

**CITATION:** Van de Ven v. Wright, 2021 ONSC 5831

**COURT FILE NO.:** CV-15-122737-00

**DATE:** 20210902

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** AMANDA VAN DE VEN, DIANNE VAN DE VEN, RUURD VAN DE VEN  
and LESLIE VAN DE VEN, Plaintiffs/Moving Parties

**AND:**

JENNY WRIGHT, Defendant/Respondent

**BEFORE:** The Honourable J. Dawe

**COUNSEL:** Deanna S. Gilbert, Counsel, for the Plaintiffs/Moving Parties

Christian Caffarena, Counsel, for the Defendant/Respondent

**HEARD:** July 28, 2021

**ENDORSEMENT**

**I. Overview**

- [1] Amanda Van de Ven, who is the plaintiff in a motor vehicle accident tort action,<sup>1</sup> moves for an order striking the defendant Jenny Wright's jury notice on account of the delay resulting from the COVID-19 pandemic. This type of motion has become increasingly common, since it has become apparent in recent months that civil jury trials are unlikely to resume in the Central East Region for a year or more.
- [2] The defendant agrees that the plaintiff should be granted leave to bring this motion, but opposes striking the jury notice.
- [3] An unusual aspect of this case is that the plaintiff's action was previously ordered bifurcated, with separate trials being held on the issue of liability and, if necessary, on the issue of damages. This order was originally made to enable the issue of Ms. Wright's liability in Ms. Van de Ven's action to be decided together with the issue of Ms. Van de Ven's own liability in a separate tort action that had been brought against her by Ms. Wright. This latter action has now settled, but the bifurcation order in Ms. Van de Ven's action still remains in effect.

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<sup>1</sup> The actions of the other plaintiffs named in the style of cause, who had made *Family Law Act* claims, have previously been dismissed on consent.

## II. Factual background and procedural history

- [4] In May 2013 Amanda Van de Ven and Jenny Wright were involved in a two-vehicle collision in East Gwillimbury. In May 2015 each sued the other. Ms. Wright subsequently delivered a jury notice in relation to Ms. Van de Ven's action.
- [5] Ms. Van de Ven maintains that she suffered a cerebral concussion in the accident that has permanently impaired her ability to work, and seeks \$5 million in damages.
- [6] Ms. Van de Ven's action was set down for trial in August 2018. In October 2019 my colleague Edwards J., who is now the Regional Senior Judge in the Central East Region, pre-tried Ms. Van de Ven and Ms. Wright's actions together. On consent of all parties, he made an order bifurcating the issues of liability and damages in both actions, and directed that the liability phases of the two trials be heard together. As he explained in his October 16, 2019 endorsement:

The trial will be with a jury and will likely take 5-7 days. The parties are agreed that any damages trial will only take place after all appeal rights in the liability trial have been exhausted.

The target date for the joint liability trial was the May 2020 sittings. However, in February 2020 counsel for the plaintiff requested that the liability trial be adjourned to the November 2020 sittings because of a scheduling conflict. Her request was granted, but as it turned out the May 2020 sittings were cancelled in any event due to the onset of the COVID-19 pandemic.

- [7] In May 2020 Ms. Wright's action against Ms. Van de Ven settled. Counsel for Ms. Wright advised me during the motion hearing that in view of this change of circumstances he would now consent to having the order bifurcating Ms. Van de Ven's action set aside so that the issues of liability and damages can be heard together in a single trial, but that Ms. Van de Ven's counsel has not agreed to this proposal.

## III. Analysis

### 1. *The impact of COVID-19 on the likely trial date*

- [8] The plaintiff moves for an order under Rule 47.02(2) of the *Rules of Civil Procedure* striking the defendant's jury notice so that her currently bifurcated trial can proceed before a judge sitting without a jury. Because she brings this motion after her action has been set down for trial, leave of the court is required: see Rule 48.04(1). However, Ms. Wright very fairly takes the position that leave should be granted because the COVID-19 pandemic "without a doubt, represents a substantial and unexpected change of circumstances since the filing of the trial record" in August 2018. I agree, and would accordingly grant leave.
- [9] There is now an extensive body of case law dealing with similar motions that have been brought in the wake of the COVID-19 pandemic and the suspension of civil jury trials in Ontario. The leading case is the Ontario Court of Appeal's decision in *Louis v. Poitras*, 2021 ONCA 49, where Hourigan J.A. emphasized (at para. 3) that "local conditions will

necessarily impact the choice of effective solutions” to the problem of trial delays resulting from the pandemic, and endorsed the practice of motion judges seeking details about local conditions from their Regional Senior Judge.

- [10] In this case, counsel obtained information about local conditions in the Central East Region during an April 19, 2021 pretrial with Regional Senior Judge Edwards. Coincidentally, I had made my own inquiries with RSJ Edwards a few weeks earlier in connection with a similar motion in a different case.
- [11] In summary, Edwards R.S.J. advised that there is now a substantial backlog of criminal jury matters in the Central East Region, which will be given priority over civil jury trials for the foreseeable future. Edwards R.S.J. told me in early April 2021 that he thought it is “highly unlikely” that civil jury trials would be able to resume in the fall of this year, “unlikely” that they will resume before “well into 2022”, and entirely possible that they may not resume until 2023. He said much the same thing to counsel during the April 19, 2021 pre-trial, advising them that the chances of this action being tried by a jury before 2023 was “close to nil”.
- [12] The COVID situation has improved since April to a point where criminal jury trials have now resumed in Central East. However, most of the courthouses in the region each have only one courtroom that can seat a socially distanced jury, so for the time being only one jury trial can proceed at a time in each courthouse, except for Oshawa which can accommodate two simultaneous jury trials. The hope is that the ongoing vaccine rollout will eventually allow jury trials to also be held in other courtrooms that have ordinary seating arrangements for jurors, but it remains unclear when this will become possible. I am satisfied that there have not been any significant changes of circumstance that affect the validity of Edwards R.S.J.’s predictions in April 2021 as to when this action could realistically proceed as a jury trial.
- [13] Conversely, Edwards R.S.J. advised counsel during the April 19, 2021 pretrial that if the jury notice in this action is struck, it is possible, although not guaranteed, that the liability phase of the bifurcated trial could be heard by judge alone in the fall or winter of 2021. I note parenthetically that had it not been for the COVID-19 pandemic the liability phase of the trial would probably have already been completed during the fall 2020 sittings.
- [14] I am accordingly satisfied that if the jury notice is not struck the trial of the liability phase of this action will very likely be delayed by a year or more.
- [15] However, a complicating factor in this case, which I will discuss further below, is that completing the liability phase of the trial will not necessarily bring the action as a whole to a final conclusion. If Ms. Wright is found at least partially liable there will then have to be a second trial on the issue of Ms. Van de Ven’s damages, which may be delayed if either party pursues an appeal from the liability verdict.
- [16] The action was originally bifurcated in this fashion so that the issue of liability in Ms. Van de Ven and Ms. Wright’s separate actions could be determined at the same time, both for

reasons of efficiency and to remove the possibility of inconsistent verdicts. However, since Ms. Wright's action has now settled these concerns no longer exist.

## 2. *The balance of interests*

- [17] In his reasons in a preliminary motion in *Louis v. Poitras* that was heard and decided in advance of the main appeal, reported at 2020 ONCA 815, Brown J.A. observed (at para. 33):

Delay in obtaining a date for a civil jury trial can, by itself, constitute prejudice and justify striking out a jury notice. This should not be a surprising proposition. Part of the “service guarantee” to the public made in r. 1.04(1) is that courts will work to provide the “most expeditious ... determination of every civil proceeding on its merits” (emphasis added). Delay in providing trial dates undermines that service guarantee.

- [18] Hourigan J.A. adopted these comments in his subsequent decision in the appeal, stating (at para. 22)

I agree with the statement of Brown J.A. in his decision on the stay motion that ... “delay in obtaining a date for a civil jury trial can, by itself, constitute prejudice and justify striking out a jury notice.” As Brown J.A. notes, the whole *raison d’être* of the civil justice system, as captured in r. 1.04(1), is that courts will work to provide the “most expeditious...determination of every civil proceeding on its merits:” ...

- [19] It is also well-settled that plaintiffs in motor vehicle accident cases tend to suffer additional specific prejudice from trial delay because of the provisions of the *Insurance Act*, R.S.O. 1990 c. I.8, which include an annually increasing statutory deductible on general damages and a 70% limit on recovery of pre-trial lost income: see, e.g., *MacKenzie v. Pallister*, 2021 ONSC 1840 at para. 12.

- [20] Any award of damages that Ms. Van de Ven ultimately receives will be subject to these statutory limits, which gives her a heightened interest in a speedy trial of her action. However, it should also be noted that if her trial remains bifurcated and she is successful on the issue of liability it may take some further time for the damages phase or her trial to be completed, particularly if either party appeals from the liability verdict.

- [21] Ms. Van de Ven's right to have her action tried speedily must be weighed against Ms. Wright's statutory right to have the case tried by a jury. However, this latter right is a qualified one. As Hourigan J.A. explained in *Louis*, *supra* at para. 17:

It is well settled in the jurisprudence that the substantive right to a civil jury trial is qualified because a party's entitlement to a jury trial is subject to the power of the court to order that the action proceed without a jury. While a court should not interfere with the right to a jury trial in a civil case without just cause or compelling reasons, a judge considering a motion to strike a jury notice has a broad discretion to determine the mode of trial. This court described the role

of the court this way in *Cowles v. Balac*, (2006) 2006 CanLII 34916 (ON CA), 83 O.R. (3d) 660 (C.A.), at paras. 38-39, leave to appeal refused, [2006] S.C.C.A. No. 496:

While that test confers a rather broad discretion on a court confronted with such a motion, it is nonetheless a sensible test. After all, the object of a civil trial is to provide justice between the parties, nothing more. It makes sense that neither party should have an unfettered right to determine the mode of trial. Rather, the court, which plays the role of impartial arbiter, should, when a disagreement arises, have the power to determine whether justice to the parties will be better served by trying a case with or without a jury.

The application of this test should not diminish the important role that juries play in the administration of civil justice. Experience shows that juries are able to deal with a wide variety of cases and to render fair and just results. The test, however, recognizes that the paramount objective of the civil justice system is to provide the means by which a dispute between parties can be resolved in the most just manner possible.

- [22] The question I must decide is whether I should give priority to Ms. Van de Ven's speedy trial rights in the circumstances of this case, bearing in mind "that the paramount objective of the civil justice system is to provide the means by which a dispute between parties can be resolved in the most just manner possible": *Cowles v. Balac*, *supra* at para. 39.
- [23] On balance, I think that the interests of justice favour granting Ms. Van de Ven's request to strike Ms. Wright's jury notice, at least provisionally.
- [24] The automobile accident at issue in this case occurred more than eight years ago, and Ms. Van de Ven's tort action has now been in the court system for over six years. The liability phase of the bifurcated trial of her action has already been delayed for nearly a year because of the COVID-19 pandemic, and if the jury notice is not struck it will probably not be heard before 2023, which is more than a year away.
- [25] In addition to the inherent prejudice that generally results from delay, if Ms. Van de Ven is ultimately successful in obtaining damages she will be further prejudiced by the *Insurance Act* provisions that will limit what she can collect in both general damages and damages for lost income before trial.
- [26] On the other side of the ledger, Ms. Wright cannot point to any tangible prejudice that she will suffer if she cannot have the question of her liability decided by a jury. There is no reason to think that a trial of this issue by judge alone will be unfair to her.
- [27] Moreover, if Ms. Wright's jury notice is struck and unexpected problems then come up that prevent the liability trial from being conducted by judge alone before civil jury trials resume in Central East, Ms. Wright's preference for a jury trial can be protected to some extent by striking her jury notice only provisionally, giving her the option of seeking to have the order varied if civil jury trials resume before this case has been tried.

- [28] On behalf of Ms. Wright, Mr. Caffarena points out that even if the balance of interests generally favour Ms. Van de Ven's right to a speedy trial, the situation is complicated by the bifurcation order. He observes that Ms. Van de Ven's projection that a liability-only trial by judge alone could be completed as soon as the fall of 2021 is premised on this trial taking approximately one week. However, if the bifurcation order were set aside so the issues of liability and damages can be tried at the same time, the combined trial would understandably take longer, with Mr. Caffarena's estimate being that it would probably take three weeks to complete.
- [29] Obtaining court time for a three-week trial is obviously more difficult than obtaining time for a one-week trial, so if the bifurcation order were set aside this would make it less likely that trial dates would be available before 2022. However, Mr. Caffarena argues that the overall trial delay might still be reduced, since even if the liability-only trial can be completed by judge alone in 2021 it is possible that either or both parties might appeal the verdict, which could delay any trial of the issue of damages for a year or longer.
- [30] Mr. Caffarena argues that these considerations favour taking a "wait and see" approach to the issue of striking Ms. Wright's jury notice. He submits that it is possible that the COVID-19 situation in Central East will improve more quickly than is currently expected, such that it may be possible for Ms. Van de Ven's combined action to be tried with a jury at some point in 2022.
- [31] I would not give effect to this argument, for four main reasons.
- [32] First, while I agree that the original rationale for the bifurcation order no longer seems to exist now that Ms. Wright's own action has settled, neither party has moved to have it set aside or varied.
- [33] Second, as Ms. Gilbert points out on behalf of Ms. Van de Ven, it is not inevitable that a bifurcated trial will take longer overall than a combined trial. Although the bifurcation order allows both parties to bring appeals on the issue of liability before any damages trial is held, the parties may not choose to exercise their rights of appeal. It is also possible that if the issue of liability is decided in Ms. Van de Ven's favour, the parties will reach a settlement on the issue of damages, making a further damages trial unnecessary.
- [34] In summary, while there are possible scenarios in which a bifurcated trial takes longer to complete than a combined trial, there are also possible scenarios in which it ends up being shorter.
- [35] Third, I think that recent developments have poured some cold water on Mr. Caffarena's optimism about the current state of the COVID-19 pandemic. While the vaccine rollout in Ontario may have been "ahead of schedule" when this motion was argued at the end of July, since that time the pace of vaccinations has slowed. Moreover, the rise of the more contagious Delta variant has led many informed observers to predict that there will be a fourth wave of infections in the fall.
- [36] While I am hesitant to take judicial notice of these factual matters, it is sufficient for present purposes for me to simply state that the evidence before me on this motion does not give

me reason to doubt the accuracy of Edwards R.S.J.'s prediction that the chances of civil jury trials resuming in Central East before 2023 is "close to nil".

- [37] Fourth, even if I am wrong about this and Mr. Caffarena's rosier predictions about the course of the pandemic come to pass, I think this possibility can be adequately addressed by making any order striking Ms. Wright's jury notice provisional. If it turns out that civil jury trials resume in Central East earlier than now seems likely, she will be able to apply to have the striking of her jury notice set aside. She also remains free to move to have the trial bifurcation order set aside or varied.

#### **IV. Disposition**

- [38] Accordingly, leave to bring this motion is granted, and the motion itself is also granted. However, the order striking the jury notice will be made only provisionally. If this matter has not been tried by the time that the Court announces a date for the resumption of civil jury trials in the Central East Region, Ms. Wright will be free to bring a motion on notice to have her jury notice restored.
- [39] As a matter of convenience to the parties, any such future motion may be brought before any judge, although it would be best for me to hear it if my sitting schedule permits me to do so in a timely way.
- [40] If the parties are unable to agree on costs between themselves, they may provide me with brief written submissions of no more than two pages in length, in addition to their bills of costs. These materials may be filed electronically through my judicial assistant. Ms. Van de Ven's costs submissions should be served and filed within four weeks of the release of this decision, and Ms. Wright's response two weeks thereafter.

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The Honourable J. Dawe

**Date:** September 2, 2021