

## CASE SUMMARY

*Gagnier v Burns, 2021 ONSC 1971*

### **OVERVIEW**

The Plaintiffs successfully moved to strike the Defendant's civil jury notice. This is the first decision of its kind in the Windsor-Essex region. Regional Senior Justice B.G. Thomas relied upon the Ontario Court of Appeal's "clear [...] guidance" in *Louis v Poitras, 2021 ONCA 49*, concluding that providing a resolution of the litigation "in the most just manner possible" involved striking the Defendant's jury notice. His Honour ordered that the jury notice be struck and directed that the matter be placed on an appropriate civil trial running list to commence in 2021, either in person or by video conference.

### **FACTS**

The Plaintiffs were injured in a motor vehicle collision on September 5, 2013. While liability and damages were in issue, the parties agreed that the "the overriding issue is causation". The Statement of Claim was issued on December 8, 2014 and the action was set down for trial on November 7, 2017, more than three years ago. The action was scheduled to proceed to an eight-week jury trial commencing on February 22, 2021. The trial was cancelled due to COVID-19 and a lack of judicial resources. The Plaintiffs motion was originally scheduled to be heard in December 2020, but was adjourned to allow the Court to more accurately assess the local judicial resources.

### **ANALYSIS & TAKEAWAYS**

Justice Thomas noted that in November 2020 an amendment to the Rules of Civil Procedure allowed for a trial by video conference. By Notices to the Profession and Public Regarding Court Proceedings, dated November 21, 2020 and January 13, 2021, Chief Justice Morawetz strongly encouraged the use of virtual hearings wherever possible. Further, Rule 1.04 specifically dictates that the Rules should be "liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

The disparities in court resources (both physical and human), differences in caseloads, as well as the progression of the COVID-19 pandemic were noted to be crucial factors in determining whether a party's jury notice should be struck. His Honour opined that consistent with the Court's direction in *Louis*, it is "essential to consider the local conditions of the Superior Court in Windsor." Justice Thomas engaged in a thorough review of Windsor's limited courtrooms, limited capacity for in-person appearances, as well as the numerous criminal matters awaiting trial. His Honour further noted that there are currently 34 outstanding civil jury matters in Windsor awaiting trial and waiting to be assigned dates in 2022. The cumulative estimated trial times for these matters is 94 weeks. Justice Thomas commented as follows:

This action will necessarily compete with those trials but only to the extent that the ongoing criminal jury trials do not occupy all available courtrooms. In addition, there is family law litigation which cannot be tried virtually. Considerable delay in the hearing of this trial is inevitable.

Justice Thomas opined that delay in obtaining a date for a civil jury trial can, by itself, constitute prejudice justifying the striking of a jury notice. Notably, Justice Thomas rejected the Defendant's argument that the plaintiffs had been compensated by way of long term, CPP-D, and accident benefits and were therefore "not in financial jeopardy", stating the benefits received by the Plaintiffs provided no evidence as to the needs of the family but, rather, provided an indication as to the seriousness of their injuries.

Justice Thomas found that an impartial judge would be capable of determining the issues of liability, damages, and quantum of damages without a jury. With regards to the option of a virtual trial, His Honour commented that "there is no functional reason to shy away from a trial held by video conference", given that civil trials have been successfully conducted in this manner in the Southwest Region. Citing Justice Brown's decision in *George Weston Ltd v Domtar Inc, 2012 ONSC 5001*, his Honour concluded that Courts must offer litigants creative, cost-attractive trial options to address the crisis currently affecting our justice system.