expert reports relating to the plaintiff Khan , the Moving Defendants submit that there are two reports which were served out of time namely:

- (i) psycho-vocational report of Alan Walton and Dr. Philip Miller of Fox Psychological Services, dated January 11, 2021; and,
- (ii) engineering report of Kodsi Engineering Ltd. dated November 27, 2020.

[23] Counsel for the plaintiff Khan fairly acknowledged that the psycho-vocational report was served out of time and that the evidence filed on this motion did not disclose any reasonable explanation for the delay in obtaining and serving this report.

[24] Counsel all provided detailed submissions with respect to a variety of clinical notes and records, some of which have only recently been produced and brought up to date in terms of disclosure, and as well with respect to some records that still have not been obtained or produced from third parties.

[25] I have concluded that the records are such that they could have been obtained long ago by a motion under Rule 30.10 by the Moving Defendants if they

truly were concerned about having inadequate disclosure prior to trial. The record further indicates that counsel for both plaintiffs have taken steps, although perhaps not as diligently as one would expect, to obtain production of records from treating physicians and clinics.

[26] As to the late served expert reports relating to the plaintiff Khadim I am of the view that those reports, having regard to the whole of the evidentiary history of medical records and expert consultations both in this action and in the accident benefit claim, do not form a reasonable basis for the adjournment of the pending trial.

[27] Turning to the action brought by the plaintiff Khan, while there are a variety of records and clinical notes outstanding as outlined in the affidavit submitted on behalf of the Moving Defendants and while those records must be produced by the plaintiff in accordance with his disclosure obligations under the Rules as discussed above, the defendants in these actions had open to them the opportunity to move pursuant to Rule 30.10 seeking production of many of these records long prior to this date and as such the absence of those records at this late date cannot form a reasonable basis for considering a motion to adjourn the trial.

[28] There have been several decisions of this court and of the court of appeal which have examined the considerations involved in a motion such as this.

[29] The court in *Ariston Realty Corp. v. Elcarim Inc.*, [2007] O.J. No. 1497 outlined in a comprehensive way the most important considerations to be examined on a motion for an adjournment. Some of those considerations included:

- (a) the overall objective of determination of the matter on its substantial merits;

(b) the principles of natural justice;

(c) the circumstances of the case and the request for the adjournment as well as the competing interests of the parties in advancing or delaying the litigation;

(d) whether the ability of the party requesting the adjournment to fully and adequately prosecute or defend the proceeding would be significantly compromised if the adjournment were refused;

(e) the prejudice not compensable in costs, if any, suffered by a party by the granting or the refusing of the adjournment.

[30] These are just some of the considerations examined by the court in *Ariston* which are engaged in the circumstances of this case.

[31] In the Court of Appeal decision in *Graham v. Vandersloot*, 2012 ONCA 60, the court in referring to its earlier decision in *Kihimji* stated at para 5:

I begin with the overriding goal of our modern Rules of Civil Procedure: to ensure as far as possible that cases are resolved on their merits. This goal is expressly set out in Rule 2.01 (1) (a) which gives a judge power to grant any relief necessary "to secure the just determination of the real matters in dispute." Courts should not be too quick to deprive litigants of a decision on the merits. The trial judge does not appear to have sufficiently taken into account that his order deprived the parties, especially the appellant, of a determination of "the real matters in dispute."

[32] The plaintiff Khan has served a very detailed and comprehensive psycho-vocational report dated January 11, 2021 in which the authors outline in detail their review of this plaintiff's clinical history and the opinions of other clinicians and experts as well as the results of their own testing and assessments along with their findings and conclusions.

[33] Most notably, these experts conclude that this 30-year-old plaintiff is completely unemployable because of the physical and psychological injuries sustained by him in the motor vehicle accident giving rise to this litigation.

[34] The nature and extent of the plaintiff Khan's injuries and resulting disabilities will have to be determined during the trial and ultimately the court will in turn have to determine whether he is completely disabled from any employment on a permanent basis. This is a critical aspect of the case that will be advanced at trial by this plaintiff and given his relatively young age, the damages that may flow from a finding of complete disability on a permanent basis, would be very substantial.

[35] The motion evidentiary record does not disclose any prior psycho-vocational assessment of the nature contained in this recently served report. While there are several psychological and neuropsychological assessments in the medical records, the assessment and opinions contained in this report are significant and may not be fairly and adequately addressed by the Moving Defendants without having an opportunity to, at the very least, obtain a critique report or possibly an independent psycho-vocational assessment. My comments should not be construed as suggesting the necessity of a further independent assessment of this plaintiff; however, I have concluded that to allow the Moving Defendants to fairly meet and respond to the case against them, the granting of an adjournment in these circumstances is warranted and the principles of justice and the appearance of justice also warrant such an adjournment. A short adjournment, of say two weeks, would not be adequate in all of the present circumstances.

[36] I have reached this conclusion having considered the prejudice that may accrue to both the plaintiffs and the defendants by the granting of such an adjournment.

[37] Other than the delay in this trial commencing for, unfortunately a longer period than in ordinary circumstances would be reasonable, the plaintiffs have not put forward any evidence of prejudice that would not ultimately be compensated for in the event they are successful at trial, including by way of prejudgment interest, if so ordered.

[38] It was urged on behalf of both plaintiffs that the delay in this case reaching trial would result in their continuing loss of income being reduced from 100% to 70% gross, however this is simply a statutory requirement in the *Insurance Act*, R.S.O. 1990, c. I.8, that cannot be described as a form of prejudice accruing to these plaintiffs that should be considered on this motion.

[39] Although these cases have their origin in a motor vehicle accident from 2014, these actions have taken time to get to their current stage. There have been no prior adjournments of this trial. The court had provided an accommodation to these parties by granting a fixed trial date given the anticipated length of the trial.

[40] This motion was also considered within the context of the very significant impact of the Covid-19 pandemic upon the operation of the Ontario Superior Court of Justice and the resulting scheduling challenges that have arisen.

[41] It is anticipated that a new trial date for these matters may not be available for 1 to 2 years. This is in large part related to the serious impact that the pandemic has had upon the proper scheduling of all matters before this court. There are many criminal jury cases pending which have not yet been able to proceed as well as serious family cases involving the urgent needs for proper child parenting. These will all have an impact on the future scheduling of the trial of these actions, however, again, on balancing the interests of these parties and as well recognizing the need to properly manage cases before this court, the circumstances as presented on this motion favour the granting of an adjournment of this trial.

[42] In reaching this conclusion I have considered all possible options to ensure that these cases are tried fully on their merits, including allowing the Moving Defendants the opportunity to fairly defend the claims of the plaintiff Khan as set out in the critical evidence contained in the plaintiff's psycho-vocational assessment report just recently served.

[43] Standing on its own, the Khadim action and its surrounding circumstances, including the late served reports, would not form a reasonable basis for the granting of an adjournment. Whether those reports will ultimately be admitted at trial is a matter to be left to the trial judge.

[44] However, as noted, these actions must be tried together and the Khadim action is tied to the circumstances in the Khan action with the result that trial of both actions must be adjourned to allow the defendants to take the necessary steps to respond to the psycho-vocational assessment report.

[45] The late service of expert reports, contrary to the requirements of the Rules, has been a chronic and frequent issue in the timely management of the civil litigation before this court. Counsel seem to have the belief that the requirements of compliance with the Rules are mere recommendations or suggestions and that as such the breach of the Rules will really have no consequences. Counsel are sorely mistaken in that belief.

[46] In the result, the trial date of March 22, 2021 is hereby vacated and the trial of these actions will be noted as having been adjourned.

[47] Counsel shall arrange to appear before me to address the rescheduling of the trial as well as the time-tabling of the necessary steps, including the service of any further responding expert reports, to ensure these actions are trial-ready.

[48] The issue of costs will also be addressed on the next date and all counsel shall file their written submissions as to costs, of no longer than two pages, plus a costs outline, if so advise, at least four days in advance of the scheduled return to court.

[49] The next attendance before court will be arranged through my administrative assistant. A selection of possible dates will be provided to counsel by my assistant.

A handwritten signature in blue ink, appearing to read "Daley J.", is written over a horizontal line.

Daley, J.

Released: March 5, 2021

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