

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Michael Quinn, deceased, by his Estate Administrator Sandra Quinn, Sandra Quinn, Kristie Kopplin, Karrie Scherba, Quinn Kopplin, McKale Kopplin, minors under the age of 18 years by their Litigation Guardian Kristie Kopplin, Emma Shakleton, Grace Shakleton and Izabella Scherba, minors under the age of 18 years by their Litigation Guardian Karrie Scherba, Plaintiffs

AND:

Dr. James David Rogers, Dr. Paul Edward Faulkner, and Joseph Brant Hospital, Defendants

BEFORE: MacNeil J.

COUNSEL: *R. Hooper* – Lawyer for the Plaintiffs/Responding Parties

M. Veneziano – Lawyer for Dr. James David Rogers and Dr. Paul Edward Faulkner, Defendants/Moving Parties

HEARD: March 26, 2024

ENDORSEMENT

[1] The Defendants, Dr. James Rogers and Dr. Paul Faulkner (“the Defendant Physicians”), bring this motion for an extension of time for the service of three expert reports pursuant to Rule 53.03(4) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[2] The Plaintiffs oppose the motion and seek to exclude the reports at trial because of the late service.

BACKGROUND

[3] This claim arises from alleged medical negligence that occurred during a laparoscopic cholecystectomy (gallbladder removal) performed on the late Michael Quinn on October 31, 2017 and a follow-up visit in November 2017. The statement of claim was issued in the action on January 9, 2020.

[4] The matter was set down for trial on January 31, 2023. It is scheduled to proceed to a jury trial commencing May 13, 2024, for an estimated 12-15 days.

[5] A timetable, including for the exchange of expert reports, had been agreed to by the parties.

[6] The Plaintiffs delivered their liability and damages expert reports by July 12, 2023. According to the timetable, the Defendant Physicians' expert reports were due by October 31, 2023.

[7] Given that the pre-trial conference was scheduled for March 4, 2024, the *Rules of Civil Procedure* required that the Defendant Physicians' expert reports be served at least 60 days before the conference, so by January 4, 2024.

[8] On January 23, 2024, the Defendant Physicians served three responding expert reports, being: (i) an expert report of emergency physician Dr. A. Shah commenting on treatment and care, dated December 22, 2023; (ii) an expert report of general surgeon Dr. A. Davison commenting on treatment and care, dated January 14, 2024; and (iii) an expert report of economist Dr. D. Hyatt commenting on the Plaintiffs' economic loss claim, dated December 20, 2023.

[9] On January 25, 2024, counsel for the Plaintiffs wrote to counsel for the Defendant Physicians indicating that the pre-trial conference was on March 4, 2024 and the expert reports were served 19 days late, pursuant to the *Rules*. He indicated that he would be seeking to exclude the expert reports at the trial.

[10] On January 29, 2024, counsel for the Plaintiffs and for the Defendant Physicians had a telephone call. The Defendant Physicians' counsel explained that the expert reports were served late due to inadvertence, as she had believed that the pre-trial conference was scheduled for the end of March 2024. She advised that the Plaintiffs could take as much time as was needed for any reply expert reports, and expressed that the Plaintiffs have not suffered any prejudice as a result.

[11] On March 4, 2024, the parties attended the pre-trial conference. The pre-trial conference Judge directed that the Defendant Physicians bring a motion respecting an extension of time for service under the *Rules*.

ISSUE

[12] The issue to be determined is whether the court should extend the time for service of the Defendant Physicians' three expert reports.

ANALYSIS

[13] Rule 53.03(1) of the *Rules of Civil Procedure* provides that a party who intends on calling an expert witness at trial shall, not less than 90 days before the pre-trial conference, serve an expert report; and Rule 53.03(2) provides that any responding expert report must be served no less than 60 days before the pre-trial conference.

[14] Pursuant to Rule 53.03(3) experts cannot testify at trial without leave if their report is not filed in accordance with the *Rules*.

[15] Rule 53.03(4) provides that a party may seek an extension of time for service of an expert report on consent, at the pre-trial conference, or on a motion before the court. The applicable test under such a motion is found in Rule 53.08.

[16] Where there has been a failure to comply with the requirements regarding experts' reports, in determining whether leave to admit the evidence should be granted, Rule 53.08(1) provides that the party seeking leave must satisfy the judge that:

- (a) there is a reasonable explanation for the failure; and
- (b) granting leave would not,
 - (i) cause prejudice to the opposing party that could not be compensated for by costs or an adjournment, or
 - (ii) cause undue delay in the conduct of the trial.

Reasonable explanation for the late service

Position of the Plaintiffs

[17] The Plaintiffs submit inadvertence is not an excuse commonly found outside of cases in which counsel miss limitation dates and the prejudice to the parties is the entirety of their claim. Here, there is little more than a bare assertion of inadvertence. This is not sufficient. No reasonable explanation has been provided for the late service.

[18] The Plaintiffs argue that counsel for the Defendant Physicians intended to serve the expert reports at the last possible moment, as a strategic move, and they were essentially caught out by the error in timing. This was not an innocent mistake and so it should not be relieved against by the granting of an extension of time. The Plaintiffs note that, not only were the expert reports not served at least 60 days before the pre-trial conference, they were not served – or even obtained – by October 31, 2023, which had been the agreed upon date set out in the parties' timetable.

Discussion

[19] In support of their motion, the Defendant Physicians filed an affidavit sworn by the lawyer who admits responsibility for missing the delivery deadline for the expert reports. The lawyer attests, at paragraphs 14 and 15 of their affidavit:

14. The Impugned Expert Reports were served on January 23, 2024, 41 days before the pre-trial conference instead of 60 days before the pre-trial conference, by inadvertence. I mistakenly believed that the pre-trial conference was at the end of March 2024 and that our expert reports were accordingly due at the end of January 2024.

15. The reports from Dr. Shah and Dr. Hyatt were finalized by December 22, 2023, within the timelines prescribed by the *Rules of Civil Procedure*. I expected to finalize the third expert report of Dr. Davison shortly thereafter, and I did not believe our reports were due until the end of January, so I did not serve those two reports at that time.

[20] The affiant was not cross-examined on the affidavit and so their evidence in this regard is uncontroverted.

[21] The Plaintiffs cite *Agha v. Munroe*, 2022 ONSC 2508, in support of their position that an extension of time should not be granted. In that case, during preliminary discussions with counsel after the jury had been selected, the trial judge was informed that the plaintiff did not have any expert reports addressing the issue of past and future income loss or past and future medical rehabilitation needs. The reason given was that the plaintiff could not afford to engage experts to prepare such reports. Soon thereafter, plaintiff's counsel advised the trial judge that he had spoken to "unnamed experts" who indicated they could provide him with reports "some time" during the following week. Counsel for the defendants strongly opposed any late delivery of such expert reports, indicating that he would not have an opportunity to obtain responding reports, thus resulting in a potential mistrial and/or adjournment of the trial. The trial judge ruled that he would not grant leave for late service of the expert reports because it would have had the "inevitable result of having to adjourn the trial for some considerable period of time" to allow the defence to obtain responding reports and a jury had already been empaneled and told the trial would be completed within a two-to-three-week period. The resulting delay "would have been completely unfair to the jury" and caused an undue delay in the conduct of the trial.

[22] I find *Agha* to be distinguishable from the case before me. In *Agha*, the explanation provided by the plaintiff's counsel for not having served expert reports was because the cost of obtaining those reports was prohibitive; and the request for leave for late service was made after the trial had begun and related to expert reports that had not yet been prepared. A decision not to obtain expert reports prior to trial is deliberate and is not the same thing as an inadvertent mistake in a delivery deadline. Further, in *Agha*, the time needed to obtain and serve the reports was effectively unknown. Here, the reports were served some months ago and the Plaintiffs have had them in hand since that time, which is in keeping with the purpose of the *Rules* to ensure that parties have reasonable notice of expert opinions.

[23] The Plaintiffs also rely on the decision in *Tyner v. Phillips*, 2023 ONSC 5207. In that case, in the months leading up to a four-week jury trial, the defendants made a motion to compel the plaintiff to attend three separate defence medical examinations. The motion was opposed by the plaintiff due to non-compliance by the defendants with the timelines set out in the *Rules* and a consent order setting out the timing for delivery of expert reports. The motion judge held that she would not compel the plaintiff to undergo three separate defence medical examinations "when the reports that will arise from those examinations are presumptively inadmissible at trial. This is particularly so due to the absence of evidence of a reasonable explanation for the delay." I find that *Tyner* is distinguishable from the case before me. Here, the three expert reports are already served, there is no examination required of the Plaintiffs and no time lag as there would have been in *Tyner*.

[24] The explanation given by the Defendant Physicians' lawyer for missing the delivery deadline is sparse and no real context or details were provided. Nonetheless, I accept the affidavit evidence and find that the failure to deliver the three expert reports at least 60 days before the pre-trial conference was due to an inadvertent mistake.

[25] A lawyer's inadvertence in meeting a deadline required by the *Rules* can constitute a "reasonable explanation" for a failure to meet the deadline: see *Noori v. Grewal*, [2011] O.J. No. 4190 (Ont. S.C.J.), at para. 26, citing *Nugent v. Crook* (1969), 40 O.R. (2d) 110 (Ont. C.A.), at para.111; *Purkis v. 736007 Ontario Ltd.*, [2001] O.J. No. 324 (Ont. Div. Ct.); and *Tarsitano v. Drutz*, 2013 ONSC 5605, at par. 32; aff'd 2014 ONCA 351.

[26] It is a fact of life that mistakes can happen to us all. Sometimes, mere inadvertence is the sole cause of a mistake.

[27] There is no evidentiary basis upon which to find that the delivery of the Defendant Physicians' expert reports to the Plaintiffs was strategically timed in order to gain some unfair advantage, as asserted by the Plaintiffs. However, to the extent that there is any truth to that assertion, I note the comments of Dubin J.A. in *Foulis et al. v. Robinson; Gore Mutual Ins. Co., Third Party* (1978), 21 O.R. (2d) 769 (C.A.), wherein the defendant and third party appealed from the award of costs against them on the scale as between solicitor and his own client following their unsuccessful defence of the action. It was the view of the learned trial Judge that there was really no defence to the action and so he had disapproved of the conduct of the defendant and the third party. On the appeal, in holding that the trial judge had erred in awarding costs on a higher scale, Dubin J.A. stated at page 776:

There is a great danger, in my respectful opinion, in a trial Judge second-guessing, after the event, how a trial should be conducted, even where the trial is presided over, as was the case here, by a trial Judge who has had great trial experience at the bar.

[28] I agree with Dubin J.A.'s statement that a judge generally should not "second guess" the steps taken by a defendant as it relates to the conduct of an action. Although the Defendant Physicians failed to comply with the agreed-upon timetable for delivery of their expert reports and they intended on serving those reports only 60 days before the pre-trial conference, there was no evidence that this was to harass the Plaintiffs or abuse the process. I do not find this conduct to be egregious or that it warrants a refusal to grant leave.

[29] In the circumstances, I am satisfied that a reasonable explanation has been provided for the failure to meet the deadline for delivery of the Defendant Physicians' expert reports.

Any prejudice or undue delay

Position of the Plaintiffs

[30] The Plaintiffs submit that, if an extension of time for service of the three expert reports is granted, the prejudice to them will be substantial and serious. Their counsel has made trial preparations on the assumption there would be no liability dispute at trial. In the view of the Plaintiffs, a trial proceeding without liability, as has been expected, would be five days in length and save significant judicial resources and legal expense. Should relief be granted on this motion, there will not only be substantial changes to the Plaintiffs' preparation now, but also in the future if they are able to obtain a reply report.

[31] While the Defendant Physicians have offered to admit any reply report up to a week prior to trial, this also presents a prejudice to the Plaintiffs in that they need to finalize their trial strategy and preparation within an extremely short period of time. The Plaintiffs should have had the advantage of a reply report at the pre-trial conference, which may have led to favourable conditions for a settlement. It is now impossible to know if the matter could have settled earlier. The hearing of this motion is less than two months from the start date of the trial. An adjournment could cause a lengthy delay of the trial of the action in light of scheduling realities and of counsel's availability, which delay would also significantly prejudice the Plaintiffs.

Discussion

[32] Prejudice will depend on the circumstances of each case and the stage of the proceedings.

[33] Here, the late expert reports were served 19 days late and 41 days prior to the pre-trial conference.

[34] The Defendant Physicians' expert reports were served on January 23, 2024, and so they will have been in the hands of the Plaintiffs just over 3.5 months by the commencement of the trial in mid-May. Although late, the delivery in January 2024 still allowed for the obtaining of legal advice and possible opinion evidence to answer the reports. While it is assumed that the Plaintiffs will want to prepare a reply expert report, there was no evidence before me regarding the need to do so nor, more importantly, was there any evidence filed by the Plaintiffs that it would *not* be possible to obtain a reply expert report in time for use at the trial.

[35] With respect to the Plaintiffs' argument that they will suffer prejudice due to the fact that their counsel has made trial preparations on the assumption there would be no liability dispute at trial, I am not persuaded by that. The Trial Management Report that was finalized at the pre-trial conference on March 4, 2024, shows three references to both "liability and damages" being issues at the trial of this matter. Before me, counsel for the Defendant Physicians advised that liability has not been admitted. Therefore, liability is a live issue at the trial. It is not prejudice for a plaintiff to have to fully prove their case at trial. In any event, to the extent the Plaintiffs' trial preparations must change if leave is granted, that is a prejudice that can be compensated for by costs or an adjournment.

[36] In balancing the potential prejudice to each of the parties, in my view, it is the Defendant Physicians who would suffer the greater prejudice if the requested time extension was not granted. This is a medical negligence case and the impugned reports address liability and damages. Counsel submits that they are the only expert reports the Defendant Physicians intend to deliver. I find that if the reports are excluded, evidence that is relevant and material to the defence will not be before the trier of fact, and the resulting prejudice to the Defendant Physicians will be significant.

[37] Based on the foregoing, I am satisfied that granting leave would not cause prejudice to the Plaintiffs that could not be compensated for by costs or an adjournment and would not cause undue delay in the conduct of the trial.

CONCLUSION

[38] In the result, the Defendant Physicians' motion is granted and, as requested, the time for service of the expert reports of Dr. A. Shah dated December 22, 2023, Dr. A. Davison dated January 14, 2024, and Dr. D. Hyatt dated December 20, 2023, is hereby extended to January 23, 2024.

[39] The Plaintiffs are granted leave to file a reply report(s), if any, and that reply report(s) should be served as soon as it is available, but in any event no less than 48 hours before the trial is to commence or as otherwise ordered by a court.

COSTS

[40] While the Defendant Physicians have been the successful parties on this motion, given that it was their expert reports that were served late and given that the relief granted is for their benefit alone, I am not inclined to award them any costs.

[41] However, I did not hear from counsel on the issue of costs at the hearing. So, if the parties are unable to agree on costs and wish to make costs submissions, they may be made as follows:

- (a) By April 24th, 2024, the Defendant Physicians shall serve and file their written costs submissions, not to exceed three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers; and
- (b) The Plaintiffs shall serve and file their responding costs submissions of no more than three pages, double-spaced, together with a draft bill of costs and copies of any pertinent offers, by May 8th, 2024; and
- (c) The Defendant Physicians' reply submissions, if any, are to be served and filed by May 15th, 2024 and are not to exceed two pages.
- (d) If no submissions are received by May 15th, 2024, the parties will be deemed to have resolved the issue of costs, and costs will not be determined by me.

MacNEIL J.

Released: April 3, 2024