CITATION: Espinoza v. Wallis, 2015 ONSC 3963
NEWMARKET COURT FILE NO.: CV-10-97953-00
DATE: 20150618

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Pedro Espinoza Plaintiff	Jillian VanAllen, for the Plaintiff
– and –	
Courtney Simpson Wallis, TD Insurance Meloche Monnex and Larkin Chrysler Dodge Jeep Ltd. and Chrysler Financial Services Canada Inc. Defendant	Sloane Bernard, for the Defendant, TD Meloche Monnex Insurance Frank DelGiudice, for the Defendant, Larkin Chrysler Dodge Jeep Ltd. Jonathan Miller, for the Defendant, Chrysler Financial Services Inc.
	HEARD: June 15, 2015

ENDORSEMENT
WITH ADDENDUM

McKELVEY J.:

Introduction

[1] The plaintiff in this action seeks an order setting aside a registrar's order, dated September 12, 2012, which dismissed this action. The plaintiff's claim is for damages for injuries which are alleged to have arisen as a result of a motor vehicle accident which occurred on February 2, 2008. The action itself was commenced on January 15, 2010.

Chronology

[2] The chronology of events leading up to and following the dismissal of the action is relevant. I therefore prepared the following chronology:

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(a) February 2, 2008 – this is the date of the motor vehicle accident.

(b) January 15, 2010 – the plaintiff's statement of claim is issued on this date. Initially, only the alleged driver of the other vehicle and the plaintiff's own insurer are named as defendants. The plaintiff's insurer is named as a defendant in connection with the underinsured/uninsured/unidentified coverage under its insurance policy with the plaintiff.

(c) March 2010 – the defendants in the action have now been served with the statement of claim.

(d) April 12, 2010 – the defendant TD Insurance Meloche Monnex ("TD Insurance") delivers its statement of defence.

(e) July 2010 – at this time, examinations for discovery are scheduled for September 2010. These examinations did not proceed, however, as a significant issue arose with respect to the ownership of the vehicle operated by the defendant, Courtney Simpson Wallis ("Wallis").

(f) July 9, 2010 – Zuber and Company LLP ("Zuber") has been retained to represent the defendant, Wallis, in the action. The have previously advised that they are operating under a reservation of rights letter. On July 9, 2010, Zuber writes to counsel in the action advising that there is an issue regarding the ownership of the Wallis vehicle and that a different insurer may be responding to the loss.

(g) July 21, 2010 – Zuber writes to counsel in the action and advises that their information suggests that the defendant, Wallis, was operating a 2007 Dodge automobile with licence plate BCLW 322. They further advise that a search of that licence plate appears to indicate that the vehicle was, at all material times, owned by Larkin Chrysler Dodge Jeep Ltd. ("Larkin Chrysler") and or Daimler Chrysler Financial Service Canada Inc. ("Chrysler Finance").

(h) September 2010 – the plaintiff serves a motion record to add Larkin Chrysler and Chrysler Financial as defendants in the action.

(i) January 18, 2011 – a court order is obtained by the plaintiff, adding Larkin Chrysler and Chrysler Financial as defendants in the action and an amended statement of claim is issued on this date.

(j) February 4, 2011 – an adjuster for Larkin Chrysler contacts the plaintiff's solicitor and requests an indulgence for the delivery of a defence.

(k) April 14, 2011 – the law firm of Shibley Righton LLP ("Shibley Righton") serves a notice of intent to defend for Chrysler Financial.

(l) May 24, 2011 – in a letter to counsel, Zuber advises that the Economical Insurance Group has taken an off-coverage position. It was the position of the

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insurer that the 2007 Dodge was not insured by Economical at the time of the accident. Zuber advises that it is proceeding to close its file and from that point, it appears that the defendant, Wallis, has been representing herself in the action.

(m) April 23, 2012 – a status notice is issued by the court.

(n) April 25, 2012 – Shibley Righton enters a statement of defence and cross-claim for Chrysler Financial. This is the first indication of any significant activity on the file since May 24, 2011.

(o) June 25, 2012 – the law firm of McCague Borlack LLP ("McCague Borlack") advises by way of correspondence that they have been retained to defend Larkin Chrysler in the action. They request an indulgence with respect to the delivery of a statement of defence.

(p) September 12, 2012 – the court issues a dismissal order for delay in accordance with the status notice.

(q) October 19, 2012 – the plaintiff's solicitor sends a motion request form to the court, which appears to be in relation to the administrative dismissal of the action.

(r) January 14, 2013 – McCague Borlack writes a letter to the plaintiff's solicitor advising that it was not their client's vehicle which was involved in the accident, and asks to be let out of the action.

(s) March 26, 2013 – in a letter from McCague Borlack to all counsel, they reference the fact that the plaintiff is proceeding with a motion to set aside the administrative dismissal on May 9, 2013. They reiterate their request to be let out of the action.

(t) April 8, 2013 – Shibley Righton advises in correspondence that they may not be in a position to attend the motion on May 9, 2013.

(u) April 29, 2013 – McCague Borlack confirms that the plaintiff's solicitor is seeking instructions to let Larkin Chrysler out of the action. They confirm that they will not oppose the motion to set aside the dismissal order.

(v) May 3, 2013 – the plaintiff's solicitor writes to counsel to advise that because Shibley Righton is not available on May 9, 2013, the motion to set aside the dismissal will be adjourned to the fall of the 2013 on consent. She further advises she will give consideration to letting parties out of the action once, "someone steps in and confirms ownership of the vehicle (and insurance coverage for the same) at the relevant time."

(w) February 10, 2014 – the plaintiff's solicitor advises in correspondence they will bring a motion to reinstitute the action. It does not appear that there has been any significant activity on the file since May of 2013.

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(x) June 6, 2014 – a notice of motion is prepared by the plaintiff's solicitor. It is returnable on October 2, 2014. It was served promptly on all parties except Larkin Chrysler. It was inadvertently not served on Larkin Chrysler and Larkin Chrysler did not know about the motion until September 29, 2014.

(y) October 2, 2014 – the plaintiff's motion was adjourned to the long motion assignment court on October 22, 2014.

(z) October 22, 2014 – the plaintiff's motion was adjourned on consent to the week of June 15, 2015 to be heard as a long motion.

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Positions of the Parties

[3] Both Larkin Chrysler and Chrysler Financial oppose the plaintiff's motion to set aside the dismissal order. The defendant, Wallis, did not attend on the return of the motion nor did she file any material. The defendant, TD Insurance, did have counsel attend to advise that they are not taking any position on the motion. TD Insurance did not file any material in response to the motion.

Applicable Principles on Setting Aside an Administrative Dismissal

[4] Rule 48.14(16) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that an order dismissing an action under this rule may be set aside under rule 37.14. Rule 37.14 provides that a party who is affected by an order of a registrar may move to set aside the order that is served, "…forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after the service of the notice of motion."

[5] The case law has established that a court, in considering whether to set aside an administrative dismissal, should consider the following issues:

(a) The party must provide an explanation of the litigation delay;

(b) The party should introduce evidence that it failed to set the action down before the deadline through inadvertence;

(c) The motion must be brought promptly; and,

(d) The plaintiff should provide evidence that there has been no significant prejudice to the other party.

[6] In considering the issues noted above, the court is required to take a contextual approach. The court is required to consider and weigh all the relevant factors to determine the order that is just in the circumstances of a particular case. (See: *Marche D'Alimentation Denis Theriault Ltee. v. Giant Tiger Stores Ltd.*, 2007 ONCA 695 (CanLII)).

[7] Both Larkin Chrysler and Chrysler Financial take the position that the plaintiff has failed to meet its burden on all four of the above noted issues.

Has the plaintiff adequately explained the litigation delay?

[8] 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. In the present case, the defence argues that the delay was excessive. They point to the fact that the original motor vehicle accident was in 2008 and that by April 2012, there had been no progress in getting documentary production from the plaintiff or arranging for discoveries.

[9] In my view, it would not be appropriate to take into account the delay in commencing the action. There is legislation covering limitation periods for commencement of an action. A plaintiff has the right to commence a lawsuit at any time prior to the expiry of the applicable limitation period. It would be contrary to the rights given to a plaintiff under the limitations legislation to then penalize a plaintiff for exercising his rights to commence an action within the time frame permitted. The test which the plaintiff must meet, therefore, is whether he has adequately explained 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.

[10] In the present case, the lawsuit was commenced on January 15, 2010. It is apparent that the action initially moved forward in a timely way. By July 2010, examinations for discovery were being scheduled to take place in September. However, Zuber acting for the defendant, Wallis, advised about an issue relating to the ownership of the vehicle. This was a significant issue and plaintiff's counsel reasonably took the precaution of bringing a motion to add both Larkin Chrysler and Chrysler Financial as defendants in the lawsuit based on the information provided by Zuber.

[11] The addition of Larkin Chrysler and Chrysler Financial resulted in some significant delay. The representative for Larkin Chrysler requested an indulgence with respect to the delivery of a defence and the insurer for Larkin Chrysler did not retain legal counsel to defend the action until June 25, 2012. Shibley Righton did not enter a defence for Chrysler Financial until April 25, 2012.

[12] Given the issues which were being addressed, I have concluded that an adequate explanation of the litigation delay has been provided by the plaintiff. Although there is little evidence of activity on this file by the plaintiff's solicitor for the period between May 2011 and April 2012, it is also apparent that the action could not move forward in a substantial way until Larkin Chrysler and Chrysler Financial delivered their pleadings. I have concluded that responsibility for much of the delay following amendment to the statement of claim rests with the defendants, Larkin Chrysler and Chrysler Financial, who delayed in a significant way, the delivery of their pleadings. It is significant to note that McCague Borlack, on behalf of Larkin Chrysler, never delivered a statement of defence prior to the administrative dismissal of the action.

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Inadvertence in Missing the Deadline

[13] The second requirement is that the plaintiff or his solicitor must lead satisfactory evidence to explain that they always intended to set the action down for trial within the time limits set out in the status notice, but failed to do so through inadvertence.

[14] The plaintiff's solicitor maintains that it was through inadvertence that the action was not set down for trial. Opposing counsel correctly pointed out that the evidence adduced by the plaintiff's solicitor on this issue is deficient. In the affidavit of Mr. Grillo, filed in support of the motion, he states that he is unable to determine from his review of the file if the status notice ever came to the attention of the associate handling the file. He states further that if the status notice did come to her attention, he has been unable to determine why the associate did not take steps to request a status hearing in response to the status notice. The associate in charge of the file at the time, left the employ of Mr. Grillo in September of 2012.

[15] It is also apparent, as noted earlier, that the lawyer in charge of the file was not directing a lot of attention to this file for about one year prior to the issuance of the status notice. The last significant event prior to the delivery of this status notice occurred in May of 2011, at which time, counsel for the defendant, Wallis, advised that his client had taken an off coverage position and they were proceeding to close their file. Having said that, it seems likely that the plaintiff's solicitor was waiting for pleadings to be delivered from both Larkin Chrysler and Chrysler Financial. It is also significant that within approximately one month following the administrative dismissal, the plaintiff's solicitor was sending a motion request form to the court, seeking a date for a motion to set aside the dismissal. All of this evidence would support a conclusion that inadvertence is the most likely reason why the deadline for requesting a status hearing was missed. Taking into account this evidence and the fact that the associate responsible for the file at the relevant time is no longer in the employ of Mr. Grillo, I am prepared to accept that the plaintiff has led satisfactory evidence to support a conclusion that they intended to request a status hearing, but failed to do so through inadvertence. This conclusion is also supported by the evidence of the plaintiff who filed a separate affidavit confirming that it had always been his intention to proceed with the case and that he was in contact with the plaintiff's solicitor from time to time. He understood that his action was proceeding in the normal course. Mr. Espinoza was not cross examined on his assertions in this regard.

Was the motion to set aside the dismissal order brought promptly after it came to the plaintiff's attention?

[16] It is apparent that the administrative dismissal order came to the attention of the plaintiff's solicitor shortly after it was issued on September 12, 2012. By October 19, 2012, the plaintiff's solicitor had sent in a motion request form to the court office in order to obtain a date for a motion to set aside the administrative dismissal. Opposing counsel acknowledged that the plaintiff's solicitor acted relatively quickly initially. However, they point out that there was no follow up by the plaintiff's counsel to schedule the motion to set aside the administrative dismissal in the fall of 2013, as initially

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contemplated. Counsel for Larkin Chrysler points out that they did not receive a copy of the notice of motion from the plaintiff's solicitor until September 29, 2014. Based on these dates, there was a delay of approximately two years in serving a motion record on the defendant, Larkin Chrysler. The delay in serving the defendant Chrysler Financial would be significantly less as they were served with the notice of motion promptly following the issuance of the notice of motion on June 6, 2014.

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[17] The delay in my view is mitigated to some extent by the fact that the plaintiff did move promptly after discovering the administrative dismissal to schedule a motion before the court as soon as reasonably possible. The initial return date for the motion was to be on May 9, 2013, but this date was adjourned at the request of the defendant, Chrysler Financial, and with the consent of all parties, with the expectation that a motion would be brought in the fall of 2013. It appears that there was some further inattention to this file by the plaintiff's solicitor in failing to follow up and schedule a motion in the fall of 2013. This resulted in a further delay of about eight months, given that the notice of motion was not actually prepared until June 6, 2014. Another factor, which is significant, is the fact that all of the defence counsel were well aware of the plaintiff's intention to bring a motion to set aside the dismissal, and the plaintiff's solicitor wrote to defence counsel on February 10, 2014, reiterating their intention to bring a motion to reinstate the action.

Is their prejudice to the defendants?

[18] The fourth requirement is for the plaintiff to satisfy a 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 the steps taken following the dismissal of the action.

[19] Mr. Grillo, in his affidavit, asserts that there would be no prejudice to the defendants for the following reasons:

(a) Liability is not an issue; and,

(b) He has, in his file, available for production, income tax returns from 2005 to 2009 and the employment file from Concord Hardware. He also refers to the fact that he has requested various information and documentation from various sources, such as CRA, OHIP, treating physicians and a medical clinic.

[20] In response, both Larkin Chrysler and Chrysler Financial submitted evidence on how they felt they had been prejudiced in their supporting affidavit material. In the affidavit filed by Larkin Chrysler, it asserts that their request to let Larkin Chrysler out of the action had been improperly denied and that they had not been able to bring a motion for summary judgment seeking a dismissal of the action as against Larkin Chrysler. They suggest that Larkin Chrysler was led to believe it would be let out of the action in April of 2013. They further assert that Larkin Chrysler has been prejudiced because it ceased operations in or about 2008/2009, and therefore its ability to identify knowledgeable witnesses has been compromised. They further referred to an inability to obtain material

evidence such as a decoded OHIP summary with pre-accident medical information related to the plaintiff. They point to the delay in the plaintiff's solicitor producing relevant damage material, which was only delivered between March and May of 2015. They further refer to the fact that they have been unable to be involved in any out of court settlement discussions.

[21] In the supporting affidavit from Chrysler Financial, they refer to the fact that the action has not proceeded beyond the stage of pleadings and again refer to the fact that the plaintiff's counsel only began making documentary disclosure commencing February 12, 2015.

[22] In argument on the motion, defence counsel broadened significantly their claims for potential prejudice. In addition to the matters referred to above, they asserted prejudice based on the following additional matters:

(a) They are concerned that evidence with respect to liability may no longer be available.

(b) Larkin Chrysler expressed concern that they were no longer able to bring a third party claim against Aurora Chrysler, who they believe may, in fact, be the owner of the Wallis vehicle.

(c) They are concerned about the fact that no police report or documentation with respect to the identity of the Wallis vehicle has been produced.

[23] While it is true that, pending the hearing of this motion, the defence has been precluded from bringing a motion for summary judgment to dismiss the claims against them, it is clear that if the action is reinstated, the defence would be entitled to bring such motions promptly. I therefore conclude that any prejudice for not being able to bring a summary judgment motion is not significant, especially taking into account that on a motion for summary judgment, the court will be able to award costs to the defendants of the entire action if they are successful on the motion.

[24] The suggestion that Larkin Chrysler is prejudiced because they cannot bring a third party claim against Aurora Chrysler does not appear to have merit. The basis for bringing a third party claim against Aurora Chrysler is on the theory that this dealer is the correct owner of the motor vehicle operated by Wallis. However, if Larkin Chrysler and Chrysler Financial are correct that they were not the owners of the vehicle, there would be no liability to pass on to Aurora Chrysler. Of course, if Larkin Chrysler or Chrysler Financial were the owners of the vehicle, then it would follow that Aurora Chrysler would not be exposed to any liability in a third party claim.

[25] With respect to the fact that Larkin Chrysler went out of business in 2008/2009, it would appear that any prejudice which might be suffered by Larkin Chrysler would have crystalized prior to the commencement of the action against Larkin Chrysler. Thus, if any prejudice occurred, it would not be as a result of the plaintiff's delay in prosecuting

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the action or as a result of steps taken following the dismissal of the action. There was no evidence adduced on this motion to suggest otherwise.

[26] The defence suggests that the plaintiff's failure to deliver a police report or documentation with respect to the identity of the Wallis vehicle has prejudiced their position on liability. It is significant to note, however, that this argument runs contrary to their assertions that the evidence in this case clearly establishes that neither Larkin Chrysler nor Chrysler Financial was the owner of the vehicle, and that they should be let out of the action. In addition, there is no evidence before the court to suggest that these defendants do not have the necessary records to properly establish they were not the owner of the vehicle involved in the accident. There is also no evidence before me which confirms that this accident was reported to the police or that a police report was created. From the evidence adduced on the motion, it does appear that no one has yet determined with certainty, who owned the motor vehicle operated by Wallis. This may prove to be a troublesome issue as the action progresses. Nevertheless, it is an issue identified early on in the action and it does not appear that there is any persuasive evidence that the delay leading up to the dismissal, or as a result of steps taken following the dismissal of the action, have resulted in the loss of any available evidence. It is interesting to note in this regard that in the affidavit filed in support of the position of Larkin Chrysler, it includes the following statement,

> Given that the plaintiff had <u>incorrectly</u> named Larkin Chrysler as a defendant and that Larkin Chrysler is not a proper party to these proceedings, no formal investigation of liability or the plaintiff's alleged damages has been carried out by Larkin Chrysler.

[27] As noted by the Court of Appeal in reference to a claim of prejudice alleged to be caused by late service of a statement of claim, "the defence cannot create prejudice by its failure to do something that it reasonably could have or ought to have done." (See: *Chiarelli v. Wiens*, (2000) 46 O.R. 3d 780.)

[28] I note as well that counsel for Ms. Wallis, based on their review of the file, appear to have been able to come to a conclusion about the identity of the Wallis motor vehicle, as reflected in their correspondence of July 21, 2010.

[29] There was no evidence adduced by the defence to call into question the assertion in Mr. Grillo's affidavit that there is no serious issue regarding liability in this action. This is not an issue that the defence raised at all in their affidavit material. There is no evidence before me to contradict the evidence of the plaintiff that this is a straightforward case of liability insofar as the circumstances of the accident are concerned.

[30] The most serious allegation of prejudice relates to the assertion that relevant evidence with respect to the plaintiff's damages may no longer be available. The defence expresses concern about the availability of relevant medical records. The defence referred, for example, to a decoded OHIP summary which was produced by the plaintiff's solicitor and was apparently requested in September 2014. The summary itself is dated

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March 23, 2015. The defence asserts that OHIP records are only available for a period of seven years prior to production. However, there is no evidence before me on this point. The OHIP record itself identifies that the claim period is from April 1, 2007 to March 4, 2015, which at least on its face would suggest that the available information goes back to about ten months prior to the accident. In addition, the plaintiff's solicitor has produced the accident benefits file, which would appear to provide details for any non-OHIP related services provided to the plaintiff after the accident.

[31] The defendants point to the fact that the plaintiff's solicitor requested records from Dr. Raffi and Dr. Gabay, but no records from these two physicians have yet been produced. While the records may not yet have been produced, I do take note of the fact that under section 19 of Reg.114/94 under the *Medicine Act*, 1991, physicians are required to retain their records for at least ten years after the date of the last entry in their record. This provides some assurance that relevant medical records will be available as required in this litigation. I also note that the plaintiff's solicitor has provided the plaintiff's prescription records from 2005 onwards, which should assist in identifying any physician who prescribed medications as part of the plaintiff's treatment for any condition.

Analysis

[32] I am required to take a contextual approach as opposed to a rigid test requiring the plaintiff to satisfy each one of the criteria. I am required to weigh all of the relevant factors to determine what is just in the circumstances of this particular case. The plaintiff appears to have satisfied the first criteria for obtaining an order setting aside the dismissal. Similarly, I am satisfied that the second criteria has been satisfied and that a status hearing was not requested due to the inadvertence of counsel.

[33] With respect to the length of time taken to set aside the dismissal order after it came to the plaintiff's attention, I note that the Court of Appeal in *Finlay v. VanPaasen*, 2010 ONCA 204 (CanLII), dealt with a situation where the plaintiff's counsel received a dismissal order in mid-May 2007. There was a two year delay before the motion to set aside the order was brought in May 2009. In that decision, the court noted that a key consideration is the issue of prejudice. It noted as well that the two year period was not so long that, by itself, it warranted denying relief. The court further recognized that 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 counsel.

[34] In the present case, the delay at its highest would be approximately two years. However, a good portion of the delay can be attributed to a request by the defence to adjourn the motion until the fall until 2013. In these circumstances, in the absence of significant prejudice, I do not see a basis to deny the relief sought.

[35] This brings me to consider the issue of prejudice. It is not possible to rule out the possibility that, at this point, there may be some documentation which is no longer available. However, much of the relevant documentation with respect to damages has been collected by the plaintiff's solicitor, apparently without difficulty. It is reasonable

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to believe that the other relevant documentation should still be available. There is certainly no specific evidence that has been brought before the court to suggest that any specific documents which would normally be required by the defence, in the context of a case like this, are no longer available through the exercise of reasonable diligence. If documents are missing, there is no evidence which specifically ties the loss of those documents to the plaintiff's delay or as a result of steps taken following the dismissal of the action.

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[36] I am mindful that the issue of prejudice is a key consideration on a motion to set aside a dismissal order. However, the evidence before me suggests that the defence position has not been compromised as a result of the plaintiff's delay or as a result of steps taken following dismissal.

[37] In my view, the principal of finality has no relevance to this case. This is not a situation where the defence has relied on the finality of the order dismissing the action. They were aware promptly after the dismissal order was given, that the plaintiff would be moving to set the dismissal aside.

[38] I am also mindful that although it is incumbent upon a plaintiff to conduct its action in a proactive manner, it would be unfair in the circumstances to ignore the passivity of the defence. There was no demand by the defence counsel to have the plaintiff bring the motion back earlier than was the case. This lack of urgency undercuts the claim of actual prejudice. See, for example: *Aguas v. Ravard Estate*, 2011 ONCA 494.

[39] I have also taken into account the comments of the Court of Appeal in *Fuller v. Rogers*, 2015 ONCA 173. At paragraph 27 of that decision, it is noted,

> The court's preference for deciding matters on their merits is all the more pronounced where delay results from an error committed by counsel. As the court stated in *Habib* at para. 7, "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 counsel." In *Marche*, Sharpe J.A. stated at para. 28, "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."

[40] I have concluded that the plaintiff has rebutted the presumption of non-compensable prejudice and that it is still possible to have a fair trial. Taking into account all of the circumstances in relation to the four principle factors which are to be considered, I conclude that the interests of justice favour setting aside the administrative dismissal of the action.

Order

[41] For the reasons set out above, there will be an order granting the plaintiff's motion to set aside the registrar's order dismissing the action. The defence counsel have argued that if the order is granted, I should make the following additional orders:

(a) Costs of the motion on a substantial indemnity basis;

(b) That a litigation timetable be set in place;

(c) That Larkin Chrysler be dismissed from the main action and crossclaims resulting from these proceedings; and,

(d) That prejudgment interest be suspended from September 12, 2012 until the reinstatement of the action.

[42] I agree that a litigation timetable should promptly be set in place. For that reason, it is further ordered that the parties shall confer and attempt to agree on an appropriate timetable for completion of the remaining steps in this action. This timetable shall be provided to the court for its consideration and approval by no later than July 31, 2015. If the parties are unable to agree on such a timetable, the parties shall provide the court with brief submissions in writing by no later than July 31, 2015, and shall attend in court again as directed by the trial co-ordinator.

[43] If counsel are not able to agree on costs, then an appointment should be taken out through the trial coordinator within thirty days of the release of this Endorsement to address the issue of costs. Prior to the hearing on costs, counsel are to deliver written briefs with respect to costs at least five days in advance of the hearing. If no steps are taken within thirty days from the release of these reasons to address the issue of costs, then there will be no costs of this motion.

[44] I decline to make an order that Larkin Chrysler or Chrysler Financial be dismissed from the main action. This is without prejudice to either of those defendants bringing a motion for summary judgment after the order reinstating the action is taken out.

[45] I also direct that the issue of prejudgment interest be directed to the trial judge, who will be in a better position to take all relevant circumstances into account in making a decision with respect to prejudgment interest.

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Justice Michael K. McKelvey

Released: June 18, 2015

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ADDENDUM

Just prior to release of my decision in this matter, I received correspondence from counsel for the defendant, Larkin Chrysler. This correspondence, dated June 18, 2015, referred to correspondence I had received from the plaintiff's solicitor, dated June 15, 2015.

By way of background, at the time of hearing argument on the motion, plaintiff's counsel made reference to statutory provisions under the *Medicine Act* and the *Public Hospitals Act*. She did not have copies of those provisions with her and I agreed that she could provide copies to me. The relevant statutory provisions were provided by way of correspondence from her, dated June 15, 2015.

The correspondence from counsel for the defendant, Larkin Chrysler, is not in response to the letter from plaintiff's counsel. Instead, counsel for Larkin Chrysler has provided additional information relating to the length of time that decoded OHIP summaries are maintained. In this regard, he has attached policies from the Ministry of Health relating to their records' retention practice and also with respect to guidelines regulating the retention and destruction policies of motor vehicle collision reports in various regions in Ontario.

Counsel appears to be asking me to take judicial notice of the Ministry policy and guidelines as well as guidelines relating to the retention and destruction policies of motor vehicle collision reports. In *The Law of Evidence* (6th ed) by Paciocco and Struesser, the authors comment on judicial notice of laws as follows:

> A judge is charged with the duty of knowing the domestic statute and common law. Under the various evidence acts, judicial notice is to be taken of the laws of Canada and of the Provinces. Laws of a foreign jurisdiction must be proved, although in certain provinces, judicial notice is to be taken from statutes from countries of the British Commonwealth. In Manitoba, judicial notice shall be taken of the laws of any part of the Commonwealth or of the United States. Most subordinate legislation, such as municipal by-laws, must be proven by official copies or certified copies.
>
> In *R. v. Schaeffer*, the court was asked to take judicial notice of an un-Gazetted park by-law. The court refused to do so, and reiterated the law: "the basic evidentiary rules concerning subordinate legislation, such as the by-law, are well known. They must be proven in the absence of a statutory provision requiring or permitting judicial notice."

I note that under the *Ontario Evidence Act*, sections 25 and 26 appear to be relevant provisions. There is nothing which would suggest that the material provided by defence counsel would be admissible under those sections of the *Evidence Act* or would be matters for which judicial notice

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could properly be considered. Of course, the guidelines attached to the letter of June 18, 2015 could properly have been introduced in evidence at the time of the motion, had they been properly proved.

I have the following concerns with respect to the correspondence received from defence counsel:

(a) Defence is attempting to adduce further argument on the motion before me, following completion of argument at the time the motion was heard. This is contrary to rule 1.09 of the *Rules of Civil Procedure*.

(b) Defence counsel has submitted additional information before me which has not been properly proved and which was not before me at the time the motion was heard. In this situation, it would appear that before I am entitled to rely on this information, defence counsel would need to bring a motion to re-open the evidence on this motion.

For the above reasons, I have concluded that it would not be appropriate for me to rely upon the material attached to counsel's letter of June 18, 2015. My decision is therefore being released without reference to this material, but without prejudice to the right of defence counsel to bring a motion to adduce further evidence and argument on this motion. If such a motion is brought, I will hear submissions from all parties affected by the proposed order.

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