CITATION: Khan v. Mander, 2011 ONSC 5276
COURT FILE NO.: CV-06-CV307608
MOTION HEARD: 2011/08/16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Khan, Plaintiff

AND:

Mander, Defendant

BEFORE: Master Haberman

COUNSEL: Van Allen, J., for the plaintiff

Falkeisen, C. for the defendant

HEARD: August 16, 2011

REASONS

[1] The plaintiff, Nairoon Khan, moves to set aside the Registrar's order of March 29, 2007 dismissing this action.

[2] This motion raises directly the dual issues of when a solicitor's repeated inadvertence, lack of attention to a file and apparent lack of understanding of the applicable law amounts to solicitor's negligence and the extent to which that can and should factor in the court's approach to a motion to set aside a second dismissal order.

[3] On the unusual facts of this case and for the reasons that follow, this motion is dismissed.

Factual context - evidence of the moving party

[4] This motion arises in the context of a personal injury action. Khan was operating her motor vehicle when it was rear-ended by the defendant, Mander. The accident occurred in November, 2001, almost 10 year ago.

[5] According to the motor vehicle report, the defendant was charged under s. 130 of the *Highway Traffic Act*. No evidence was presented regarding the outcome of that charge. When questioned by the investigating officer, Mander apparently stated that she saw that traffic was very slow, that she tried to slow down by pushing her brakes, that she pushed hard, but that she "have no brakes" (sic). Mander has not third partied a garage or car repair shop in this action, nor has she admitted liability for this incident.

[6] Khan has filed two affidavits in support of her motion. The first is her own and it runs for all of three short paragraphs. In it, Khan states that:

- she is the plaintiff;
- that it has always been her intention to proceed with the action;
- that she relied on her lawyer, Andrew Mantella to take all necessary steps to proceed with the action; and
- that she has been advised of the dismissal order and instructed her lawyers to move to set it aside.

[7] Khan was cross-examined on her affidavit. Over the course of 50 pages of questions, her most frequent and usual response was that she did not remember. Among the questions to which she provided that response was:

- Do you recall ever attending examinations for discovery?
- How many times did you call Mr. Mantella?
- Was it more than twice?

[8] Khan did state that she did not expect it to take 10 years to get to trial.

[9] The second supporting affidavit was sworn by Andrew Mantella and it contains the chronology of events, as follows.

[10] Mander was put on notice of Khan's claim by letter of May 31, 2002 and her insurer, State Farm, conducted surveillance of Khan in October 2003, before the statement of claim was issued. Apparently, their report contains both still photos and a CD, though these documents were not tendered into evidence on this motion.

[11] The statement of claim was issued on November 21, 2003, within the applicable limitation period, and served on May 4, 2004, therefore both events occurred on the eve of their respective deadline (two years and 6 months, respectively).

[12] By July 2004, a statement of defence had been delivered.

[13] Mantella states that he was working at Kronis, Rotsztain, Margles Cappel at the time the claim was issued but that he left that firm in December 2004 to begin his own practice. Mantella's evidence is to the effect that, upon his departure, he failed to file a Notice of Change of Lawyer. His explanation for this is described simply as "inadvertence."

[14] No details are provided for this lapse, so it is not clear if Mantella appreciated that he had to file a notice of change; if instructions were given to staff to do so but not carried out; or whether this was the only file he is aware of where the notice was not filed, so it somehow fell through the cracks. This is the first of several times in his affidavit that

Mantella relies on his inadvertence as a justification for having done or failed to do something. The problem he claims this created is discussed later in his evidence.

[15] Mantella then notes that a motion was brought by the defendant to transfer the matter to Toronto and an order was obtained on December 30, 2004. He claims that a copy of the order was never provided to him and that he only obtained it in 2007. It is clear on the face of the order that it was made on consent, so Mantella was certainly aware that the motion was being brought and when. Whether or not a copy of the order was provided to him, it was open to him to follow up by either requesting one from moving counsel or from the court file. He says nothing about having tried either, nor does he explain why his late receipt of the order is significant.

[16] The parties proceeded to examinations for discovery of Khan, which took place over the course of three days between April 4 and August 29, 2005. Undertakings were given but not fulfilled.

[17] In the interim, State Farm, Mander's insurer apparently conducted further surveillance of Khan in August and September 2005. There is a reference to still photos and a VHS video having been attached to the report but again, none are included in the evidence put before this court.

[18] State Farm also arranged for Khan to submit to two defence medical examinations, one with Dr. Silverstein in August 2005, the second with Dr. Bail, in September 2005.

[19] After leaving the Kronis firm in December 2004, Mantella apparently worked for a period of time out of his home. In September 2005, however, his marriage ended and as a result, he moved his practice to office space outside the home. Mantella apparently obtained new authorizations from Khan as a result of the move to reflect his new address and he believes these were returned to him in late 2005, early 2006.

[20] Mantella states that he received a letter from defence counsel regarding the undertakings on August 31, 2005. He follows this by saying he was moving his office in mid-September 2005. He does not tie the two thoughts together, so it is not clear, if the move two weeks after receipt of the letter is being offered as the reason for his having taken no steps to deal with it. What is clear is that no request letters were sent out at that time to seek the responses needed to comply with undertakings or even after current authorizations were received.

[21] In March 2006, State Farm counsel advised Mantella that they would be moving on the outstanding undertakings and on a number of refusals and that the motion was returnable on May 30, 2006. It was only after receipt of the letter regarding the motion that Mantella began writing to the various non- parties in pursuit of the documents he needed

to fulfill undertakings that had been given, in some cases, a year earlier. This delay, from August 2005 to March 2006 is not explained

[22] The defence motion for undertakings and refusals came before Master Birnbaum, and a consent order was made, requiring Khan to comply with her outstanding undertakings by August 7, 2006.

[23] Mantella then sent out a series of request letters between April 2006 and May 2007 and responses were provided to State Farm counsel from May 26, 2006 up until June 10, 2008.

[24] Khan maintains that she has now answered or requested all outstanding undertakings and that up-dated information has also been provided, however, it became clear during the course of submissions that that was not an accurate representation of the status of the undertakings.

[25] It was not until June 10, 2008 that the plaintiff served an unsworn affidavit of documents and her sworn affidavit of documents was served in January of this year. The action had already been dismissed by the time either version was served. Again, no explanation is provided for this delay.

[26] This action was dismissed by the Registrar for failure to set it down for trial in March 2007 and Khan moved to set aside the dismissal order (the first dismissal order). In his evidence regarding this issue, Mantella states as follows:

> *It was subsequently determined that the Order of the Registrar, as well as the Status Notice requesting that the matter be set down for trial, had been sent to my former firm, KRMC.*

[27] Presumably, this is why Mantella indicated earlier that he had neglected to file his Notice of Change when he left the firm.

[28] This omission however, appears to be a red herring. During cross-examination, Mantella was taken to a copy of the Status Notice that was provided to his office by defence counsel in November 2006, before the action was dismissed. There was a handwritten note on the cover letter, and Mantella identified the writing as that of his brother, Frank, who worked for him. The note states:

> *Kindly fax a copy of Master Birnbaum's order to me...This will be given my immediate attention."*

[29] It is therefore clear that Mantella's office did receive the Status Notice, notwithstanding his failure to ensure the court knew where to find him. Mantella initially stated that he had no recollection of having been alerted to the letter or to the notice by his brother, who

is neither a lawyer nor a paralegal, but worked as "an assistant". It is unclear why Mantella had him dealing with mail if he was not trained to recognize those documents which required attention on an expeditious basis.

[30] As regards Frank's note, Mantella maintains that he did not authorize it nor was he aware of it. He says, however, that Frank would have known what a status notice was.

[31] Mantella's evidence on cross-examination about this issue, however, is not consistent with his affidavit regarding this issue. Having initially sworn that the status notice was sent to his old firm, he then indicated on cross-examination that his brother saw it nonetheless but did not bring the notice to his attention. Mantella then admitted that he actually received the notice himself, and that he saw it in November or December 2006. Mantella was asked whether he did anything at that time to set the matter down for trial and if not why not.

[32] His response was that he didn't because he believed the plaintiff had outstanding undertakings and that it was not appropriate for him to set the action down in those circumstances. However, he did not seek a Status Hearing. Mantella does not explain why he failed to do so. His decision not to set the action down at that time, however, was clearly intentional.

[33] I note that when asked at cross-examination if he ever changed his address with the court, after having had this action dismissed twice, Mantella responded that he could not recall if he had.

[34] The motion to set aside the first dismissal order came before Master McAfee on May 4, 2007 and proceeded on consent. The master ordered full compliance with the outstanding order of Master Birnbaum. She also ordered that the action had to be set down for trial by August 7, 2007.

[35] There is no suggestion in the materials that Mantella viewed this time frame as unreasonable or something with which he would have difficulty complying. He had apparently advised he would not be conducting discovery of the defendant and there is no evidence to suggest that there were any motions he wanted to bring or that there was anything at all outstanding on his end. Further, during that period of time, it was permissible to conduct mandatory mediation after, but within a fixed time frame, of setting the action down for trial. There was therefore no apparent impediment to complying with, at least, this aspect of the master's order.

[36] This brings us to the second point at which Mantella relies on his inadvertence. This time, he claims he failed to diarize this matter through inadvertence. His evidence on this point can only be described as bizarre. Having stated that he neglected to diarize the date, he then says in his affidavit that he entered it into his tickler system. I am at a loss

to understand how this differs from diarizing the matter. Mantella does say that he saw the date in the tickler system but that he was advised the issue had been dealt with. Again, he points the finger at his brother, Frank, as the culprit who misled him by assuring him all was in order. Mantella never checked this for himself.

[37] As it turns out, no trial record was ever served or filed. The action was therefore dismissed a second time (the second dismissal) on August 10, 2007. That was four years ago. It is the second dismissal order that is the subject of this motion.

[38] From that time until 2010, though Mantella received no trial scheduling court notice, he failed to appreciate that there was a problem with this file and he neglected to make enquiries of the court as to why the matter was not being dealt with.

[39] Mantella presents several factors to justify his lack of diligent attention to this file. He starts by saying that from early 2007 and until mid-2009 he had "serious personal health issues", which took him out of the office a couple of times per week and interfered with his focus due to the psychological impact of having to deal with these health issues. He does not elaborate, and when asked about this on cross-examination, he refused to provide particulars. All he did say was that there was a formal diagnosis in January 2007. He would not indicate what that diagnosis was, anything as to the nature of his ailment or whether he was hospitalized for it.

[40] The second factor identified by Mantella as a distraction from his work was the divorce proceeding in which he became involved, starting in the fall of 2007. Custody was among the issues to be determined on the divorce application. This process concluded in the late fall of 2009. On cross-examination, however, he admitted that he actually separated in 2005. He did not explain why this issue was suddenly more of a distraction for him from 2007 onwards.

[41] There is no evidence from Mantella to suggest that he sought assistance for his practice as a result of his reduced working hours, his apparent problems with focus and productivity and the stress he was under as a result of his personal issues. It was his view and remains his view that it was not necessary. Mantella was also quick to point out that, though he was having trouble focusing he had not lost focus.

[42] What he does say is that his assistants were looking after the office for him. His staff included his brother, Frank, and his life partner and now wife, who is not a lawyer. He did have a lawyer working with him, but only from early 2009 and she did not deal with this file.

[43] At some point between 2007 and 2009, Mantella contacted the Law Society for a referral for counselling, though it is unclear if he took the issue beyond getting a referral.

[44] Once again, Mantella states that he failed to receive the dismissal order – the second one – made on August 10, 2007. He claims he only became aware of it when his staff contacted the court on March 25, 2008. However, on cross-examination, he conceded that defence counsel brought it to his attention earlier in March 2008, in a letter received on the 13th. He did not bring this second dismissal order to his client's attention.

[45] Mantella wrote to defence counsel, indicating that he would be moving to set aside the dismissal, yet no motion was scheduled and motion materials were apparently only completed in July 2008, some four months later.

[46] In the interim, he tried to locate the dismissal order in the court file without success. He relies on that to explain part of the delay for not getting his motion record in order sooner, yet says nothing about why he did not seek a copy of the order from defence counsel. Further, whether or not he was able to locate a copy of the actual order, he was entitled to a copy of the case history for the file and that would have made it evident that the action had been dismissed and when that had occurred. Ultimately, Mantella said, when cross-examined, that he had no explanation for the delay in drafting the materials for this motion.

[47] On June 10, 2008, after being advised that the defendant would oppose the motion to set aside the dismissal order, Mantella wrote to defence counsel to provide further answers to undertakings and a draft affidavit of documents and he asked his assistant to book a motion date.

[48] One again, Mantella maintains he was misled by his staff, who told him the motion record had been served and filed on July 7, 2008. When he returned from a family vacation later that month, he learned this assistant had left his employment, and that another staff member had followed on her heels. He did not hire a replacement until September 2008.

[49] Mantella says that he himself came upon the motion record in September or October 2008 while going through boxes of closed files, yet again, he did nothing. For the third time in his affidavit, Mantella relies on his inadvertence for his failure to serve and file the motion record at that time. This time he claims his focus was on settling the plaintiff's accident benefits file, which was accomplished in early to mid-2009. He does not explain in the affidavit while work on one file precluded work on the other.

[50] Mantella admitted that from September 2008, when he realized the motion record had not been served and filed, until May 2010, he was fully aware of the status of the motion but that he took no steps to deal with it because he did not appreciate that this was important. He was working at that time, and certainly able to deal with Ms. Khan's accident benefit file, so equally able to deal with this matter, yet it appears he felt that setting aside this dismissal order – the second such order in this matter – would be "routine". He agreed

with defence counsel that he had made a deliberate decision not to do anything about the tort action.

[51] Mantella also admits that he failed to diarize the matter for follow up. Ms. Khan contacted his office on May 19, 2010 for an up-date and he told her the trial record was filed and he was awaiting assignment of a trial scheduling court or trial date. He must have either followed up with the court or reviewed his own file at that point – he does not say which or when in his affidavit. When cross-examined, he indicated that this is when he realized - for the second time, apparently as he figured that out in the fall of 2008- that the trial record had never been filed. Thereafter - again, he does not say when – he reported this matter to his insurer.

[52] Mantella was cross-examined at some length about why he took no steps to get this motion on when he realized in early fall 2008 that nothing had been done with the motion record. His response is nothing short of alarming. He stated the following at different points in his cross-examination:

> *I didn't realize at the time that a registrar's dismissal was such a serious matter.*
>
> *I didn't realize there was any great urgency, so my focus, as I noted, was on settling the accident benefits claim during that time period for Ms. Khan.*
>
> *I didn't realize the order of the registrar would be so difficult to rescind.*
>
> *I believed a motion would be necessary...I didn't realize that it wasn't as routine as I had believed it was.*
>
> *I just thought that at some point it would be reinstated and we would either resolve it or it would proceed to trial at that point.*
>
> *I didn't believe there was a hurry to bring the motion.*

[53] This is Mantella's evidence, though he was aware this was the second dismissal of this action and that the relief he was seeking was going to be opposed by the defendants.

[54] Mantella also concedes that from May 2008 until November 2010, when he finally served this motion record, he had no contact with defence counsel. He also concedes that he made no effort to consult with defence counsel regarding a suitable date for the motion. Although he claims the material for this motion were available as of September 2008 at the latest, he provided no explanation for why the materials were not served and filed until November 2010.

[55] It is important to note that Mantella's illness, whatever it involved, and his divorce proceedings, were, on his evidence, behind him by the end of 2009, yet it took about another full year before this motion was scheduled. The only explanation for this is that

Manetella, for whatever reason, assumed that getting a second dismissal order set aside several years after it was issued was simply a perfunctory exercise, even when the motion was going to be opposed.

[56] At some point in 2010, Mantella began doing some research on the legal issues involved in this motion and realized, for the first time he claims, that this was a serious matter. That is when and why he reported it to his insurer.

[57] Mantella concedes that he has not yet obtained a future loss of income report, though this plaintiff has not worked since her accident 10 years ago.

The defendant's evidence

[58] The defendant filed the affidavit of Peter Duda, counsel on the file. His chronology of events makes it clear that he was pushing this file. Calls to schedule discoveries were placed by his office on seven occasions between July 28 and September 21, 2004 and dates were not agreed to until late September.

[59] Mantella's explanation for not wanting to set up discoveries is two-fold: he says first that he was not contacted directly and, further, that he wanted joint discoveries in this file and Kahn's related action. Whether or not Mantella or his office was contacted is immaterial – his staff represent him and should have made him aware that the defence was pressing.

[60] Once discoveries began they were aborted twice as the plaintiff was unable to continue to completion. There is no evidence from Mantella explaining why that was the case.

[61] As a result, though Duda began the scheduling process in July 2004, discoveries were not completed until August of the following year.

[62] The return date for the defence motion to comply with undertakings was scheduled for May 30, 2006. No one appeared for Khan, though this precedes the time frame where Mantella justifies his inattention to the file by relying on his poor health and family issues. He does not even mention his failure to attend the motion in his evidence, let alone explain how it occurred.

[63] Duda called Mantella from court and the two negotiated resolution of the motion over the phone. They reached resolution on an unopposed basis, which included a deadline for compliance with 38 undertakings and 10 refusals of August 7, 2006, as well as payment of costs plus costs thrown away.

[64] A copy of the order was provided to Mantella for approval as to form and content, which he apparently ignored until mid July 2006.

[65] On August 25, 2006, defence counsel wrote to Mantella to advise him that he was in breach of this order as there were still undertakings outstanding and the cost orders, due in June and early August had not been paid.

[66] The status notice was issued on November 15, 2006 and received by defence counsel on November 24, 2006. He wrote to Mantella on November 28, 2006, enclosing a copy and advising that Master Birnbaum's undertakings and refusals order was still outstanding, such that Mantella was now in contempt. Mr. Duda also threatened to bring another motion unless Mantella set the matter down for trial. He did not want to file the trial record himself in view of the outstanding refusals and undertakings.

[67] Defence counsel wrote again on December 1, 2006, enclosing a further copy of the master's order, and on February 29, 2007, at which time Mantella was advised that the defendant was seeking a case conference with the master. As the action was not case managed, the master declined to set up a case conference, suggesting, instead, a further motion.

[68] Counsel spoke in February or March 2007, at which time Mantella indicated he was under the impression that the undertakings had all been answered. That, however, was not the case. Reponses have been provided as late as last year, when new counsel came on board for the purpose of dealing with this motion.

[69] The defendant received the first dismissal order on April 5, 2007, and forwarded it to Mantella on April 11, 2007, asking for his costs thrown away. The response from Mantella was to the effect that he had not received the dismissal order and that he was waiting for a list of outstanding undertakings from the defendant.

[70] I note that in her order, Master Birnbaum listed precisely what remained to be answered, both in terms of undertakings and refusals. All Mantella had to do was go back to his file and, if no running list had been created as materials were being sent, compare what he had sent to the order and it would have been clear to him what remained to be done. Mantella's request for a list of what was outstanding at this time therefore appears to be a stalling tactic.

[71] As a courtesy, a further list of undertakings was provided by the defence on April 26, 2007. At that time, Duda advised that he would not oppose a motion to set aside the dismissal order if it was agreed that: the remaining undertakings would be fulfilled within 45 days; the action would be set down for trial within 60-120 days; and costs of $500 were paid forthwith. Mantella agreed to those terms and on May 4, 2007 Master McAfee signed the order providing that the undertakings would be answered by June 30, 2007 and that the deadline for setting the action down was extended to August 7, 2007.

[72] Costs were also provided for in the master's order and they were paid in June 2007. There was no further communication from Mantella and nothing else was done to comply with the terms of the order. The action was therefore dismissed a second time on August 10, 2007.

[73] Having heard nothing from Mantella, defence counsel wrote to him on March 12, 2008, advising that "history had repeated itself" and the action had been dismissed a second time. Now Mantella was in breach of both the orders of Master Birnbaum and Master McAfee.

[74] It was not until April 8, 2008 that Mantella responded in a letter erroneously dated March 25. He indicated that he had been advised by the court that the action had been dismissed and that he would be bringing a motion to reinstate it. It was clear from April 11, 2008 on that any such motion would be opposed, yet Mantella took no steps to even identify the legal test he would have to address on this opposed motion.

[75] The motion record was not served until November 5, 2010 by Mantella's representative, more than 2 and half years after he learned of the dismissal and the fact that his motion would be opposed. This was the first contact with the defence about this matter since April 8, 2008. At that point there were still 14 undertakings and 3 refusals outstanding, along with various requests. Many of these were still outstanding at the time that Duda swore his affidavit in December 2010.

[76] In terms of prejudice, Duda points out that Dr. Silverstein, who conducted one of the defence medical examinations, is over 80 years of age. He does not refute the evidence that this physician is apparently still seeing patients and has testified in court earlier this year. The age, however, remains an issue. This matter would not get to trial, even if set down immediately for at least a year. Obtaining a new defence medical examination at this stage, as Mantella's counsel suggests, is not a satisfactory response as that new doctor will be seeing the plaintiff more than ten years after her injuries were sustained. This could have a very negative impact at trial. Of course, additional defence medical examinations would likely be required as the current ones are now stale.

[77] Duda also states that the investigator who performed surveillance of Khan may be retired. He does not say that he is retired or that he is not available. He expresses concerns as to whether the original surveillance has been retained and whether the form of technology used to capture it is convertible, so capable of being used today. All of this is expressed as conjecture, however, not fact.

[78] Finally, Duda indicates that several treating physicians (Drs. Ostroff, Ashinoff and Rampersad) have not yet produced their complete clinical notes and records. Apparently, counsel handling the motion wrote to all three physicians on January 19, 2011 but that was seven months ago and there is no indication that there has been either responses from

each or follow-up. It is not clear at this stage whether those records are available at this time. The evidence indicates that Kahn has not received notification from any physicians that her records have been or are to be destroyed but that is not necessarily the end of the story.

The law

[79] In many respects, the Court of Appeal has spoken clearly about what the court should be looking for when faced with motions of this kind. Essentially, there is no hard and fast test that governs. A contextual approach is preferred (see *Scaini v. Prochnicki* (2007), 85 OR (3d) 179), though the four factors articulated by the Court in *Reid v. Dow Corning Corp.* (2001), 11 CPC (5^{th}) 80 have been considered an appropriate starting point.

[80] In view of the *Reid* factors, a court will expect to see the following issues addressed with evidence by the moving party on motions of this kind:

1) An explanation for the litigation delay: The plaintiff must explain why it has taken longer that the prescribed standard to get the case ready for trial and her evidence must clearly demonstrate that it was always her intention to proceed with the action, notwithstanding her lawyer's inattention.

   According to *Reid*, a deliberate decision by either the lawyer or the client not to advance the litigation will be problematic;

2) Inadvertence in meeting the deadline: Generally, a bald statement to this effect will not suffice, unless the other factors outweigh this one. Evidence explaining how the deadline was missed is expected;

3) The motion is brought promptly: This generally means that the motion has been brought within a few months; and

4) The defendant will suffer no prejudice as a result of the plaintiff's delay: Although the onus is initially on the defendant to raise prejudice, explain it and tie it to the delay, the plaintiff can refute the defendant's theory with its own evidence. Prejudice can be inferred where the delay has been extensive (see *Aguas v. River Estate,* 2011 ONCA 494).

[81] All four *Reid* factors need not be satisfied in order for a motion of this kind to succeed. Instead, these factors must be balanced along with all other relevant factors that are at play. As a result, a detailed factual analysis is required and each case must be decided on its own facts. This leaves the court with considerable discretion.

[82] The Court of Appeal has also been consistent in acknowledging that its role involves dealing with the obvious tension between wanting to deal with a case on its merits as opposed to the need for a timely resolution of disputes. How does the justice system maintain its integrity if it does not provide justice in an expeditious manner and if its procedural rules are regularly flouted? Conversely, is it justice if a party is prevented from having its case heard on its merits because of a procedural breach?

[83] The avoidance of unnecessary delay was found to be a central principle in the administration of justice in *March d'Alimentation Denis Theriault Ltee. v. Giant Tiger Stores* (2007), 87 OR (3d) 660. There, the court mandated that each time a motion of this nature comes to the fore, this duality of goals must be considered in the context of the factual matrix and included in the balance (see *Marche*).

[84] Again, it is the facts of each case that will govern: how many breaches; over how long a period; why was this permitted to occur; has the plaintiff always been intent on pursuing its rights or have they wavered in that intention; what was the defendant's role in the delay and how are they harmed by it now if the matter proceeds? Did the court contribute to this problem by not sending the status notice or by sending it to former counsel? These are but a few of the questions to be asked, bearing in mind that justice means justice not only for the plaintiff, but for all parties.

[85] Two of the *Reid* factors merit special attention in this case.

[86] The first is the role of prejudice as there appears to be some confusion on the part of the Bar as to its role in these motions. Is it a "key" factor, such that in its absence, the motion must succeed or is it a significant factor, the absence of which is important but not determinative of the outcome of the motion?

[87] A second *Reid* factor worthy of a closer look is the impact of delay in bringing the motion. As the court must be cognizant of the tension between the need for finality versus the desire to have cases tried on their merits, how should those two principles be reconciled?

[88] A further issue that requires a more in depth consideration is whether a motion of this kind should be treated differently if the lapse is that of counsel and appears to be closer to negligence than mere inadvertence. In other words: where the inadvertence of counsel that is relied on approaches or reaches solicitor's negligence, should the fact that the plaintiff may still have a right to pursue her own counsel at the end of the day be considered as an additional factor that should be part of the balance or is it a wholly irrelevant consideration?

The role of prejudice

[89] One of the four factors considered in the *Reid* case is prejudice. As Master Dash put it in the case:

> *The plaintiff must convince the court that the defendants have not demonstrated any significant prejudice in presenting their case 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 fade over time and that sometimes 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.*

[90] The starting point is therefore with the defendant as only they can be specific about the prejudice they will suffer if the matter proceeds (see *Chiarelli v. Wiens* (2000) 46 OR (3rd) 780). Their evidence can then be challenged by the plaintiff.

[91] As the current state of the law is that not all four factors must be satisfied, the issue becomes this: how important is prejudice? Is its presence or absence determinative of the motion?

[92] A good starting point is *Scaini*, (supra). While stating that the need for compliance with all four *Reid* factors was too inflexible an approach, the Court of Appeal added:

> *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 an order that is just.*

[93] This suggests that the absence of prejudice does not necessarily bring an end to the inquiry and a resolution in favour of the plaintiff, as such an approach would conflict with a contextual analysis.

[94] In *Marche*, the Court of Appeal made it clear that absence of prejudice was not enough to result in a positive result for the moving plaintiff and that a full analysis was still called for:

> *However, it is not enough for the respondents to show that the appellant could advance its case despite the delay in the matter were to proceed to trial. There are four branches to the Reid test, and, according to Scaini, those four factors are not exhaustive.*

[95] Another issue to consider when doing the prejudice analysis is what the defendant can rely on to demonstrate it. In *Wellwood v. OPP* 2010, ONA 386, the Court of Appeal

considered an expired limitation period and inordinate delay in moving as part of the prejudice analysis, Cronk J.A. holding that the master did not err by considering both in the balance when dealing with prejudice.

[96] There, two actions arose from the withdrawal of criminal charges against the plaintiff in January 2004. The first action was dismissed in January 2005 and the second in November of that year.

[97] The motion to set aside these orders were scheduled for April, July, October and then November 2005 but the motion materials were not served until April 2007 and the motion did not proceed until October 31, 2007, almost two years after dismissal of the second action and even longer following dismissal of the first.

[98] In the context of these facts, the Court of Appeal agreed with the master's analysis regarding prejudice, concluding that the expiry of the applicable limitation created a presumption of prejudice and that the delay in bringing the motion was an appropriate consideration:

> *I agree with the master that the delay in prosecuting the Second Action and in bringing the Motions was inordinate. Almost two years passed from the dismissal of the second action to the date of the hearing of the Motions and a delay of about one year and ten months occurred from the expiry of the limitation period to the hearing of the Motions. And more than three years elapsed from the initial commencement of the litigation to the date when the respondent finally sought to set aside the dismissal orders. The respondent demonstrated no sense of urgency to advance the litigation or to move to set aside the dismissal orders.*

[99] These facts, coupled with the plaintiff's failure to adduce a cogent explanation for the delay resulted in the appeal being granted and the master's order, hence the dismissal order, being reinstated.

[100] Prejudice can be inferred if the delay is long enough. In *Aguas*, (supra) the Court of Appeal overturned the decision of a lower court and set aside the dismissal order. In doing so, however, the court found that the lower court's analysis of prejudice was correct, in so far as finding that it could be inferred. The lower court's error, according to Rosenberg, J.A., was in placing unreasonable emphasis on this factor. Ultimately, the court was unable to accept that there was, in fact, prejudice on the facts.

[101] At the end of the day, it appears the Court of Appeal, though recognizing the importance of prejudice, has decreed that the fact that it cannot be established in a particular case does not end the inquiry – the contextual approach demands that lack of prejudice is just one factor to be considered in the balance.

[102] Similarly, it would appear that the presence of prejudice would not automatically result in the motion to set aside being dismissed– the nature and degree of prejudice would have to be assessed in the context of the other factors.

Delay in bringing the motion to set the dismissal order aside

[103] In *Marche*, (supra) the Court of Appeal favoured the principle of finality:

> *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.*

[104] Thus, the court appears to have recognized that there will be cases where, even in the absence of prejudice, the delay in moving to set aside the dismissal order will be sufficient grounds to let it stand.

[105] In *Aguas*, (supra) the Court of Appeal reviewed both *March,* (supra) and *Wellwood*, (supra) where the principle of finality was given prominence, concluding that in both cases, the delay was effectively intentional.

[106] *Aguas*,(supra) was a case involving court error – counsel has filed a notice of change of solicitor in a timely fashion but notwithstanding, the court sent the status notice and the dismissal order to previous counsel.

[107] Here, the court found that the lower court had erred by allowing finality to trump in the context where neither party acted as though the dismissal had been final. The defendant continued to participate in the litigation notwithstanding the order, attending a watch brief of oral discoveries arising out of a second accident and action. The court focused, as well, on the defendant's lack of urgency – instead of pushing for the set aside motion, they carried on.

[108] Thus, while not discounting the need for finality, it was found that the principle was simply not applicable on the facts of this case. In my view, this recent decision in no way detracts from earlier cases considered by the Court of Appeal when dealing with the issue of finality as an appropriate consideration for the mix.

What is the impact of a negligent lawyer?

[109] This appears to be an area of the law that has given counsel some difficulty as of late – those who have failed to read the decisions of the Court of Appeal carefully believe that the court has not been entirely consistent when dealing with the negligent solicitor and

how that should affect the outcome of these motions. That, in my view, is not the case. The legal principles enunciated in these cases are, in fact, wholly consistent when each is considered within the facts of each case.

[110] The Court of Appeal first considered the role of a delinquent counsel in the context of this kind of motion in *Marche*, (supra). There, Sharp J.A. considered the impact of a deliberate delay as distinct from one caused by inadvertence. In that case, it was established on the evidence that counsel had formed a deliberate intention not to advance the litigation and he had put the file in abeyance, leading to a 5-year gap between the dismissal order and the motion to set it aside. As in this case, undertakings had not been fulfilled and counsel missed materials from the court because he had failed to keep the court current by filing a Notice of Change of Solicitor.

[111] The master dismissed the motion to set aside the registrar's dismissal order, but he was overturned by a single judge. In reinstating the master's decision and, hence, the dismissal order, the court dealt with the solicitor's role in several places, indicated that it was important to distinguish between inadvertence and negligence, and noting that:

> *the solicitors' conduct in this case amounts to more than that kind of lapse or inadvertent mistake that the legal system can countenance. We should opt for a resolution that discourages this type of conduct which undermines the important value of having disputes resolved in a timely fashion....*
>
> *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 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 through (sic) into question the willingness of the courts to live up to the stated goal of timely justice.*
>
> *...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.*

[112] The court concludes by stating:

> *The legal system should not condone the solicitor's behaviour as to do so would fail to provide appropriate incentives to those engaged in the justice system and would risk harming the integrity and repute of the administration of justice. Reinstating the action at this point would undermine the finality principle while refusing to reinstate (sic) the action does not interfere with the need to ensure adequate remedies.*

[113] In *Finlay v. Van Passsen* 2010, ONCA 204, the Court of Appeal again looked at the impact of solicitor's negligence as a potential factor in the constellation of those to be considered. A personal injury case like this one, the Finlay action was dismissed by the registrar for failing to set it down for trial and the motions judge then refused to set aside the dismissal order. The Court of Appeal overturned both orders and the action was allowed to proceed.

[114] The fact that the registrar had neglected to send a copy of the status notice to either Finlay or his counsel was considered to have been significant in this case, although the court did not ultimately decide the case on the basis of that issue, alone.

[115] Writing for the court, Laskin J. explained that the accident giving rise to the claim occurred in 2003; the claim was issued in October 2004 and the status notice issued (but was not sent to the plaintiff) in January 2007. The action was then dismissed on April 30, 2007 and the motion to set aside the dismissal order was brought in May 2009, two years later. It appears that the motions judge had focused on the two year delay in bringing the motion when deciding not to set aside the dismissal order.

[116] The Court of Appeal concluded that the failure to serve the plaintiff with the status notice was only an irregularity, such that it did not deprive the registrar of jurisdiction to then dismiss the action. The lack of service, however, was an important consideration for the court, which stated that, had Finlay's counsel moved swiftly to bring the set aside motion, the interests of justice would have demanded that relief be granted.

[117] That was not what occurred, however, so counsel's role and the delay it created had to be considered. It appears that the motion materials were drafted but never served. Apparently, both the lawyer and law clerk who had worked on the file had left the firm and no one else reviewed the file. Letters from defence counsel urging action were ignored.

[118] The motion judge focused on this two year gap, finding that because Finlay had been unable to satisfy the third prong of the *Reid* test, his motion must fail. Laskin J, found in dealing with the motion in this way, the judge had effectively ignored the mandated contextual approach. Failure to comply with only one of the four factors should not have been fatal to the success of the motion unless the balance of all relevant factors led to that result.

[119] Looking at the matter contextually, the Court of Appeal concluded that the outcome of an examination of the other factors, including court error, outweighed the two-year delay and therefore justified setting the dismissal order aside.

[120] In arriving at its finding, the court considered the role of counsel, Laskin J stating:

> *In my view, 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.*

[121] This phrase has been read by Khan to suggest that whether the delay is caused by inadvertence or solicitor's negligence is immaterial. I do not share that view. It makes no sense for the Court of Appeal to have condoned all forms of solicitor's negligence in all cases. Such a reading would run counter to the need to balance the court's recognition of the litigants' entitlement to finality and the integrity of the civil justice system against the right of the plaintiff to have her case heard on its merits.

[122] While the court suggested that the court's "primary" focus should be with the rights of the litigants, that phrase must be read as embracing the rights of all litigants, not simply those of plaintiffs who have run afoul of Rule-imposed deadlines. When considering the respective rights of litigants, which includes a defendant's right to have the matter come to an end by settlement or trial within a reasonable period of time, there is no direct statement from the court suggesting that solicitor's negligence, and the possible suit the plaintiff can bring against such a counsel, must be completely excluded from consideration.

[123] As I read *Finlay,* it leaves room for the court to consider solicitor negligence as part of the contextual approach when balancing the rights of the parties with a view to doing justice between them. The fact that Laskin J. then goes on to refer to Sharp J's discussion in *Marche* reinforces that this is clearly what the court intended.

[124] In *Machocek v, Ontario Cycling Association*, 2011 ONCA 410, the court considered *Marche* (supra) in the context of a dismissal caused by a solicitor whose conduct was responsible for delay. There, the court held:

> *...the appellants are not left without a remedy as they still have recourse through an action in solicitor's negligence.*

[125] This is a clear and current statement of how the court views the issue and its place in the contextual approach.

[126] A review of these cases suggests that a solicitor's negligence is something which the court can and should consider in its deliberations. To set aside a dismissal order when the delay in moving the action forward or bringing the motion to set aside the dismissal order arose largely as a result of solicitor's negligence undermines the integrity of the administration of justice in the eyes of the public. Why should a lawyer be exempted from compliance with the Rules pursuant to which he or she must practice if parties representing themselves would be expected to comply? Rules providing timelines were enacted with the intention that they would be followed. Where they haven't been, the

party affected must provide a sound and compelling explanation for the default. The fact that their counsel was not aware of or ignored the Rules should not be considered an acceptable explanation and should not work in their favour.

[127] I therefore conclude that when a solicitor's conduct has been so egregious as to be negligent rather than mere inadvertence, the court should not rely on that fact as the primary focus of the analysis. However, the fact that the plaintiff can turn around and sue her counsel if her motion to set aside a dismissal order is not successful in such circumstances is a factor the court can weigh in the balance.

Analysis and conclusion

1. Has the plaintiff provided an adequate explanation for the litigation delay?
2. Inadvertence in meeting the deadline?

[128] I will treat these two issues together as there is significant overlap. The action arises from an accident that occurred in November 2001. Though liability has not been admitted, the defendant apparently rear-ended the plaintiff's vehicle and gave faulty brakes as the reason for her failure to stop on time. There are no other defendants or third parties to this litigation. In view of how the accident occurred and the reason for it provided for the defendant, it is unlikely that liability will be forcefully contested. This will become more important when I deal with the issue of prejudice and potentially fading memories.

[129] The statement of claim was issued near the end of the applicable imitation period, on November 21 2003, and served near the expiry of the 6-month period for service, on May 4, 2004. Counsel came perilously close to the deadline in each case. Based on the Court of Appeal's decision in *Hamilton v. Koyanagi Architects et al*, 104 OR (3d) 689, the court should consider such "under the wire" conduct when reviewing delay.

[130] This action appears to be a fairly straightforward personal injury case. The factual context of this action is not akin to a medical malpractice case, by way of example, where it may take a considerable period of time for a plaintiff to amass her medical records, and consult with and then retain expert witnesses. In those cases, it makes sense to do as much of that work as possible to assess the viability of a legal action before incurring the expense of issuing and then serving a claim. In those cases, waiting until the last possible moment is not unusual and the rational for such an approach is well understood by the court.

[131] Here, there is no obvious rationale for the plaintiff to have waited until her rights were almost extinguished before taking action. Barring some explanation for waiting until the eve of expiry of both the limitation period and statement of claim, Khan was obliged to move the action along.

[132] The defence pleading was delivered in July 2004 and a motion to move the action to Toronto was brought in December 2004. In the same time frame, Mantella left his former firm and set up shop in his home. For reasons undetermined and not discussed in the evidence, Mantella failed to alert the court to his new address. Despite this omission, however, it seems that various critical court documents did come to Mantella's attention, as defence counsel ensured that they did.

[133] Khan was examined for discovery over the course of parts of three days, the last attendance taking place in August 2005. The defendant was not examined for discovery and there are apparently no plans to examine that party. It should have been a simple matter from this point forward to satisfy undertakings, arrange mediation and set the action down for trial – but that is not what took place.

[134] Mantella moved his practice a second time in September 2005 when his marriage ended and he left the matrimonial home. It seems he again neglected to tell the court where to find him.

[135] In the interim, he did nothing about the outstanding undertakings, aside from sending out a new set of authorizations to Khan, bearing his new office address. Though he received executed copies from Khan in late 2005/early 2006, he still did nothing to pursue the outstanding information he had undertaken to provide.

[136] The defendant advised Mantella they would be moving on the undertakings in March 2006 and the motion proceeded on May 30, 2006. A consent order was ultimately obtained as Mantella neglected to appear for the motion. He was reached at his office by phone and the terms of a settlement were worked out at that time. I note this was before the alleged health or marriage-related problems that Mantella later relies on to justify his lack of attention to the file. He does not explain – or even mention – his failure to attend.

[137] The consent order required full compliance by August 7, 2006. It was only in April 2006, in anticipation of the motion, that Mantella finally sent out a few request letters. He failed, however, to follow up when replies were not received.

[138] The compliance deadline came and went. In the interim, the action was dismissed by the registrar in March 2007.

[139] In his supporting affidavit for this motion, Mantella stated that the reason this occurred is that the status notice was sent to his former firm – though he had already moved from there to his home and from his home to a new office premises.

[140] Cross-examination revealed that this evidence was not accurate- in fact, defence counsel sent him the status notice in November 2006, so there was ample time to set the action

down for trial; seek an extension of deadline by which to set it down; or request a status hearing. Mantella chose none of the above.

[141] It is clear that the letter was received by Mantella's office – his brother, a staff member in his office, wrote directly on it. Though Mantella maintains that his brother would have known what a status notice was, he himself, initially did not recall having seen the notice. Later on in the examination, however, he advised that he had seen the status notice but that he did not set the action down for trial as he still had undertakings outstanding. This does not address the failure to seek an extension order or a status hearing. There is no explanation for why the status notice was ignored or why Mantella failed to address this issue in his initial evidence. The fact that this evidence had to be pried from Mantella, in my view, is important.

[142] The first dismissal order was set aside without opposition. As a result, the delay that came before it would generally not be considered in the context of this motion, as it has already been "forgiven". This case, however, is markedly different from the norm, in that the status notice was clearly received and reviewed – but then, apparently, ignored. There is no evidence to the effect that it was misplace or misfiled or inadvertently mislaid.

[143] The status notice is not mentioned at all in Mantella's affidavit – instead he blames his failure to act on the court, for having sent the notice to his former firm. In view of how matters unfolded, this is immaterial as, essentially, he is to blame for the misdirection of his mail in any event.

[144] It may well be the case that the status notice was not received directly from the court because, having moved twice, Mantella apparently took no steps in either case, to alert the court to his new address. That, however, is a red herring, as the status notice was provided by defence counsel in this case.

[145] I am concerned by the manner in which Mantella approached this issue. This is a motion to set aside a dismissal order –the second in this file – yet Mantella did not review his file well enough when preparing his evidence to properly and fully convey to the court what actually transpired with respect to the first status notice. The fact that he failed to mention that he received the status notice from the defendant is a serious omission.

[146] The first dismissal order was set aside on May 4, 2007. The order required that Khan fulfill the outstanding undertakings, already ordered fulfilled, and that the action be set down for trial by August 7, 2007. That was more than four years ago.

[147] Mantella relies on inadvertence in this instance – he claims he failed to diarize the new set down date. He states, however, that he entered it into his tickler system, though, such

that his evidence on this point is actually inconsistent. Either he entered it/diarized it or he didn't.

[148] Relying on the fact that he did, indeed, enter the date, Mantella then claims that he saw it, asked about it and was assured by his brother, Frank, that it had been dealt with.

[149] Frank had no legal training- he was neither a lawyer nor a law clerk, so it is not at all clear why Mantella reposed such a high level of trust in his brother. The point is that he hired him and left him to deal with these issues. If the problem was, indeed, Frank, Mantella remains responsible for having hired him, having delegated matters of this kind to him, having failed to provide him with adequate training and supervision and having failed to follow up and check his work. Khan is also bound by the acts of the brothers, or the lack thereof.

[150] No trial record was served or filed despite the terms of the order setting aside the first dismissal order. In view of the failure to comply with the new deadline for setting the action down, it was dismissed again.

[151] Despite the dismissal of the action, Mantella served an unsworn affidavit of documents at some point in 2008.

[152] There has clearly been considerable delay in moving forward with this action, including two dismissal orders. Aside from wholly inadequate and, at points, inaccurate or inconsistent reasons provided by Mantella for this, he has also provided two overriding reasons for his inattentiveness. The first involves his health, the second being the end of his marriage.

[153] In terms of his health, Mantella claims that he had "serious personal health issues" from early 2007 until mid-2009. The first status notice, however, was received in November 2006, so this explanation in no way addresses this lapse.

[154] Further, although Mantella states in his affidavit that his health problems interfered with his focus, he provided no indication as to what his health problems were and he refused to respond to any questions about the issue when cross-examined. It appears he was not off work continuously for any time period though he claims his problems took him out of the office a couple of times per week. For full days or partial days? For medical treatment or due to fatigue? None of the answers to any relevant questions about the health problems were provided.

[155] As the onus is on Khan to explain the litigation delay, her lawyer's reference to his "health problems" without any detail is, in my view not an adequate way of deflecting the issue. As a result, I am hard pressed to allow Mantella, and hence Khan, to rely on his medical problems as a justification for the lack of attention to this file.

[156] The second factor that Mantella points to as the basis for his distraction from work was his divorce proceeding. This, he says, became an issue for him early in 2007- so, once again, after the first status notice was sent – finally resolving in the late fall of 2009. On cross-examination, Mantella admitted that he actually separated in 2005 – that was why he moved his practice from the home – yet he does not explain why, in 2007, it became harder for him to manage.

[157] There is no evidence as to why Mantella did not consider sending his files or referring his clients elsewhere while he took the time he apparently needed to get well. There is no indication that he retained legal staff to assist him, at least, not during this apparently difficult time. There is no indication that he informed Khan of his personal situation or that he suggested she look elsewhere for legal counsel.

[158] On the basis of all of Mantella's evidence, I do not believe that the litigation delay has been adequately justified and I am unable to say that it was the result of inadvertence. Mantella's failure to provide complete and accurate information heightens my concerns. This litigation appears to have become bogged down due to nothing short of Mantella's ongoing and repeated negligence.

[159] What of Khan during all of this time? As noted, her evidence is sparse, her memory of events minimal. Though she claims she called Mantella to make inquiries from to time, she can't say when she did so or advise how often. There is no evidence to suggest that she took Mantella to task for the delay or threatened to pull her file from him, though she testified that she had not expected the litigation to take 10 years to conclude.

3. The motion to set aside the dismissal was not brought promptly

[160] The action was dismissed for a second time on August 10, 2007. Once again, Mantella states that he did not receive a copy of the order, presumably because he had still not notified the court of his whereabouts, despite having already had the action dismissed from under his feet a year or so earlier.

[161] But once again, Mantella's affidavit evidence was discredited on cross-examination. It was not because of his staff contacting the court office that Mantella learned of the dismissal order – it was sent to him by defence counsel in early March 2008. Again there is no direct evidence explaining why Mantella failed to alert court staff to his whereabouts in the face of having already been on the wrong end of a dismissal order. Although he apparently became aware of the order during the "window" of health issues and divorce, I have already indicated why I am unable consider that evidence as helpful to Mantella – or, as a result, to Khan.

[162] Mantella began with good intensions, and assured defence counsel that he would move to set the order aside but he then claims he had trouble locating a copy of the order in the

court file. He makes no mention of having asked defence counsel for a copy of the document, however, or of having reviewed the computerized Case History to satisfy himself that the dismissal order had, indeed, been made and when this occurred. There is no reason to expect that defence would have been anything less than helpful in view of past conduct or that the dismissal order was not reflected on the Case History.

[163] Materials were completed in July 2008 but no return date was booked for the motion and nothing was served. Yet again, Mantella claims he was misled by staff who assured him the materials had been served and filed on July 7, 2008. But if this was the case, they would first have had to book a motion date – without the date in his calendar, why would he have accepted that this representation by staff was accurate? Mantella's evidence on this point is extremely difficult to accept.

[164] Mantella also relies on staff turn-over. When he returned from vacation that summer, he says he learned that his secretary and another staff member had left his employ. He therefore had no secretary in place until September 2008.

[165] But, this, too, is a red herring as Mantella, himself, came across the motions materials in a box he was perusing in September or October 2008 – yet he did nothing with them. Again, he blames his failure to act on inadvertence, claiming that his focus was on settling Khan's accident benefits. He does not explain why working on one file prevented him from working on the other – to the contrary, one would have thought that his review of the AB file would have reminded him that he was dealing with a date of loss of 2001.

[166] During cross-examination, the real reason for Mantella's inaction was uncovered. It seems he was unaware that a registrar's dismissal order – a second dismissal order, in this case- was "a serious matter." Rather, he says he believed that having the dismissal order set aside would be a routine matter.

[167] Though told early on that the defendant would not be consenting to the motion, there is no indication that Mantella performed any research to see if or how that fact affected the "routine" nature of the motion he had to bring. A simple review of the Rule and the case digests in the Rules would have given him some idea of the impediments he was facing, impediments that were growing by the day as no motion was initiated. But even that appears to have been beyond Mantella.

[168] Mantella left the materials as he found them and made no effort to diarize the matter. It was only when Khan phoned him in May 2010 that he realized – again – that the trial record had never been filed and the action has been dismissed. Thereafter, he says – he does not say when - he reported the matter to his insurer.

[169] Mantella and his office had no contact whatsoever with the defence between April 2008 and November 2010, more than 2 and a half years later, when this motion record was finally served and filed.

[170] Even if I were to accept that Mantella's health issue intervened to distract him from giving proper attention to his practice and to this file, those issues were resolved by mid 2009. Even if I were to accept that his matrimonial issues exacerbated his ability to remain focused on his work, those issues, too, were resolved by late 2009.

[171] It was not until November 2010 that this motion was launched and there is absolutely no credible justification for this delay, particularly when Mantella himself came across the unfiled materials in September/October 2008 and received a phone call from Khan in May 2010. Once again, it appears the delay in bringing the motion was the direct result of Mantella's negligence.

4. Prejudice

[172] It has been almost 10 years since the date of loss and this action is still at least a year away from trial if the relief sought is granted. I have already commented on liability. In view of how the accident happened and the defendant's contemporaneous evidence about it, I do not consider the lack of reliable evidence regarding that issue, caused by the delay, to be critical to the outcome of the case.

[173] That, however, still leaves the issue of damages. Khan has yet to return to work and in view of the amount of time that has now passed, the likelihood of her ever doing so is remote. Undertakings were fulfilled over an incredibly long period of time, but for the most part, almost all have now been answered. Surveillance has been conducted twice and defence medical examinations were performed – albeit several years ago.

[174] The defence expresses concern about their witness, Dr. Silverstein in view of his advanced age. Will he still be in practice when this matter is finally reached for trial? Will he be well and able to testify? How credible will he be as a witness at his age and so many years after having seen Khan?

[175] Khan has endeavoured to address these concerns with evidence, indicating that, though 81 years of age at present, Dr. Silverstein is still carrying on a medical practice, working from 9:00 am – 4:30 pm from Monday to Thursday, and half days on Friday. He still conducts assessment for personal injury litigation and has apparently testified as recently as January of this year.

[176] There is no indication, however, as to how the doctor performed as a witness. Did he provide his evidence in a compelling way? Further, Khan's evidence regarding Dr. Silverstein only addressed the present, not necessarily a reliable indicator of how an 81-

year old man will conduct himself as an expert witness when testifying a year or more from now.

[177] There is the added concern that Dr. Silverstein saw Khan several years ago – this is the kind of thing that can discredit the validity of a medical expert's opinion. Neither party brought case law dealing with a similar factual scenario involving an aging expert witness.

[178] While Khan's counsel offered to have Khan attend for a follow-up with Dr Silverstein as well as further defence medical examinations if requested, neither is a wholly satisfactory solution. In view of Dr. Silverstein's age, he could choose to cease practice between now and trial, or that choice could be taken from him. A new physician would be seeing Khan for the first time more than 10 years after her accident – that is unlikely to impress a trier of facts.

[179] The evidence regarding the investigator's potential retirement is pure conjecture, without some indication of his age or his actual intention. I do not see it as adding to a prejudice argument.

[180] Similarly, the notes of the three physicians requested in January 2011 may well be available – no one, it seems, has followed up. It is also not clear on the evidence that these physicians, in the context of the constellation of health professionals who saw and treated this plaintiff, would have anything sufficiently material to add to create prejudice if the notes cannot be found.

[181] Finally, the defence raises an issue regarding the threat hanging over the defendant, Mander's head in view of the outstanding litigation. There was apparently reference in Dr. Bail's report to Khan's expressed homicidal ideations towards Mander. As a result, the police became involved. There is no evidence, however, to indicate that any of this was ever brought to Mander's attention or that the resolution of this action, one way or the other, would bring an end to Khan's thoughts, assuming they persist six years after they were expressed to this physician. I therefore do not find that this issue is a relevant part of the context for my deliberations.

[181] A concern which does not appear to have been raised directly is Khan's own evidence at trial. So much time has passed since her accident and when cross-examined for this motion, she certainly did not come across as detail-oriented. How will she be able to say, so far down the road, when certain symptoms lessened or flared? Though cases of this kind often turn largely on testimony of the medical experts, the doctors' findings and prognosis are often based to some degree on a patient's self-reporting, and it is apparent from her cross-examination that Khan suffers from a faded memory when it comes to these events.

[182] A defendant should therefore be able to enter the arena of the courtroom with some hope of being able to challenge the plaintiff, herself. It is clear Khan recalls little of anything about the last few years. While this factor could turn out to be a two-edged sword, there is still a risk that counsel's neglect could end up working to Khan's advantage and buying her undue sympathy as a result. This cannot be discounted and should not be endorsed.

[183] I therefore find there is some risk of prejudice, though I would say it is modest to moderate.

5) Other relevant factors

[184] The delays in this case are of the extreme variety:

- It has been almost 10 years since the date of loss;
- The action has been dismissed twice;
- The second dismissal occurred more than 4 years ago;
- Counsel has known about it for almost 3 ½ years;
- There was no contact with defence counsel for over 2 ½ years before this motion was launched.

[185] In the face of these delays, Mantella has provided only vague reasons for his inattention to the file and for only part of the time involved, and he has refused to particularize what it was that kept his focus off his practice. This approach makes it very difficult for the court to accept that Mantella's personal issues were of such a nature to justify his failure to proceed expeditiously with this matter.

[186] To the extent that Mantella purported to explain any of these delays in his affidavit evidence, he was caught out several times on cross-examination. It is clear that in some instances, he relied on red herrings. In others, he failed to address the real basis for his failure to act. Mantella has been neither forthcoming nor forthright with this court in his affidavit evidence on several occasions. This is troubling.

[187] What is most astonishing about all of this is the wrap up evidence that emerged during cross-examination, to the effect that Mantella really didn't appreciate that he had anything to worry about and that he thought he could have the dismissal order set aside as a matter of routine. As a result of this erroneous belief, he left it, to be dealt with at some future date.

[188] It is very hard to comprehend how any lawyer practicing in Toronto who has already faced one dismissal order could remain totally oblivious to the Rules that govern this situation, as well as the body of law that had been and was being developed in this area. There has never been any suggestion that motions to set aside orders dismissing actions for delay are dealt with by the court in a perfunctory matter. Even when such motions are

brought on consent, we expect to see some explanation for both litigation delay and delay in bringing the motion, if there has been any.

[189] In light of all of the foregoing and in view of the comments articulated by the Court of Appeal in a series of cases, I am compelled to consider how the public would view my granting the relief sought on these unusual facts. If I were to ignore Mantella's conduct, I would be bringing the administration of justice into disrepute. This must be considered in the balance. The court should not be seen to be condoning solicitor's negligence of this magnitude, when it has led to such extreme delays, both in the action, itself, and in bringing this motion.

[190] On the basis of all of the foregoing, I find that in this case, the order must be refused.

Released: September 9, 2011

Master Joan Haberman