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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KATHRYN VACCARO v. UNIFUND INSURANCE COMPANY

BEFORE: Master R. Dash

COUNSEL: Brian Pickard, for the plaintiff

Kadey Schultz, for the defendant

REASONS FOR DECISION

[1] The plaintiff moves to set aside an order of the registrar dismissing the action as abandoned under rule 48.15. These motions have become a regular fixture on masters' motion lists in Toronto since rule 48.15 came into force in January 2010. That rule provides that an action will be dismissed if no defence[1] has been filed within 180 days after the issuing of the statement of claim.[2] An issue on this motion is whether different contextual considerations apply to setting aside an order dismissing an action as abandoned under rule 48.15, which occurs at a very early stage of an action before a defence is filed (and indeed because no defence has been filed) than to a dismissal for delay under rule 48.14, which occurs at a much later stage of the action, at least two tears after a defence is filed. The plaintiff also seeks an order validating service of the statement of claim made after the six month deadline for service.

PRE-LITIGATION HISTORY

[2] The plaintiff applied to the defendant, her motor vehicle insurer, for various statutory accident benefits arising out of a motor vehicle accident that occurred on March 6, 2005. The first application was submitted on March 14, 2005. She attended numerous assessments between March 2005 and February 2008 by a variety of doctors and other health care professionals, many conducted at the request of the defendant. Attendant care and housekeeping benefits were terminated by the defendant in mid-2006 and a claim for lost educational expenses denied on

[1] The defendant can file either a statement of defence, a notice of intent to defend or a motion in response to an action within the six months.
[2] Alternatively the time will stop running if the action is set down for trial or final judgment obtained within the six month period. Further, the registrar must give 45 days notice before the action is dismissed.

January 31, 2008. The defendant paid out the maximum of $100,000 available in medical and rehabilitation benefits for non-catastrophically injured persons. The plaintiff thereafter applied on or about August 15, 2007[3] for a determination of catastrophic impairment in order to be eligible for further benefits. She was assessed by the defendant's medical experts. On March 20, 2008 the defendant denied that the plaintiff suffered a catastrophic impairment and denied a request for payment of further medical and rehabilitation benefits.[4] The plaintiff applied for mediation with FSCO[5] on June 13, 2008. A mediation is mandatory before a claimant can commence an action or arbitration for those benefits.

[3] The FSCO mediation proceeded on September 11, 2008 and March 9, 2009 with mediator Ann Walker, but the parties agreed to delay issuance of a report indicating a failed mediation in order to conduct a private mediation. The private mediation was ultimately cancelled and on November 9, 2009 Ms. Walker sent to the parties what she referred to as a "draft" of her report setting out issues settled and those remaining in dispute. The report sets out "date issued by mediator: November 9, 2009". Two minor corrections were made at the request of the defendant and a final version of the mediator's report was sent on November 30, 2009. The issues in dispute in the final version were identical to those in the draft version.

[4] The date of issuance of the report is important because of the limitation period set out in section 281.1 of the *Insurance Act*[6] for commencing an action or arbitration. The section provides that a mediation, court proceeding or arbitration must be commenced within 2 years of the insurer's refusal to pay the benefit claimed, but if mediation proceeds and fails, a court proceeding or arbitration may be commenced "within 90 days after the mediator reports to the parties". The plaintiff and defendant disagree as to the date that the mediator reported to the parties. The plaintiff says the mediator reported on November 30, 2009, the date the final report was sent and as a result this action was commenced on time, the statement of claim having been issued on February 26, 2010. The defendant says the mediator reported on November 9, 2009 and as a result the limitation period to sue for outstanding attendant care, housekeeping, lost educational expense and various medical and rehabilitation benefits expired before the action was commenced. The defendant concedes that the claim for a declaration for catastrophic impairment and other medical and rehabilitation expenses is not out of time since the action was commenced within two years of denial of the claim and would not have expired until March 20, 2010. The limitation period for all benefits has now expired and the plaintiff would not be entitled to commence a fresh proceeding if this action is not restored.

[5] The plaintiff was represented by the law firm of Neinstein & Associates during her application for accident benefits and during the FSCO mediation. Commencing on or about October 20, 2009 she has been represented by the law firm of Srebrolow Lebowitz Spadafora ("SLS"), and in particular by lawyer Matthew Consky. The defendant was not advised until

[3] The plaintiff says the application was submitted on July 27, 2007.The defendant says it was submitted August 15.
[4] The defendant continues to pay income replacement benefits.
[5] Financial Services Commission of Ontario.
[6] The *Insurance Act*, R.S.O. 1990 c. I. 8 as amended

November 13, 2009 of the change of lawyer [7]. SLS has represented the plaintiff in this action, although counsel for the plaintiff on this motion, Mr. Pickard, has been retained by LawPro. Counsel for the defendant on this motion and at FSCO was Ms. Schultz.

HISTORY OF THE LITIGATION

[6] The following chorology sets out what has transpired since the action was commenced:

(a) The statement of claim was issued by SLS on February 26, 2010. The claim was for a declaration of catastrophic impairment and for payment of outstanding rehabilitation and medical expenses and other accident benefits. Unifund is the sole defendant.

(b) No attempts were made to serve the defendant within the ensuing six months permitted for service of the statement of claim under rule 14.08 i.e. by August 25, 2010 or to otherwise advance the litigation. Ipso facto, no attempts were made to ensure a defence was filed within 180 days after the statement of claim was issued as required by rule 48.15 (also August 25, 2010). The only contact with the defendant was a letter from Mr. Consky to Ms. Schultz on June 15, 2010 requesting payment of an agreed tutoring expense.

(c) On August 26, 2010 the registrar sent a notice to the parties as required by rule 48.15(1)5 indicating that the action would be dismissed as abandoned unless within 45 days (i.e. by October 10, 2010) either a defence was filed or the action set down or disposed of by final judgment. Ms. Schultz, received the notice on August 30, 2010.[8] There is no evidence as to the date it was received by SLS, although Mr. Consky admits that it was received.

(d) On September 3, 2010 Ms. Schultz wrote the court, copied to Mr. Consky, indicating that the defendant had never been served with the statement of claim, that the deadline for service had passed and she looked forward to receiving notice that the action had been dismissed. Mr. Consky did not respond to the letter or take any steps to serve the statement of claim, move to extend the time for service, move to extend the deadline under rule 48.15 or otherwise advance the litigation before the October 10 deadline set out in the notice from the registrar.

(e) The statement of claim was served on the defendant, out of time, on November 8, 2010. As of the date of service however, the action had not yet been dismissed. No request was made for a statement of defence prior to the dismissal of the action.

(f) No motion was brought to extend the time for service or to extend the rule 48.15 deadline for defence before the action was dismissed. Although a motion to extend

[7] The defendant complains that although SLS advised the defendant's lawyers on November 13, 2009 of its retainer, SLS failed to provide them with a Direction and Authorization. This has no consequence to the matter before me.
[8] Although she was not on record for the defendant, Ms. Schultz received the notice because she was listed as the contact for the defendant in the statement of claim (although an incorrect insurer was described in the address line).

the time for service was booked on September 20 returnable November 12, 2010 it did not proceed.[9] Mr. Consky says it was adjourned to January 13, 2011 because "materials were not ready", but that does not appear in the court's records. No motion had ever been served. Although the confirmation form indicates Mr. Consky was unable to confirm an adjournment with the lawyers for Unifund because none had been appointed, it is clear he was aware of Ms. Schultz's involvement and had not tried to contact her about a date. On November 13 Ms. Schultz asked for a copy of the affidavit of service, which Mr. Consky provided on November 15.

(g) On November 19, 2010 the registrar dismissed the action as abandoned under rule 48.15.

(h) SLS claims they received the dismissal order on November 23, 2010. SLS claims they started preparing materials for a motion to set aside the dismissal on December 8, 2010 when the order was brought to the attention of James Srebrolow, but no-one at SLS contacted Ms. Schultz. A motion was booked for January 20, 2011 without consulting the defendant.

(i) In the interim, LawPro had been notified on December 15, 2010 and in turn Mr. Pickard was retained by LawPro on December 23, 2010 to bring this motion.

(j) The January 20 motion did not proceed. According to Mr. Consky he adjourned the motion on January 18 to obtain a special appointment for a long motion. Ms. Schultz however was advised by the court that the motion was struck from the list because no materials had been filed. In any event, it is clear that no motion materials had been served by the motion return date. On January 20, Mr. Consky advised Ms. Schultz that a special appointment was necessary and that LawPro had been retained to bring the motion. (No materials were served until May 30, 2011).

(k) Mr. Pickard first contacted Ms. Schultz on January 24, 2011 and advised he had asked the court to appoint a master to hear a motion to set aside the dismissal and validate service of the statement of claim, although it appears that he first contacted the scheduling unit on February 1 and then submitted a requisition for a long motion in March.[10] Mr. Pickard's office contacted Ms. Schultz on March 25, 2011 to discuss dates for a case conference with the master.

(l) For reasons that have not been made clear I was not assigned to hear the motion until April 18th and on May 25, 2011 I conducted a case conference to establish a timetable and return date for the motion.

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[9] This also explains why the registrar did not dismiss the action on October 11, 2010 since the court's policy is not to dismiss an action, despite expiry of a deadline, if any motion is booked and is outstanding.

[10] The scheduling unit does not schedule long masters' motions. In fact the requisition was erroneously submitted in March to the scheduling unit. Mr. Pickard then had to re-send it in April to the masters'' administration, where it should have been sent in the first place: see Toronto Practice Direction effective January 1, 2011 paragraph 14.

(m) The motion was ultimately served on the defendant on May 30, 2011 in accordance with the timetable. The motion was heard on September 1, 2011.

THE LAW ON SETTING ASIDE A REGISTRAR'S DISMISSAL AS ABANDONED

The Applicable Rules

[7] The registrar dismissed the action as abandoned pursuant to rule 48.15(1) which provides:

> **48.15** (1) The registrar shall make an order dismissing an action as abandoned if the following conditions are satisfied, unless the court orders otherwise:
>
> 1. More than 180 days have passed since the date the originating process was issued.
>
> 2. None of the following has been filed:
> i. A statement of defence.
> ii. A notice of intent to defend.
> iii. A notice of motion in response to an action, other than a motion challenging the court's jurisdiction.
>
> 3. The action has not been disposed of by final order or judgment.
>
> 4. The action has not been set down for trial.
>
> 5. The registrar has given 45 days notice in Form 48E that the action will be dismissed as abandoned.

[8] The motion is brought pursuant to rule 37.14(1) which provides:

> **37.14** (1) A party or other person who…
>
> (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.

The Test on a Motion to Set Aside a Registrar's Dismissal

[9] The approach that a judge or master should take on a motion to set aside a registrar's dismissal has been considered by not less than seven decisions of our court of appeal between January 2007 and July 2011.[11] Although different panels of the Court of Appeal have approached

[11] *Scaini v. Prochnicki*, 2007 ONCA 63, 86 O.R. (3d) 179, [2007] O.J. No. 299 (C.A.); *Marché D'Alimentation Denis Thériault Lteé v. Giant Tiger Stores Ltd.*, 2007 ONCA 695, (2007), 87 O.R. (3d) 660, [2007] O.J. No. 3872 (C.A.); *Finlay v. Van Paassen*, 2010 ONCA 204, (2010), 101 O.R. (3d) 390, [2010] O.J. No. 1097 (C.A.); *Wellwood*

with different nuance the tension between on one hand the public interest in discouraging litigation delay and on the other hand granting an indulgence to allow actions to proceed on their merits if no prejudice will result, the basic approach to such motions as first set out in *Scaini v. Prochnicki* has been applied consistently.

[10] The court must consider and weigh all relevant factors, including the four *Reid*[12] factors, which are likely to be of central importance in most cases, to determine the order that is just in the circumstances of the particular case. The plaintiff need not rigidly satisfy each of the four *Reid* factors and a contextual approach is required.[13] It may be in a particular case one factor upon which the plaintiff comes up short is of such importance that taken together with the other factors, the plaintiff must fail.[14]

[11] The four *Reid* factors as cited by the Court of Appeal in *Marché v. Giant Tiger* are as follows[15]:

> (1) *Explanation of the Litigation Delay*: The plaintiff must adequately explain the delay in the progress of the litigation from the institution of the action until the deadline for setting the action down for trial as set out in the status notice. She must satisfy the court that steps were being taken to advance the litigation toward trial, or if such steps were not taken to explain why.... If either the solicitor or the client made a deliberate decision not to advance the litigation toward trial then the motion to set aside the dismissal will fail.
>
> (2) *Inadvertence in Missing the Deadline*: The plaintiff or her solicitor must lead satisfactory evidence to explain that they always intended to set the action down within the time limit set out in the status notice, or request a status hearing, but failed to do so through inadvertence. In other words the penultimate dismissal order was made as a result of inadvertence.
>
> (3) *The Motion is Brought Promptly*: The plaintiff must demonstrate that she moved forthwith to set aside the dismissal order as soon as the order came to her attention.
>
> (4) *No Prejudice to the Defendant*: The plaintiff must convince the court that the defendants have not demonstrated any significant prejudice in presenting their case at trial as a result of the plaintiff's delay or as a result of steps taken following the dismissal of the action.

The Tension between Discouraging Delay Caused by Lawyer Neglect and Permitting Actions to be Determined on Their Merits

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v. Ontario (Provincial Police), 2010 ONCA 386, 102 O.R. (3d) 555, [2010] O.J. No. 2225 (C.A.); *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, 2010 ONCA 887, 104 O.R. (3d) 689, [2010] O.J. No. 5572 (C.A.); *Machacek v. Ontario Cycling Assn.*, 2011 ONCA 410, [2011] O.J. No. 2379 (C.A.); *Aguas v. Rivard Estate*, 2011 ONCA 494, [2011] O.J. No. 3108 (C.A.)

[12] The factors summarized in *Reid v. Dow Corning Corp.*, [2001] O.J. No. 2365, 11 C.P.C. (5th) 80, reversed on other grounds [2002] O.J. No. 3414, 48 C.P.C. (5th) 93 (Div. Ct.) are often referred to as the *Reid* factors.

[13] *Scaini v. Prochnicki*, supra at paras. 23-24

[14] *Scaini v. Prochnicki*, supra at para. 25

[15] *Marché v. Giant Tiger*, supra at para. 12

[12] A number of the decisions from the Court of Appeal emphasize the effect of litigation delay on the justice system, the need for finality to litigation, and the need to send a message to discourage lengthy delay resulting from the actions (or inaction) of a party or his lawyer that amount to more than inadvertence. The message in appropriate cases may be to deny reinstatement of an action even when there has been no actual prejudice to the defendants resulting from the delay. Other decisions have emphasized absence of prejudice and the rights of innocent plaintiffs not to be denied their day in court as a result of the actions of their lawyer. Since in this case the delay and the resulting dismissal as abandoned arose through the neglect of plaintiff's counsel yet there is no evidence of actual prejudice to the defendant arising from the delay or reliance on the dismissal, I must examine the decisions of the Court of Appeal in greater detail.

[13] *Marché v. Giant Tiger* emphasized the effect of delay on the civil justice system. The court stated that the *Reid* requirement of explanation for litigation delay "ties into a dominant theme in modern civil procedure: the discouragement of delay and the enhancement of an active judicial role to ensure timely justice."[16] There is "a strong public interest in promoting the timely resolution of disputes. 'The notion that justice delayed is justice denied reaches back to the mists of time'...Litigants are entitled to have their disputes resolved quickly so that they can get on with their lives."[17] The court stated that where despite the delay the defendant would not be unfairly prejudiced, "according the plaintiff an indulgence is generally favoured,"[18] however it is not sufficient to demonstrate that the defendant could still advance its case despite delay since "there are four branches to the *Reid* test, and...those factors are not exhaustive."[19] The court emphasized that the law seeks a "finality to litigation" and the "finality principle grows stronger as the years pass. Even where the defendant could still defend itself despite the delay, "at some point the interest in the finality of litigation must trump the opposite party's plea for an indulgence."[20]

[14] The court in *Marché v. Giant Tiger* considered the effect of solicitor's inadvertence or negligence. It stated that where a lengthy delay was "caused by the solicitor effectively abandoning the file" it cannot be considered "mere inadvertence". Although one consideration is that a plaintiff not be left without a remedy and an innocent client should not ordinarily suffer the irrevocable right to proceed by reason of inadvertence of his solicitor, the client is not left without a remedy "where the solicitor's conduct is not mere inadvertence, but amounts to conduct very likely to expose the solicitor to liability to the client". In such case refusing an indulgence "will not necessarily deny the client a remedy."[21] The court pointed out the solicitor's conduct in that case amounted to "more than the kind of lapse or inadvertent mistake that the legal system can countenance. We should opt for a resolution that discourages this type of conduct which undermines the important value of having disputes resolved in a timely fashion" and in such circumstances a refusal to set aside the dismissal" sends the right message and

[16] *Marché v. Giant Tiger*, supra at para. 23
[17] *Marché v. Giant Tiger*, supra at para. 25
[18] *Marché v. Giant Tiger*, supra at para. 34
[19] *Marché v. Giant Tiger*, supra at para. 35
[20] *Marché v. Giant Tiger*, supra at para. 39
[21] *Marché v. Giant Tiger*, supra at paras 27-29.

provides appropriate incentives to those involved in the civil justice system."[22] Excusing delays of such magnitude "risks undermining public confidence in the administration of justice" and could be seen as "the legal system protecting its own."[23]

[15] The principles set out in *Marché* discouraging delay because of its undermining public confidence in the administration of justice and a need for finality trumping a plea for an indulgence in the face of excessive delay has been quoted and applied by the majority judgment of Court of Appeal in *Wellwood v. Ontario*[24], where the court added that under the rules of civil procedure, "the party who commences a proceeding bears primary responsibility for its progress. For this reason, the initiating litigant generally suffers the consequences of a dilatory regard for the pace of the litigation."[25] The emphasis on delay and finality and lawyers' conduct was also quoted and applied by the Court of Appeal in *Machacek v. Ontario Cycling Assn.* The court emphasized that where the lengthy delay was attributable to the lawyer for the plaintiff failing to move the action along and take appropriate steps to set aside the dismissal order, the plaintiffs "are not left without a remedy as they still have recourse through an action in solicitor's negligence."[26] The court in *Machacek* held that while absence of evidence of actual prejudice was an important factor, "it has to be balanced by a consideration of the finality principle" and the "delay in this case and the conduct of counsel tips the balance toward the latter."[27]

[16] On the other hand, in *Finlay v. Van Passen*, the Court of Appeal stated that prejudice is "a key consideration on a motion to set aside a dismissal order." With respect to solicitor's conduct, the court stated: "Speculation about whether a party has a lawsuit against its own lawyer, or the potential success of that lawsuit, should not inform the court's analysis of whether the registrar's dismissal order ought to be set aside...The court should be concerned primarily with the rights of the litigants, not with the conduct of their counsel." The court referred to the statement by Sharpe J.A. in *Marché* that the law will not ordinarily allow an innocent client to suffer the irrevocable loss of the right to proceed by reason of the inadvertence of his solicitor, but concluded that that Sharpe J.A. recognized in *Marché* that "the situation may be different where the lawyer's conduct is not inadvertent but deliberate."[28]

[17] Therefore the courts in *Finlay* and in *Machacek* came to different conclusions about what Sharpe J.A. meant in *Marché* when he described lawyers' conduct that went beyond inadvertence and which could in appropriate circumstances result in the innocent client losing his rights to proceed with the action against the defendant, and be restricted to an action against the lawyer. In *Machacek* it was said to be negligent conduct and in *Finlay*, deliberate conduct.

[18] Similarly in *Aguas v. Rivard Estate*, the majority decision accepted the motion judge's finding that the delay was caused by "negligence in file management rather than mere

[22] *Marché v. Giant Tiger*, supra at para. 31
[23] *Marché v. Giant Tiger*, supra at paras 32
[24] *Wellwood v. Ontario*, supra at paras 75-76
[25] *Wellwood v. Ontario*, supra at para. 48
[26] *Machacek v. Ontario Cycling Assn.*, supra at paras. 9 and 10.
[27] *Machacek v. Ontario Cycling Assn.*, supra at para. 10
[28] *Finlay v. Van Passen*, supra at paras. 32-33

inadvertence" and that favoured dismissal[29] yet distinguished the results in *Marché* and *Wellwood*, stating that in *Marché* the solicitor "effectively abandoned the file" and had "put the file in abeyance and intentionally and stubbornly refused to proceed with the action" and that in *Wellwood* the delay by the plaintiff was intentional.[30] The majority appreciated that the "plaintiff bore responsibility for moving the action along" but the defendants' lawyer's "lack of display of any sense of urgency undercuts the claim of actual prejudice." The majority did not consider *Machacek*.

[19] In a sharply worded dissent in *Aguas*, Juriansz J.A. was of the view that the principle enunciated in *Marché* and *Wellwood* could not be limited to cases where a file was "effectively abandoned" or where the delay was intentional, but had a broader application and the terminology in those cases were only inferences from counsel's inattention during a four year delay. They "inferred nothing more than the lack of action on the part of the plaintiff's solicitors in moving the cases forward".[31] Justice Juriansz emphasized that "lawyers who fail to serve their client threaten public interest in the administration of justice." He reminded of the words of Sharpe J.A. in *Marché* that courts "should opt for a resolution that discourages this type of conduct that undermines the important value of having disputes involved in a timely fashion". He notes the observation of Sharpe J.A. that "delay in an individual case surpasses the rights of the particular litigants and engages the public interest."[32] As opposed to the traditional model where litigants controlled the pace of the litigation and great value was placed on determining actions on their merits, rule 48.14 "provides for the removal of individual cases from the court's docket to serve the greater public interest in an efficient court system." Justice Juriansz also stated that "where negligence rather than mere inadvertence is involved" maintaining the dismissal would not necessarily deprive the plaintiff of a remedy whereas reinstating the action would undermine the finality principle. He noted that the Court of Appeal in *Machacek* applied the *Marché* approach to a lawyer's conduct that was responsible for the delay since the plaintiffs would still have recourse "through an action in solicitor's negligence."[33] While Justice Juriansz was speaking in dissent, his views echo those of the panels of the Court of Appeal in *Marché*, *Wellwood* and *Machacek*.

[20] On motions to set aside an administrative dismissal, the tension between the principle of determining actions on their merits and the public interest in discouraging delay has been highlighted by Lasken J.A. speaking for the court in *Hamilton (City) v. Svedas Koyanagi Architects Inc.* (*Hamilton* was decided before *Machacek* and *Aguas*). He states that in exercising discretion on such motions, "two principles of our civil justice system come into play...The first...is that civil actions should be decided on their merits...The second principle is that civil actions should be resolved within a reasonable timeframe...Both the litigants and the public have an interest in timely justice. Their confidence in the administration of our civil justice system depends on it. On motions to set aside an order dismissing an action for delay, inevitably there is

[29] *Aguas v. Rivard Estate*, supra at para. 17
[30] *Aguas v. Rivard Estate*, supra at paras. 15 and 16
[31] *Aguas v. Rivard Estate*, supra at paras. 46-49
[32] *Aguas v. Rivard Estate*, supra at para. 49
[33] *Aguas v. Rivard Estate*, supra at paras. 39-40

a tension between those two principles."[34] Justice Laskin then lists what are typical considerations the court weighs to resolve this tension. These considerations echo the *Reid* factor. Justice Laskin adds that the amount of weight to be assigned to each consideration "will vary from case to case. The court's overriding objective is to achieve a just result – a result that balances the interests of the parties and takes into account the public's interest in the timely resolution of disputes."[35]

Presumption of Prejudice

[21] As noted, one of the *Reid* factors for the court to weigh in determining such order as is just is whether the defendants have been prejudiced by the delay or by reliance on the finality of the dismissal. While prejudice is only one of the relevant factors[36], it is invariably a "key consideration."[37] The plaintiff is charged with the task of demonstrating, at least prima facie, that the defendants have suffered no prejudice as a result of the delay. The court in *Wellwood* explains the operation of the presumption of prejudice: "The expiry of a limitation period can give rise to some presumptive prejudice, the strength of which increases with the passage of time. Where the presumption arises, the plaintiff bears the burden of rebutting the presumption, on proper evidence. Where the presumption is so displaced, the onus shifts to the defendant to establish actual prejudice."[38]

[22] The presumption arises when an action is dismissed after the passage of a limitation period, even if the action was commenced within the applicable limitation period. Because memories of witnesses fade over time a presumption of prejudice would arise "after passage of an inordinate length of time after a cause of action arose or after an applicable limitation period has passed."[39] The "force of the presumption [...] will depend on the time which has passed after the expiration of a limitation period as well as on the nature of the action. While the presumption will speak as a barely audible caution immediately after a limitation period has expired, it may command with increasing imperativeness on the passage of a substantial time, depending on the cause of action".[40]

[23] How can a plaintiff rebut the presumption of prejudice? "The plaintiff can overcome the presumption of prejudice for example by evidence that relevant documents have been preserved, key witnesses are available, certain elements of the claim may not be in issue, and in the case of personal injury, that medical evidence of the progress of the injuries is available."[41]

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[34] *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, supra at paras. 20-22
[35] *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, supra, at para. 23
[36] *Marché v. Giant Tiger*, supra at para. 35
[37] *Finlay v. Van Passen*, supra, at para. 28.
[38] *Wellwood v. Ontario*, supra at para. 60
[39] *Wellwood v. Ontario*, supra at paras. 71-72
[40] *Wellwood v. Ontario*, supra at para. 67 quoting *Clairmonte* v. Canadian Imperial bank of Commerce, [1970] 3 O.R. 97 (C.A.)
[41] *Wellwood v. Ontario*, supra at para. 62, quoting *Kassam v. Sitzer*, [2004] O.J. No. 3431, aff'd [2005] O.J. No. 1849 (Div. Ct.)

The Difference between Dismissal for Delay (Rule 48.14) and Dismissal as Abandoned (Rule 48.15)

[24] The delay in this case from commencement of the action to dismissal was "only" nine months (although an additional six months passed until the motion to set aside the dismissal was served). The defendant asks me to consider as a contextual factor on motions to set aside dismissals as abandoned that when the Rules Committee passed rule 48.15 effective January 2010 they intended that plaintiffs no longer have the luxury of delay in serving the statement of claim and getting a defence filed. They argue that some teeth must be given to the new six month deadline which requires a plaintiff to ensure an action is defended or concluded before it is dismissed as abandoned. Rule 48.14 dismissals for delay occur at a much later stage of a lawsuit and only after a status notice is issued two years after a defence is filed. Rule 48.14 is designed to ensure that defended actions proceed quickly through discovery and other steps in the litigation to ensure they are set down for trial without delay. On the other hand rule 48.15 dismissals occur at the front end of the litigation to ensure they are served and defended without delay.

[25] It is often pointed out by counsel that rule 48.15 is intrinsically problematic because rule 14.08 permits six months for service of the statement of claim after the action is commenced, yet rule 48.15 requires a defence within 180 days, either the same as or less than the six months permitted for service.

[26] The dismissal of actions as abandoned for failure to file a defence was not a new concept when rule 48.15 was introduced effective January 2010 and must be placed in historical context. Until 1997 there were no rules that led to a court generated dismissal of an undefended action as abandoned, no matter how long it took the plaintiffs to obtain either a defence or a judgment or to set the undefended action down for trial. In February 1997, rule 77.08 was introduced for case managed actions in Toronto and Ottawa (and later Windsor). That rule required that a defence be filed or an action set down or terminated within 180 days of commencing the action or it would be dismissed by the registrar. The rule applied only to case managed actions and only to the three named jurisdictions. Although actions in Toronto were originally randomly assigned to case management, between July 2001 and January 2005 all new eligible Toronto actions were case managed. Commencing January 2005 new actions in Toronto were no longer automatically case managed and rule 77.08 ceased to apply to Toronto actions. It was replaced by rule 78.06 that required that actions be defended, set down or terminated within two years after they were commenced, failing which they would be dismissed as abandoned. (Rule 77.08 continued to operate in Ottawa and Windsor.) Also, in January 1999 rule 76.06 was introduced for simplified procedure actions in Toronto and two other jurisdictions[42], requiring that a defence be filed (or set down or terminated) within 180 days or the action would be dismissed as abandoned. The rule applied across the province for simplified procedure actions commencing January 2002.

[42] Toronto, County of Frontenac and Territorial District of Temiskaming.

[27] As part of the rule reforms that came into effect on January 1, 2010 following the release of the Osborne Report,[43] rules 76.06 (for simplified procedure actions), 77.08 (for case managed actions in Ottawa and Windsor) and 78.06 (for actions in Toronto) were all revoked and were replaced by rule 48.15 which now applied to all actions in Ontario, simplified or ordinary procedure and case managed or not. (A transition exception in rule 48.15(7) provides that rule 78.06 continues to apply to Toronto actions that were commenced before January 2010.)

[28] By way of summary, in Toronto where this action was commenced parties had since 1999 been used to a rule requiring a defence within 180 days in simplified procedure actions, but in ordinary actions had, since 2005, been governed by a rule requiring a defence within two years (although it had been 180 days in case managed actions between 1997 and 2005). When rule 48.15 was introduced in January 2010 lawyers in Toronto were no stranger to dismissals as abandoned, although they had been working with a two-year rule in ordinary actions for the previous six years. The new rules however, including rule 48.15, were published and the profession was aware of them at least a year before they came into force.

[29] As with rules 76.06, 78.06 and 77.08, rule 48.15 requires the registrar to provide 45 days notice of the pending dismissal, often referred to as a notice of case expiry.

[30] I addressed the issue of setting aside a dismissal as abandoned under rule 76.06(1) and how it may differ from a dismissal for delay under rule 48.14 in *Gagne v. Toronto Police Services Board*[44]. I first decided that the same test should apply to a dismissal as abandoned as the test for dismissal for delay articulated in *Scaini* and in *Marché*:

> Therefore the test for setting aside a registrar's dismissal under rule 76.06(1) will be the *Scaini* and *Marché* test of taking a contextual approach and weighing all relevant factors, of which the four *Reid* factors will be of central importance, to determine the order that is just in the circumstances of the particular case. [45]

[31] In *Gagne* however I addressed the difference in context between a motion to dismiss as abandoned as opposed to a motion to dismiss for delay:

> Rule 76.06(1) is different in that it comes into play before a defence is filed. In fact it applies because no defence is filed. The action is dismissed 180 days after the statement of claim is issued unless the action is defended, set down or disposed of by final order.[46]
>
> Of course, the first *Reid* factor, explanation of the delay, will have a very different context under rule 76.06(1) than it would have under...rule 48.14. The deadline in rule 76.06(1) will be from the institution of the action until the deadline for obtaining judgment or having a defence filed, rather than until the deadline for setting the action down. Under rule... 48.14, the action will have been dismissed at a time much further

[43] *Civil Justice Reform Project Summary of Findings and Recommendations*, the Honourable Coulter Osborne, November 2007.
[44] *Gagne v. Toronto Police Services Board*, [2008] O.J. No. 1474, 60 C.P.C. (6th) 365
[45] *Gagne v. Toronto Police*, supra at para.
[46] *Gagne v. Toronto Police*, supra at para. 25

> advanced than under rule 76.06(1) and thus involves considerably more delay. Under rule 76.06(1) by definition the dismissal takes place six months after an action is commenced, prior to a defence, so the concept of an inordinate delay must be viewed in that context. Also under the second *Reid* factor the consideration will be inadvertence in failing to meet the deadline for obtaining judgment or a defence rather than for setting the action down.[47]

[32] In my view there is little difference to the context to be applied to a dismissal as abandoned under the simplified procedure or under the case management rules as opposed to under rule 48.15. Although Rule 76 is "designed to promote the straightforward, expeditious and less expensive determination of disputes involving"[48] smaller monetary claims, new rule 48.15 was passed as part of the Rules Committee's response to the Osborne Report which, although not dealing with this specific issue, was concerned about delays and costs in the justice system as an impediment to access to justice. Rule 48.15 is a court-controlled case flow management tool to purge the system of inactive files so that plaintiffs cannot issue and then simply sit on statements of claim. In my view the purpose of rule 48.15 is to discourage delay at the front end of an action, prior to defence, and prevent plaintiffs from commencing an action and then taking no steps or insufficient steps to pursue it. The Rules Committee decided that six months was long enough to get a statement of claim served and a first defending document filed.

[33] Lawyers must adapt to the law of the land. They cannot wait until close to the six month deadline to effect service of the statement of claim. Service must be effected early to permit a defence to be filed within the 180 day deadline.

[34] Of the seven Court of Appeal decision I have referenced, six have dealt with dismissals for delay, in each case under what is now rule 48.14(4)[49] resulting from a failure by a plaintiff to take any steps following receipt of a status notice (such as set the action down). The status notice would have been sent at least two years after the first defence was filed and the dismissal 90 days later. The only Court of Appeal decision dealing with a dismissal as abandoned is *Wellwood v. Ontario* where the action was case managed and was dismissed as abandoned under what was then rule 77.08. The Court of Appeal in *Wellwood*, while not specifically considering whether there might be a difference in the test, confirmed that on a motion to dismiss as abandoned (under rule 77.08) the correct test was to take a contextual approach, weigh all relevant factors including the four *Reid* factors and balance the interests of the parties to determine the order that is just in the circumstances of the case.[50]

[35] *Wellwood* was an action for malicious prosecution arising out of a murder charge laid in 2000 and withdrawn in January 2004. The action was commenced in July 2004 and a second identical action in September 2004.[51] Both statements of claim were served in December 2004,

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[47] *Gagne v. Toronto Police*, supra at para. 27
[48] *Gagne v. Toronto Police*, supra at para. 20 quoting *Hudon v. Colliers Macauley Nicolls Inc.*, [2001] O.J. No. 1558 (Div. Ct.)
[49] Before Jan. 1, 2010 rule 48.14(4) was rule 48.14(3)
[50] *Wellwood v. Ontario*, supra, at paras. 19-20
[51] The second action was identical but was required because the claim in the first action against the crown was a nullity, the requisite notice not having been provided.

within the time limits of rule 14.08.[52] No defences were filed, and none were demanded. The registrar sent the 45 day case expiry notice on Nov. 9. 2004 and then dismissed the first action on Jan. 19, 2005. Although a motion was scheduled for April 2005, it was adjourned several times with no motion being served and ultimately dismissed as abandoned. A request for the defendants' consent to amend the claim and set aside the dismissal was refused. The second action was dismissed in November 2005. Although draft materials were sent in October 2005, and a consent requested and refused in September 2006, neither motion record was served until April 2007. After several adjournments the motions were heard in October 2007. Other motions to correct misnomers in the pleadings and consolidate the two actions were also not proceeded with prior to the dismissals.

[36] In *Wellwood* the master had refused to set aside the registrar's dismissal order. Her decision was reversed by the Divisional Court, but the Court of Appeal restored the decision of the master. The master and the Court of Appeal relied on the following circumstances in refusing to set aside the dismissal: The overall significant passage of time including the time since the cause of action arose. No meaningful steps were taken to regularize pleadings or otherwise advance the litigation other than serving the statement of claim. There was a delay of over two years from dismissal of the first action to service of the motion to set aside and almost three years from the commencement of the action until the motion to set aside. The only explanation was that over that time materials were being redrafted and the matter had to be reported to LawPro. The master's finding that the plaintiff's delay was intentional was not challenged.[53] Although there was no evidence of actual prejudice there was a presumption of prejudice in that the limitation periods expired after the actions were commenced and before the motions to revive were served. Evidence of preservation of the crown brief was insufficient to rebut the presumption of prejudice since other sources of evidence would be required.[54] The principles articulated in *Marché* of discouraging inordinate delay which risks undermining confidence in the administration of justice and the trumping of the finality principle were all applicable to the matter before the court in *Wellwood*.[55]

ANALYSIS

[37] I begin my analysis by considering the four *Reid* factors on a contextual basis.

The Litigation Delay

[38] I am not concerned about pre-litigation delay. The delay referenced in the first *Reid* factor is typically delay in the progress of the litigation after the action has been commenced. In some cases pre-litigation delay, as part of the overall passage of time since the cause of action arose, can play a role in determining whether prejudice has been caused by the delay when considering the fourth *Reid* factor. In any event, I do not consider the pre-litigation delay

[52] See the motions decision of Master Sproat reported at [2008] O.J. No. 1473 at para. 7. There was a related second action that followed similar time lines.
[53] *Wellwood v. Ontario* (C.A.), supra, at para. 74
[54] *Wellwood v. Ontario*, supra, para. 84
[55] *Wellwood v. Ontario*, supra, paras. 75-76, 79.

significant. Catastrophic impairment and additional benefits associated therewith were denied on March 20, 2008. Mediation at FSCO is a pre-requisite to commencement of civil proceedings and it was conducted September 11, 2008 and March 9, 2009. The mediator's report was delivered on November 9 or November 30, 2009 depending on the correct interpretation of section 281.1 of the *Insurance Act* and this action was commenced approximately three months later on February 26, 2010. Pre-litigation delay in my view is not a factor in this case.

[39] From the time the statement of claim was issued on February 26, 2010 until the expiry of the 180 day deadline (approximately August 26, 2010), and indeed until the statement of claim was served on November 8, 2010, nothing whatsoever was done to advance the litigation. No motion was brought to extend the time for service under rule 14.08 or validate the late service and no motion was brought to extend the rule 48.15 deadline. There was no demand for an early defence (i.e. before the 20 day deadline for defence) given the pending dismissal. The action was then dismissed on November 19, 2010. Not even the sending by the registrar of the 45 day notice of pending case expiry on August 26, 2010 or the letter from Ms. Schultz on September 3, 2010 reminding of the pending deadline moved the lawyers to action, other than serving the statement of claim 2½ months after the notice was sent.

[40] There is no acceptable explanation for the litigation delay. There is an explanation for the default in serving the statement of claim and responding to the rule 48.15 deadline. Mr. Consky claims the "date for service and responding to the Registrar's Notice had not been diarized and were therefore missed." He also claims that during this period he was switching assistants and converting from a paper to electronic diary.[56] That may explain missing the deadline, but not the delay. This is an accident benefits action and the defendant insurer is not difficult to serve. There is no explanation as to why the statement of claim was not sent for service at the same time it was issued so that a defence would have been received well in advance of any deadline. There is no explanation as to why an early defence was not demanded. The lawyers have not explained why no motion was served to extend the time for service or to extend the rule 48.15 deadline, particularly after receiving the 45-day case expiry notice from the court.

[41] Although one may be tempted to say that the delay from commencement of the action until dismissal was "only" nine months, considered in the context of the purpose of rule 48.15, to discourage delay at the front end of an action and compel at least one defence to be filed within six months, the delay, covering inaction over the entire six month period (and then three months more) is significant, if not inordinate.

[42] In my view the explanation of litigation delay is inadequate. The lawyer's actions go beyond inadvertence and in my view the failure to take any steps could well amount to holding the file in abeyance, if not actionable negligence. If the dismissal is not set aside the plaintiff will not be without a remedy.

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[56] The defendant claims that Consky diarized the wrong date for commencement of the action and so even if he had switched to an electronic diary he still would have had the wrong date. This may be true, but it is not relevant to the matter in issue which deals with delay in the action after the litigation was commenced. The defendant adduces this evidence to support their allegation that plaintiff's counsel was "thoroughly incompetent" and that he demonstrated a "systemic inattention to the file."

[43] The plaintiffs have however also provided an affidavit from the plaintiff personally. It is clear from that affidavit that she always intended to pursue the action, had instructed Mr. Consky to commence the action, was unaware of the delay or that the statement of claim had not been served and did not sanction the delay. She assumed (in my view reasonably) that "these kind of actions take a long time to complete" and so did not think it unusual that the claim was not resolved within a year of it being issued. She co-operated with the prosecution of her claim by attending assessments with some 21 doctors or other health care providers, including assessments required by the defendant, and by meeting with her lawyers on several occasions. She personally did not receive the 45-day notice of pending dismissal. The plaintiff's personal "innocence" in the delay will be considered as part of the contextual determination of what is just; however it does not inform the determination of whether the inordinate delay has been explained.

[44] The plaintiff has not met the first *Reid* factor.

Was the Ultimate Dismissal a Result of Inadvertence?

[45] I have earlier set out the explanation of Mr. Consky that the "date for service and responding to the Registrar's Notice had not been diarized and were therefore missed" and that during this period he was switching assistants and converting from a paper to electronic diary. While the overall delay goes beyond inadvertence and is further evidence of a systemic inattention to the file, I am satisfied that the penultimate dismissal arose as a result of "inadvertence" in the broadest sense of that word.

[46] Even if the dismissal arose as a result of negligence, in my view the second *Reid* factor has been satisfied.

Did the Plaintiff Move Promptly Once Aware of the Dismissal?

[47] SLS received the dismissal order on November 23, 2010. Although SLS claims they started preparing materials on December 8, 2010 and reported the matter to LawPro a week later and although LawPro retained Mr. Pickard on December 23, 2010 and Mr. Pickard in turn contacted Ms. Schultz on January 24, 2011 to advise that he intended to bring a motion, no motion materials were served until May 25, 2011, six months after the plaintiff's lawyers became aware of the dismissal. This does not qualify as moving promptly. Rule 37.14(1) requires the "notice of motion" to be "served" forthwith. This requirement is not satisfied by advising your adversary that a motion will be brought or even by booking a date.

[48] Although a motion had been booked for January 20, 2011 (without consulting defendant's counsel contrary to paragraph 5 of the Toronto Practice Direction) it did not proceed, nor had materials been prepared or served. A special appointment was required for a full day motion. Although the plaintiff encountered difficulties in obtaining the assignment of a master

and a case conference date to schedule the long motion, this does not explain why it took six months to serve the motion. The bulk of the delay in serving materials lies at the feet of counsel retained by LawPro who waited five months after their retainer before serving the motion material. There has never been an explanation of that delay. The plaintiff could have complied with rule 37.14 and the third *Reid* factor by serving their notice of motion promptly after receiving the dismissal order, returnable, if necessary, on "a date to be fixed." Even if LawPro lawyers had a volume of materials to review from SLS and extensive investigations were required to confirm the preservation of all relevant records and the availability of all potential medical witnesses in order to rebut the presumption of prejudice, the notice of motion should have been served forthwith to comply with rule 37.14. Supplementary motion records containing the extensive evidence that was ultimately prepared could have been served at a later date.

[49] The plaintiff has not satisfied the third *Reid* factor.

Prejudice

[50] As previously indicated and as conceded by the defendant, the action for a declaration of catastrophic impairment and certain benefits was commenced within two years of denial and the limitation period had not expired at the time the action had commenced. There is a legal issue with respect to the claim for other benefits that had been denied more than two years before the action was commenced, and although the time under section 281.1 of the *Insurance Act* extends the limitation to 90 days "after the mediator reports to the parties", the parties disagree whether that means after any report, including a draft, was delivered, or if it means delivery of the final report. With the first interpretation the action was commenced several weeks too late, but with the second interpretation it was commenced several days before the limitation period expired. A court will ultimately determine that issue at another time, but it is not necessary that I resolve it for purposes of this motion.

[51] Clearly the limitation period had expired by the time that the actions were dismissed. There is therefore a presumption of prejudice, however slight.

[52] The plaintiff has gone to great lengths to rebut the presumption of prejudice in the manner adopted in *Wellwood*: "by evidence that relevant documents have been preserved, key witnesses are available, certain elements of the claim may not be in issue, and in the case of personal injury, that medical evidence of the progress of the injuries is available." The evidence provided by the plaintiff is detailed, specific and thorough.

[53] The plaintiff's evidence starts with the fact that this is an action for accident benefits and as such the only issue is medical. The primary issue, the determination of catastrophic impairment, is solely a medical determination. Liability is not at issue in this action and as such there is no need to search for independent witnesses to the accident.

[54] The first application for accident benefits was received by the defendant as the accident benefits insurer on March 14, 2005, a week after the accident. The defendant has been involved in assessments of the plaintiff's condition since the first assessment of rehabilitation needs on March 20, 2005. The plaintiff has been treated or assessed by 21 different health care practioners

and all medical reports and records are preserved. The plaintiff was assessed 23 times for the defendant insurer between March 2005 and January 2008 by 11 different assessors, including an occupational therapist, a neurologist, an ophthalmologist, a psychologist, a rehabilitation optometrist, a chiropractor, a psychiatrist, a physiatrist and a kinesiologist. The assessments included rehabilitation needs, functional abilities and catastrophic impairment from a number of different specialties. She has also seen an orthopaedic surgeon and other specialists. The plaintiff's lawyers have preserved copies of all reports generated by the plaintiff or by the insurer. In particular they have preserved 16 reports on the issue of catastrophic impairment.

[55] The plaintiff's lawyers have conducted extensive searches and determined that all healthcare providers who assessed and/or treated the plaintiff are alive, still practise in Ontario and are available for trial. Most clinical notes and records have already been received and are preserved. In any event, physicians are required to keep a patient's medical records for at least ten years[57] and as such the earliest date they may be destroyed is March 2015. The plaintiff's lawyers have a decoded OHIP summary in their file from October 2, 2003 (three years pre-accident) to March 16, 2009, and since OHIP records are kept for seven years, an OHIP summary since March 2009 is still available. The plaintiff's education records, employment payroll records and income tax returns from 2000 to 2007 are preserved in the lawyer's file. The lawyers continued to forward clinical notes and records, medical reports and other records to the defendant through 2009.

[56] The insurer has had ample opportunity to do whatever meaningful investigations it wished including surveillance, additional assessments and meeting with the plaintiff herself. Indeed, the defendant has conducted numerous assessments, has paid the limit of medical and rehabilitation benefits and continues to pay income replacement benefits. It cannot be said the defendant has not been advised of her medical progress and needs.

[57] Clearly and convincingly the plaintiff has rebutted the presumption of prejudice. The onus thus shifts to the defendant to adduce any evidence of actual prejudice. The defendant has provided no evidence whatsoever of actual prejudice. This is likely because the defendant has not suffered any actual prejudice as a result of the delay or as a result of reliance on the finality of the dismissal order. The defendant relies on the presumption of prejudice caused by the passage of the limitation period, which as I have indicated has been rebutted by the plaintiff.

[58] The plaintiff has satisfied the fourth *Reid* factor.

CONCLUSION ON MOTION TO SET ASIDE REGISTRAR'S DISMISSAL

[59] In the nine-month period from issuance of the statement of claim on February 26, 2010 until dismissal of the action on November 19, 2010 nothing was done to advance the litigation except to serve the statement of claim on November 8, more than two months after the deadline for service under rule 14.08. Even though the delay was "only" nine months, I have determined that the delay was inordinate in the context of the purposes for which rule 48.15 was enacted,

[57] By policy directive of the College of Physicians and Surgeons of Ontario, Section 19 and by O. Reg. 114/94 under the *Medicine Act*.

namely to discourage delay at the front end of an action, prior to defence, and to prevent plaintiffs from commencing an action and then taking no steps or insufficient steps to pursue it. The Rules Committee has decided that six months is long enough to get a statement of claim served and a first defending document filed. I also determined that the delay was entirely due to neglect on the part of the plaintiff's lawyer and that the plaintiff herself always intended to pursue the action, was not aware of and did not condone the delay. There is no reasonable explanation for the delay.

[60] I also determined that the six month delay from the time that the plaintiff's lawyers became aware of the dismissal on November 23, 2010 until the motion was served on May 25, 2011 was inordinate and could not be considered moving promptly. The first month of that delay is attributable to the plaintiff's lawyers, SLS, and the remaining 5 months, after the file was reported to LawPro lie entirely at the feet of the lawyers retained by LawPro. It is not sufficient to advise the defendant that a motion is intended. It is not enough to book a motion. To comply with rule 37.14(1) and indeed the third *Reid* factor, a "notice of motion" must be "served" forthwith after learning of the registrar's order.

[61] As stated in cases such as *Marché* and *Wellwood*, excusing delays of such magnitude "risks undermining public confidence in the administration of justice." If the court consistently restores actions dismissed as abandoned simply because the rule 48.15 deadline is only six months and a six or nine month delay is not inordinate, then rule 48.15, and the front end delay it is designed to discourage, become meaningless and of no real effect.

[62] On the other hand I determined that missing the deadline under rule 48.15 arose from the lawyer's inadvertence, a further example of counsel's neglect. I also determined that the plaintiff rebutted the presumption of prejudice created by passage of the limitation period and that there was no actual prejudice arising from the delay or from reliance on the dismissal.

[63] I am mindful that where despite the delay the defendant is not unduly prejudiced, an indulgence is generally favoured, however the court must still consider all factors as well as the finality principle, which grows stronger with the passage of time. Even where the defendant could still defend itself despite the delay, "at some point the interest in the finality of litigation must trump the opposite party's plea for an indulgence." [58] As stated in *Marché*, "delay in an individual case surpasses the rights of the particular litigants and engages the public interest" and "excusing delays of such magnitude risks undermining public confidence in the administration of justice". Clearly in appropriate cases the court must "send the right message" and "provide appropriate incentives to those involved in the civil justice system."[59]

[64] The questions I must ask are whether the point has been reached *in this case* where finality of litigation should trump the plea for an indulgence and whether the magnitude of the delay *in this case* would undermine public confidence in the administration of justice such that the action not be reinstated in order to send the message that the court will not tolerate such delay.

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[58] *Marché v. Giant Tiger*, supra at para. 39
[59] *Marché v. Giant Tiger*, supra at para. 32

[65] I also take into account my determination that if the action is not restored, the plaintiff, who is personally innocent of the delay and default, will not be with a remedy as she would have a claim against her negligent lawyers. That would in effect transfer the burden on the plaintiff to commence an action against her lawyers rather than proceeding against the insurer who ceased paying her benefits. While the plaintiff may have a claim against her lawyers, it is not axiomatic that the court will foreclose pursuit of the action against the defendant insurer in order to satisfy the public's interest in discouraging delay.

[66] Whether in this case the finality of litigation must trump the plaintiff's plea for an indulgence and whether it is necessary to restrict the plaintiff's claim to an action against her lawyer must be determined by examining all relevant factors on a contextual basis. It will be necessary to resolve the tension in this case between determining the action on its merits and the public interest in discouraging delay.[60] The weight assigned to each consideration will vary from case to case. "The court's overriding objective is to achieve a just result – a result that balances the interests of the parties and takes into account the public's interest in the timely resolution of disputes."[61]

[67] The plaintiff has failed to satisfy two of the *Reid* factors, delay and moving promptly to set aside the dismissal. It has established the other two factors, dismissal due to inadvertence and absence of prejudice. The plaintiff need not rigidly satisfy all four factors. Although the litigation delay is inordinate in the context of rule 48.15, the overall delay between institution of action and dismissal is nine months. The additional delay of six months until the motion was served to set aside the dismissal brings the total delay to 15 months where nothing was done except late service of the statement of claim. The defendant, who has been involved with assessing the plaintiff since March 2005, has clearly not been prejudiced by this delay.

[68] While I do not excuse the delay, and while the plaintiff's lawyers have ignored the requirements of rule 48.15, I note that in context this is a claim for accident benefits. The plaintiff was actively pursuing her claim for benefits for over 4½ years between March 2005 and November 2009. She made applications, attended assessments and received benefits. When the maximum non-catastrophic benefits were paid and a catastrophic impairment designation was denied she pursued the mandatory mediation at FSCO. This action was commenced within approximately 90 days after the mediation was reported as failed. The defendant was actively involved in the entire process. The 15 month litigation delay is relatively short compared to the active period that preceded it.

[69] I also note that in *Wellwood*, being the only action where the Court of Appeal has dealt with early stage dismissals as abandoned, the court refused to reinstate the action where not only had six months passed between statement of claim and dismissal as abandoned, but an additional 22 months before a motion was served to set aside the dismissal. The latter delay was the focus of the court's concern in that case. The delay in serving the motion in the matter before me was six months. Further, in *Wellwood*, unlike here, the plaintiff failed to rebut the presumption of

[60] *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, supra at paras. 20-22
[61] *Hamilton (City) v. Svedas Koyanagi Architects Inc.*, supra, at para. 23

prejudice. I am also mindful that the plaintiff herself was neither aware of nor condoned the delay in the litigation in this case.

[70] Considering all factors in context, and mindful of balancing the interests of both parties as well as the public's interest in the timely resolution of disputes, I am of the view that the point has not been reached in this case where finality of litigation should trump the plea for an indulgence to the innocent plaintiff nor has the magnitude of the delay in this case reached the point where it would undermine public confidence in the administration of justice. To the contrary, the unique circumstances of this being an accident benefits claim where the defendant insurer has been assessing the plaintiff's medical condition and claims for benefits almost continuously since shortly after the accident, the complete absence of prejudice and the plaintiff's personal "innocence" in the delay carries greater weight than the nine month delay in the litigation caused by her lawyer even combined with the six month delay in serving the motion. In my view this is not a case where the plaintiff should be forced to seek compensation against her lawyers, rather than from the accident benefits insurer. Justice would be best served by allowing the action to proceed against the defendant and be determined on its merits.

[71] I therefore conclude that it is just to order that the order of the registrar dismissing the action be set aside. The defendant, who through years of involvement is fully familiar with the case should be in a position to deliver a statement of defence within 20 days. In case the defendant defaults, I will extend the rule 48.15 deadline for three months to allow time to obtain a default judgment.

MOTION TO EXTEND TIME TO SERVE STATEMENT OF CLAIM

[72] Rule 14.08(1) requires that "the statement of claim shall be served within six months after it is issued." Rule 14.08(3) makes this service deadline subject to rule 48.15. As noted the statement of claim was served on November 8, 2010, 8½ months after the statement of claim was issued and beyond the six month mandated by rule 14.08. Service was however effected before the action was dismissed. Rule 3.02(1) permits the court to extend any time prescribed under the rules, on such terms as are just.

[73] The test for an extension of time to serve a statement of claim is set out by the Court of Appeal in *Chiarelli v. Wiens*.[62] The only issue on such motion is whether the defendant will be prejudiced by the extension.[63] The prejudice must arise because of the delay in service.[64] The onus of showing the defendant would not be prejudiced is on the plaintiff, although if the defendant is seriously claiming it will be prejudiced by an extension it has at least an evidentiary burden to provide some details.[65]

[62] *Chiarelli v. Wiens*, [2000] O.J. No. 296, 46 O.R. (3d) 780 (C.A.)
[63] *Chiarelli v. Wiens*, supra at para. 10
[64] *Chiarelli v. Wiens*, supra at para. 16
[65] *Chiarelli v. Wiens*, supra at para. 14

[74] I have already set out in some detail how the plaintiff has shown on proper evidence that the defendant has not been prejudiced by the delay in the litigation. The same considerations apply to the delay in service of the statement of claim. There is no evidence from the defendant of actual prejudice. The defendant will not be prejudiced if the extension is granted. Further, since service has already been effected and since service was made before the action was dismissed it is just to grant the extension of time nunc pro tunc and validate the service made on November 8, 2010.

COSTS

[75] Although the plaintiff was successful in having the registrar's dismissal set aside and having the time for service of the statement of claim extended, a very significant indulgence was granted to the plaintiff. The plaintiff suggests the motion ought not to have been opposed. I disagree. It was very reasonable of the defendant to oppose the motion. There has never been a fulsome explanation of the delay in the litigation or in serving the motion to set aside the dismissal. The plaintiff's lawyers demonstrated an abject and systemic inattention to this file. While I was of the view that the just order was to restore the action, an order maintaining the registrar's dismissal would also have been justified on the evidence. In my view this is a case where costs should be awarded to the defendant notwithstanding that it was unsuccessful in resisting the motion. Although the plaintiff's lawyers' conduct in the action could be characterized as negligent, it was not the sort of reprehensible conduct which would attract costs on the substantial indemnity scale. Costs will be on the partial indemnity scale.

[76] The defendant has presented a cost outline indicating actual costs incurred of $33,616 and partial indemnity costs of $22,824. I take no issue with the hourly rate charged by defendant's counsel on a partial indemnity scale and I have no doubt the hours claimed were spent. The fixing of costs however is not simply a mathematical exercise of multiplying hours by an hourly rate. The court must consider all relevant factors including those set out in rule 57.01 and award costs that are fair and reasonable in the circumstances and which represent what the unsuccessful party should reasonably have anticipated to pay for the costs of the motion. While indemnity is a factor it is only one factor.

[77] The motion was extremely important to both parties since continuation of the action was at stake. The issues were complex both legally and factually. A number of Court of Appeal decisions need to be considered and a novel issue was raised concerning dismissal in the context of an early stage dismissal as abandoned. The defendant reviewed extensive materials prepared by the plaintiff and prepared a responding motion record which filled in a number of gaps in the history set out in the plaintiff's affidavits, a detailed factum and a book of authorities. It was necessary to cross-examine three of the plaintiff's lawyers who filed affidavits in order to flesh out the reasons for the delay. A full day was set aside to argue the motion.

[78] Some of the time claimed by the defendant is more properly costs of the action, rather than costs of the motion. For example costs incurred before the motion was brought are more properly costs of the action including receipt of the notice of case expiry, receiving and reviewing the statement of claim and considering a statement of defence. The time spent in

reviewing the law on whether the limitation period for commencing action for some benefits had expired before the action was commenced (based on when the mediator "reported" to the parties) was of little or no value to the issues on the motion (since the limitation period had clearly expired by the time the action was dismissed), but will be of value in supporting a limitations defence at trial.

[79] In all of the circumstances I am of the view that costs of $16,500 inclusive of HST and disbursements are fair and reasonable in the circumstances, and considering the work also done by plaintiff's counsel, within the reasonable expectations of the plaintiff.

[80] The defendant has not sought costs against the lawyers for the plaintiff nor have the lawyers been put on notice under rule 57.07(2). Costs will therefore be awarded against the plaintiff personally. In light of my conclusions that the negligent conduct of the lawyers caused the delay and the dismissal and ipso facto necessitated this motion, it is my expectation that the plaintiff's lawyers will absorb these costs personally or through LawPro and will neither call upon their client to pay the costs nor charge their client for the time they spent on this motion.

ORDER

[81] I hereby order as follows:

(1) The order of the registrar dated November 19, 2010 dismissing the action as abandoned is set aside.

(2) The time for service of the statement of claim is extended nunc pro tunc to November 8, 2010 and service is validated as of that date.

(3) The defendant will deliver its statement of defence by October 25, 2011.

(4) The deadline for dismissal as abandoned under rule 48.15 is extended to January 6, 2012.

(5) The plaintiff shall pay to the defendant its costs of this motion within 30 days fixed in the sum of $16,500.00.

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Master R. Dash

DATE: October 4, 2011