

**CITATION:** Broome v. Western Assurance, 2023 ONSC 1732  
**COURT FILE NO.:** CV-19-14095  
**DATE:** 20230315

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Jennifer Broome, Plaintiff

**AND:**

Western Assurance Company, Defendant

**BEFORE:** The Honourable Regional Senior Justice M.L. Edwards

**COUNSEL:** Mark Stoiko, for the Plaintiff

Jennifer M. Cosentino, for the Defendant

**HEARD:** March 13, 2023

**ENDORSEMENT**

[1] When is too long for a party to amend a claim to add punitive damages after the action has been set down for trial?

**The Facts**

[2] This matter dates back to a motor vehicle accident which occurred on July 21, 2011, nearly 12 years ago. The plaintiff claimed accident benefits from the defendant and commenced an action in November 2013.

[3] I have been case managing this file since approximately February 2021. On February 8, 2021, I ordered the plaintiff to file the trial record by April 29, 2021. In May 2021, the plaintiff retained her present counsel.

[4] On May 13, 2021, the parties attended a pre-trial before me with an understanding that the matter would have a further pre-trial in June 2022 and that the matter would proceed to trial in November 2022.

[5] Further case conferences took place in April 2022, August 2022, and November 2022. The purpose of all of the case conferences was to move the matter along so that the case would be ready for trial. On November 21, 2022, I ordered with the consent of the parties that this matter would proceed to a global mediation on June 29, 2023 and a trial in November 2023.

[6] At no time during the course of any of the aforementioned case conferences did plaintiff's counsel advise the court, let alone put the defendant on notice, of his intention to bring a motion to amend the pleadings to add a claim for punitive and aggravated damages.

- [7] Plaintiff's counsel conceded in argument that the earliest indication that he gave to counsel for the defendant about his client's intention to amend the claim was not until he actually served his motion materials either in late December 2022 or early January 2023.

### **Position of the Plaintiff**

- [8] The plaintiff relies on Rule 26.01 of the *Rules of Civil Procedure* (the "Rules"), which requires the court to grant leave to amend a pleading unless prejudice will result that could not be compensated for by costs or an adjournment. The plaintiff also relies heavily on the concept of his client's entitlement to protection under the *Statutory Accidents Benefits* regime, which is intended to be consumer protection legislation.
- [9] Mr. Stoiko relies on a decision of the Court of Appeal, *Pucci v. Wawanese Mutual Insurance Co.*, 2020 ONCA 265 for the proposition that an insurer has an obligation to act in good faith towards its insured as it relates to an accident benefits dispute.
- [10] Mr. Stoiko argues that there has been a significant change in circumstances given various updated medical reports which have been supplied to the defendant, which he says should have caused the defendant to pay his client the accident benefits claimed in this litigation.

### **Position of the Defendant**

- [11] Ms. Cosentino acknowledges the application of Rule 26.01 and Rule 48.04 of the Rules and stresses that given the timing of the motion and its proximity to the fixed trial date that there is significant prejudice to the defendant and, for that matter, prejudice to the plaintiff herself. The prejudice to all parties flows from the very real possibility that the trial date might be adjourned as the defendant would be seeking as a condition of any order amending the claim, an order allowing for further discovery of the plaintiff; further productions; and the possibility of further defence medical examinations.

### **Analysis**

- [12] In *Marks v. Ottawa (City)*, 2011 ONCA 248, the Court of Appeal affirms that there is no absolute right to amend pleadings and that the factors to be considered in relation to a motion under Rule 26 are as follows:
- (a) An amendment should be allowed unless it would cause an injustice not compensable in costs;
  - (b) The proposed amendment must be shown to be an issue worthy of trial and *prima facie* meritorious;
  - (c) No amendment should be allowed which if originally pleaded would have been struck; and
  - (d) The proposed amendment must contain sufficient particulars.

- [13] The law with respect to the application of Rule 26 was further reviewed by the Court of Appeal in *1588444 Ontario Ltd. v. State Farm Fire and Casualty Co.*, 2017 ONCA 42. The principles applicable are summarized by the Court of Appeal at paragraph 25 and confirm that the court must grant leave to amend unless the responding party would suffer non-compensable prejudice. The Court of Appeal in *1588444 Ontario Ltd.* further confirms that the amendment may be granted at any stage of the action and that, as it relates to prejudice, the prejudice must flow from the amendments and not from some other source. Of particular importance in the Court of Appeal decision is confirmation that at some point, the delay in seeking an amendment would be so lengthy and the justification so inadequate that prejudice to the responding party will be presumed.
- [14] As it relates to the issue of delay in the pursuit of a motion to amend a pleading, the most recent decision of the Court of Appeal on this issue can be found in *Horani v. Manulife Financial Corporation*, 2023 ONCA 51 where the Court of Appeal found a presumption of prejudice where the appellants were seeking leave to amend their pleading seven and a half years after the incident in question and four years after the action had been set down for trial.
- [15] On the facts of the case before me, the motion to amend was brought more than nine years after the issuance of the plaintiff's statement of claim; nearly seven years after the closure of pleadings and five years after the last examinations for discovery.
- [16] There is almost no explanation for why the plaintiff did not move more expeditiously to amend her statement of claim to plead punitive damages. In oral argument, Mr. Stoiko apologized for the late notice but, in my view, while his apology was genuine, it is little explanation for the tardiness of the plaintiff in pursuit of a claim for punitive damages.
- [17] What is particularly egregious is this matter has been case managed by me for nearly two years. The purpose of case management, in this particular case, as it is in so many cases, is to streamline the litigation in an effort to move the matter along to its ultimate conclusion, that being either settlement or a trial.
- [18] Counsel for all parties have agreed to a timetable that would see this matter tried in November 2023. To bring a motion at this late stage seeking an amendment to plead punitive damages requires this court to exercise its discretion against the plaintiff's motion. The delay is now so egregious that prejudice can be presumed. It would be inappropriate to grant the relief sought where this case is for all intents and purposes on the "eve of trial".
- [19] The plaintiff's motion is dismissed. The parties have agreed that the costs should be fixed in the amount of \$2,500 to the successful party. As such, I am ordering that the client pay costs fixed in the amount of \$2,500 within 30 days from today's date.



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Edwards, RSJ.

**Date:** March 15, 2023