CITATION: Liu v. Berbatiotis, 2014 ONSC 4741
COURT FILE NO.: 11-CV-425884
MOTION HEARD: May 21, 2014

SUPERIOR COURT OF JUSTICE - ONTARIO

Between: Pei Liu

Plaintiff

v.

Tasos Berbatiotis, Dina Govostis and Security National Insurance

Defendants

And Between: Tasos Berbatiotis

Plaintiff by counterclaim

v.

Pei Liu, Nick Govostis and Economical Mutual Insurance Company, c.o.b. as The Economical Insurance Group

Defendants by counterclaim

BEFORE: Master Thomas Hawkins

COUNSEL: William G. Scott for moving plaintiff
F (416) 869-0271

J. Dannial E. S. Baker for responding defendant
Tasos Berbatiotis
F (416) 593-1352

Rachel E. Pano for responding defendant
Security National Insurance
F (416) 599-7439

Ian M. Thompson for responding defendant
Dina Govostis and defendant by counterclaim Nick Govostis

F (416 364-9118

No one for defendant by counterclaim Economical Mutual Insurance Company

REASONS FOR DECISION

Nature of Motion

[1] In this action arising from an accident in which the plaintiff pedestrian was stuck by a motor vehicle, the plaintiff moves in part for an order setting aside the order of the registrar dated August 30, 2011 dismissing this action for delay with costs. The motion is opposed.

[2] The plaintiff brings this part of her motion pursuant to subrules 37.14 (1)(c) and 2. These subrules provide as follows.

> 37.14 (1) A party or other person who,
>
> (a) is affected by an order obtained on motion without notice;
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> (b) fails to appear on a motion through accident, mistake or insufficient notice; or
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> (c) is affected by an order of a registrar,
>
> may move to set aside or vary the order, by a notice of motion 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 service of the notice of motion.
>
> (2) On a motion under subrule (1), court may set aside or vary the order on such terms as are just.

[3] The plaintiff is a party affected by an order of a registrar.

[4] Before I set out the history of this action, I wish to clarify a few things. First, references to the plaintiff's first lawyer (whom I will call "lawyer C.P.") and to her second lawyer (whom I will call "lawyer G.C.") are not references to William G. Scott who argued this motion on behalf of the plaintiff. References to the plaintiff's lawyers are not references to Mr. Scott's firm. They are references to the law firm where lawyer G.C. practiced.

History of Action

[5] The following is a history of this action with an emphasis on the events leading up to the registrar's dismissal order of August 30, 2011 and to argument of this motion before me on May 21, 2014.

Date	Event
October 3, 2003	Plaintiff pedestrian is injured when struck by a motor vehicle driven by defendant Berbatiotis.
February 27, 2004	Lawyer C.P. sends letter to all defendants except Security National advising them of plaintiff's intended claim.
May 16, 2005	Lawyer C.P. has registrar in Brampton issue statement of claim in this action.
May 21, 2005	Defendant Berbatiosis is served with statement of claim.
May 26, 2005	Defendant Dina Govostis is served with statement of claim.
June 27, 2005	Defendant Dina Govostis serves her statement of defence, crossclaim and counterclaim as a self represented party.
November 7, 2005	Defendant Berbatiotis serves his statement of defence and counterclaim.
November 23, 2005	Defendant by counterclaim Nick Govostis serves his statement of defence to counterclaim .
November 28, 2005	Plaintiff serves her statement of

	defence to counterclaim.
December 28, 2005	Defendant by counterclaim Economical Mutual Insurance Company serves its statement of defence to counterclaim.
January 11, 2006	Cassels Brock serves Notice of Appointment of solicitors for defendant Dina Govostis and defendant by counterclaim Nick Govostis.
May 1 & 2, 2006	Plaintiff's second lawyer, lawyer G.C., serves Notice of change of solicitors.
June 12, 2006	Lawyer G.C. serves motion record for motion to amend statement of claim and add Security National Insurance as a defendant.
June 22, 2006	MacKenzie J. hears motion and makes order granting plaintiff leave to amend statement of claim and adding Security National Insurance as a defendant.
July 6-10, 2006	Lawyer G.C. has amended statement of claim served.
2006	Govostis defendants serve their amended statement of defence and defence to counterclaim.
October 26, 2006	Defendant Security National Insurance serves its statement of defence and crossclaim. Lawyer G.C. writes defence counsel proposing dates for exchange of affidavits of documents and for examinations for discovery. Most defence counsel do not reply until April 2007.

April 30, 2007	Lawyer for Security National Insurance writes other counsel advising that examinations for discovery have been scheduled for September 17, 2007.
June 28, 2007	Brampton registry of this court issues Status Notice Action not on a Trial List (Form 48.C1).
September 13, 2007	Plaintiff's lawyers write defence counsel advising that examinations for discovery will have to be rescheduled because September 17, 2007 date was not cleared with them. They also propose a litigation timetable to deal with the Status Notice. Lawyer for Security National writes plaintiff's lawyers noting that a notice of examination for September 17, 2007 had been served on plaintiff's lawyers on May 7, 2007.
September 14, 2007	Lawyer G.C. writes to Brampton registry of this court to request a status hearing.
September 17, 2007	Brampton registry of this court schedules a status hearing of this action for October 5, 2007.
October 1, 2007	Lawyer G.C. serves plaintiff's affidavit of documents.
October 2, 2007	Plaintiff's lawyers write to five different non-parties requesting clinical notes and records, decoded OHIP summary, handwritten police notes and accident benefit files on the plaintiff.
October 5, 2007	Status hearing for this action held. Litigation timetable approved. Action is to be set down for trial by

	December 31, 2008.
October 17, 2007	Defendant by counterclaim Economical Mutual serves its affidavit of documents.
November 2007	Counsel exchange correspondence respecting dates for examinations for discovery. They finally agree that examinations for discovery will proceed on February 4 and 8, 2008.
January 11 & 18, 2008	Govostis defendants and Security National serve their affidavits of documents.
February 4 & 8, 2008	Defendant Dina Govostis, defendant by counterclaim Security National and defendant Berbatiotis are examined for discovery.
June 25, 2008	Plaintiff's lawyers write proposing dates for examination for discovery of defendant by counterclaim Economical Mutual.
December 31, 2008	Plaintiff does not set action down for trial or bring motion for order extending set down deadline.
January 21, 2009	Registrar dismisses action for delay with costs.
January 26, 2009	Plaintiff's lawyers receive copy of registrar's dismissal order.
March 30, 2009	Plaintiff's lawyers serve motion record for order setting aside registrar's dismissal order.
April 17, 2009	Price J. hears plaintiff's motion. He sets aside registrar's dismissal order and approves a litigation timetable under which action is to be set down for trial by December 31, 2009. He also orders that action be transferred

	from Brampton to Toronto.
May 13, 2009	Plaintiff's lawyers confirm dates for examinations for discovery of plaintiff and defendant by counterclaim Economical Mutual.
July 15, 2009	Plaintiff's lawyers write opposing counsel proposing mediation and providing a list of mediators.
July 20 & 21, 2009	Plaintiff and defendant by counterclaim Economical Mutual are examined for discovery.
July 14, 2010	Plaintiff's lawyers write lawyer for defendant Berbatiotis requesting answers to his discovery undertakings.
July 20, 2010	Security National's lawyers write plaintiff's lawyers advising that Security National refuses to proceed to mediation.
May 9, 2011	Toronto registry of this court issues Status Notice: Action not on a Trial List (Form 48.C1)
June 22, 2011	Plaintiff's lawyers write opposing counsel requesting that they agree to a new litigation timetable, failing which plaintiff's lawyers will bring a motion to fix a timetable. They also propose a mediation and mediators.
June 28, 2011	Lawyers for Security National write to plaintiff's lawyers taking the position that the parties are not required to mediate.
August 9, 2011	Plaintiff's lawyers serve motion record for order fixing a new litigation timetable. Security National and Economical Mutual consent to plaintiff's proposed new

	timetable.
August 18, 2011	Plaintiff's motion comes before Haberman M. Counsel for defendant Berbatiotis does not consent to new timetable and requests an adjournment in order to file responding materials. Haberman M. grants this request, but is unable to adjourn the motion to a fixed date because the Toronto court registry cannot locate the court file. The court file had not yet been transferred from Brampton to Toronto. Haberman M. adjourns plaintiff's motion sine die.
August 30, 2011	Registrar issues order dismissing this action for delay with costs.
November 16, 2011	Process server assisting the plaintiff's lawyers searches court file for this action and confirms that file from Brampton registry has been transferred to Toronto registry.
December 28, 2011	Plaintiff's lawyers write lawyer for defendant Berbatiotis advising that court file has been transferred to Toronto registry and requesting dates for plaintiff's motion to set aside registrar's dismissal order. Lawyer for Berbatiotis does not respond.
March 6, 2012	Plaintiff's lawyers again write to lawyer for defendant Berbatiotis requesting dates for the plaintiff's motion with the same result. Lawyer for Berbatiotis does not respond.
April 20, 2012	Plaintiff's lawyers write to lawyer for Berbatiotis advising that they have booked June 20, 2012 for plaintiff's motion.

June 11, 2012	Plaintiff's lawyers serve motion record for plaintiff's motion to set aside registrar's dismissal order. Only defendant Berbatiotis opposes motion. His lawyer serves a responding affidavit a few days later and requests an adjournment to cross-examine. The motion is adjourned to September 28, 2012 and then adjourned again to permit cross-examinations.
November, 2012	Plaintiff's lawyers report this matter to their insurers who retain repair counsel to assist plaintiff and her lawyers.
January 14, 2013	Team Leader Glustein M. assigns me to hear plaintiff's motion as a half day long motion.
April 5, 2013	Plaintiff's lawyers write four non-parties requesting their documents on the plaintiff's treatment and plaintiff's Ontario Disability Support Program file.
April 8, 2013	Plaintiff's lawyers write opposing counsel with answers to her discovery undertakings and request answers to undertakings of Berbatiotis. The same day I convene a telephone case conference to timetable the plaintiff's long motion with a return date of October 9, 2013 for one half day.
September 3, 2013	I convene an in person case conference and adjourn plaintiff's motion to May 21, 2014 as an all day long motion.
May 21, 2014	I hear plaintiff's long motion and reserve judgment.

Legal Test for setting Aside Registrar's Dismissal Order

[6] In *Scaini v. Prochnicki*, 2007 ONCA 63, 85 O.R. (3d) 179, Goudge J.A., speaking for the Court of Appeal for Ontario, allowed an appeal from a motion judge. The motion judge had dismissed a plaintiff's motion to set aside a registrar's dismissal order because the plaintiff had failed to satisfy one of four criteria often used in deciding such motions. Master Dash originally laid down these four criteria in *Reid v. Dow Corning Corp.* (2001), 11 C.P.C. (5^{th}) 80.

[7] At paragraphs 21 to 24 of his decision, Goudge J.A. expressed himself as follows.

> 21 More importantly, I do not agree that the case law reviewed in *Reid, supra*, yields the proposition that an appellant must satisfy each relevant criterion in order to have the registrar's order set aside. None of the cases referred to say so expressly and several proceed on a more contextual basis. For example, in *Steele v. Ottawa-Carleton (Regional Municipality)*, [1998] O.J. No. 3154 (Gen. Div.) Master Beaudoin, at para. 17, described the guiding principle in deciding whether to set aside a Rule 48.14 dismissal by the registrar as follows:
>
> > … Ultimately, the Court will exercise its discretion upon a consideration of the relevant factors and will attempt to balance the interests of the parties.
>
> 22 I agree with Master Beaudoin.
>
> 23 In my view, a contextual approach to this question is to be preferred to a rigid test requiring an appellant to satisfy each one of a fixed set of criteria. The latter approach is not mandated by the jurisprudence. On the other hand, the applicable rules clearly point to the former. In particular, the motion to set aside the registrar's order dismissing the action for delay engages rule 37.14(1) (c) and (2). The latter invites the court to make the order that is just in the circumstances. A fixed formula like that applied by the motion judge is simply too inflexible to allow the court in each case to reach the just result contemplated by the rules.
>
> 24 That is not to say that there are no criteria to guide the court. Indeed I view the criteria used by the motion judge as likely to be of central importance in most cases. While there may be other relevant factors in any particular case, these will be the main ones. The key point is that the court consider and weigh all relevant factors to determine the order that is just in the circumstances of the particular case.

[8] Because Goudge J.A. said that the four *Reid* criteria used by the motion judge were likely to be of central importance in most cases, I will consider these four criteria, using a contextual approach respecting the facts underlying this motion while attempting to balance the interests of the parties, to determine the order that is just in the circumstances of this action.

First *Reid* Criterion

[9] The first *Reid* criterion is as follows.

> Has the plaintiff provided a satisfactory explanation for the litigation delay?

[10] This explanation must cover all delays in the prosecution of this action from its inception on May 16, 2005 forward.

[11] This action was prosecuted although slowly from May 2005 to the end of October, 2006. The action was then about 17 months old. The action was delayed by issues over who owned the vehicle which the defendant Berbatiotis was driving at the time of the accident and whether there was liability insurance covering that vehicle.

[12] The action was dormant for about six months after October 2006.

[13] At the end of April 2007 the lawyer for the defendant Security National (not the plaintiff's lawyer G.C.) wrote the other counsel to advise that examinations for discovery had been set up for September 17, 2007. Lawyer G.C. waited four months before objecting to discoveries on September 17, 2007 on the basis that this date had not been cleared with him. As a result, no discoveries in this action were held until February 4 and 8, 2008.

[14] There was a flurry of activity in this action in October 2007. A status hearing took place on October 5, 2007. The court approved a timetable with a deadline of December 31, 2008 for the plaintiff to set this action down for trial, some 14 months away.

[15] Apart from the facts that four of the six parties to this action were examined for discovery in February 2008, and that arrangements were made to examine the other two parties (the plaintiff and the defendant by counterclaim Economical Mutual) in March 2009, little happened in the 14 months ending December 31, 2008.

[16] The plaintiff's lawyers did not set this action down for trial by December 31, 2008. As a result the registrar dismissed this action for delay on January 21, 2009.

[17] The plaintiff's lawyers brought a motion to set aside the registrar's dismissal order. The motion was heard on April 17, 2009 partly on consent and partly unopposed. The presiding judge, Justice Price, approved a new litigation timetable with a set down deadline of December 31, 2009. He also set aside the registrar's dismissal order and ordered that this action be transferred from Brampton to Toronto.

[18] On May 13, 2009 the plaintiff's lawyers made arrangements for the examinations for discovery of the plaintiff and the defendant by counterclaim Economical Mutual. These examinations proceeded on July 20 and 21, 2009.

[19] On July 15, 2009 the plaintiff's lawyers wrote the first of two letters to opposing counsel proposing a mediation and providing a list of mediators. The defendant Security National refused to proceed to mediation. Its lawyers said the parties were not required to mediate because this action was not in case management immediately prior to January 1, 2010.

[20] In his factum, Mr. Scott submitted that the refusal of Security National to proceed to mediation prevented the plaintiff from setting this action down for trial. In Toronto the court registry staff will not permit a party to an action subject to mandatory mediation to set that action down for trial until mediation has taken place or, at a minimum, the parties have agreed on a mediator and a date for mediation. That did not happen here.

[21] Unless court registry staff agreed with counsel for Security National that the parties were not required to mediate, it would be necessary for the plaintiff to request the mediation coordinator to appoint a roster mediator to mediate this action and proceed without Security National, or bring a motion for an order exempting this action from the requirement to mediate before setting this action down for trial. That would delay matters for up to six to eight months.

[22] I do not know whether or not court registry staff in Toronto would agree with counsel for Security National that this action is exempt from mandatory mediation because the plaintiff's lawyers did not attempt to set this action down for trial without proceeding to mediation or securing all parties' agreement on a mediator and a date for mediation.

[23] Matters did not get to the stage where the plaintiff's lawyers brought a motion for an order that this action is not subject to mandatory mediation or an order exempting this action from mandatory mediation.

Nevertheless, this unresolved dispute over whether this action is subject to mandatory mediation has contributed to the overall delay.

[24] Mr. Scott submits, correctly, that although the plaintiff bears the main responsibility for moving this action forward, I may have regard to the conduct of the defendants to see if their conduct contributed to the overall delay. In *Bolohan v. Hill*, 2012 ONCA 121 the Court of Appeal for Ontario did just that at paragraph 17 of the court's judgment. This was a factor in the court's decision not to allow an order dismissing the action for delay to stand, but rather to allow the action to proceed to trial.

[25] The defendant Berbatiotis has not yet served his affidavit of documents, nor has he answered his discovery undertakings. This may require a motion by the plaintiff with significant delay.

[26] There were occasions when opposing counsel did not respond to letters from the plaintiff's lawyers at all, or did so only belatedly. This also contributed to the overall delay in this action.

[27] While this is not anyone's fault, the fact that five lawyers are involved in this action has made it more difficult to schedule examinations for discovery.

[28] The plaintiff's lawyers have not fully explained all the delay. However the unexplained delay is not so egregious that I should dismiss this motion because the plaintiff has not met the first *Reid* criterion. I am also influenced in reaching that conclusion by the fact that some of the other parties have contributed to the delay in the various ways I have outlined above in paragraphs [23] to [26].

[29] I now turn to the second *Reid* criterion. This criterion may be expressed as follows.

> Has the plaintiff led satisfactory evidence to explain that she always intended to set this action down for trial within the time limits set out in a court order but failed to do so because of inadvertence?

[30] In my view the main purpose of the second *Reid* criterion is to identify those situations in which a plaintiff or a plaintiff's lawyer, with the approval of his or her client, has deliberately flouted the Rules of Civil Procedure or orders of the court.

[31] Some of the cases on this subject describe this attitude as contumacious or stubbornly disobedient behaviour. I do not regard lawyer G.C. as a stubbornly disobedient person. Lawyer G.C. has prosecuted this action slowly and has been slow to react to events. He has sworn in his

supporting affidavit that he always intended to proceed with this action. His conduct is compatible with that statement. The plaintiff herself has sworn to a similar statement in her supporting affidavit.

[32] The classic case of inadvertence within the meaning of the second *Reid* criterion is that of the lawyer who forgets about a set down deadline or fails to diarize a set down deadline or both and, as a result, misses that deadline. This is not such a case.

[33] Lawyer G.C. was aware of the registrar's May 9, 2011 Status Notice: Action not on a Trial List (Form 48 C.1), and took steps to deal with it. Lawyer G.C. was not able to obtain the consent of all parties to a new litigation timetable. Form 48 C.1 itself tells the reader what to do in that circumstance. One requests the registrar to arrange a status hearing to show cause why the action should not be dismissed.

[34] Subrule 48.14(8) is to much the same effect. This subrule provides as follows.

> Where a status notice has been served, any party may request that the registrar arrange a status hearing, in which case the registrar shall mail to the parties a notice of the status hearing, and the hearing shall be held before a judge or case management master.

[35] The plaintiff's lawyers did not request the registrar to arrange a status hearing. Instead they brought a motion for an order that the court impose a new litigation timetable. None of the other parties requested the registrar to arrange a status hearing.

[36] In my view the fact that the plaintiff's lawyers brought a motion to establish a new litigation timetable rather than request the registrar to arrange a status hearing is, at worst, an irregularity, and not a reason for dismissing this motion.

[37] Subrule 2.01 (1) is relevant. This subrule provides as follows.

> 2.01 (1) A failure to comply with these rules is an irregularity and does not render a proceeding or a step, document or order in a proceeding a nullity, and the court,
>
> (a) may grant all necessary amendments or other relief, on such terms as are just, to secure the just determination of the real matters in dispute; or

(b) only where and as necessary in the interest of justice, may set aside the proceeding or a step, document or order in the proceeding in a whole or in part.

[38] The plaintiff's motion came before Master Haberman on August 18, 2011. She is a case management master. On the evidence before me no one appears to have raised with Master Haberman the objection that the proceeding before her was a motion whereas it should have been a status hearing. This difference is important. At a status hearing the onus is on the plaintiff to persuade the presiding judge or case management master that the action should not be dismissed for delay. On a motion to establish a timetable or vary an existing one, the onus is different. Since the proceeding is a motion and not a status hearing, the onus is to some extent on the defendants to persuade the court that no new timetable should be established because the action should be dismissed for delay.

[39] Had one of the defendants raised with Master Haberman the objection that the proceeding before her was not a status hearing but should have been one, Master Haberman could have exercised her power under subrule 2.01(1)(a) to grant "other relief" and convert the motion before her into a status hearing. Because no one asked her to grant that relief, she did not do so.

[40] Master Haberman adjourned the motion before her for several reasons. One of the defendants requested an adjournment to gain access to the court file in order to prepare responding materials but the court file could not be located. We now know that this was because the plaintiff's lawyers did not take the steps necessary to transfer the court file from Brampton to Toronto as Justice Price had ordered on April 17, 2009. In these circumstances Master Haberman declined to adjourn the plaintiff's motion to a fixed date. Instead she adjourned that motion indefinitely.

[41] The registrar dismissed this action for delay on August 30, 2011 because the action had not been set down for trial or terminated, no one had filed a timetable containing the prescribed information which was signed by all parties and a draft order establishing the timetable, and the court had not ordered at a status hearing that the action not be dismissed for delay. This all had to happen within 90 days of the date in May 2011 when the registrar served the status notice in this action. None of these things happened.

[42] It seems to me that the registrar's dismissal order of August 30, 2011 was the result of inadvertence by the plaintiff's lawyers. That inadvertence took several different forms.

[43] The plaintiff's lawyers reacted to the registrar's May 2011 status notice, but in an irregular way. They brought a motion. They should have requested the registrar to arrange a status hearing but failed to do so. They should have realized their error and either sent a belated request to the registrar to arrange a status hearing and asked Master Haberman to adjourn their motion to the status hearing or asked her to convert the motion before her into a status hearing. Through inadvertence, they failed to do so.

[44] Further, they should have asked Master Haberman to direct the registrar not to dismiss this action for delay before a specified date that was far enough into the future that a status hearing of this action could be held in the meantime and a decision on that hearing released. Once again, through inadvertence, they failed to do so.

[45] The important thing is that the plaintiff's lawyers reacted to the status notice. They did not simply ignore it. That is why I say that the registrar's August 30, 2011 dismissal order was the result of lawyer inadvertence and not the result of lawyers' stubborn disobedience.

[46] I have therefore come to the conclusion that the plaintiff has met the second *Reid* criterion.

[47] I will now deal with the third *Reid* criterion, namely the following.

Has the present motion been brought promptly?

[48] The registrar's dismissal order appears to have come to the attention of the plaintiff's lawyers shortly after August 30, 2011. The plaintiff's lawyers do not suggest otherwise.

[49] The plaintiff's lawyers gave priority to ensuring that the court file had been transferred from Brampton to Toronto. The process server for the plaintiff's lawyers confirmed in November 2011 that the court file had indeed been transferred to this court's Toronto registry. This was a sensible priority because the lawyer for the defendant Berbatiotis (who has taken the lead in opposing this motion) wanted access to that court file in order to prepare materials responding to the initial plaintiff's motion which was before Master Haberman on August 18, 2011. He would doubtless want access to that file in order to respond to this motion.

[50] On December 28, 2011 lawyer G.C. wrote counsel for Berbatiotis advising that the court file was now in Toronto and requesting dates when he was available to argue this motion. Lawyer G.C. got no response.

[51] The plaintiff's lawyers wrote a follow up letter on March 6, 2012 with the same result: no response from counsel for Berbatiotis.

[52] Finally on April 20, 2012 the plaintiff's lawyers wrote counsel for Berbatiotis advising that they had unilaterally booked a hearing date of June 20, 2012 for this motion.

[53] The plaintiff's lawyers took until June 11, 2012 to serve their motion record. Counsel for Berbatiotis served a responding affidavit and requested an adjournment to cross-examine. The motion was adjourned to September 28, 2011.

[54] Events in the office of the plaintiff's lawyers made a further adjournment of this motion necessary. An associate working on this motion changed firms. A law clerk assisting lawyer G.C. was very slow to respond to voicemail messages from counsel for Berbatiotis who was trying to set up cross-examinations.

[55] In November 2012 lawyer G.C. reported this matter to his insurers. The insurers retained repair counsel who took over carriage of this motion. They prepared a supporting affidavit 188 paragraphs long. All this took several months.

[56] It is true that over one year passed between the date that lawyer G.C. swore his 188 paragraph supporting affidavit and the date this motion was argued as an all day special appointment. There is a high demand for all day special appointment motions. Wait times for such motions are typically six to eight months and longer in situations like the present one, where the schedules of four or five lawyers must be accommodated.

[57] Given these unusual circumstances, I have come to the conclusion that this motion was brought reasonably promptly. The plaintiff has therefore met the third *Reid* criterion.

[58] I will now consider the fourth *Reid* criterion. To my mind it is the most important one. The fourth *Reid* criterion may be expressed as follows.

> Have the defendants suffered any significant prejudice in presenting their case at trial as a result of the plaintiff's delay in prosecuting this action or as a result of steps taken following the dismissal of this action?

[59] The plaintiff has the onus of persuading me that the defendants have not suffered such prejudice. That said, in most motions like the present one, where there is no ongoing relationship between the plaintiff on the one hand and the defendants on the other hand, the defendants have the better means of knowledge as to whether they have suffered actual prejudice.

[60] First of all, I need not consider the situation of the defendant by counterclaim Economical Mutual. It did not oppose this motion.

[61] The defendant Berbatiotis has sworn an affidavit dated June 14, 2012. In that affidavit he relies upon the generic presumed prejudice that is based on the fact that the memories of witnesses fade with the passage of time. This may reach the stage where a plaintiff has delayed bringing an action to trial for such a long time that a fair trial can no longer be had.

[62] In his affidavit Berbatiotis does not identify any particular witness whose memory of matters in issue in this action has significantly faded. He does not state that he or anyone on his behalf has interviewed any witnesses whose memory of matters in issue in this action have significantly faded.

[63] In this action the problem of memories fading with the passage of time has been reduced by the fact that all parties were examined for discovery several years ago.

[64] More importantly, Berbatiotis relies upon two instances of what he claims are instances of actual prejudice.

[65] The following is one of the main defences which Berbatiotis has raised. It was raining at the time of the accident and late at night. Berbatiotis says that the plaintiff was wearing a garbage bag, making her hard to see. As a result, Berbatiotis was unable to avoid hitting the plaintiff with the car he was driving. The plaintiff denies that she was wearing a garbage bag at the time of the accident.

[66] Another defence which Berbatiotis raises is that he was not the owner of the car he was driving at the time of the accident. Berbatiotis says that he discussed the vehicle ownership issue with the police officer investigating the subject accident. Berbatiotis says he showed this police officer a bill of sale for the vehicle which confirmed that the vehicle had been transferred to one Helder Santos who later became Berbatiotis' brother-in-law. This police officer took the bill of sale. Berbatiotis never got the bill of sale back. Berbatiotis says that Toronto Police Service has told him that this police officer has since retired and that his notes are no longer available. Toronto Police Service will not give Berbatiotis contact information for this police offer. Berbatiotis does not identify this police officer by name.

[67] Berbatiotis does not say when he got this information from Toronto Police Service.

[68] The plaintiff has several answers to these claims of prejudice. One police officer is identified in the motor vehicle accident report for this accident.

He is P.C. Kim badge 7750. P.C. Kim's notes are available. They are an exhibit to an affidavit of lawyer G.C. sworn on April 30, 2013.

[69] A law clerk employed by the plaintiff's lawyers obtained these notes in 2007. She also obtained notes of other officers involved in the investigation of this accident. They are Sergeant McNeil badge 6214, P.C. McConnell badge number not disclosed, P.C. Wilson badge 6716, and P.C. MacPhaden badge 99609. These notes are also an exhibit to lawyer G.C.'s affidavit.

[70] Berbatiotis does not say that any police officer observed what the plaintiff was wearing at the time of the accident, that is a garbage bag or something else. The notes produced do not clarify this. P.C. Kim's notes state in part "Drove thru and hit what appeared to be a garbage bag and realized it was a person". This is what Berbatiotis told P.C. Kim, rather than what P.C. Kim personally observed.

[71] Berbatiotis states that he believes that the Emergency Medical Services paramedics at the scene would have noticed the garbage bag on the plaintiff and made notes. He does not state this as a matter of fact. Berbatiotis is speculating. He says that he contacted EMS administration and was told that all reports concerning this incident and the names of the paramedics involved are no longer available. Berbatiotis does not say when he contacted EMS administration.

[72] The issue of the missing bill of sale is a red herring. If Berbatiotis was negligent at the time the car he was driving struck the plaintiff he is liable to the plaintiff regardless of who owned that car. If he was not a negligent driver he is not liable to the plaintiff regardless of who owned the car. No one argued before me that some defect in the car was a factor in the accident.

[73] Lawyer C.P. gave Berbatiotis early notice of the plaintiff's intended claim by letter dated February 27, 2004. Berbatiotis was served with the statement of claim in this action on May 21, 2005. These events occurred long before there was any delay in the prosecution of this action. Berbatiotis was in a position to identify, locate and interview witnesses and take statements from them within five months of the accident when the memories of those witnesses were fresh.

[74] One cannot manufacture prejudice by failing to take prudent defensive measures. If Berbatiotis and his advisors failed to interview witnesses until they could no longer be found, or until their memories had faded, that is not something for which they can blame the plaintiff. There is no evidence that Berbatiotis and his advisors interviewed or attempted to interview

witnesses to the matters in issue in this action with reasonable promptness after Berbatiotis had notice of the plaintiff's claim against him and of this action.

[75] Dina Govostis ("Dina") and her son Nick Govostis ("Nick") have also served affidavits in response to this motion. Dina is both a defendant and a defendant by counterclaim in this action. Berbatiotis has counterclaimed against Dina and Nick for damages for defamation because they said that Berbatiotis was the owner of the vehicle which struck the plaintiff on October 3, 2003. This counterclaim has nothing to do with the plaintiff.

[76] Berbatiotis has also counterclaimed against the plaintiff for damages based on the cost of repairs to the vehicle as a result of the collision with the plaintiff. (Berbatiotis says that after the accident, he became the owner of the vehicle.)

[77] Dina also got early notice of the plaintiff's intended claim on February 27, 2004 and was served with the statement of claim on May 26, 2005. My comments about failure to take prudent defensive measurers set out in paragraph [74] above apply here as well. There is no evidence that Dina or Nick or their advisors interviewed or attempted to interview witnesses to the matters in issue in this action promptly after they had notice of the plaintiff's claim and this action.

[78] Neither Dina nor Nick complains that any witness helpful to either of them has died or disappeared and cannot be located despite reasonable efforts to find such witnesses. Indeed, none of the defendants has raised this complaint.

[79] Nick has also sworn an affidavit in response to this motion. As I have said, Nick is a defendant by counterclaim only. Most of Nick's affidavit deals with the issue of who owned the subject vehicle at the time of the accident on October 3, 2003. This is a subject about which the plaintiff has no knowledge. In this affidavit Nick does not complain that he has suffered actual prejudice as a result of delays in the prosecution of this action.

[80] Suzanne Courtlander, the lawyer for Security National, has sworn a lengthy affidavit in response to this motion. Her affidavit describes the events surrounding the subject accident and then provides a detailed history of this action with an emphasis on the delays of lawyer G.C. and his colleagues. Since I have set out a detailed history of this action following paragraph [5] above, I will not set out Ms. Courtlander's history.

[81] There is one error in Ms. Courtlander's affidavit. She says that the police file on this accident has not been obtained and may not now be available. As I have explained in paragraphs [68] and [69] above, a law clerk in the

office of lawyer G.C. obtained the investigating police officers' notes in 2007. Whether there are or were additional materials which Toronto Police Service would be prepared to release I do not know. No party to this action ever brought a rule 30.10 motion to obtain additional records, if any, from Toronto Police Service. Any such party could have done so. This is another example of failure to take prudent defensive measures.

[82] Ms. Courtlander raises one example of actual prejudice. She says that at her examination for discovery, the plaintiff testified that she attended at Toronto Rehabilitation for "stretch exercise". Any records of what treatment the plaintiff received at this facility are no longer available. It seems to me that any prejudice flowing from the plaintiff's inability to produce records of her treatment at Toronto Rehabilitation is more likely to harm the plaintiff rather than the defendants. I say this because both liability and damages are in issue in this action. It is up to the plaintiff, not the defendants, to prove what injuries she suffered and what treatment she received, made necessary as a result of her accident.

[83] During argument Mr. Scott pointed out that the plaintiff's most serious injuries are objective in nature. They are fractures. He noted that the records which the plaintiff has produced include an O.H.I.P. treatment summary, hospital records, clinical notes and records of the doctors who treated her, and the accident benefit insurer's file on the plaintiff. The Toronto Rehabilitation records on the plaintiff seem to be the only missing treatment records.

[84] I note that none of the defendants ever asked the plaintiff to undergo an independent medical examination.

[85] This is not a case where any defendant took prejudicial steps following the registrar's dismissal of this action on August 30, 2011. I refer to such things as the destruction of documents helpful to the defence in the reasonable but mistaken belief that the plaintiff had abandoned this action. Here it was apparent soon after August 30, 2011 that the plaintiff was moving to set aside the registrar's dismissal order.

[86] In summary, while there has been some prejudice to the defendants, almost all of it is the generic prejudice that results from the fading of memories with the passage of time. This prejudice and the actual prejudice alluded to by some affiants are in this case not sufficiently serious that I should dismiss this motion. The effect of the generic prejudice has been significantly reduced by the fact that examinations for discovery have been held. I am also influenced by the facts that the defendants have failed to take prudent defensive measures as explained above, and have contributed to the overall delay.

[87] I have therefore come to the conclusion that the plaintiff has met the fourth *Reid* criterion.

[88] I must also balance the interests of the parties. Here I am of the view that the prejudice to the plaintiff if her action is dismissed is significantly greater than the prejudice to the defendants if the action is allowed to proceed. This action is ready to be set down for trial except for the issue of mandatory mediation. The option of dismissing this motion and leaving the plaintiff to start a new action against her dilatory lawyers is not a viable one, given the plaintiff's age. She is over 80 years old.

Result

[89] For all these reasons I have come to the conclusion that the just order in the circumstances is an order granting this motion subject to the following terms. First, I dispense with the requirement that this action proceed to mandatory mediation. This will avoid a delay of several months which would occur if the plaintiff had to bring a motion to determine if this action is or is not exempt from mandatory mediation. Of course, the parties are free to proceed to voluntary mediation if they wish to do so. Secondly, my order granting this motion is subject to the term that the plaintiff set this action down for trial within 30 days of the entry of the formal order disposing of this motion.

Costs

[90] In granting this motion despite all the delays, I consider that I have granted the plaintiff an indulgence. The price of an indulgence is the payment of the costs of those who have sought unsuccessfully to prevent its being granted. See *Fox v. Bourget* (1987), 17 C.P.C. (2d) 94 (Ont. Dist. Ct.). I therefore award the costs of this motion to the defendants as follows:

(a) Tasos Berbatiotis (who assumed the main burden of opposing this motion) costs of $5,000;

(b) Security National costs of $3,000

(c) Dina Govostis costs of $2,000; and

(d) Nick Govostis and Economical Mutual: no costs. Nick is not a defendant. Economical Mutual did not oppose this motion.

[91] I consider these costs as the fair and reasonable amount which the plaintiff ought to pay. These costs are to be paid within 45 days.

(original signed)

Date: August 22, 2014

Master Thomas Hawkins