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INSURANCE LAW BULLETIN

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COVID-19 – Striking the Jury Notice: The “Wait and See” Approach *Pietsch et al. v. Lyons*

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Introduction

As we approach one year of grappling with COVID-19 and its consequences, a number of decisions have been released dealing with jury actions. This morning, Justice Rady released her decision in *Pietsch et al. v. Lyons*, in which the plaintiffs sought an order striking the jury notice on two grounds. First, the expected expert evidence would be too complex for a jury to understand. Second, and more importantly, the jury notice should be struck because the COVID-19 pandemic has made it unlikely that the case, with a jury, would be tried in a timely way, thus forcing the plaintiffs to suffer prejudice resulting from delay.

Facts

The case involved a motor vehicle accident that occurred in October of 2013. The plaintiff issued the Statement of Claim nearly two years later. The action is set to commence jury selection in September of 2021.

The plaintiff first argued that the biomedical and medical expert evidence would be too complicated for a jury to understand. Additionally, a jury trial would require waiting in a backlog of cases caused by the pandemic. In essence, the plaintiff claimed that a jury trial would be too complicated and unduly delay a resolution of the action.

The defendant submitted that the plaintiff’s argument regarding complexity of the case had not been raised previously and thus should not be given any weight. With respect to the pandemic delay, the defendant advocated a “wait and see” approach.

Decision

Justice Rady adopted the defendant’s position and did not strike the jury notice. She found that the complexity argument ignored the fact that trials are dynamic processes with unpredictable twists and turns throughout the litigation. Justice Rady noted that Rule 47.02(3) permits the trial judge to strike a jury as the evidence unfolds during trial or even at the outset of trial if it should be required.

In response to the plaintiff's pandemic delay submissions, Justice Rady held that "an allegation of delay alone has been held to be an insufficient basis on which to strike a jury." In other words, the plaintiff's argument relied too heavily on conjecture. Justice Rady also noted that the courts have been adapting by introducing virtual hearings, outfitting courtrooms, and implementing enhanced electronic filing to the court system. As such, it is not clear that a non-jury case is more likely to be heard before a jury trial.

Finally, Justice Rady noted that this case was not "on the eve of trial", making the wait and see approach the more suitable choice.

The plaintiff's motion was dismissed as premature and without prejudice to it being renewed in the future as circumstances may change.

Conclusion

While it previously seemed that opposing a motion to strike a jury notice during the pandemic was destined to failure, Justice Rady's decision provides that there is hope for litigants who wish to see their case decided by a jury.