Date: 20240702
Docket: CI 08-01-58965
(Winnipeg Centre)
Indexed as: Rummery et al. v.
The Winnipeg Regional Health Authority and Dr. Erik R. Smith
Cited as: 2024 MBKB 98

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

GARY RUMMERY, BRIAN WEATHERBY AND MAURICE RUTHERFORD, AS EXECUTORS OF THE ESTATE OF DALE ALWYN GEORGE PARKINSON, AND THE SAID ESTATE OF DALE ALWYN GEORGE PARKINSON,	)	E. Beth Eva for the plaintiffs
plaintiffs,	)	Kelly L. Dixon for The Winnipeg Regional Health Authority
- and -	)	
THE WINNIPEG REGIONAL HEALTH AUTHORITY AND DR. ERIK R. SMITH,	)	G. Todd Campbell Adam J. Meyers for Dr. Erik R. Smith
defendants.	)	
(BY ORIGINAL ACTION)	)	
AND BETWEEN:	)	
JANE PARKINSON AND BRETT PARKINSON,	)	E. Beth Eva for the plaintiffs in the original action
plaintiffs,	)	
- and -	)	
THE WINNIPEG REGIONAL HEALTH AUTHORITY AND DR. ERIK R. SMITH,	)	
defendants.	)	JUDGMENT DELIVERED: July 2, 2024

LANCHBERY J.

INTRODUCTION

[1] On November 27, 2006, Dale Alwyn George Parkinson (Mr. Parkinson) presented at the Salvation Army Grace General Hospital (Grace Hospital) complaining of chest pain. Mr. Parkinson was treated by Dr. Erik Smith (Dr. Smith). Within a few hours, Mr. Parkinson was released from hospital after Dr. Smith determined Mr. Parkinson's symptoms were gastrointestinal in origin.

[2] Some time after Mr. Parkinson's release from hospital, he died from what is commonly known as a heart attack. An autopsy was performed. The autopsy report concluded Mr. Parkinson suffered from myocardial infarction and atherosclerotic coronary disease. Additional findings included critical atherosclerotic stenosis of the proximal left anterior descending and circumflex coronary arteries.

[3] The plaintiffs filed a Statement of Claim on November 12, 2008, alleging Dr. Smith and the Winnipeg Regional Health Authority (WRHA) were negligent in the care provided.

ISSUES

[4] The defendants bring summary judgment motions, arguing the plaintiffs' delay in prosecuting this action, which arose in 2006 and was not scheduled for trial until January 2025, is without justification. Therefore, the delay is both

inordinate and inexcusable, resulting in prejudice to both defendants and should be dismissed.

Timelines

- On August 19, 2009, Dr. Smith filed a Statement of Defence;
- On February 17, 2010, Mr. Campbell wrote to Ms. Eva requesting that she provide her availability for discoveries (Exhibit A of Affidavit of Agnes Tolka sworn February 23, 2024 (Tolka Affidavit));
- On July 20, 2010, Mr. Campbell provided Ms. Eva with an expert report from Dr. Merrill Pauls, an Emergency Physician (Exhibit B to Tolka Affidavit);
- On December 17, 2010, Ms. Eva wrote to Mr. Campbell to advise the plaintiffs retained an expert to respond to Dr. Pauls' report and requested that he provide Dr. Smith's Affidavit of Documents (Exhibit C to Tolka Affidavit);
- On March 21, 2011, Mr. Campbell wrote to Ms. Eva requesting the report of the expert that she previously advised the plaintiffs had retained and the plaintiffs' Affidavit of Documents (Exhibit D to Tolka Affidavit);
- Between July 26, 2011 and January 9, 2012, Mr. Campbell wrote to Ms. Eva on five occasions requesting a response to his letter of March 21, 2011 (Exhibit E, F, G, H and I to Tolka Affidavit).

During this timeframe, Mr. Campbell provided Ms. Eva with a draft Affidavit of Documents of Dr. Smith (Exhibit G to Tolka Affidavit);

- On February 4, 2012, Ms. Eva provided Mr. Campbell with three expert reports from Dr. John Rabson. Two of those reports were from 2008 and the other report was from 2011 (Exhibit J to Tolka Affidavit);
- On April 4, 2012, Ms. Eva provided Mr. Campbell with a draft Affidavit of Documents of the plaintiffs (Exhibit K to Tolka Affidavit);
- On July 4, 2012, Mr. Campbell wrote to Ms. Eva requesting her client's availability to schedule examinations for discovery (Exhibit L to Tolka Affidavit);
- Between September 12, 2012 and March 15, 2013, Mr. Campbell wrote to Ms. Eva on four occasions requesting a response to his letter of July 4, 2012 (Exhibits M, N, O and P to Tolka Affidavit);
- On March 19, 2013, Ms. Eva wrote to Mr. Campbell providing copies of the documents listed in Schedule A of the plaintiffs' Affidavit of Documents, and provided a list of available dates for examinations for discovery (Exhibit Q to Tolka Affidavit);
- On March 27, 2013, Mr. Campbell wrote to Ms. Eva providing copies of the documents listed in Schedule A of Dr. Smith's Affidavit of Documents (Exhibit R to Tolka Affidavit);

- On April 13, 2013, Mr. Campbell wrote to Ms. Eva requesting that she provide additional dates for examinations for discovery during the summer of 2013 (Exhibit S to Tolka Affidavit);
- Examinations for discovery of Dr. Smith and the plaintiffs' representative, Jane Parkinson, took place on January 15 and 16, 2014;
- On September 28, 2015, Mr. Campbell wrote to Ms. Eva stating that he had not heard from her since the examinations for discovery and requested that she provide the plaintiffs' answers to undertakings (Exhibit T to Tolka Affidavit);
- Between November 9, 2015 and March 8, 2017, Mr. Campbell wrote to Ms. Eva on four additional occasions requesting that she provide the plaintiffs' answers to undertakings (Exhibits U, V, W and X to Tolka Affidavit);
- On May 12, 2017, Dr. Smith filed a Notice of Motion to compel production of the plaintiffs' answers to undertakings;
- On May 19, 2017, before Dr. Smith's motion was heard, Ms. Eva wrote to Mr. Campbell providing partial answers to undertakings and a summary of the plaintiffs' claim for damages (Exhibit Z to Tolka Affidavit);
- On September 24, 2019, Ms. Eva wrote to Mr. Campbell providing further answers to undertakings, a quantification of the plaintiffs'

damages claim, and an expert report from M Group Chartered Professional Accountants LLP (Exhibit AA to Tolka Affidavit);

- Between November 29, 2019 and February 7, 2020, counsel for all parties exchanged e-mails regarding their clients' positions on damages (Exhibit BB to Tolka Affidavit);
- On June 1, 2020, Mr. Campbell provided Ms. Eva with an expert report from Dr. Lorne Gula, a Cardiologist (Exhibit CC to Tolka Affidavit);
- On September 23, 2022, the plaintiffs filed a pre-trial conference brief (Exhibit DD to Tolka Affidavit). The initial pre-trial conference took place on December 15, 2022;
- At the pre-trial, I ordered the plaintiffs to provide an expert on the standard of care for emergency physicians by May 1, 2023. It was not until January 8, 2024, 13 months from the deadline agreed to by plaintiffs' counsel, and 8 months after the report was due; and
- The plaintiffs' expert report on standard of care was provided over 17 years after Mr. Parkinson presented at the Grace Hospital, and over 15 years since the Statement of Claim was filed.

[5] It is important to highlight that at the December 15, 2022 pre-trial, the WRHA sought permission to file a delay motion. I decided I required further information prior to making this decision. I booked trial dates on the condition this action was without prejudice to the WRHA bringing their motions at a future

date. I booked the trial dates at the pre-trial conference so as to not unduly delay the hearing of the claim in the event I did approve any motions for delay. The pre-trial conference memorandum referenced this decision was made without prejudice, and that the plaintiffs did not object to this process. At the next pre-trial, permission was granted to both the WRHA and Dr. Smith to proceed with these delay motions again without objection.

Positions of the Parties

The Defendants

[6] The defendants argue, since the new delay rules came into force in 2018, courts in Manitoba are engaged in a culture shift regarding the extent of the delay that will be tolerated. This rule is linked to the court's overall concern on access to justice.

[7] The defendants cite ***The Workers Compensation Board v Ali***, 2020 MBCA 122, in support of its position the action should be dismissed.

[8] They also cite ***Law Society (Manitoba) v. Eadie***, 1988 CarswellMan 157, in support of its position. The facts in this case are:

(a) This is a straightforward medical malpractice case that by the date of the trial will be 18 years old;

(b) Although there may be some complexity in the calculation of the quantum of damages, this is a claim under ***The Fatal Accidents Act***, C.C.S.M. c. F50, the remaining issues are straightforward;

(c) Almost 16 years has passed since the Statement of Claim was filed;

(d) The plaintiff's explanation for the delay is unreasonable; and

(e) The passage of time is prejudicial to the defendants. (***Ali*** and ***Ian Dmytriw et al v. Jonah NK Odim et al***, 2020 MBCA 112)

The Plaintiffs

[9] The plaintiffs argue the evidence filed by the defendants is seriously deficient and grossly misrepresents the progress and steps taken in the action.

[10] These deficiencies include missing correspondence exchanged between counsel. The WRHA's answers to undertakings were provided on February 21, 2018, when the undertaking was given on January 16, 2014. In support of its position, Ms. Eva references paragraphs 76 and 77 of the ***Ali*** decision. Further, she argued that answers to undertakings were significant advances in the litigation.

[11] Dr. Smith, during his examination for discovery, incorrectly stated he was not in possession of any other expert reports, which is factually incorrect. On November 30, 2022, counsel provided additional expert reports; one from Dr. Pinchuk, dated October 21, 2012; and another report from Dr. Pauls, dated March 10, 2012.

[12] Only when the plaintiffs provided a report from Mr. Alan Martyszenko for the loss calculations in September 2019, did the defendants argue the plaintiffs were not entitled to bring a claim for any loss resulting for diminution of the Estate's value.

[13] The plaintiffs argue the requirement of ***Manitoba Court of King's Bench Rules***, M.R. 553/88 Rule 24.01, is there must be significant prejudice as a result of the delay, which is not made out.

[14] The plaintiffs argue it was the defendants' lack of action that is responsible for the delay and therefore should be dismissed.

ANALYSIS

[15] The leading case on delay is ***Ali***. Cameron J.A. set out the proper approach:

> [39] I will begin with the obvious. There are two issues to be addressed on a motion to dismiss for delay pursuant to r 24.01. The first is whether there has been delay; the second is whether the delay has resulted in significant prejudice (r 24.01(1)).
>
> [40] When assessing the issue of delay, the court must decide whether it has been inordinate and inexcusable. The wording is conjunctive; the moving party has the onus to establish both requirements.
>
> [41] In keeping with *Oliver*, the proper approach to be taken when deciding whether a delay is "inordinate and inexcusable" is to determine whether the delay is "in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case" (r 24.01(3)). This involves consideration of the first four factors identified in *Eadie*, as well as any other relevant circumstances, and would include a consideration of the current status of the litigation in comparison to a reasonable comparator (discussed below) and the role of each party in the overall delay.
>
> [42] Although the moving party has the onus to prove that the inordinate delay is inexcusable, "[a]s a rule, until a credible excuse is made out, the natural inference would be that [inordinate delay] is inexcusable" (*Allen v McAlpine (Sir Alfred) & Sons, Ltd*, [1968] 1 All ER 543 at 561 (CA)). Appellate courts across Canada have adopted this principle. Thus, upon inordinate delay being established, the onus upon the moving party to establish inexcusable delay will essentially be met, and the plaintiff will be called upon to justify the delay (see *Ross v Crown Fuel Co Ltd et al* (1962), 1962 CanLII 541 (MB CA), 37 DLR (2d) 30 at 50 (Man CA)). The issue is then whether the nature and quality of the evidence provides the judge with a clear and meaningful explanation for the delay in the particular circumstances of the case.

> [43] If the delay is found to be inordinate and inexcusable, significant prejudice to the moving party is presumed (see r 24.01(2)). The presumption is rebuttable.
>
> [emphasis in original]

Was there Delay?

[16] This claim is not complicated. Mr. Parkinson presented at the hospital complaining of chest pain. The physicians attributed his symptoms to a gastrointestinal problem. He was treated based on this diagnosis and released three hours later. Shortly thereafter, Mr. Parkinson suffered a heart attack.

[17] Just before the limitation period expired, the plaintiffs' claim was filed.

[18] In answer to the first two factors posed in ***Eadie***, the case at bar is a straightforward medical malpractice claim involving whether the physician erred by not being alert to heart disease as a potential cause of the chest discomfort; should Dr. Smith have discharged Mr. Parkinson before six hours elapsed from the initial presentation; should another blood panel been completed before discharge; and was Mr. Parkinson discharged too soon after the administration of morphine?

Is the Delay Prejudicial to the Defendants?

[19] The plaintiffs cite ***City Sheet Metal Co. Ltd. v. Euromax Canada Inc.***, 2021 MBQB 118 in support of their argument, a seven-year delay did not mean that a witness' ability to recall events is not prejudicial. Edmond J. (as he then was) found:

> [45] I have no doubt that it may be difficult for witnesses to recall and accurately testify regarding events that occurred in 2008. That said, this

> is an action based on an alleged wrongful termination of a distributorship agreement. The issues to be determined will be whether there was a distributorship agreement in place, and if so, who are the parties to the agreement and whether reasonable notice was given to terminate the agreement. Other issues include mitigation and damages. It is anticipated that the trial will only last three days and not many witnesses are required. The determination of the issues will probably be largely dependent upon the documents that will be filed, some of which are attached to the Abosh affidavit. While I accept that the delay may make it more difficult for the defendant to prepare for trial, I am not satisfied that the threshold of a significant prejudice has been met in this case.

[20] The plaintiff argues this is a document case where physician's notes, nurse's observations, as well as medical charts, will be the focus. The difference is, unlike a distributorship agreement (***Euromax***), in this litigation notes taken were as a result of human observation. Those who made the notes will need to testify as to the meaning of their notes in a medical chart. The cases speak to the frailty of memory. Eighteen years have elapsed since this event, which will have a greater impact than on the meaning of the words in a written contract.

[21] The case of ***Euromax*** is distinguishable for other reasons such as:

- The key employees and principals in making the agreement, may have been unavailable, but no effort was made to locate a key witness and the subpoena power remained;
- The case was for wrongful termination, as opposed to medical malpractice;
- There was no effort by Euromax to preserve its written records when a sophisticated entity is required to preserve documents for a minimum of six years; and

- The defendant refused the plaintiff's efforts to schedule a pre-trial conference.

[22] The fact circumstances are significantly different than the facts herein. The period of delay is 16 years, as opposed to eight years in ***Euromax***.

Is the Delay Both Inordinate and Inexcusable?

Position of Dr. Smith

[23] I now turn to whether the delay has been inordinate and inexcusable. Dr. Smith bears the onus to establish both requirements. To reach a determination on inordinate and inexcusable, Rule 24.01(3) requires me to consider whether the delay is "in excess of what is reasonable having regard to the nature of the issues in the action and particular circumstances of the case".

[24] In ***Eadie***, the following factors shall be considered in determining whether the delay is "in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case". The factors are:

(a) The subject matter of the litigation;

(b) The complexity of the issues between the parties;

(c) The length of the delay;

(d) The explanation for the delay; and

(e) The prejudice to the other litigant.

[25] In ***Ali***, the court stated that in addition to the first four factors, the court should consider any other relevant circumstances, and would include a consideration of the current status of the litigation in comparison to a reasonable comparator and the role of each party in the overall delay.

[26] The defendants argue there have been prolonged periods of delay throughout, notably the following:

- A Statement of Defence was filed on August 19, 2009. Between August 2009 and February 2012, a period of two and a half years, no steps were taken by the plaintiffs. In December 2010, the plaintiffs advised they had retained an expert report, but it was not produced to defendants' counsel until February 2012;
- A draft Affidavit of Documents was provided by the plaintiffs only on April 4, 2012, which is 32 months after pleadings closed, and 11 months after it was requested by Dr. Smith's counsel;
- The draft affidavit only provided a description of the documents, and it was only after an additional 11 months were the plaintiffs' documents provided (43 months after close of pleadings);
- Examinations for Discovery were not completed until mid-January 2014, although Dr. Smith's counsel requested plaintiffs' counsel availability in February 2010;

- Plaintiffs' counsel did not provide partial answers to undertakings until May 2017, 39 months after the Examination for Discovery took place;
- On five separate occasions, Dr. Smith's counsel requested plaintiffs' counsel provide the answers to undertakings;
- After plaintiffs' counsel provided partial answers, it was only after an additional period of 28 months before the plaintiffs' counsel provided full answers to undertakings together with an expert report from M Group Chartered Professional Accountants on September 24, 2019; and
- On September 23, 2022, the plaintiffs booked a pre-trial conference, which was three years less one day where there was no activity, other than an exchange of e-mails, and Dr. Smith provided an additional expert report.

Position of the WRHA

[27] The WRHA timeline mirrors that of Dr. Smith. From the close of pleadings, there is almost 13 of the 15 years of delay attributable to the plaintiffs. WRHA submits Rule 24.02 (1) applies. This Rule provides:

> **24.02(1)** If three or more years have passed without a significant advance in an action, the court must, on motion, dismiss the action unless
>
> (a) all parties have expressly agreed to the delay;
>
> (b) the action has been stayed or adjourned pursuant to an order;

> (c) an order has been made extending the time for a significant advance in the action to occur;
>
> (d) the delay is provided for as the result of a case conference, case management conference or pre-trial conference; or
>
> (e) a motion or other proceeding has been taken since the delay and the moving party has participated in the motion or other proceeding for a purpose and to the extent that warrants the action continuing.

[28] WRHA submits the transitional provisions are in effect, as in this case, the delay extended beyond January 1, 2019 (Rule 24.02(4)). (***Buhr v. Buhr***, 2021 MBCA 63)

[29] The Court of Appeal in ***Buhr*** confirmed I should apply a functional test to the evidence whether a particular step actually functioned to advance the action in a "significant way". In ***Buhr*** (para. 78), the Court of Appeal commented "there is no presumption that the provision of answers to undertakings is a significant advance, which must then be rebutted. To be clear, the functional test is a broad-based inquiry into whether the advance in an action 'moves' the litigation forward in a meaningful way considering the nature, value, importance and quality of the action".

[30] In ***WRE Development Ltd v LaFarge Canada Inc***, 2022 MBCA 11, the court found in assessing the significance of a step, a court can consider whether anything happened as a result of that step.

[31] WRHA submits that between January 17, 2014 and September 24, 2019 there was no significant advance in the litigation. WRHA further submits that the answers to undertakings were provided only because Dr. Smith's counsel repeatedly requested answers be provided and it took a threat of bringing a

motion to compel answers being provided before they were received. As in ***Buhr***, the plaintiffs only provided partial answers to undertakings, and the partial answers were only considered a modest advance not a significant advance.

[32] WRHA submits there is a second three-year period without significant action. Between September 24, 2019, when complete answers were provided, and September 23, 2022, when the plaintiffs requested the first pre-trial conference, three years less one day elapsed. Between these dates, in and around June 2020, Dr. Smith delivered an expert report to the plaintiffs without any significant advance being taken other than booking the pre-trial conference.

[33] WRHA submits that even if the court does not accept there was no significant advance in either of the three-year periods, this claim should be dismissed for inordinate and inexcusable delay.

[34] WRHA submits the focus will be on what advances should have occurred by a reasonable litigant. This was question was dealt with in ***Ali***:

> [65] As previously discussed, Manitoba courts have routinely considered the length of the delay, the complexity of the issues and the subject matter of the litigation to determine whether the delay is inordinate or not. These factors can often be assessed on the basis of the case file and its chronology, and judges must utilise their own experience and judgment to decide whether a delay is inordinate or not. Although the moving party bears the onus of establishing inordinate delay, it does not need to submit any particular evidence to show that the action is taking much longer than what would normally be expected.
>
> [66] At its core, the court is asked to consider whether the delay is "out of proportion to the matters in question" (see *Wiegert v Rogers*, 2019 BCCA 334 at para 32). When making this assessment, a court is required to compare the progress in the action against that of a reasonable litigant advancing the same claim under comparable conditions; the delay will be considered inordinate if the difference

> between the delay in the present action and the comparator is so large as to be unreasonable (see *Trebilcock* at paras 115, 120).
>
> [67] In *Arbeau*, the Court held that evidence is not necessarily required to establish a comparator timeline with respect to inordinate delay, as judges and masters are "quite capable of making this assessment in most cases, based upon the nature of the action and the court record" (at para 26). Likewise, in *Transamerica*, the Court indicated that "whether there has been delay in any particular case is to be determined based on an examination of the record, the submissions of counsel, and the experience of the judiciary" (at para 22), and that expert evidence of a comparator "is not to be expected" (*ibid*).

[35] I find the plaintiffs established, on the clearest of terms, the delay is both inordinate and inexcusable. A delay of 15 years from the filing of the Statement of Claim is well beyond the steps a reasonable litigant would be expected to have taken to bring this straightforward medical negligence claim to trial. This delay is in excess of the delay where the courts in which ***Ali*** and ***Dmytriw*** considered the delay inordinate and inexcusable. I agree this is also a case where inordinate and inexcusable delay has been proven by the defendants. Therefore, presumption of prejudice to the defendants has been met.

[36] Having met its burden, it is now up to the plaintiffs to rebut the presumption.

[37] The plaintiffs' first argument Mr. Parkinson died leaving an extremely complicated Estate both in assets and personal circumstances. The court accepts this to be true, however, I reject the implication the plaintiffs wish me to find.

[38] Plaintiffs' counsel agreed by 2011 the Estate issues were resolved. There was no evidence from the Executors of the Estate explaining how the

complications encountered administrating the Estate impacted the Estate's ability to prosecute the medical malpractice claim. An Executor is required to deal with multiple issues at the same time. In this case, the Estate hired a litigation lawyer, sometime in 2008, to file the Statement of Claim. Any suggestion the claim could not be prosecuted until the Estate's financial issues were resolved is contradicted by the facts.

[39] If the plaintiffs' argument is the unravelling of Mr. Parkinson's financial assets impacted the Estate's ability to fully assess the damages, counsel should have made an application to bifurcate the trial. Failure to bifurcate is not crucial to my analysis, but the negligence claim could have resolved the liability portion years before the first pre-trial conference.

[40] What is crucial is by 2011, the damages assessment to Mr. Martyszenko was not delivered until 2017. This six-year period confirms to me the absence of a significant advance in the litigation. If completing the Estate was critical, the Executors offered no explanation why Mr. Martyszenko needed six years to complete his expert report. There is no evidence from Mr. Martyszenko why it took so long to produce the report. This delay is just another period where no significant advance occurred in this litigation.

[41] The plaintiffs submit the affidavits in this case were deficient, as they lacked specificity and failed to include reference to many e-mails exchanged. Neither of the defendants indicated the plaintiffs' answers to undertakings were

provided in 2018. In support of this position, they cite ***Ali***:

> [76] As I said at the outset, I have a number of concerns relating to the affidavits filed in this proceeding. With one minor (and inconsequential) exception, there is no narrative or explanation in any of the affidavits, and they do nothing more than attach copies of communications between counsel and a few additional documents.
>
> [77] The defendant's first affidavit was potentially misleading and certainly deficient in that it appended a select portion of the correspondence between counsel. Without the plaintiff's responding affidavit, it would have been impossible to know the true history of these proceedings. It goes without saying that, if a party is suggesting that an action should be dismissed for delay and is relying on the steps taken or not taken in the proceeding, the entire record of what has transpired should be placed before the court.

[42] In considering the plaintiffs' position, I considered the next two paragraphs in ***Ali***:

> [78] While the plaintiff's affidavit addresses that concern, there is no direct explanation for much of the delay, and little or no evidence to support a finding that the delay was reasonable. For example, why did it take nearly 12 years to obtain the wage loss (actuarial) report? To a large extent, the Court is left to read "between the lines" in the correspondence and to infer what has transpired and why. In the absence of a reasonable explanation for the delay, the Court is left with the impression that the delay is attributable to the failure of counsel to act diligently and in a timely manner.
>
> [79] Simply put, there has been no clear and meaningful explanation of, or justification for, the delay in the particular circumstances of this case. Essentially, the plaintiff says, here is what happened, it has just taken a long time. That is not enough.

[43] The plaintiffs' position may be summarized as the defendants failed to take steps which contributed to the delay. The position the defendants need to advance the litigation is an incorrect statement of law. This is the plaintiffs' action to advance.

[44] I considered Ms. Jane Parkinson's Affidavit. The documents she provided contain six volumes. In my review of the documents, none of them explain why

a medical malpractice claim has run for 16 years without a hearing. As noted, this is not a complicated claim.

[45] An explanation for the six-year period from 2011, until the expert report on damages being provided, is lacking. In ***Ali***, a 12-year period to provide an actuarial loss of income claim was an indication of lack of diligence on the part of counsel. In this case, it was 11 years from when Mr. Parkinson presented at the Grace Hospital.

[46] I find the explanations offered by the plaintiffs are insufficient. I would describe them as excuses. Excuses are not sufficient to rebut the resumption this was inordinate and inexcusable delay.

[47] As the remedy is discretionary, it is appropriate at this time to repeat Burnett J.A.'s words from ***Ali*** :

> [85] Almost seven years ago, the Supreme Court of Canada made it clear that a shift in culture is required, that when court costs and delays become too great, people simply give up on justice, and that a fair process is illusory unless it is also accessible—proportionate, timely and affordable (see *Hryniak v Mauldin*, 2014 SCC 7 at paras 25-28). While the Court in *R v Jordan*, 2016 SCC 27 was concerned with timely proceedings in the criminal law context, many of its observations also apply in the civil law context. In *Jordan*, the Court recognised that fair trial interests are affected because the longer a trial is delayed, the more likely it is that a party will be prejudiced in mounting a defence owing to faded memories, unavailability of witnesses, or lost or degraded evidence, and that timely trials are important to maintain overall public confidence in the administration of justice (see paras 20, 25).
>
> [86] As my colleague Mainella JA emphasised in *Glenwood Label & Box Mfg Ltd v Brunswick Label Systems Inc et al*, 2019 MBCA 12 at para 5, there is a strong public interest in promoting the timely resolution of disputes in our civil justice system. In *Letang v Hertz Canada Limited*, 2015 ONSC 72, Myers J observed (at paras 18-19):
>
> > . . . The Supreme Court of Canada has ruled that the goal of achieving a fair and just civil dispute resolution process

> becomes illusory unless it is proportionate, timely, and affordable. . . . There are real people behind lawsuits – even claims involving sophisticated corporations. These people are entitled to timely justice. Because the civil justice system does not deliver timely, affordable and proportionate justice, people are looking elsewhere for dispute resolution to the detriment of the public and the common law. Fixing the civil justice system requires a culture shift on the part of the players in the system. . . .
>
> . . . Justice delayed is justice denied. The courts and the profession cannot implement a culture shift by continuing to operate on a "business as usual" basis. Courts and counsel must recognize that delay is itself a disease that eats away at the justice and justness of the system. The Court of Appeal has recognized the importance of prosecuting civil cases quickly in many cases dealing with dismissal for delay. But the last decade of efforts has proven that delay cannot be combatted successfully just by dismissing the oldest cases. Delay at all stages should be recognized as a serious form of prejudice that undermines affordability and proportionality and rots the uncompromisable goals of fairness and justice.
>
> [footnotes omitted]
>
> [87] The time has come to stop paying lip service to the phrase "justice delayed is justice denied". Unreasonable delays in civil matters can no longer be tolerated for numerous reasons, but chiefly because they seriously undermine access to justice.

[48] This case was straightforward. It was a claim with prescribed benefits under ***The Fatal Accidents Act***, C.C.S.M. c. F50. There is nothing unusual about the fact circumstances. Although the damage claim is more than $5,000,000, this too is not unusual. Competing expert reports are commonplace in civil litigation.

[49] I acknowledge my decision to grant the defendants' motion is discretionary. I am aware of the plaintiffs' claim and the sense of loss Mr. Parkinson's family must feel. The length of the delay in this case is too

significant for me to ignore, given the culture change in moving civil cases to trial in a timely manner.

[50] I find the defendants have met their burden and the plaintiffs failed to rebut the presumption of prejudice. To exercise my discretion in not granting these motions results in the problems addressed in ***Ali***. I refuse to exercise my discretion, as this delay is in excess of the delay in ***Ali*** and ***Dmytriw***, which resulted in the delay motion being granted.

CONCLUSION

[51] I find that between January 17, 2014 and September 24, 2019, more than three years passed without a significant advance in this action against Dr. Smith and the WRHA. I find that between January 17, 2014, none of the exceptions in KB Rule 24.02(1)(a) - (e) apply in these circumstances. KB Rule 24.02(1) therefore requires that the action be dismissed for delay.

[52] Furthermore, I also find that there has been inordinate and inexcusable delay in the prosecution of this action which justifies its dismissal under KB Rule 24.01(1). The delay is inordinate having regard to the length of time a claim under ***The Fatal Accidents Act***, alleged to have been the result of the defendants' medical malpractice, would reasonably require to be prosecuted. The delay is inexcusable because the plaintiffs have failed to persuade me otherwise. Inordinate and inexcusable delay gives rise to a presumption of significant prejudice under KB Rule 24.01(2). The plaintiffs have failed to adduce evidence to rebut the presumption. In these circumstances, I am satisfied that I

ought to exercise my discretion in accordance with KB Rule 24.01(1) to dismiss this action for delay.

[53] Therefore, the motions of Dr. Smith and the WRHA are granted. Costs may be spoken to if not agreed.

_____ J.