CITATION: Chrisjohn v. Riley, 2015 ONSC 1131
COURT FILE NO.: CV-04-8593-00
DATE: 20150220

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
DEBORAH L. CHRISJOHN, KENNARD CHRISJOHN, ROSALEEN P. WEILER, PAMELA CHRISJOHN, and MICHELLE CHRISJOHN	Douglas M. Bryce, for the Plaintiffs
Plaintiffs	
- and -	
SHAWN C. RILEY, DECEASED, AND / OR THE ESTATE OF SHAWN C. RILEY, ECONOMICAL MUTUAL INSURANCE COMPANY, BELAIR INSURANCE COMPANY, IROQUOIS IRONWORKS LTD., and LANGDON INSURANCE COMPANY	Amir Fazel, for the Defendants, Langdon Insurance Company
Defendants	
	HEARD: February 18, 2015

REASONS FOR JUDGMENT

Justice Skarica

Nature of Proceeding

[1] The plaintiff brings a motion to set aside an order of the local registrar, dated August 21, 2007 which dismissed the plaintiffs' action by way of administrative dismissal.

Overview

[2] On August 31, 2002 the plaintiff, Deborah Chrisjohn, was seriously injured in an automobile accident. She retained a lawyer, R.N. He filed an action on August 27 or 30, 2004. On May 14, 2007, a status notice was issued indicating that the action would be dismissed in 90 days for delay. By order of the Local Registrar, on August 21, 2007 the plaintiffs' action was dismissed by way of an administrative dismissal. It is clear and undisputed that Mr. R.N. was negligent in the handling of the file. On September 2, 2009, Deborah Chrisjohn obtained new counsel, A.M. A statement of claim was issued against her former lawyer R.N. On February 20, 2013, the new lawyer A.M. brought a motion to set aside the administrative dismissal. This motion was brought five and a half years after the administrative dismissal.

Issue

[3] Does Rule 37 of the *Ontario Rules of Procedure* allow for the setting aside of an administrative dismissal, by way of motion brought five and a half years after the administrative dismissal order was made.

Brief Background Facts

[4] The chronology of key and important dates relevant to this proceeding, are set out in various affidavits. They can be summarized as follows:

(1) August 31, 2002 – This is the date of the motor vehicle accident causing serious injuries to the plaintiff Deborah Chrisjohn.

(2) August 30, 2004 – A statement of claim was issued by Ms. Chrisjohn's lawyer, R.N., on August 30, 2004 against Shawn Riley and a number of insurance companies.

(3) November 10, 2005 – Certain insurance companies were released from the action by order of Justice Seppi.

(4) January 12, 2006 – Justice Seppi ordered that the defendant Langdon Insurance Company and Iroquois Ironworks could be added to an amended statement of claim. Counsel advise that the draft amended statement of claim was never filed and seek an order to do that in these proceedings heard in February, 2015 but initiated in February, 2013.

(5) May 14, 2007 – A status notice was sent to R.N. advising that unless the matter was set down for trial within 90 days, the "action will be dismissed for delay".

(6) July 26, 2007 – An examination for discovery was held of Deborah Chrisjohn. 53 undertakings were made by R.N. I am advised that to date, February 18, 2015, none of them have been complied with.

(7) August 21, 2007 – By order of the Local Registrar, D. Des Vignes, the plaintiffs' action was dismissed by an administrative dismissal order.

(8) August 22-30, 2007 – Deborah Chrisjohn received correspondence from the court indicating the case was dismissed. Ms. Chrisjohn provided the letter to R.N. R.N. advised her that her case was not dismissed and he would take care of it.

(9) November 2007 – Ms. Chrisjohn and R.N. attended a mediation with the defendants' lawyers.

(10) November 2007 – August 2009 – There was a breakdown in communication between Deborah Chrisjohn and R.N. R.N. would not return calls. When she did speak to him he was abrasive. R.N. had marital problems. From 2007 to 2009, Ms. Chrisjohn indicated that R.N. was consistently abusive, used profanity, treated her dismissively and bullied her into keeping him as her lawyer. She had a brain injury as a result of the accident and relied on him. R.N. told her the case was being handled.

(11) August 2007 – August 2009 – R.N. was in contact with the defendants' lawyers but never brought a motion to "normalize the proceedings".

(12) August 31, 2009 – Ms. Chrisjohn retained a new lawyer, A.M. She retained him to continue on with her claim for compensation for the motor vehicle collision.

(13) August 31, 2009 – April 17, 2010 – There was no contact between A.M. and the defendants' lawyers.

(14) Early 2010 – A.M. called to let Ms. Chrisjohn know that her case was dismissed from court. A.M. did not think the action was over for good but in order to get around the dismissal, a negligence claim would have to be made on her former lawyer, R.N.

(15) April 18, 2010 – A.M. phoned the defendants' lawyers and told Hershel Sahian, that the plaintiff was now pursuing a claim against her former lawyer "since the limitation period for pursuing the defendant Langdon Insurance Company had long since expired". From April 19, 2010 until February 20, 2013 (34 months) the defendants lawyers had no further contact with Langdon's lawyers.

(16) April 30, 2010 – R.N. takes a leave from his practice on medical grounds due to depression and incapacity.

(17) August 11, 2010 – A statement of claim was launched against the "old" lawyer R.N. by the new lawyer, A.M. on the grounds of solicitor's negligence in handling Ms. Chrisjohn's file.

(18) September 22, 2010 – A.M. wrote R.N. advising R.N. to contact his insurer, LawPro, to put them on notice of the plaintiff's claim. R.N. did not do so.

(19) March 22, 2011 – A.M. brought a motion for an order compelling R.N. to report the claim to LawPro. R.N. opposed the motion. Justice Rady indicated that the Rules did not authorize the relief sought. The motion was adjourned so that the Law Society could be contacted.

(20) March 25, 2011 – A.M. brought a formal complaint to the Law Society regarding R.N.'s failure to provide timely notice to LawPro.

(21) August 2011 – LawPro advised A.M. that they were now involved.

(22) October 2011 – LawPro advised A.M. that due to R.N.'s tone of emails, LawPro was closing its file.

(23) May 2012 – November 2012 – Correspondence was sent back and forth from LawPro to A.M. On October 22, 2012 LawPro advised A.M. to deal directly with R.N. as it was declining to appoint counsel.

(24) December 21, 2012 – January 2, 2013 – A status hearing was held on the R.N. lawsuit for negligence. Justice Rady ordered that the R.N. negligence law suit ought not to be dismissed for delay.

(25) Early 2013 – A.M. had been advising Ms. Chrisjohn about how the R.N. negligence law suit was proceeding. A.M. now advised Ms. Chrisjohn he would be filing a motion to set aside the dismissal for delay of the action.

(26) February 20, 2013 – A.M. brings the motion to set aside the administrative dismissal of the action five and a half years earlier on August 21, 2007.

(27) February 18, 2015 – This motion was heard and argued in Brampton

Law

[5] The law regarding these types of motions made pursuant to Rule 37 is clear and was not in dispute.

[6] The leading case in this matter is *Reid v. Dow Corning Corp.*, [2001] O.J. No. 2365 (Ont. S.C.J.). In *Reid*, Master Dash sets out four criteria that must be satisfied and held that if all the four criteria are not satisfied, the order will stand. He held at paras. 40 and 41:

> 40 While I agree there must be some balancing of interests, I find, upon review of the caselaw presented to me, that in determining whether to set aside a registrar's order dismissing an action made under rule 48.14(3), a plaintiff must satisfy four criteria. If the plaintiff fails to satisfy any one of these criteria, the registrar's order will stand.
>
> 41 The four criteria to be met are as follows:
>
> 1. Explanation of the Litigation Delay: The plaintiff must adequately explain the delay in the progress of the litigation from the institution of the action until the deadline for setting the action down for trial as set out in the status notice. She must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken to explain why. For example the complexities of the case and the number of parties may have required significantly more time to move the action toward trial, or the delay was caused by interlocutory matters or appeals. The plaintiff could explain that the action was stalled due to the inattention or negligence of her solicitors which was contrary to her own instructions or expectations. It is absolutely essential that the plaintiff lead satisfactory evidence that she personally always intended the action to proceed to trial without delay, that she did not assent to the delay, and that she always reasonably assumed it was so proceeding or made appropriate inquiries of her solicitors. If either the solicitor or the client made a deliberate decision not to advance the litigation toward trial then the motion to set aside the dismissal will fail.

2. Inadvertence in Missing the Deadline: The plaintiff or her solicitor must lead satisfactory evidence to explain that they always intended to set the action down within the time limit set out in the status notice, or request a status hearing, but failed to do so through inadvertence. In other words the penultimate dismissal order was made as a result of inadvertence.

3. The Motion is Brought Promptly: The plaintiff must demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.

4. No Prejudice to the Defendant: The plaintiff must convince the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action. The court takes note that witnesses' memories generally tend to fade over time and that sometime it is difficult to locate witnesses or documents. However to bar the plaintiff from proceeding with her action on the ground of prejudice, the defendant must lead evidence of actual prejudice. This might include evidence of specified documents lost over time, or destroyed following a dismissal, or of specific witnesses who have died, or have disappeared and the defendant has been unable to locate them with due diligence. While litigation is outstanding the defendants must take care to obtain and preserve evidence.

[7] The Ontario Court of Appeal has made significant changes to the *Reid* formula over time. Failure of one or two or even three of the four *Reid* factors will not be decisive. The court is required to take a contextual approach.

[8] The following cases outline the evolution of the law in defining the "contextual approach":

(a) *Scaini v. Prochnicki et al.* (2007), 85 O.R. (3d) 179, at paras. 21-26 :

[21] More importantly, I do not agree that the case law reviewed in Reid, supra, yields the proposition that an appellant must satisfy each relevant criterion in order to have the registrar's order set aside. None of the cases referred to say so expressly and several proceed on a more contextual basis. For example, in Steele v. Ottawa-Carleton (Regional Municipality), [1998] O.J. No. 3154, 74 O.T.C. 259 (Gen. Div.), Master Beaudoin, at para. 17, described the guiding principle in deciding whether to set aside a rule 48.14 dismissal by the registrar as follows:

Ultimately, the Court will exercise its discretion upon a consideration of the relevant factors and will attempt to balance the interests of the parties.

[22] I agree with Master Beaudoin.

[23] In my view, a contextual approach to this question is to be preferred to a rigid test requiring an appellant to satisfy each one of a fixed set of criteria. The latter approach is not mandated by the jurisprudence. On the other hand, the applicable rules clearly point to the former. In particular, the motion to set aside the registrar's order dismissing the action for delay engages rule 37.14(1)(c) and (2). The latter invites the court to make the order that is just [page185] in the circumstances. A fixed formula like that applied by the motion judge is simply too inflexible to allow the court in each case to reach the just result contemplated by the rules.

[24] That is not to say that there are no criteria to guide the court. Indeed I view the criteria used by the motion judge as likely to be of central importance in most cases. While there may be other relevant factors in any particular case, these will be the main ones. The key point is that the court consider and weigh all relevant factors to determine the order that is just in the circumstances of the particular case.

[25] It may be that in a particular case, one factor on which the appellant comes up short is of such importance that, taken together with the other factors, the appellant must fail. What is important is that the analysis be contextual to permit the court to make the order that is just.

[26] Thus, in my view, the motion judge erred in principle by requiring the appellant to satisfy each of the four criteria separately in order to succeed in setting aside the registrar's order, without considering and weighing all the relevant factors. I would therefore set aside his order.

...

(b) *Marche D'Alimentation Denis Theriault Lte et al. V. Giant Tiger Stores Ltd.* (2007), 87 O.R. (3d) 660, at paras. 20-23, 26-29, 32, 34, 38:

[20] In Scaini v. Prochnicki (2007), 2007 ONCA 63 (CanLII), 85 O.R. (3d) 179, [2007] O.J. No. 299 (C.A.), a decision handed down after those of both the Master and the Divisional Court, this court reversed the line of authority that had strictly required a moving party to satisfy each element of the four-part test in Reid v. Dow Corning Corp., supra. Writing for the court, Goudge J.A. stated at paras. 23-24 that "a contextual approach. . . is to be preferred to a rigid test requiring an appellant to satisfy each one of a fixed set of criteria". The four Reid criteria are "likely to be of central importance in most cases", but they are not exhaustive and "[t]he key point is that the court consider and weigh all relevant factors to determine the order that is just in the circumstances of the particular case". [page667]

[21] The contextual approach mandated by Scaini to determine what "is just in the circumstances of the particular case" invites the application of important underlying principles and values of the civil justice system that are inherent in the four Reid factors. As I read his reasons, the Master's interpretation of the four Reid factors implicitly embraced these principles and values.

[22] On this appeal, three of the four elements from the Reid test are at issue, namely, explanation for the litigation delay, inadvertence in missing the deadline, and prejudice to the plaintiff.

Explanation for the litigation delay

[23] The Reid test's requirement of an explanation for the litigation delay ties into a dominant theme in modern civil procedure: the discouragement of delay and the enhancement of an active judicial role to ensure timely justice. This action was dismissed by the Registrar under rule 48.14: a status notice was sent because the action had not been placed on the trial list within two years of the filing of a statement of defence, and the respondents failed to set the action down for trial within 90 days after receiving the status notice. Rule 48.14 is one of many rules of civil procedure designed to promote the timely resolution of disputes, to discourage delay in civil litigation and to give the courts a significant role in reducing delays. Before the promulgation of rule 48.14, parties had total control over when cases were placed on the trial list. Rule 48.14 "establishes a procedure which gives the court a degree of control over the speed at which litigation proceeds to a conclusion. . . . In essence the rule provides for a very limited form of case management." Garry D. Watson & Craig Perkins, Holmested and Watson: Ontario Civil Procedure, vol. 4 supplement (Toronto: Carswell, 1984) [at] 4815. The case management regime, for which rule 48.14 was a precursor, was introduced in part to reduce "unnecessary cost and delay in civil litigation": rule 77.02.

...

[26] In the light of the important principle of promoting the timely resolution of disputes, I see no reason on the record before us to disagree with the Master's finding that the respondents failed to satisfy the first step of the Reid test. The solicitor "had put the file in abeyance" and that his conduct indicated "a deliberate intention not to advance the litigation toward trial". As the Divisional Court judge found, the delay flowed from the solicitor's "intentional and stubborn refusal to proceed with the action". The respondents' solicitors failed to observe the rules relating to filing Notices of Change of Solicitor or to ensure adequate communication within their office when the assistant encountered difficulties in that regard. This failure meant that the solicitor did not receive the Registrar's rule 48.14 Notice, but he nonetheless should have known that under the Rules of Court, failure to set the action down for trial within two years of the statement of defence would lead to the action being dismissed.

Inadvertence in missing the deadline

[27] The Master and the Divisional Court disagreed as to whether the solicitor's conduct constituted "inadvertence" for the purposes of the second branch of the test. The Master, focusing on [page669] the conduct of the solicitor, held that it was not. The Divisional Court judge, focusing on the fact that the client believed that the action was proceeding to trial, held that the solicitor's neglect of the file should be considered inadvertent. I agree with the Master that, in light of the length of the delay and the fact that it was caused by the solicitor effectively abandoning the file, this is not a case where the failure to move the case along to trial can be considered as mere inadvertence.

[28] One important consideration is that the plaintiff will not be left without a remedy. I recognize here the need to ensure that adequate remedies are afforded where a right has been infringed. The law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his or her solicitor: see, e.g., Chiarelli v. Wiens (2000), 2000 CanLII 3904 (ON CA), 46 O.R. (3d) 780, [2000] O.J. No. 296 (C.A.), at para. 9.

[29] However, this calculus implicitly assumes that the court is left with a stark choice between defeating the client's rights and forcing the opposite party to defend the case on its merits. That assumption is faulty where, as in this case, the solicitor's conduct is not mere inadvertence, but amounts to conduct very likely to expose the solicitor to liability to the client. When the solicitor is exposed in this way, the choice is different; refusing the client an indulgence for delay will not necessarily deny the client a legal remedy.

...

[32] Moreover, excusing a delay of this magnitude and gravity risks undermining public confidence in the administration of justice. Lawyers who fail to serve their clients threaten public confidence in the administration of justice. The legal profession itself has recognized this danger: Commentary to rule 2.01 of the Law Society of Upper Canada's Rules of Professional Conduct states, "A [page670] lawyer who is incompetent does the client a disservice, brings discredit to the profession, and may bring the administration of justice into disrepute" (emphasis added). There is a risk that the public would perceive disregarding the solicitor's conduct in the circumstances of this case as the legal system protecting its own. Excusing a delay of this kind would [throw] into question the willingness of the courts to live up to the stated goal of timely justice.

[33] Overall, reinstating this action would excuse a five- year delay after the dismissal of an action, explained only by the fact that a lawyer formed "a deliberate intention not to advance the litigation toward trial" and "put the file in abeyance". That would risk undermining the integrity and repute of the administration of justice.

Prejudice to the plaintiff

[34] The fourth step in the Reid test focuses on prejudice to the defendant and the goal of having disputes resolved on their merits. The Rules of Civil Procedure must be interpreted in a manner that recognizes that expeditious justice is only one value to be weighed against others and that delay may be excused where necessary to ensure complete justice. As rule 1.04(1) states, the rules are to be "liberally construed to secure the just, most expeditious and least expensive determination or every civil proceeding on its merits" (emphasis added). Expeditious justice must be balanced with the public interest in having disputes determined on their merits. Where, despite the delay, the defendant would not be unfairly prejudiced should the matter proceed for resolution on the merits, according the plaintiff an indulgence is generally favoured.

...

[38] When an action has been disposed of in favour of a party, that party's entitlement to rely on the finality principle grows stronger as the years pass. Even when the order dismissing the action was made for delay or default and not on the merits, and even when the party relying on the order could still defend itself despite the delay, it seems to me that at some point the interest in finality must trump the opposite party's plea for an indulgence. This is especially true where, as in the present case, the opposite party appears to have another remedy available.

...

(c) But see Finlay v. Paassen, 2010 ONCA 204, at para. 31-32 where the Court of Appeal held that the possibility of an action against a solicitor was not a germane consideration whether a dismissal for delay should be set aside.

...

(d) *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887, at paras. 19-22, 33:

[19] Judges' decisions on whether to set aside a registrar's order dismissing an action for delay are discretionary. The general principles and specific considerations that structure the exercise of this discretion are well established: see [page695] Scaini v. Prochnicki (2007), 2007 ONCA 63 (CanLII), 85 O.R. (3d) 179, [2007] O.J. No. 299 (C.A.); Marché d'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd. (2007), 2007 ONCA 695 (CanLII), 87 O.R. (3d) 660, [2007] O.J. No. 3872 (C.A.); Finlay v. Van Paassen (2010), 2010 ONCA 204 (CanLII), 101 O.R. (3d) 390, [2010] O.J. No. 1097, 266 O.A.C. 239 (C.A.).

[20] Two principles of our civil justice system and our Rules of Civil Procedure come into play. The first, reflected in rule 1.04(1), is that civil actions should be decided on their merits. As the motion judge said, at para. 31 of his reasons:
"the court's bias is in favour of deciding matters on their merits rather than terminating rights on procedural grounds".

[21] The second principle, reflected in the various time limits mandated by our rules, and indeed, as noted by the motion judge, in the provision for a status notice and hearing, is that civil actions should be resolved within a reasonable time frame. In Marché, at para. 25, my colleague Sharpe J.A. wrote about the strong public interest in promoting the timely resolution of disputes. Both the litigants and the public have an interest in timely justice. Their confidence in the administration of our civil justice system depends on it.

[22] On motions to set aside an order dismissing an action for delay, invariably there is tension between these two principles. In seeking to give effect to these principles, motion judges must take account of and weigh a list of considerations. These considerations typically include

-- the length of the delay;

-- whether the plaintiff has adequately explained the delay;

-- whether the delay has prejudiced the defendants;

-- whether the dismissal order resulted from a lawyer's inadvertence; and

-- whether, after becoming aware of the dismissal order, the plaintiff moved reasonably promptly to set it aside.

...

[33] On motions to set aside orders dismissing an action for delay, the question whether a defendant has been prejudiced by the delay is invariably a key, if not the key, consideration. Svedas and Bradscot filed affidavits stating that they had been prejudiced by the long delay because many of their important witnesses were now either unavailable or could no longer remember much about the project. The motion judge relied on this evidence to find, at para. 28 of his reasons, that the City's delay had prejudiced the defendants:

> The Defendants Svedas and Bradscot have both provided instances of where important witnesses are unavailable or their evidence impaired by the passage of time caused by the City's delay. In the case of Svedas, the lead principal involved in this project, Mr. Koyanagi, is 80 years old and semi-retired, and his memory of a project completed 16 years ago has faded. Svedas's senior technical employee with day- to-day responsibility for the project is in poor health and unavailable to testify as a witness. Other technical personnel involved in the project have long since left the firm and Svedas has no knowledge of their whereabouts. Bradscot also provided evidence that key personnel involved in the project no longer worked for the company and could not be located or, if they could be located, had faded memories of the project or were unavailable to testify for health reasons.

...

(e) *Habib v. Mucaj*, 2012 ONCA 880, at paras. 6-7:

[6] No one factor is necessarily decisive of the issue. Rather, a "contextual" approach is required where the court weighs all relevant considerations to determine the result that is just. Here, the Master specifically referenced the proper test and engaged in the weighing exercise. He found that, after the weighing exercise, the just result was to set aside the dismissal order. The Master's order was discretionary and was made as part of his duty to manage the trial list. The decision, therefore, attracts significant deference from a reviewing court: *Finlay v. Paassen*, 2010 ONCA 204 (CanLII).

[7] Furthermore, on a motion to set aside a dismissal order, the court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel. However, where the lawyer's conduct is not inadvertent but deliberate, this may be different: *Marché d'Alimentation Denis Thériault Ltée. v. Giant Tiger Stores Ltd.* (2007), 2007 ONCA 695 (CanLII), 87 O.R. (3d) 660 (O.C.A.), at para. 28. Here, the plaintiff lawyers' conduct was found by the Master not to be deliberate. Simply because the appeal judge's view is that the conduct was "negligent" or "bordering on negligent", does not mean the Master was not entitled to find the conduct not to be deliberate or not intentional.

...

(f) *Elkhouli v. Senathirajah et al.*, 2014 ONSC 6140

[45] Rule 48.14 is also repealed and replaced with a simpler rule with longer time frames. Under the new Rule each Statement of Claim in the boilerplate portion at the outset of that document, will contain a notice that the action will be dismissed 5 years after it is commenced unless it has been set down for trial or otherwise disposed of or there is an order extending the time. The dismissal will be automatic with no further notice.

[46] This action was commenced on December 16th 2009. If the new rule had applied throughout its existence, the action would be subject to being dismissed on December 16, 2014, being the end of the five year period now contemplated by the amended rule.

[47] I appreciate that there are transition provisions with respect to actions commenced under the previous timeframe. Nevertheless an action that would have been subject to dismissal on January 2, 2015 for failure to set the action down for trial under the old rule, now has a further three years before anything happens.

[9] Master Muir in *Bagus v. Telesford*, 2014 ONSC 3512, provides a useful summary of the current contextual approach to these types of motions at paras. 23-27:

> [23] The law relating to motions seeking an order setting aside an administrative dismissal order is summarized in my decision in *744142 Ontario Ltd. v. Ticknor Estate*, 2012 ONSC 1640 (CanLII), 2012 ONSC 1640 (Master). At paragraph 32 of that decision I set out the applicable principles as follows:
>
>> 32. In the last five years, the law relating to setting aside registrar's dismissal orders has been the subject of seven decisions of the Court of Appeal for Ontario. Although each of those decisions brings a slightly different approach to the decision making process, the general approach first set out by the Court of Appeal in Scaini has been followed consistently. The principles that emerge from those decisions can be summarized as follows:
>>
>> • the court must consider and weigh all relevant factors, including the four Reid factors which are likely to be of central importance in most cases;
>>
>> • the Reid factors, as cited by the Court of Appeal in Giant Tiger, are as follows:
>>
>> (1) Explanation of the Litigation Delay: The plaintiff must adequately explain the delay in the progress of the litigation from the institution of the action until the deadline for setting the action down for trial as set out in the status notice. She must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken to explain why.... If either the solicitor or the client made a deliberate decision not to advance the litigation toward trial then the motion to set aside the dismissal will fail.
>>
>> (2) Inadvertence in Missing the Deadline: The plaintiff or her solicitor must lead satisfactory evidence to explain that they always intended to set the action down within the time limit set out in the status notice, or request a status hearing, but failed to do so through inadvertence. In other words the penultimate dismissal order was made as a result of inadvertence.
>>
>> (3) The Motion is Brought Promptly: The plaintiff must demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.
>>
>> (4) No Prejudice to the Defendant: The plaintiff must convince the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action;

• a plaintiff need not satisfy all four of the Reid factors but rather a contextual approach is required;

• the key point is that the court is to consider and weigh all relevant factors to determine the order that is just in the circumstances of each particular case;

• all factors are important but prejudice is the key consideration;

• prejudice to a defendant may be presumed, particularly if a lengthy period of time has passed since the order was made or a limitation period has expired, in which case the plaintiff must lead evidence to rebut the presumption;

• once a plaintiff has rebutted the presumption of prejudice, the onus shifts to the defendant to establish actual prejudice;

• prejudice to a defendant is not prejudice inherent in facing an action in the first place but prejudice in reviving the action after it has been dismissed as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action;

• the party who commences the litigation bears the primary responsibility under the Rules for the progress of the action;

• in weighing the relevant factors, the court should not ordinarily engage in speculation concerning the rights of action a plaintiff may have against his or her lawyer but it may be a factor in certain circumstances, particularly where a lawyer's conduct has been deliberate. The primary focus should be on the rights of the litigants and not with the conduct of their counsel.

[Footnotes Omitted]

[24] I am also mindful of the observations of the Court of Appeal in its decision in *Hamilton (City)*. At paragraphs 20-22 of that decision Justice Laskin notes as follows:

> 20 Two principles of our civil justice system and our *Rules of Civil Procedure* come into play. The first, reflected in rule 1.04(1), is that civil actions should be decided on their merits. As the motion judge said at para. 31 of his reasons: "the court's bias is in favour of deciding matters on their merits rather than terminating rights on procedural grounds."
>
> 21 The second principle, reflected in the various time limits mandated by our rules, and indeed, as noted by the motion judge, in the provision for a status notice and hearing, is that civil actions should be resolved within a reasonable timeframe. In *Marché*, at para. 25, my colleague Sharpe J.A.

> wrote about the strong public interest in promoting the timely resolution of disputes. Both the litigants and the public have an interest in timely justice. Their confidence in the administration of our civil justice system depends on it.
>
> 22 On motions to set aside an order dismissing an action for delay, invariably there is tension between these two principles.

[25] I also note that the Court of Appeal has recently emphasized the principle that these motions involve an exercise of the court's discretion. The court must weigh all relevant considerations to determine the result that is just in the circumstances. See *Habib v. Mucaj*, 2012 ONCA 880 (CanLII) at paragraph 6.

[26] Finally, it should be emphasized that the general preference in our system of civil justice is for disputes to be decided on their merits. See *MDM Plastics Ltd. v. Vincor International Inc.*, 2013 ONSC 710 (CanLII), 2013 ONSC 710 (S.C.J.) at paragraphs 24 and 28.

[27] State Farm argued that recent decisions of this court and the Court of Appeal suggest that there is a trend toward a stricter approach on motions to set aside dismissal orders. I agree that the tests set out by the Court of Appeal in connection with status hearings and motions to restore actions to the trial list appear to be more rigid than the applicable test on this motion. The test on a contested status hearing, for example, is conjunctive. It requires a plaintiff to explain her delay and demonstrate that the defendant will not be prejudiced. See *Faris v. Eftimovski*, 2013 ONCA 360 (CanLII) at paragraph 42. However, none of the half dozen or more Court of Appeal decisions dealing with administrative dismissal orders take that approach. They all require a contextual analysis where it is not necessary for a plaintiff to satisfy all factors. The court is to weigh all of the factors and make the order that is just in the circumstances. In my view, this remains the applicable test.

Analysis

[10] I now will consider the relevant factors in turn.

1. Explanation of Litigation Delay

[11] During the time that R.N. had carriage of the file, (2002-2009), little progress was made to bring this matter to trial. For example, in January 2006, Justice Seppi indicated that an amended statement of claim could be added to the file. This was never done during R.N.'s tenure and is only being done now

with the motion initiated in February 2013. The status notice on May 14, 2007 was not responded to. An examination for discovery was held in July 2007. 53 undertakings were made. Eight years later none have been complied with. The plaintiff and her counsel were aware of the administrative dismissal in August 2007 but did not bring the requisite notice of motion to, in his words, "normalize the proceeding". Finally he was discharged in July 2009. A.M. was brought on in August 2009. From August 2009 until early 2013, A.M.'s strategy was to pursue R.N. for negligence. A.M. told the defendants' lawyer that he was pursuing R.N. due to limitation periods expiring against Langdon. I believe that it is a reasonable conclusion that A.M. made a strategic decision to abandon proceedings against Langford and pursue R.N. instead. In February 2013, A.M. changed this strategy and sought to pursue Langdon again. Accordingly, A.M. made a deliberate decision not to advance the litigation toward trial and this decision alone accounted for an almost three and a half year unacceptable delay.

[12] Accordingly, the plaintiff has not provided a satisfactory explanation for the litigation delay.

2. Inadvertence in Missing the Deadline

[13] R.N. received the status notice in May 2007. Very little had been done to advance the file by that time. Nothing was done to set the matter for trial or seek relief from the pending 90 day deadline. There was a discovery held in July 2007,

with numerous undertakings being made which eight years later are still outstanding. There is no satisfactory evidence to explain that R.N. intended to set the action down within the time limit set out in the status notice. R.N. was at one point depressed and had marital problems. What influence these problems had on R.N.'s conduct and decisions from 2002 to 2007 is unclear.

[14] Again the plaintiff has not provided satisfactory evidence establishing inadvertence.

3. Motion Brought Promptly

[15] In August 2007 both Ms. Chrisjohn and her lawyer were aware of the administrative dismissal. No motion to set it aside was brought by R.N. from 2007 until he was discharged in 2009. However. R.N. assured Ms. Chrisjohn that everything was alright and even conducted a mediation shortly thereafter. However, on August 31, 2009, a new lawyer A.M. was retained. In early 2010, he told Ms. Chrisjohn that her case was dismissed. In order to get around the dismissal, A.M. pursued R.N. instead. The motion to set aside the dismissal was not brought until February, 2013; three years after A.M. told Ms. Chrisjohn about the dismissal order still being in effect.

[16] It is obvious that, with the five and a half year delay, the plaintiff has failed to demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.

4. No Prejudice to the Defendant

[17] The plaintiff, in her factum, concedes, regarding prejudice that the burden of proof on the plaintiff is as follows:

> 58. Master Muir outlines the process for determining prejudice, reiterating the approach taken by the Ontario Court of Appeal, as follows:
>
> (g) prejudice to the defendant may be presumed, particularly if a lengthy period of time has passed since the dismissal order was made;
>
> (h) if prejudice is presumed, the Plaintiff must lead evidence to rebut the presumption; and,
>
> (i) once the presumption of prejudice has been rebutted by the Plaintiff, the onus shifts to the Defendant to establish actual and significant prejudice.
>
> *Wellwood v. Ontario Provincial Police* 2010 ONCA 386 at 60 (Plaintiffs' Brief of Authorities, Tab 12)
>
> *Bagus v. Telesford* 2014 ONSC 3512 (CanLII) at 23 (Plaintiffs' Brief of Authorities, Tab 1)
>
> 59. Master Muir pointedly repeats that the Defendant must establish *significant* prejudice and not simply *any* prejudice in order to defeat the motion to set aside the dismissal.
>
> *Bagus v. Telesford* 2014 ONSC 3512 (CanLII) at 39 (Plaintiffs' Brief of Authorities, Tab 1)

[18] Regrettably, this is a very lengthy period of delay.

[19] I find the following gaps in the evidence to be significant:

Liability

[20] The plaintiffs' contention is that, pursuant to paragraph 13 of the proposed amended statement of claim, the other driver, Shawn Riley was impaired. Shawn Riley died from injuries in the accident. There at the present time is little evidence that he was or was not impaired by alcohol. The OPP records for occurrence reports are available. Exactly what is in those records, no one can say for certain. Officer Smith, the investigating officer had a stroke in January 2004. Exactly what his mental status is right now is uncertain. Whether his notes were preserved on retirement, no one knows.

[21] Police material that may have existed in 2007 may or may not be available. This material may or may not establish Mr. Riley's sobriety. Even more significant, I was advised that hospital records can be obtained but currently hospital records are only required to be kept for 10 years. This means that in 2015, 2002 records may not be available. Normally, hospitals in serious accidents take blood samples of victims of car accidents. There is an analysis of blood alcohol done. This analysis may establish that Mr. Riley is over the legal limit regarding alcohol or it may establish he is under the limit and not impaired. No one knows if the records still exist or what is in them. The hospital records have the potential to significantly assist the defendants. If the records do not exist (the plaintiffs cannot say one way or the other) the defendant is seriously

prejudiced in its defence. It is the plaintiffs' burden to establish they exist and the plaintiff has failed to rebut this serious and significant aspect of prejudice to the defendant.

Missing Medical Evidence

[22] The current plaintiffs' lawyer over the last year has made significant attempts to obtain medical evidence and fill in current gaps in the medical evidence.

[23] Despite the plaintiffs' best efforts, serious and significant gaps in the medical evidence still exist and cannot be remedied.

[24] These gaps include:

(1) The original CT scans and x-rays are no longer available. The best the defendant can do is rely on what the medical doctors say about the records.

(2) OHIP records covering the pre-accident history of the plaintiff are no longer available.

(3) Even more significantly, OHIP records for the first five months after the accident are no longer available.

(4) The records of two treating professionals, Dr. Monture and Dr. Dronyk, chiropractor, are not available although records of many other treating doctors are available.

(5) Pharmacy records from 2002 to 2005 are no longer available. The best the plaintiff can do is analyze the medical files, that it has and can obtain from other professionals, and try to fill in the gaps.

(6) The 911 records are not available.

(7) The failure of the plaintiff to comply with undertakings has prejudiced the defendant. The plaintiff undertook to provide contact information for witnesses to the accident and never did so. Accordingly, the witnesses may now never be located; may be deceased and in all likelihood would not be in a position to provide detailed evidence 13 years after the event.

[25] I conclude (1) given the very lengthy delay, prejudice to the defendant may be presumed and that the plaintiff has failed, on the material before me to rebut that presumption and as well, (2) that there has been in fact significant, actual prejudice to the defendant caused by the significant delay by the plaintiffs in moving to set aside the administrative dismissal order in 2007.

[26] Accordingly, the plaintiff has failed to satisfy any of the four *Reid* factors. There is one final consideration which I would like to include in the contextual approach I must take.

[27] In *Hernandez v. Lariviere*, 2014 ONSC 7158, my colleague, Justice Lofchik indicated at paras. 68-70:

> [68] In Thomas v. McLelland, the Court held that notwithstanding the fact that no prejudice arose to the defendant in that case, given the other three Reid factors and in the context of the facts, to allow the Plaintiff's motion and set aside the dismissal order would bring the administration of justice into disrepute. The Court observed that with regard to its gatekeeper mandate, "What we permit, we promote".
>
> *Thomas v. McLelland*, supra, at para. 32-36

> [69] The Ontario Court of Appeal has recognized as relevant to the fourth Reid factor the security of legal position gained by a litigant through a court order granted because of delay or default. Finality is a central principle in the administration of justice and is a compelling consideration. Even when the order dismissing the action was made for delay or default and not on the merits, and even when the party relying on the order could still defend itself despite the delay, at some point the interest in finality must trump the opposite party's plea for an indulgence. This is especially true where the opposite party has another remedy available. Refusing the Plaintiff an indulgence for delay will not deny him a legal remedy.
>
> *March D'Alimentation*, supra, at para. 37-38
>
> [70] In the circumstances of this case the finality principle must trump the Plaintiff's request for an indulgence and restricting the Plaintiff's claim to an action against his lawyer is a just result on a contextual basis that balances the interest of the parties and takes into account the public's interest in the timely resolution of disputes.

[28] I do not take into account whether the plaintiff has another remedy against either R.N. or A.M. for negligence – see *Finlay v. Paassen*, 2010 ONCA 204, at paras. 31-32.

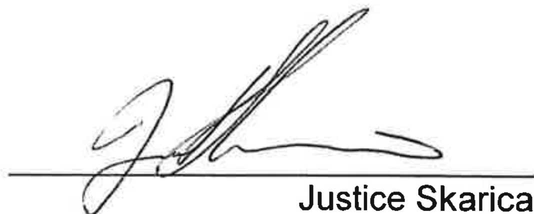
[29] However, I do take into account that on April 18, 2010, A.M. the plaintiff's "new" counsel phoned Mr. Sahian, counsel for the defendant Langdon Insurance Company and advised that he was pursuing a claim against R.N. since the limitation period against Langdon had long expired. In plain English, Langdon had an administrative dismissal and approximately three years later, was told by counsel that in effect, the case against it was over. Langdon heard nothing for 34 months and then was served with the proceedings.

[30] Accordingly, for five and a half years, Langdon, based on an administrative order and on the plaintiff counsel's communications, assumed,

legitimately that the case against it was over. To quote Justice Lofchik, finality is a central principle in the administration of justice and is a compelling consideration. The integrity and respect for the administration of justice requires the public to be able to confidently rely on the assurances and communication of counsel and on orders properly made. The interest in finality, in these circumstances must trump the opposite party's plea for indulgence.

Conclusion

[31] For the reasons cited, the plaintiff's motion fails and is dismissed with costs. The administrative dismissal order of this action dated August 21, 2007 is confirmed.



Justice Skarica

Released: February 20, 2015

CITATION: Chrisjohn v. Riley, 2015 ONSC 1131
COURT FILE NO.: CV-04-8593-00
DATE: 20150220

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

DEBORAH L. CHRISJOHN, KENNARD CHRISJOHN, ROSALEEN P. WEILER, PAMELA CHRISJOHN, and MICHELLE CHRISJOHN

Plaintiffs

\- **and –**

SHAWN C. RILEY, DECEASED, AND / OR THE ESTATE OF SHAWN C. RILEY, ECONOMICAL MUTUAL INSURANCE COMPANY, BELAIR INSURANCE COMPANY, IROQUOIS IRONWORKS LTD., and LANGDON INSURANCE COMPANY

Defendants

REASONS FOR JUDGMENT

Justice Skarica

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