CITATION: *Awada v. Kanywabahizi*, 2021 ONSC 5918
COURT FILE NO.: CV-17-73723
DATE: 2021/09/09

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
TARICK AWADA, ALEXANDRA AWADA and JACOB AWADA, by his Litigation Guardian, TARICK AWADA Plaintiffs	Najma Rashid, for the Plaintiffs
– and –	
ANNABELLE KANYWABAHIZI Defendant	David Zarek and Natasha Skupsky, for the Defendant
	HEARD: August 25, 2021 (By Zoom)

RULING ON MOTION

(Defendant's Motion to Adjourn Trial)

CORTHORN J.

Introduction

[1] This action arises from a motor vehicle collision that occurred on August 28, 2015 in the parking lot of a shopping mall. The plaintiff, Tarick Awada, and the defendant, Annabelle Kanywabahizi, were each attempting to leave their respective parking spots when their vehicles collided.

[2] Mr. Awada alleges that he sustained serious personal injuries as a result of the collision. He also alleges that the residual effects of the injuries are such that he is no longer able to earn the six-figure income that he earned as a financial advisor, prior to the collision.

[3] Mr. Awada claims damages of $3,800,000 plus interest. Of that total, the claim for damages for loss of income is by far the largest component at $3,000,000.

[4] The other two plaintiffs are Mr. Awada's adult son and daughter. They claim damages pursuant to the *Family Law Act*, R.S.O. 1990, c. C.3 totalling in excess of $140,000.

[5] In summary, the damages claimed by the plaintiffs are approximately $4,000,000.

[6] Ms. Kanywabahizi denies liability for the collision. In her pleading, she raises the issue of causation. She also denies that the plaintiffs have suffered the damages as alleged in the statement of claim.

[7] This action is set to proceed to a pre-trial conference in September 2021 and to trial on October 4, 2021. The trial is to proceed before a jury and is expected to last four weeks.

[8] In June 2021, Ms. Kanywabahizi retained new counsel. Ms. Kanywabahizi now seeks an adjournment of both the pre-trial conference and the trial. The defendant is prepared to pay the plaintiffs costs, thrown away, of trial preparation to date.

[9] The grounds for the motion to adjourn include the following:

- Counsel newly retained on behalf of the defendant requires time to fully review the file and to develop and pursue a strategy for the defence of the action at trial;
- Additional defence medical and other examinations are required. Three examinations have been scheduled – all for dates in November 2021;
- Additional time is required to obtain a report in response to the plaintiffs' second economic loss report, served in March 2021;
- Additional time is required to obtain at least one report, and possibly two, in reply to the accident reconstruction report served by the plaintiffs in April 2021. A report from a mechanical engineer is required. A report from a biomechanical engineer – addressing the dynamics of the collision – may also be required; and
- The defendant intends to bring a motion for the production of documents from two non-parties – the Ontario Securities Commission ("OSC") and the equivalent body in Alberta, the Alberta Securities Commission ("ASC")[1]. These documents are said by the defendant to relate to Mr. Awada's qualifications and ability to earn income as a financial advisor – both prior and subsequent to the collision.

[10] The plaintiffs oppose the request for an adjournment of both the pre-trial conference and the trial. In response to the motion for the adjournment, the plaintiffs brought a motion to strike the jury notice delivered by the defendant. That motion was scheduled to be heard immediately following the motion to adjourn.

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[1] Subsequent to the 2015 collision, Mr. Awada moved to Calgary, Alberta, where he continues to live.

[11] On the return of the two motions, counsel were advised that the motion to adjourn would be heard and determined. The motion to strike the jury notice would be adjourned and, if necessary, re-scheduled to be heard on an urgent basis (i.e., if the motion to adjourn the pre-trial conference and trial is not successful).

[12] Counsel were informed on August 27, 2021 that the request for the adjournment is granted, with written reasons to follow. This ruling sets out the court's reasons for granting the adjournment of both the pre-trial conference and the trial.

The Law

[13] As the moving party, the defendant bears the onus of establishing that granting the adjournment is warranted in the circumstances.

[14] The court must consider the interests of the parties, the potential prejudice to the parties resulting from either outcome, and the interests of the administration of justice in having civil trials conducted in a timely and orderly manner: see *Khan v. Baburie*, 2021 ONSC 1683, at para. 9.

[15] In its 2004 decision in *Khimji v. Dhanani* (2004), 182 O.A.C. 142, at paras. 18-23, the Court of Appeal for Ontario identified several factors for the court to consider on a motion for an adjournment:

i) The overall objective of civil proceedings is a just determination of the real matters in dispute;

ii) The prejudice that may be caused by granting or refusing the adjournment; and

iii) The length of the adjournment and the disruption caused to the court's schedule.

[16] In *Ariston Realty Corp v. Elcarim Inc.*, Perrell J. considered a motion for an adjournment of a trial in the context of rr. 1.04(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and the principles of natural justice: 2007 CanLII 13360 (Ont. S.C.), at paras. 27, 29. At para. 34 of *Ariston*, Perrell J. set out a non-exhaustive list of ten factors that the court may need to weigh when exercising its discretion to grant or refuse an adjournment:

- the overall objective of a determination of the matter on its substantive merits;
- the principles of natural justice;
- that justice not only be done but appear to be done;
- the particular circumstances of the request for an adjournment and the reasons and justification for the request;

- the practical effect or consequences of an adjournment on both substantive and procedural justice;
- the competing interests of the parties in advancing or delaying the progress of the litigation;
- the prejudice not compensable in costs, if any, suffered by a party by the granting or the refusing of the adjournment;
- 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;
- the need of the administration of justice to orderly process civil proceedings; and
- the need of the administration of justice to effectively enforce court orders.

[17] When applying those factors, it is helpful to know the history of the action.

History of the Action

[18] Set out below is a chronology of the action to date:

August 8, 2015	-	The motor vehicle collision occurs.
July 8, 2017	-	The statement of claim is issued.
September 13, 2017	-	The statement of claim is served.
February 5, 2018	-	The defendant serves a statement of defence, jury notice, and requisition for a bilingual trial.
February 28, 2018	-	The defendant serves an accident reconstruction report, dated January 18, 2018, authored by Travis Fricker of HBC Forensic Engineers ("the HBC Report").
April 10, 2018	-	The plaintiffs serve their affidavit of documents.
June 28, 2018	-	Tarick Awada is examined for discovery.
July 5, 2018	-	The defendant is examined for discovery.
December 3, 2018	-	The plaintiffs serve a supplementary affidavit of documents.
December 4, 2018	-	The plaintiffs serve an economic loss report, dated November 27, 2018, prepared by Kristin Demaline of ADS Forensics Inc. ("the ADS Report").

December 12, 2018	-	The parties attend mediation.
January 31, 2019	-	Plaintiffs' counsel files the trial record with the court. She does so with the agreement of the defendant's former counsel.
April 16, 2019	-	The court issues a notice of trial advising the parties of a pre-trial conference scheduled for October 5, 2020 and the trial date of October 4, 2021.
August 1, 2019	-	The defendant serves an economic loss report, dated August 1, 2019, prepared by Conor Paxton of Matson Driscoll & Damico Ltd. ("the MDD Report").
September 24, 2019	-	The plaintiffs serve a second supplementary affidavit of documents.
October 18, 2019	-	Defendant's counsel cancels the second attempt at mediation, scheduled for November 18, 2019.
January 2, 2020	-	The defendant serves the report of Dr. Arlin Pachet, dated December 31, 2019. This report is described in the plaintiffs' materials on this motion as a "Psychological Report".
January 20, 2020	-	The plaintiffs choose to be self-represented.
July 30, 2020	-	The plaintiffs re-retain their counsel of record.
September 4, 2020	-	The plaintiffs serve additional documents, updating their productions.
October 1, 2020	-	The plaintiffs serve additional documents, updating their productions.
October 5, 2020	-	A pre-trial conference is conducted. Deadlines are set for the delivery of expert reports on behalf of the plaintiffs (April 1, 2021) and, thereafter, on behalf of the defendant (July 1, 2021).
February 26, 2021	-	The defendant produces the underlying documents related to the HBC Report (accident reconstruction).
March 31, 2021	-	The plaintiffs serve a report dated March 25, 2021 from psychiatrist, Dr. Quickfall.
March 31, 2021	-	The plaintiffs serve a report dated March 26, 2021 from physiatrist, Dr. Perera.

April 1, 2021	-	The deadline set, at the pre-trial conference conducted in October 2020, for the delivery of the plaintiffs' expert reports passes.
April 9, 2021	-	The plaintiffs serve an economic loss report, dated April 8, 2021, prepared by Tom Strezos of Grewal Gyatt LLP ("the Strezos Report").
April 16, 2021	-	The plaintiffs serve an engineering report prepared by Richard Lamoureux and Olivier Musca ("the RLOM Report").
May 14, 2021	-	The plaintiffs serve a third supplementary affidavit of documents.
June 10, 2021	-	The defendant's new counsel is retained.
June 29, 2021	-	Defendant's counsel exchanges emails with the mediator with respect to a second attempt at mediation scheduled for July 7, 2021. Through being copied on this exchange of emails, plaintiffs' counsel learns that the defendant is now represented by different counsel.
July 1, 2021	-	The deadline set, at the pre-trial conference conducted in October 2020, for the delivery of the defendant's expert reports passes.
July 5, 2021	-	Mediation scheduled for July 7, 2021 is cancelled because the defendant's new counsel is not available on that date. Defendant's new counsel serves a notice of change of lawyers.

[19] The passage of the April 1, 2021 deadline before the plaintiffs served the Strezos Report and the RLOM Report is not a factor in the court's decision to grant the adjournment. The plaintiffs provided reasonable explanations as to why they were unable to meet the April 1, 2021 deadline when serving those reports.

[20] Six years after the collision, four years after the action was commenced, and two years after the trial date was set, why is the defendant not ready to proceed to trial? After all that time, can it be said that to permit the trial to proceed in October (with or without a jury) would significantly compromise the defendant in defending the action at trial?

Analysis

[21] My analysis of the grounds on which the defendant relies in support of the request for an adjournment is divided into the following categories:

a) Miscellaneous Factors;

b) The October 2020 Pre-Trial Conference;

c) The Engineering and Biomechanics Reports;

d) The Economic Loss Reports;

e) The Medical Reports; and

f) The Additional Discovery Steps.

[22] I turn first to the miscellaneous factors.

a) Miscellaneous Factors

[23] Based on the chronology set out above, I find that the defendant is not solely responsible for the action not being ready to proceed to trial in October 2021. I find that the plaintiffs bear some of the responsibility in that regard – specifically because of the timing of service of their experts' reports. Those reports are discussed in greater detail in subsequent sections of this ruling.

[24] I appreciate that the defendant's former counsel agreed to the matter being set down for trial as of early 2019 – when plaintiffs' counsel filed the trial record. I note, however, that neither of the parties had any input into the trial date selected. For the purpose of this motion, I distinguish between a court appearance at which counsel for the parties agree upon a trial date and a trial date assigned without any input from counsel.

[25] On inquiry at the outset of the motion, both counsel confirmed to the court that the claims made are in excess of the third party limits available to the defendant. The defendant faces personal exposure in the event the damages and pre-judgment interest, if any, awarded to the plaintiffs at trial exceed the defendant's third party limits.

[26] The court was not informed of the defendant's third party limits. Regardless of what those limits are, I find that the potential for personal exposure gives rise to prejudice to the defendant if she is required to proceed to a trial of this action without the opportunity to fully defend the claims made against her. That prejudice is a significant factor in the court's decision to grant the adjournment.

[27] The defendant's counsel is retained directly by the defendant's motor vehicle insurer. It is not in dispute that the defendant's insurer is providing instructions to counsel with respect to the defence of the action.

b) The October 2020 Pre-Trial Conference

[28] It is also not in dispute that as of the October 2020 pre-trial conference, neither the plaintiffs nor the defendant had served all of the expert reports upon which they intend to rely at trial.

[29] The only medical report that had been served was that of Dr. Arlin Pachet – from a defence psychological evaluation conducted in late November 2019. The only other expert reports available as of the date of the pre-trial conference were the defendant's accident reconstruction report (served in February 2018) and the plaintiffs' first economic loss report (served in December 2018).

[30] It is noteworthy that, as of October 2020, no expert reports from a health professional had been served on behalf of the plaintiffs.

[31] On the return of this motion, the plaintiffs repeatedly stressed that, regardless of the state of the file as of October 2020, they were prepared to engage in meaningful settlement discussions at the pre-trial conference. That may well be an accurate description of the type of discussion in which the plaintiffs were prepared to engage. What was realistically possible at the time, however, fell short of the type of comprehensive pre-trial conference that is meaningful to all parties to an action.

[32] An accurate description of what was realistically possible is reflected in the endorsement of the presiding judge. That endorsement begins with the following statement: "The parties agreed that a comprehensive pre-trial conference could not fully take place today as both parties will need to update their reports."

[33] On the consent of the parties, the presiding judge set a timetable for the service of expert reports. The plaintiffs were to serve their reports by April 1, 2021 and the defendant hers by July 1, 2021.

[34] It is not in dispute that the plaintiffs did not identify the nature or type of expert reports they intended to serve by April 1, 2021. The July 1, 2021 deadline for service of the defendant's reports was made at a time when no one involved – neither counsel nor the court – knew the number and/or type of reports that the plaintiffs intended to serve by the April 1, 2021 deadline.

[35] It is incumbent on all counsel at a pre-trial conference to be reasonable and realistic in setting timelines. Meaningful and considered input from all counsel is required. I find that, collectively, counsel were not realistic and they both failed to provide the court with meaningful and considered input when the deadlines for service of expert reports were set.

[36] Despite lacking knowledge as to the type of expert reports to expect by April 1, 2021, the defendant's former counsel agreed to a period of three months within which to deliver responding reports. I find that the defendant's former counsel was optimistic in believing that it would be possible to respond to all of the plaintiffs' expert reports – whatever they might be – within the three-month period between April 1 and July 1, 2021.

[37] I find that it would not have been possible for the defendant's former counsel, upon receipt of the medical reports served by the plaintiffs in March 2021, to have completed the following steps:

- Determine the type of medical expert opinion evidence required in response;
- Determine the number and type of defence medical examinations required in response;
- Identify experts to conduct the defence medical examinations;
- Secure Mr. Awada's consent or, if necessary, an order of the court requiring him to attend the examinations;
- In the midst of the COVID-19 pandemic make the travel arrangements necessary for Mr. Awada, who now resides in Calgary, to attend in whatever city or cities the assessments are to be conducted; and
- Serve the reports from those examinations no later than July 1, 2021.

[38] I find that, once the plaintiffs had served their expert medical reports, it was inevitable that the defendant would not be able to meet the July 1, 2021 deadline set in the pre-trial conference endorsement. That inevitability was something that the counsel for the parties were required to consider as of the spring of 2021 in terms of how the action would progress from that point forward.

[39] I find that service by the plaintiffs of a second economic loss report (from a new expert) and an engineering report which addresses not only reconstruction of the collision, but the biomechanics of the collision, contributed to it being inevitable that the defendant would not be in a position to meet the July 1, 2021 deadline for the service of her reports.

[40] I find that the change in the defendant's counsel, in the summer of 2021, had minimal impact on the time required to permit the defendant to marshal the expert evidence upon which she intends to rely at trial. My finding in that regard is based on what has happened since the defendant's new counsel was retained, including the following:

- The defendant requests that Mr. Awada attend three, and possibly four, defence examinations. Three examinations are scheduled to be conducted in November 2021. Those examinations are with a psychiatrist, a physiatrist, and a neuropsychologist. The potential fourth examination is with a vocational assessor;

- On the return of this motion, plaintiffs' counsel informed the court that she would seek instructions from Mr. Awada as to which, if any, of the defence medical examinations he consents to attend; and

- If Mr. Awada refuses to attend one or more of the assessments and/or the parties are unable to agree upon the terms pursuant to which Mr. Awada consents to attend any assessment, the defendant will be required to bring a motion.

[41] I turn next to the service of reports with respect to liability for and the biomechanics of the collision.

c) The Engineering and Biomechanics Reports

[42] In support of the request for an adjournment, the defendant submits that she requires time to address an issue raised for the first time in the RLOM Report served by the plaintiffs in April 2021.

[43] In February 2018, approximately three weeks after serving her pleading, the defendant served the HBC Report. The purpose of that report was "to assess the severity of the collision and determine the impact speed of the Awada BMW." That report does not address the biomechanics of the collision.

[44] The opinions expressed in the HBC Report are (a) that the Delta-V (change in velocity) of the Awada vehicle, as a result of the collision, was in the range of 3.7-7.0 kph, and (b) that the speed of the Awada vehicle was in the range of 10 to 11 kph at the time of the collision. No opinion is expressed about the biomechanics of the collision (i.e., addressing whether the collision was of sufficient severity to have caused the type of injuries that Mr. Awada alleges he suffered).

[45] A copy of the curriculum vitae of the author of the HBC Report is before the court. The author has a B.Sc. in Mechanical Engineering and a P.Eng. designation. I find that there is nothing in the author's curriculum vitae to indicate that he has the qualifications to provide an opinion with respect to the biomechanics of a collision.

[46] The plaintiffs did not respond to the HBC Report until April 16, 2021, when they served the RLOM Report. At p. 15 of that report, the authors express opinions that (a) the Delta-V of the Awada vehicle was in the range of 5.1 to 11 kph, and (b) "the typical threshold for injury is a Delta-V of about 8 km/h." With the former opinion, the authors of the RLOM Report respond to an issue addressed in the HBC Report. I find that with the latter opinion, the authors of the RLOM Report introduce an issue not addressed in the HBC Report.

[47] Referring to several studies, the authors of the RLOM Report explain why Delta-V is preferred over either force or acceleration as an indicator of the relative severity of a collision. They conclude the relevant section of their report with the following paragraph:

> Given our estimated delta-V between 5.1 to 11 km/h for the Awada BMW, it was determined that the subject impact may have occurred at a delta-V over the generally accepted threshold for transient injuries from whiplash in low-impact rear-end collisions. While the risk for substantive injuries to occur below 8 km/h delta-V is generally considered low, there is a multitude of data that suggest that injuries can, and do, occur.

[48] The conclusory section of the RLOM Report ends with the following summary opinion: "It was determined that the subject impact may have exceeded the 8 km/h delta-V threshold for whiplash injury."

[49] It is not clear which sections of the RLOM Report were authored by Mr. Musca and which were authored by Mr. Lamoureux. Their respective curriculum vitae are not in the record before the court. In the signature lines, Mr. Musca is identified as having a B.A.Sc. and his P.Eng. designation; Mr. Lamoureux is identified as having a B.Eng. And his P.Eng. designation.

[50] I might, if called upon to do so, infer from those qualifications that Mr. Musca expressed the opinion with respect to the Delta-V required for an injury threshold. For the purpose of this motion, however, it does not matter which of the two authors expressed that opinion. What matters is that the RLOM Report raises an issue not previously addressed by the defendant's expert – the biomechanics of the collision in the context of causation of the plaintiffs' injuries. The defendant raised the issue of causation in her statement of defence and intends to address the issue at trial.

[51] The opinion expressed in the RLOM Report regarding the biomechanics of the collision is on the basis of the verb "may". That opinion is not expressed on a balance of probabilities. Regardless, the defendant faces the risk that the opinion on the biomechanics of the collision will be admitted in evidence at trial for consideration by the trier of fact.

[52] I find that it would be unfair to the defendant to require her to proceed to trial without the opportunity to respond to the opinion on biomechanics expressed in the RLOM Report. I am mindful that the RLOM Report was served on behalf of the plaintiffs (a) almost seven years after the date of the collision, (b) almost four years after the action was commenced, (c) two years after the action was set down for trial, and (d) less than six months prior to the trial date.

[53] I accept as a reasonable ground in support of the request for an adjournment of the trial the defendant's stated intention to have one or more experts respond to the opinions expressed in the RLOM Report.

d) The Economic Loss Reports

[54] The damages claimed by Mr. Awada for loss of income are based on allegations that the injuries he sustained in the collision have significantly reduced his ability to be gainfully employed. The prayer for relief in the statement of claim includes a claim for damages for loss of income in the amount of $3,000,000.

[55] In support of the request for an adjournment, the defendant submits that she requires time to address the approach taken in the Strezos Report, served in early April 2021, to the calculation of Mr. Awada's damages for loss of income. Defendant's counsel submits that the Strezos Report introduces a new and different approach to the calculation of damages for loss of income claimed by Mr. Awada (i.e., in comparison to the ADS Report served by the plaintiffs in December 2018). In response, plaintiffs' counsel submits that the Strezos Report merely contains "different arithmetic."

[56] In December 2018, the plaintiffs served the ADS Report. The plaintiffs relied on that report for the purpose of the October 2020 pre-trial conference; in it, Mr. Awada's damages for past and future loss of income are calculated to be in the range of $1,300,000 to $2,580,000.

[57] The author of the ADS report relied on two scenarios when calculating Mr. Awada's damages for loss of income. The two scenarios are summarized as follows at p. 2 of the ADS Report:

> In Scenario 1, the Plaintiff's Projected income is calculated based on the average operating income of his business from 2010 through 2016. This scenario considers the variability in the commission income earned by the Plaintiff each year.
>
> In Scenario II, we have calculated the Plaintiff's Projected income based on the income earned in the fiscal year ended October 31, 2016. The Plaintiff's commission level had gradually increased prior to the MVA and he stated he intended to increase the level of his business' operations in future. This scenario reflects the high range of annual income the Plaintiff may have continued to earn.

[58] In August 2019, the defendant responded to the ADS Report by serving the MDD Report. The purpose for which MDD was retained is explained, as follows, in the introductory paragraph of the report:

> You have asked us as independent professional accountants experienced in economic damage quantification matters to provide you with a Limited Critique Report setting out our comments regarding the report prepared by Kristin Demaline of ADS Forensics Inc. dated November 22, 2018 ("ADS Report") which measures the economic losses sustained by Mr. Awada as a result of a motor vehicle accident that occurred on August 28, 2015 (the "accident").
>
> This report has been prepared to assist you and the court in the assessment of economic damages in the above noted litigation proceedings.

[59] A review of the MDD Report demonstrates that it is exactly as described above – a critique and nothing more. For example, the following points are raised in the MDD Report:

- ADS relied on estimates, rather than the actual figures, for Mr. Awada's business expenses for the years 2017 and 2018;

- If it were assumed that Mr. Awada would have retired at age 63 – and not age 68 as assumed by ADS – then the totals in the ADS Report would be reduced by $162,000 under Scenario 1 and $288,000 under Scenario 2; and

- If it were assumed that Mr. Awada will not have to retire early – as ADS has assumed – then the income losses ADS has calculated would be reduced by $1,000,000 under both Scenarios 1 and 2.

[60] On April 9, 2021, the plaintiffs served the Strezos Report. I agree with the characterization of that report as providing a "new and different approach to the calculation of damages for loss of income claimed by Mr. Awada" (see para. 55, above). Relying on that new and different approach, Mr. Strezos calculates the damages for past and future loss of income to be in the range of $2,610,000 to $2,810,000.

[61] The difference between the ADS approach and Mr. Strezos' approach is easily identified by Mr. Strezos' summary of the assumptions upon which he relied when calculating Mr. Awada's damages for loss of income:

- We have estimated that Mr. Awada's Assets Under Management ("AUM") at the end of 2015 (just after the Accident) as being approximately $14.1 million. We have assumed that but for the Accident, Mr. Awada would have grown his AUM by the average actual new business he generated during the years 2012 to 2015. In addition, as his income from residual commissions is based on the value of his AUM, we also increased his AUM by the change in commissions as based on the value of his AUM, we also increased his AUM by the change in the S&P/TSX Composite Index from 2015 to the present. However, in order to account for the possibility of client attrition, we applied a 2 per cent reduction to his AUM subsequent to 2015.

- It should be noted that our calculations are based on the assumption that Mr. Awada's AUM would have grown in accordance with changes in the S&P/TSX Composite Index. We note that if, as an alternative, his assets were to have grown in accordance with the average rate of return on Government of Canada marketable bonds, the losses as calculated above would be reduced to a total of **$2,610,000**.

[62] As opposed to a claim for damages for past and future loss of income in the range of $1,300,000 to $2,580,000, the defendant is now facing a claim in the range of $2,610,000 to $2,810,000. I find that it would be unfair to the defendant to require her to proceed to trial without the opportunity to marshal the evidence upon which she intends to rely in response to the different approach taken and the increased damages for loss of income calculated by Mr. Strezos.

e) The Medical Reports

[63] The exchange of medical reports is addressed in the October 2020 Pre-Trial Conference section of this ruling. For the reasons set out in that section of the ruling, I find that it would be unfair to the defendant to require her to proceed to trial without the opportunity to respond to the medical reports served on behalf of the plaintiffs. Whether that response includes all of the defence examinations proposed remains to be determined through agreement of the parties or on a motion.

f) Additional Discovery Steps

[64] In support of the request for an adjournment, the defendant requests time to pursue (a) a motion under r. 30.10 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for the production of documents from the OSC and the ASC, and (b) examinations for discovery of the two *FLA* plaintiffs.

i) Documents from Non-Parties

[65] On the return of the motion, counsel for the defendant acknowledged that no request for the production of the OSC and ASC files was made prior to the motion for an adjournment. To his credit, counsel for the defendant was not critical of the decision made by the defendant's former counsel not to pursue production of those files. He simply identified that his instructions are to take a more comprehensive approach to the defence of the action – including at trial – than had been taken to date by the defendant's former counsel.

[66] I agree with the plaintiffs that the defendant could have pursued the production of the OSC and ASC files at a much earlier date. I find, however, that it would be unfair to the defendant to require her to proceed to trial without the opportunity to fully investigate and defend the claim for damages for loss of income.

[67] The time required to permit the defendant to bring the relevant motion(s) may not contribute to any greater delay in the trial date than will the time required to address the defendant's request for Mr. Awada to attend three or more defence medical examinations. I say "may not" as opposed to "will not" because the defendant has not addressed whether she will need to bring more than one motion for the production of documents from the non-parties – specifically because the ASC is located in Alberta.

[68] Before turning to the additional discovery steps, I will deal with the manner in which the OSC and ASC files are addressed in the supporting affidavits filed by the defendant. I have a number of concerns in that regard, including the following:

- At para. 16 of his affidavit, associate counsel relies on information provided to him by counsel who appeared on the return of the motion. The decision in *Manraj v. Bour* (1995), 44 C.P.C. (3d) 111 (Ont. Gen. Div.) is authority for the principle that a lawyer who is the source of information as to an important issue contained in an affidavit sworn on information and belief was not permitted to make submissions to the court: at paras. 3-6. Caution is required when there are multiple lawyers involved in a file and affidavit evidence is required. It is not possible to fulfill more than one role – as the source of information and belief, as the affiant, or as counsel making submissions on the return of the motion;

- The third sentence of that paragraph includes opinion or argument from the affiant, and neither is proper in the context of this affidavit;

- In the reply affidavit of yet another associate counsel in the office of the defendant's counsel, reference is made to Mr. Awada's evidence on examination for discovery. That evidence is summarized and characterized, at times, as "evasive". A copy of the transcript from the examination for discovery of Mr. Awada is not included as evidence. It would have been preferable for the reply affidavit to include the transcript as an exhibit and for the affiant to have refrained from characterizing Mr. Awada's evidence; and

- The same reply affidavit includes argument with respect to the claim for damages for loss of income and the defendant's right to pursue a r. 30.10 motion. The inclusion of argument in the affidavit is improper.

[69] I turn next to the second-to-last ground upon which the defendant relies in support of the request for the adjournment.

ii) Examinations for Discovery of the FLA Claimants

[70] It is not in dispute that the first request made for the *FLA* plaintiffs to attend for examination for discovery was made in the summer of 2021, a matter of weeks prior to the return of the motion. On the return of the motion, counsel for the defendant was not critical of the defendant's former counsel for not having conducted those examinations. Counsel for the defendant characterized these examinations as part of a change in the defence strategy.

[71] In opposing the request for an adjournment, the plaintiffs rely on a communication from the defendant's former counsel, sent in the summer of 2018. Following the examinations for discovery of Mr. Awada and the defendant at that time, counsel for the plaintiffs inquired as to when the examination for discovery of Alexandra Awada would take place. The inquiry was made in an effort to arrange for the examination, if it was to be conducted, to take place before Ms. Awada returned to school in September 2018.

[72] The affidavit evidence of associate counsel in the office of counsel for the plaintiffs is that the defendant's former counsel sent an email to counsel for the plaintiffs "advising that she did not intend to examine the *FLA* claimants." A copy of the relevant email is an exhibit to the associate counsel's affidavit. The email includes a single sentence in which the defendant's former counsel said, "I will not be examining the *FLA* claimants *at this time*" (emphasis added.)

[73] The difference between what the defendant's former counsel said in her email and how her statement is characterized by associate counsel in his affidavit is significant. Fortunately, on this motion, nothing turns on the position taken in 2018 by the defendant's former counsel. There may, however, be occasions when the contents of an email are material to the outcome on a motion. I make this point solely to emphasize the attention to detail required in the preparation of affidavit evidence.

[74] In summary, I find that the defendant's former counsel did not take the position that she never intended to conduct examinations for discovery of the *FLA* plaintiffs. I also find that it would be unreasonable to require the defendant to proceed to trial without the opportunity to examine the *FLA* plaintiffs for discovery.

iii) The Two Subsequent Motor Vehicle Accidents

[75] The reply affidavit delivered by the defendant refers to two motor vehicle collisions in which Mr. Awada is said to have been involved subsequent to the 2015 collision that is the subject of this action. Counsel for the defendant intends to pursue productions related to those collisions.

[76] Once again, I find that it would be prejudicial to the defendant to require her to proceed to a trial of this action without the opportunity to address these two motor vehicle accidents.

Prejudice to the Plaintiffs

[77] The plaintiffs rely on Mr. Awada's inability to earn an income at his pre-accident level, the financial stress he faces as a result, and the physical and psychological toll that a delay in the trial will take on Mr. Awada. In addition, plaintiffs' counsel submits that if the defendant is permitted to pursue the discovery steps described herein – specifically the defence medical examinations – the parties will effectively be "re-litigating" the case.

[78] I do not in any way dismiss the financial, physical, and psychological stress that Mr. Awada is experiencing as a plaintiff in motor vehicle accident litigation. As I have already noted, however, the delay to the spring of 2021 in serving numerous expert reports contributes significantly to the position in which the defendant now finds herself. The parties responsible for that delay are the plaintiffs. They are not to be 'rewarded' for that delay by an outcome on this motion that forces the defendant, who faces personal exposure, to trial without the opportunity to fully defend the claims advanced.

[79] It is inaccurate to describe the steps that the defendant intends to take as "re-litigation" of the case. The adjournment is required to permit the defendant to (a) respond to a biomechanics opinion expressed in a report served in the spring of 2021, (b) respond to medical reports from a number of different experts, and (c) respond to a new and different approach to the damages claimed for loss of income. The defendant is doing nothing more than litigating the case as first disclosed in the expert reports served in the spring of 2021.

[80] I find that the prejudice to the defendant of not granting the adjournment far outweighs the prejudice to the plaintiffs from granting the adjournment.

Disposition

[81] The request for the adjournment of the pre-trial conference and of the trial scheduled to commence on October 4, 2021 is granted. This matter was on the list to be spoken to at Trial Management Court on August 31, 2021. As a result, a new date for both the pre-trial conference and trial will have been addressed in the context of that appearance.

[82] The defendant shall pay to the plaintiffs their costs, thrown away, of preparation for trial to date. In the event the parties are unable to resolve both the scale on which those costs are to be paid and the quantum, counsel shall make arrangements through the office of the Trial Co-ordinator for a case conference before me to address the logistics for resolving the issue of costs thrown away.

Costs of the Motion

[83] There shall be no costs of this motion to adjourn. Although the defendant is successful on the motion, I find that the conduct of the defence to date is such that the defendant should not be rewarded with costs of the motion. That conduct includes the manner in which the deadlines were set for the exchange of expert reports, the delay in pursuing the examinations for discovery of the *FLA* plaintiffs, the delay in pursuing one or more motions for the production of documents from non-parties, and the delay in pursuing documentary discovery related to motor vehicle accidents which happened a number of years ago.

[84] I also find that the conduct of the plaintiffs to date is such that they are not entitled to their costs of the motion. That conduct includes the manner in which the deadlines were set for the exchange of expert reports, the delay until the spring of 2021 to serve any medical expert reports, and the failure to appreciate that a delay in the trial was inevitable because of the number and type of expert reports served in the spring of 2021.

Madam Justice S. Corthorn

Madam Justice Sylvia Corthorn

Released: September 9, 2021

CITATION: *Awada v. Kanywabahizi*, 2021 ONSC 5918
COURT FILE NO.: CV-17-73723
DATE: 2021/009/09

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

TARICK AWADA, ALEXANDRA AWADA and JACOB AWADA, by his Litigation Guardian, TARICK AWADA

Plaintiffs

– and –

ANNABELLE KANYWABAHIZI

Defendant

RULING ON MOTION

(Defendant's Motion to Adjourn Trial)

Madam Justice Sylvia Corthorn

Released: September 9, 2021