

Leveraging Delay: How to use a Plaintiff's Delay to a Defendant's Advantage

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Often, defendants and their insurers wonder why plaintiffs get away with delaying litigation for so long, without courts dismissing their actions for delay. What if the defendants have been prejudiced by the passage of time? The answer, sometimes, may have to do with whether defendants have contributed to delays, or caused their own prejudice, and provides guidance in how we run our practices. Defendants ought to consider leveraging potential delay by obtaining and preserving evidence from the outset, and advancing the litigation to increase the presumption of prejudice.

In the recent decision of [Batji v. Koku](#), a motion successfully argued by our office on behalf of the E&O insurer of the plaintiffs' counsel, the Ontario Superior Court set aside an administrative dismissal of an action. They did so despite the fact that seven years had passed since the claim was issued, and between 8 to 14 years had elapsed since the underlying events. We were successful in obtaining a cost award of \$12,000.

How can up to 14 years pass, and a court still allow the action to proceed? The main reason has to do with the issue of prejudice.

In setting aside an administrative dismissal in Ontario, the following four factors are considered:

- a) the explanation for the delay;
- b) any inadvertence in missing the deadline;
- c) whether the motion to set aside the dismissal was brought promptly; and,
- d) whether there would be prejudice to the defendants if the action were restored.

All of these factors need not be met; courts primarily consider the extent of prejudice in determining whether to set aside an administrative dismissal. The primary principle is to hear

actions on their merits, and not allow an innocent client to suffer because of his or her lawyer's inadvertence.

The court in *Batgi* found that while there were delays, the defendants had no complaint about the pace of the litigation. In that case, the parties were both unaware of an administrative dismissal for two years, and proceeded as if the matter was proceeding towards trial, albeit slowly. The court affirmed the principle that, while it is the plaintiffs' primary responsibility to move an action forward, the defendants cannot 'lie in the weeds' and take no steps, only later to complain about the delay.

The defendants in *Batgi* also complained of prejudice because of the loss of a witness and some documents. The court found that the defendants' failure to take witness statements or preserve documents earlier on could not be blamed on the plaintiffs' delay, but on the defendants themselves.

Discussion

What are the implications as defendants, and what can we do about the issues of delay and prejudice?

1. Preserve Documents and Witness' Evidence

Ensure that all relevant documents are obtained from your insured at the outset of litigation. Locate witnesses and obtain statements early on. As time passes, it may be hard to locate witnesses, memories fade, and witnesses may become ill or die. Documents may get lost. Even if the plaintiff isn't pushing the litigation forward, preserving relevant evidence at the outset will permit the defendant to put its best foot forward.

2. Push Litigation Forward and Oppose Delays where Appropriate

A defendant's strategy is often to maintain a low profile. While this sometimes makes sense in context, at other times, it can create a disadvantage. While we don't want to wake up a "sleeping dog", we need to ensure that we are protecting our insured's interests. Taking periodic steps may assist in later arguing prejudice arising from a plaintiff's delay.

Consider whether taking active steps will help your insured. Can it show that you are not accepting delay? Can you identify the prejudice that the insured faces? Can it strengthen the insured's case?

The longer a plaintiff delays, the more there is a rebuttable presumption of prejudice in favour of the defendants. Contacting the plaintiff's counsel periodically can help establish that the plaintiff's delay is inordinate, inexcusable, or intentional, thus giving rise to a presumption of prejudice, or perhaps even demonstrating actual prejudice.

Taking intermittent steps to push forward the litigation may also help the merits of a case, improve efficiency, and reduce costs. For instance, regularly telling a self-represented plaintiff

that s/he needs an expert report on standard of care in a professional liability case can help set up the insured to win a summary judgment motion down the road when the plaintiff fails to produce one.

3. Be Reasonable

Consider when it is appropriate to oppose the plaintiff's position, and when it is prudent to consent. In *Batji*, we successfully obtained a cost award of \$12,000, while getting the administrative dismissal set aside. The court determined that there was no indulgence being granted. The parties had been unaware of the dismissal for two years, and the motion was brought promptly when counsel learned of it. Rather, the court concluded that both parties assumed the action was proceeding, and acted at a pace that seemed to suit both.

The Bottom Line

Where a plaintiff has delayed an action, the delay may be leveraged to the defendant's advantage. Preserving evidence from the outset, including documents and witness statements, ensures that the insured can put his best foot forward. Taking steps to push forward, where appropriate, can increase the presumption of prejudice for the insured, improve efficiency and potentially reduce costs.