
CANADA / JUDGMENT

Hoang v. Dean

2021 BCSC 537

COURT

Supreme Court of British Columbia

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2021 BCSC 537 Hoang v. Dean

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hoang v. Dean,

2021 BCSC 537

Date: 20210216

Docket: M183300

Registry: Vancouver

Between:

The Vu Hoang

Plaintiff

And

Faiz Dean and Mohammed Ishtiaic Dean

Defendants

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

Counsel for the Plaintiff:

B. Therrien

Counsel for the Defendants:

D. Gorgis

Place and Date of Hearing:

Vancouver, B.C.

February 12, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 16, 2021

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[1] The defendants in this personal injury matter apply for orders that:

- a) the trial - currently scheduled for 7 days commencing on April 6, 2021 - be adjourned generally; and
- b) the plaintiff be required to attend independent medical examinations ("IMEs") on February 17 and March 12, 2021, with an occupational therapist and a physiatrist, respectively.

Alternatively, the defendants seek an order that the 84-day deadline for exchanging expert reports be extended from January 11, 2021 to March 17, 2021 - with March 17 being the anticipated date for delivery of a report arising from the March 12 IME.

- [2] The plaintiff opposes the applications, arguing that the defendants waited too late to begin scheduling IMEs, and that although the plaintiff may be partially at fault for failing to attend an IME scheduled in December 2020, the primary responsibility for being unable to meet the deadline is that of the defendants.

Background Facts

- [3] The present action arises from personal injuries the plaintiff alleges were sustained in a motor vehicle accident on June 17, 2017 (the "First Accident"). The action was commenced on January 25, 2018. A response to civil claim was filed on November 20, 2018, which admitted liability for the accident. Lists of documents have been exchanged, and an examination for discovery was held on May 4, 2020.
- [4] The current trial date was reserved in October 2019, although it appears that the proposed date had been discussed between counsel as early as June 2019. The adjournment, if granted, would be the first in respect of this action.
- [5] The plaintiff was involved in two subsequent motor vehicle accidents: on July 6, 2019 (the "Second Accident") and on October 30, 2020 (the "Third Accident").
- [6] The plaintiff has apparently been off work since the beginning of 2020, allegedly as a result of injuries suffered in the First Accident.
- [7] Current counsel for the defendants assumed conduct of this matter in mid-November 2020, taking over from a lawyer who had left his firm at the end of October 2020.
- [8] On November 9, 2020, the handling ICBC adjuster exchanged emails with counsel for the plaintiff asking whether that counsel would be representing the plaintiff in respect of his Third Accident. Counsel replied in the affirmative.
- [9] On November 18, 2020, the plaintiff provided to the defendants its proposed amended notice of civil claim, which would add the drivers of the vehicles involved in the Second Accident and the Third Accident as defendants in the action and thereby extend the scope of this action to those two accidents. Counsel for the defendants responded that day confirming the defendants' consent. On November 27, 2020, the plaintiff filed an application to effect this, returnable on December 15, 2020. The application was served on the defendants on November 30, 2020. The Notice of Application filed by the plaintiff argued that:

The plaintiff alleges an injury to his lower back from the First Accident. The medical evidence suggests this injury was aggravated by the Second Accident and the Third Accident. The injuries from the First Accident, the Second Accident and the Third Accident are therefore indivisible and should be tried together.

- [10] Before me, the parties were agreed that the major injuries arising from the three accidents are, in fact, indivisible.

- [11] I am advised that on December 1, 2020, counsel for the defendants raised questions about whether the 7 days that had been reserved for trial were sufficient to deal with all three accidents.
- [12] The application to add parties was adjourned generally on December 4, 2020, and did not proceed. The plaintiff now takes the position that the Second Accident and the Third Accident are within the jurisdiction of the Civil Resolution Tribunal and subject to caps on recovery for non-pecuniary losses. As a result, the plaintiff asserts that the issues in those actions cannot properly be added to this action.
- [13] On December 11, 2020, counsel for the defendants advised counsel for the plaintiff of an IME with a physiatrist scheduled for 8:00 am on December 16, 2020. Counsel for the plaintiff replied on December 14, 2020, confirming the appointment.
- [14] An appointment for an IME with an occupational therapist for a functional capacity evaluation was scheduled for December 18, 2020. That appointment was cancelled because the plaintiff was not available. On December 15, 2020, the defendants sent out a request for alternative appointment dates with occupational therapists who could meet a January 11, 2021 report deadline. None were available.
- [15] On December 16, 2020, the plaintiff did not show up at the time (8:00 am) and location scheduled for his IME. Emails indicated that the plaintiff's wife called the clinic at about 8:26 am saying that they thought the appointment was at 10:00 am, but that the plaintiff was close by and would head straight to the clinic. The doctor agreed to wait until 8:40 am. It is asserted on behalf of the plaintiff that he arrived at the office lobby of the building with the clinic at 8:30 am, but was delayed by Covid-19 screening - however, the only evidence of this is a hearsay statement in an affidavit from a paralegal, the source of which is not an identified individual but rather "my review of our file". An email from the clinic indicates that the plaintiff arrived at the doctor's office at 8:54 am and had to be sent away because the doctor had to move on to his next appointment. The defendants have been charged a cancellation fee.
- [16] At 9:28 am that day, the defendants' paralegal emailed the plaintiff's paralegal asking for dates the plaintiff was not available so that a new appointment could be scheduled.
- [17] The next day, December 17, 2020, counsel for the defendants sent a letter to counsel for the plaintiff advising that the defendants had canvassed available specialists and were unable to find any that were able to not only conduct an examination but also provide a report in time for the deadline for the delivery of expert reports (January 11, 2021). The defendants sought the plaintiff's consent to extend the deadline.

[18] On January 5, 2021, a paralegal from the defendants' law firm emailed plaintiff's counsel, following up on the request as to the plaintiff's availability (or non-availability) and asking for confirmation that the plaintiff would consent to abridging the service deadlines given that the deadline was less than a week away. That afternoon, plaintiff's counsel responded as follows:

I am not agreeable to abridging the service deadline. Your office has had conduct of this matter since the pleadings were filed. Please refer to the attached decision of *Balingoay v Dhindsa* for my position on this matter.

I am not aware of any authority that would require the plaintiff to provide his availability for assessments. The procedure, as Madam Justice Matthews sets out at paragraph 17 of *Balingoay*, is for the defence to schedule an appointment and then see if the plaintiff is available. If the plaintiff is not available, the defence is allowed to bring on an application to compel attendance.

[19] Counsel for the plaintiff has placed in evidence lists from an IME agency indicating available dates for IMEs in late December 2020 and early January 2021, and suggests that the defendants are wrong to say that IMEs were not available. The defendants' evidence is that "none of these doctors were able to meet the deadline of January 11, 2021 to have a report produced."

[20] On January 8, 2021, the plaintiff served expert reports of a neurosurgeon, diagnosing lower back pain, lower extremity symptoms and impaired sleep; and of a psychiatrist diagnosing somatic symptom disorder, major depressive disorder and generalized anxiety disorder.

[21] On January 14, 2021, the defendants' insurance adjuster sent out a request for available physiatrists and occupational therapists who could conduct an IME in the second half of February 2021. It appears from the correspondence that the intention was to leave enough time for an application to be brought to compel attendance at the IMEs, which is sensible given the position taken by the plaintiff.

[22] On January 20, 2021, the defendants were able to secure an IME appointment with an occupational therapist for February 17, 2021, with a report anticipated by March 3, 2021. On January 21, 2021, the defendants were able to secure an IME appointment with a physiatrist for March 12, 2021, with a report anticipated by March 17, 2021. Counsel for the defendants wrote to counsel for the plaintiff on January 28, 2021, advising of these two appointments. That same day, the application materials for the present application were delivered. The application was originally scheduled for February 9, 2021, but the plaintiff noted that this did not give the full notice period required by the rules and insisted that it be reset. It was heard on February 12, 2021.

Positions of the Parties

- [23] The defendants argue that it is necessary for them to have the results of the proposed IMEs in order to be on an equal footing at trial. They rely on the plaintiff's failure to attend the IME scheduled for December 16, 2020. They also argue that it is necessary for them to conduct a further examination for discovery of the plaintiff in respect of the injuries suffered in the Second Accident and the Third Accident. They raise questions about whether the 7 days that have been scheduled for trial will be sufficient time to canvass issues that arise in connection with the two subsequent accidents. For all of these reasons, they ask that the trial be adjourned or, alternatively, that the deadline for service of expert reports be extended to allow them to serve the reports to be obtained.
- [24] The plaintiff argues that it is the defendants' delay in scheduling the IMEs that left them in a position where a simple error by the plaintiff has put the trial date at risk. I was taken through an extensive series of correspondence dating back to 2017, which the plaintiff asserts demonstrates a lack of urgency on the part of the defendants in handling the claim. Counsel noted that the plaintiff has been off work for over a year, and that if the trial does not proceed in April it could be as long as a year and a half before it can be rescheduled.
- [25] The plaintiff also argues that there is no need for the court, in a trial of the present action, to consider the effects of the Second Accident and the Third Accident. The plaintiff relies on *Bradley v. Groves*, 2010 BCCA 361, for the proposition that the plaintiff can proceed to judgment in the present action, recover most if not all of its losses, and not be concerned about any allocation of responsibility as between the drivers in each of the three accidents.

Applicable Law

Trial Adjournment

- [26] The governing principles in considering an application for adjournment of a trial were discussed by Justice Dillon in *Navarro v. Doig River First Nation*, 2015 BCSC 2173 at paras. 18-19 and 24-25:
- [18] A judge exercises discretion when an adjournment is sought and has wide powers in relation to the order that is made. The discretion must, of course, be exercised judicially in accordance with appropriate principles. The exercise of discretion is a delicate and difficult matter that addresses the interests of justice by balancing the interests of the plaintiff and of the defendant. This balancing requires a careful consideration of all of the elements of the case including the nature of the proceedings and the parties
- [19] There are numerous factors to be considered on an adjournment application. However, the paramount consideration is the interest of justice in ensuring that there will remain a fair trial on the merits of the action. Because the overall interests of justice must prevail at the end of the day, courts are generous rather than overly strict in granting adjournments, particularly where granting the request will promote a decision on the merits. The natural

frustration of judicial officials and opposing parties over delays in processing civil cases must give way to the interests of justice, which favours a claimant having his day in court and a fair chance to make out his case.

- [24] The explanation for the need of an adjournment is an important consideration. It has been said that simple neglect to get properly ready for a hearing, while irksome for the other party, will still usually lead to an adjournment on the theory that the prejudice to the person denied the adjournment will be greater than prejudice to the person who is forced to accept an adjournment. It would be unjust to decide, without more, that a party who has been less than diligent will be forced to go to trial unprepared. Failure of a party's lawyer to take appropriate and/or timely steps should not irrevocably jeopardize the client under the "often applied principle that the sins of the lawyer should not be visited upon the client" provided that relief can be given on terms that protect the innocent adversary as to costs thrown away and as to the security of the legal position he has gained.
- [25] Prejudice to the parties if an adjournment is granted or is not granted must be considered. Any prejudice to be suffered by either side must be weighed and balanced. However, it is non-compensable prejudice that is pivotal.

[Citations removed.]

- [27] In *Henderson v. Fisher*, 2020 BCSC 886 at para. 9, Justice Branch summarized a list of factors that may be considered on an application to adjourn a trial. Those factors include:
- a) the history of the matter, including any deliberate delay or misuse of the court process;
 - b) the grounds, explanation and reasonableness of the request, including the availability of the parties, their counsel, and any witnesses;
 - c) the timeliness of the request;
 - d) the potential prejudice to the parties;
 - e) the right to a fair trial; and
 - f) the proper administration of justice, including the interest in the early resolution of disputes.

[Citations removed.]

- [28] Consideration of the history of a matter includes consideration of whether the trial has been previously adjourned, and if so, why: *Navarro* at para. 22.

Independent Medical Examinations

- [29] Rule 7-6(1) of the Supreme Court Civil Rules provides:

Order for medical examination

- (1) If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make
 - (a) an order respecting any expenses connected with the examination, and
 - (b) an order that the result of the examination be put in writing and that copies be made available to interested parties of record.
- [30] The order is discretionary. It is designed to balance the plaintiff's advantage in obtaining expert opinions, by providing the defendant with access to the plaintiff for such prior to trial: *Tran v. Abbott*, 2018 BCCA 365 at para. 17. The court's discretion is to be exercised in light of the purpose of an IME: to put the parties on an equal footing with respect to medical evidence so as to ensure a reasonable equality between the parties in the preparation for trial: *Kenny v. Bateman*, 2017 BCSC 900 at paras. 53-56.
- [31] Rule 7-6(1) is aimed at securing a just determination of each proceeding on the merits and to encourage full disclosure, and should be given a fair and liberal interpretation to meet those objectives: *Tran* at paras. 19 and 30.
- [32] The timeliness of an application is a factor to be considered in the exercise of the court's discretion. The ability to respond to any new report, and the effect that a new report may have on trial preparation or on the trial itself, are factors properly taken into account on applications of this sort: *Kenny* at para. 67.
- [33] Where the application is made after the expiry of the 84-day deadline, the court should also consider whether the examination sought will advance the litigation, in the sense of potentially yielding relevant evidence touching on a material issue: *Timar v. Barson*, 2015 BCSC 340 at para. 18.

Abridgement of Time for Service of Expert Reports

- [34] The court has jurisdiction to reduce the time for service of expert reports pursuant to Rule 11-6(3), in which the words "unless the court otherwise orders" qualify the 84-day deadline. In exercising that jurisdiction, the court should have regard to the principles applied under Rule 11-7(6) when a late-delivered report is tendered at trial: *Usmon v. Masi*, 2020 BCSC 958 at para. 6. In *Usmon*, Justice Riley commented that:
 - [7] Of particular note is Rule 11-7(6)(c), which gives the court at trial the residual discretion to admit a report despite non-compliance with the service requirements where "the interests of justice require it". In *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109, Mr. Justice Abrioux, as he then was, explained that the "interests of justice" are not properly invoked "to simply excuse or ignore" the requirements in the Rules. Rather, there must be compelling reasons justifying the "extraordinary step" of abrogating the service requirements. In my

view, the same analysis is appropriate in considering whether the court should exercise its discretion to abridge the 84-day service requirement in advance of the trial under Rule 11-6(3).

- [35] In *Usmon*, the completion of expert reports had been delayed as a result of the Covid-19 pandemic, and Justice Riley granted an order abridging the deadline.
- [36] A different result obtained in *Balingoay v. Dhindsa*, 2018 BCSC 2307. In that case, the defendants claimed to have attempted to arrange an IME in a timely manner, but the plaintiff had failed to respond as to available dates. Justice Matthews commented at para. 15 that the usual process in British Columbia is for the defendant to suggest dates and advise the plaintiff of the doctor to conduct the IME, then negotiate any appropriate terms, leaving sufficient time if agreement is not reached for an application to be brought. Thus:
- [17] Accordingly, if a party seeks an IME for a report to be served as a primary report at least 84 days before trial, that party must start planning for the IME with enough time to identify the examiner, propose dates, deal with any conditions, make an application, if necessary, before the IME which itself must be conducted with enough time for the examiner to conduct the examination and complete the report.
- [37] In *Balingoay*, the plaintiff was notified of the proposed IME less than a week before it was scheduled, and the IME appointment was only 9 days prior to the 84-day deadline. Justice Matthews concluded, at paras. 33-35 that:
- [33] There is a compelling case for the defendants' application for an IME on the equal-footing basis.
- [34] The late delivery of the defendants' report is more problematic. The defendants seek to address this by agreeing to abridge the time for the plaintiff's rebuttal report, if any, to the report the defendants seek to serve late by the same amount of time that they seek to have abridged. That would mean that the rebuttal report would be served at the opening of the trial. In my view that is the antithesis of the objectives of the purpose of the rules pertaining to timelines as described by the Court of Appeal in *Tran*. The parties would not have the time before trial to understand each other's cases, let alone engage in meaningful settlement and avoid trial by ambush.
- [35] The defendants have not offered any acceptable reason for their delay in seeking the first IME, the second IME or in bringing this application. The first delay is manifestly unacceptable, and the second and third in light of the first delay are baffling. The only explanation is that the defendants have chosen to delay and now seeks to avoid the natural consequences of their actions.

Indivisible Injuries and Joint versus Several Liability

[38] The plaintiff argues that the extent of injuries suffered in the Second Accident and the Third Accident is irrelevant to the determination of damages in respect of the initial accident, relying on *Bradley*. In that case, the plaintiff had proceeded through trial against the driver in the first of two accidents in which she was injured. The second defendant was never joined as a party. The trial judge concluded, at para. 66 of the trial judgment (quoted at para. 10 of the appeal judgment), that:

... the defendant Groves is liable to pay 100 percent of the damages awarded to Ms. Bradley flowing from both accidents. Because there is no contributory negligence on the part of Ms. Bradley, apportionment is not necessary. It is also not necessary because both tortfeasors are not before the court . . .

[Emphasis added.]

[39] On appeal, Groves argued that the two drivers should be approached as several tortfeasors and damages apportioned. The Court of Appeal disagreed, concluding at para. 37 that:

If a trial judge finds on the facts of a particular case that subsequent tortious action has merged with prior tortious action to create an injury that is not attributable to one particular tortfeasor, then a finding of indivisibility is inevitable. That one tort made worse what another tort created does not automatically implicate a thin or crumbling skull approach (as in *Blackwater*), if the injuries cannot be distinguished from one another on the facts. Those doctrines deal with finding the plaintiff's original position, not with apportioning liability. The first accident remains a cause of the entire indivisible injury suffered by the plaintiff under the "but for" approach to causation endorsed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333. As noted by McLachlin C.J.C. in that case, showing that there are multiple causes for an injury will not excuse any particular tortfeasor found to have caused an injury on a "but-for" test, as "there is more than one potential cause in virtually all litigated cases of negligence" (at para. 19). It may be that in some cases, earlier injury and later injury to the same region of the body are divisible. While it will lie for the trial judge to decide in the circumstances of each case, it is difficult to see how the worsening of a single injury could be divided up.

[40] The judgment in *Rabbani-Nejad v. Sharma*, 2020 BCSC 58, is an example of the principles in *Bradley* being applied where there was no contributory negligence in multiple accidents.

[41] The approach is different where the plaintiff is contributorily negligent in respect of one or more accidents giving rise to indivisible injuries. In that situation, the approach is described in *Chevez-Babcock v. Peerens*, 2020 BCSC 863 at para. 153:

[153] In *Demidas v. Poinen*, 2012 BCSC 416 at para. 56, and *Blenkarn v. Mills*, 2016 BCSC 1976 at paras. 23-30, this court has addressed the approach to take where multiple accidents cause indivisible injuries and the plaintiff is at fault for one or more and not at fault for one or more. The goal is to apportion the damages so that the tortfeasor only pays for the portion of the harm he or she caused: *Blackwater* at para. 70; *Blenkarn* at para. 23. The approach is

to assess the overall damages, then estimate the damage caused by the at-fault accident, and deduct it from the award. In practice, courts attempt to determine a percentage of the overall loss that is caused by the accident for which the plaintiff was at fault and then apply it to the dollar figure of overall damages. This is different from the apportionment of damages, which compares the degrees of departure from the standard of care as between several tortfeasors and the plaintiff if the plaintiff has been contributorily negligent.

[42] As noted above, the plaintiff takes the position that the Second Accident and the Third Accident will have to be dealt with before the Civil Resolution Tribunal. The plaintiff relies on s. 133 of the Civil Resolution Tribunal Act, S.B.C. 2012, c. 25 (as amended), which provides that:

Claims within jurisdiction of tribunal for accident claims

- (1) Except as otherwise provided in section 113 [restricted authority of tribunal] or in this Division, the tribunal has jurisdiction in a dispute, in respect of an accident, over a claim concerning one or more of the following:
 - (a) the determination of entitlement to benefits paid or payable under the Insurance (Vehicle) Act;
 - (b) the determination of whether an injury is a minor injury for the purposes of the Insurance (Vehicle) Act;
 - (c) liability and damages, if the amount, including loss or damage to property related to the accident but excluding interest and any expenses referred to under section 49 [order for payment of expenses], is less than or equal to the tribunal limit amount.
- (2) For the purposes of this Act, the tribunal
 - (a) has exclusive jurisdiction in respect of claims described in subsection (1) (a) or (b) of this section, and
 - (b) is to be considered to have specialized expertise in respect of claims described in subsection (1) (c) of this section.

The Act applies to accidents occurring on or after April 1, 2019, and the limit of its jurisdiction for purposes of s. 133(1)(c) is \$50,000.

[43] No argument was addressed before me as to the significance of the deemed "specialized expertise" in s. 133(2)(b), and whether that impacts on the court's ability to consider and make findings as to liability and damages arising from accidents subsequent to April 1, 2019, where such findings are relevant to litigation involving an earlier accident involving the same plaintiff.

Analysis

Independent Medical Examinations

- [44] There is no doubt that, apart from concerns about timing, the defendants would be entitled to an order for the two IMEs that they seek. The plaintiff initially agreed to the IMEs. They are clearly appropriate given the nature of the injuries claimed and given the plaintiff's alleged inability to work. The only objection raised to them at this time is that the deadline for delivery of expert reports based on the current trial date will have passed before the IMEs can occur, that any reports that may arise from the IMEs will be inadmissible, and that as a result there is no practical benefit to requiring the plaintiff to attend.
- [45] The authorities indicate that the court would be unlikely to order an IME if there is no prospect of the resulting report being admissible in the litigation. As a result, I need to consider whether the court should either (a) adjourn the trial, or (b) abridge the deadlines for service of the resulting reports, such that there would be value to the plaintiff undergoing the IMEs.

Trial Adjournment

- [46] There are several factors that would militate against granting the adjournment in this matter. The Supreme Court Civil Rules contemplate all litigation being conducted in a speedy and inexpensive manner. The action has already been ongoing for over three years. The plaintiff alleges that he is unable to work and would greatly benefit from resolution of this matter. Given that liability is admitted, there will likely be at least some recovery to the plaintiff's benefit.
- [47] The lateness of the plaintiff's efforts to schedule the IMEs, beginning as they did in December 2020, is clearly a contributing factor to the situation in which the parties find themselves. As well, I would note that there appear to be brief delays in January 2021 that are attributable to the plaintiff - from January 6 to 13, 2021 (after the defendants were aware the plaintiff would not consent to an IME and prior to the defendants sending out a revised request for available IME appointments), and from January 22 to 27, 2021 (after the IME dates were reserved and before the present application was filed).
- [48] Other factors militate in favour of granting an adjournment. Most important of these is the importance of ensuring a fair trial on the merits. I accept that it is important for the defendants to have these IME reports in order to fairly respond to the plaintiff's claims. As noted in the cases discussed above, the IME process is aimed at securing a just determination of every proceeding on the merits.
- [49] Also of significance in this case is that the plaintiff is at least partially to blame for the present situation, given his non-attendance at the IME at the time scheduled on December 16, 2020. The impact of this failure was exacerbated by the time it took plaintiff's counsel to respond to the defendants' requests of December 16 and 17, 2020 aimed at rescheduling the

IMEs. While the lack of response until January 5, 2021 is somewhat understandable given the intervening winter break, it was still a delay of nearly three calendar weeks at a particularly sensitive point in the litigation.

- [50] I would agree that there was somewhat of a late start in seeking the IMEs, and that it would have been advisable for the defendants to initiate that process earlier in the fall of 2020 to leave sufficient margin of error. However, there are other contributing factors including:
- a) The Third Accident, which occurred at the end of October 2020, and had potential impacts with respect to stabilization of the plaintiff's injuries and his long-term prognosis;
 - b) The change in responsible counsel for the defendants - after the lawyer previously handling the file left the firm at the end of October, the current lawyer did not assume conduct of this file until November 9, 2020; and
 - c) The discussions with respect to the proposed addition of parties, including the filing of an application to add these parties, which took focus away from preparation for a trial involving just the existing defendants - once the plaintiff abandoned the application, the defendants moved with reasonable dispatch to organize the IMEs.
- [51] It appears to me that the parties are going to have to deal with the significance of the Second Accident and the Third Accident as they relate to the present action - and do so in advance of trial. It is now clear that the plaintiff intends to move forward asserting that there is no liability issue in respect of those other accidents. While there is a clear strategic benefit to the plaintiff in moving forward on the assumption that it can simply claim compensation for all indivisible losses without allocation, it is not clear to me that the underlying facts for that assumption have been established. The defendants' understanding is that there may well be issues as to liability. If the defendants' understanding is accurate, then the trial judge will need to hear sufficient information to decide whether the plaintiff is contributorily negligent in respect of either of those accidents, and, if so, how to allocate responsibility for the indivisible injuries.
- [52] The parties do not appear to have grappled yet with the appropriate approach in the circumstances - particularly given the potential role of the Civil Resolution Tribunal in respect of the later accidents. It is not clear to me that the use of the words "specialized tribunal" in s. 133 of the Civil Resolution Tribunal Act would prevent this court from considering those issues at least in connection with the impact on any award to be made against the present defendants. It may be that the drivers in respect of each of the Second Accident and the Third Accident need to be brought in to this proceeding in some way. None of these issues were properly addressed before me and I draw no conclusions on them.
- [53] With respect to the timeliness of the request for adjournment, in my view it has been brought on in a relatively expeditious manner after communication of the plaintiff's position on January 5, 2021. In my view, it was reasonable for the defendants to obtain new appointments for IMEs as part of the application it is making so that there is a basis for the

court to order attendance. While, as noted above, there are a few days of delay in January 2021 that are not fully explained, in my view the number of days is not unreasonable in the circumstances.

- [54] I note that this is the first request for an adjournment in this matter. It is brought nearly eight weeks in advance of the trial date - at a time when the most intense trial preparation remains in the future. It is also brought at a time when the court has options available to it that may allow the trial to proceed in a fair manner.
- [55] I cannot say in the circumstances that there has been any deliberate delay or misuse of the court process. Since the defendants' current counsel assumed conduct of this file, there has been steady forward progress in advancing the matter.
- [56] The Balingoay case, relied on by the plaintiff, is an example of circumstances in which the delays attributable to the defendants were sufficient to overcome the court's desire to ensure a fair trial on the merits notwithstanding the shortcomings of counsel in preparing a matter for trial (I refer in particular to the excerpts from Navarro set out above). In this case, there are delays attributable to both parties. The ultimate question is whether the conduct of the defendants in this matter has reached the point that the court must say enough is enough and the trial must go ahead. I do not find that to be the case, and I conclude that it would not be reasonable to require the defendants to proceed with the trial in this matter without the benefit of the two IMEs they seek.

Abridgement of Time for Service of Expert Reports

- [57] That does not mean an adjournment must flow. It may be that there are other steps that the court can take to maintain the trial date and thereby address the prejudice that would be suffered by the plaintiff from adjournment of the trial in this matter.
- [58] In this case, I conclude that the circumstances are such that it would be in the interests of justice to abridge the time for delivery of the IME reports. In the present circumstances, the alternative is to adjourn the trial to the prejudice of the plaintiff, which is not a desirable outcome. In my view, there is a reasonable likelihood that abridgement of the deadline may allow the trial to proceed and thereby address that prejudice to the plaintiff.
- [59] The plaintiff relies on Balingoay, in which an abridgment of the deadline for expert reports was refused. That judgment was premised on a complete failure of the defendants to have offered any acceptable reason for the request. As importantly, there was no suggestion of any contribution on the part of the plaintiff to the need for an abridgement. In light of my conclusions above with respect to the defendants' conduct, and the fact that some delay is attributable to the plaintiff, I am persuaded that abridgement of time should be ordered in this case.

- [60] However, it is important in granting this extension to ensure that the plaintiff's right to a fair trial is protected. It is important to consider not only the defendants' ability to properly defend the claim, but also the plaintiff's ability to evaluate and potentially respond to the defendants' reports. I note that not every expert report requires a response, and it will not be known until the plaintiff receives the defendants' expert reports whether a response is required, but in granting the present order it is important to account for the possibility that it might.
- [61] The second IME report is scheduled to be delivered by March 17, 2021. The parties will need to re-evaluate at that time whether it is appropriate for the trial to proceed. In order to facilitate that, I will adjourn the defendants' application to adjourn the trial to 9:00 am on Friday, March 19, 2021. By that time, the plaintiff will have had the functional capacity evaluation report for over two weeks and the physiatrist's report for a couple of days. The plaintiff should be ready at that time to advise the court whether it will require a rebuttal report and, if so, whether it is realistic to deliver that report in advance of the trial date.

Second Accident and Third Accident

- [62] By that date, the parties should each have determined their positions in respect of the Second Accident and the Third Accident. The defendants should be in a position to advise, with appropriate evidentiary support, whether there is a real issue as to liability in either of those accidents. To the extent that the defendants determine that it is appropriate and necessary to add those drivers as parties in this case, that application must be brought quickly. The defendants should make any such application in regular chambers in an appropriately timely manner so that it is decided and any order made is implemented in advance of the hearing on March 19, 2021.
- [63] At that time, with the parties having made all realistic efforts to allow this matter to proceed as scheduled, the court will be in a position to evaluate the defendants' application to adjourn the trial and balance the interests of both parties at that time. Any application for relief consequential upon an adjournment that may be necessary to ameliorate the prejudice suffered should be returnable at the same time.

Conclusion

- [64] I order that:
- a) The plaintiff is to attend the two IMEs that have been scheduled by the defendants - with an occupational therapist on February 17, 2021, and with a physiatrist on March 12, 2021;
 - b) The deadline for delivery of expert reports by the defendants is extended to March 3, 2021, for the report of the occupational therapist and March 17, 2021 for the report of the physiatrist; and

- c) The application for an adjournment of the trial is adjourned to 9:00 am on Friday, March 19, 2021, to be heard before me.

I will be seized of the resumption of the application for adjournment of the trial, but I do not propose to seize myself of any other matters in respect of this action.

[65] These reasons for judgment are given orally. Should a transcript be ordered, I reserve the right to edit the reasons but the substance and the result will not change.

"Veenstra J."

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