IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

B E T W E E N :

IAN DMYTRIW, an infant who sues by his father and next friend, GORDON DMYTRIW, GORDON DMYTRIW and RHONDA DMYTRIW	)	***T. J. Kochanski*** *for the Appellants (via videoconference)*
(Plaintiffs) Respondents	)	
- and -	)	***R. P. Sokalski*** *and* ***R. Nerbas***
JONAH N.K. ODIM and NIELS GIDDINS	)	*for the Respondents (via videoconference)*
(Defendants) Appellants	)	
- and -	)	
BRIAN POSTL, OSCAR CASIRO, SHIRLEY SCOTT, ROBERT BLANCHARD, HELMUT UNRUH, HEALTH SCIENCES CENTRE, WINNIPEG REGIONAL HEALTH AUTHORITY, THE GOVERNMENT OF MANITOBA, and THE MINISTER OF HEALTH, PROVINCE OF MANITOBA	)	*Appeal heard:* ***June 8, 2020***
	)	*Judgment delivered:* ***November 18, 2020***
(Defendants)	)	

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the Manitoba, *Court of Appeal Rules*, Man Reg 555/88R, this appeal was heard remotely by videoconference.

On appeal from 2019 MBQB 143

Corrected Judgment: A corrigendum was issued on December 7, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

SIMONSEN JA

[1] The defendants, Drs. Jonah N. K. Odim and Niels Giddins, appeal a motion judge's refusal to dismiss this medical malpractice action for delay.

[2] The plaintiff, Ian Dmytriw (Ian), was born on November 4, 1994 with a heart condition. The condition was diagnosed shortly after his birth and, on November 10, 1994, Dr. Odim, chief pediatric cardiac surgeon at the Health Sciences Centre, in Winnipeg, performed heart surgery known as an arterial switch heart repair to correct the abnormality. Approximately 13 days after the surgery, Ian's leg movement ceased and investigation identified a hemorrhagic infarction to his spinal cord, rendering him paraplegic.

[3] In February 2002, Ian, by his father, and both of his parents, Gordon and Rhonda Dmytriw (the parents), in their own capacity, issued the statement of claim against a number of defendants. The action has since been discontinued against all defendants other than Drs. Odim and Giddins (the defendants).

[4] In the statement of claim, the plaintiffs allege that Dr. Odim and Dr. Giddins, a pediatric cardiologist, failed to fully and accurately inform the parents about the proposed procedure, including all material risks. As well, Dr. Odim is said to have been insufficiently experienced to perform the surgery and to have done so negligently. Dr. Giddins is alleged to have been negligent in the operation of the pediatric cardiology surgery program being

conducted at the Health Sciences Centre, including in the supervision of Dr. Odim.

[5] Both defendants deny negligence and say that Ian's injuries resulted from the hemorrhagic infarction to the spinal cord, which was not caused by the surgery.

[6] In 1994, Dr. Odim performed a number of pediatric cardiac operations on other patients in Winnipeg, and there were 12 perioperative deaths in those children. On March 5, 1995, Manitoba's chief medical examiner called an inquest into those deaths, as a consequence of which the Manitoba Pediatric Cardiac Surgery Inquest (the Inquest) was conducted. I will say more about this later.

[7] The defendants' motion to dismiss the action for delay was filed on November 18, 2016. The motion was granted by the master. On October 7, 2019, the motion judge allowed an appeal from the master's decision, by way of a fresh hearing, and dismissed the motion for delay, permitting the action to proceed. The defendants appeal that decision.

Grounds of Appeal

[8] The defendants raise a number of grounds of appeal, arguing in essence that:

1. The motion judge erred in law by applying r 24.01 (Motion for Dismissal for Delay) (the former rule) of the Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88, (the *QB Rules*), as it read prior to being replaced by a new r 24.01 (the current rule) on January

1, 2018. (There is agreement that current r 24.02, also now part of the rule governing motions for dismissal for delay, is not applicable, given the transitional provision in subrule 24.02(4) and the fact that the delay motion was filed before January 1, 2019).

2. The motion judge erred in law by giving consideration to, and relying on, Ian's status as a minor to excuse periods of delay that occurred prior to him reaching the age of majority.

3. The motion judge erred in law by considering the unfortunate circumstances of Ian, and engaging in a comparison of the prejudicial effects to the parties of dismissing or not dismissing the action for delay.

4. The motion judge misapprehended the evidence and made palpable and overriding errors in his findings of fact; and

5. The motion judge erred in law, or in the alternative as a matter of mixed fact and law, by failing to consider or adequately consider and misdirecting himself as to the meaning of inherent prejudice.

[9] According to the defendants, these errors led to a decision that was unjust.

[10] I need not address grounds of appeal 2 and 3, because, for the reasons that follow, I would accede to grounds 1, 4 and 5. I conclude that the motion judge erred in law by applying the former rather than the current rule, made a palpable and overriding error in his determination of the period of

unexplained delay, and did not properly deal with inherent prejudice. Therefore, I would allow the appeal, and dismiss the action for delay.

The Chronology

[11] After the filing of the statement of claim and the defendants' statements of defence in 2002, limited examinations for discovery of the plaintiffs were conducted in 2005. Although a number of motions have since been heard, examinations for discovery are not complete, the plaintiffs have not produced the required expert reports, and the matter is not ready to be set down for trial.

[12] To determine whether the motion judge erred in his finding about the length of the period of unexplained delay, it is important to consider who did what, when and why. Therefore, I will review, in some detail, the key dates in the chronology:

- February 28, 2002–statement of claim issued.
- Fall 2002–the defendants' statements of defence filed.
- March and August 2004–the plaintiffs obtain expert opinion letters from Dr. Christian Soder (a pediatric anaesthetist and pediatric intensivist) and Dr. Jacques LeBlanc (a pediatric cardiovascular and thoracic surgeon) on the standard of care regarding the medical treatment provided to Ian, and counsel for the plaintiffs provides copies of those letters to counsel for the defendants.

- September 24, 2004–the plaintiffs file motion to have the action brought under then r 20A of the *QB Rules*. Although the motion is dismissed, the disposition sheet indicates that "all parties consent to case management and may, if they wish, proceed with it".

- September 13 and 14, 2005–examinations for discovery of the plaintiffs on liability conducted. The discoveries deal with damages only by requests for undertakings to particularise and quantify the claim and to produce copies of medical and other records.

- November 23, 2005–the plaintiffs file motion seeking severance of the issues of liability and damages.

- June 2, 2006–counsel for the defendants requests of counsel for the plaintiffs copies of the films of the CT scans and x-rays that Ian underwent after the arterial switch procedure.

- December 22, 2006–order for severance of the issues of liability and damages granted by the master.

- February 12, 2007–pre-trial conference held at the request of the plaintiffs. Counsel for the defendants objects to the use by the plaintiffs of the Report of the Pediatric Cardiac Surgery Inquest (the Inquest Report) at the trial. Counsel for the defendants also objects to the plaintiffs relying on Dr. Soder's report dated March 8, 1996 (the Soder Inquest Report), which

was prepared for the Inquest regarding the level of care provided by the defendants to the 12 other children.

- January 7, 2008–the defendants' appeal from the master's decision on severance allowed, and severance motion dismissed.

- October 17, 2008–counsel for the defendants requests of counsel for the plaintiffs answers to undertakings given on examination for discovery and the CT scans and x-rays that had been sought on June 2, 2006.

- Fall 2008–counsel agree that a portion of the defendants' testimony from the Inquest, which was conducted in 1996 (totalling 61 pages, 42 from Dr. Odim and 19 from Dr. Giddins), can be read in at trial as if it were examination for discovery.

- November 5, 2009–the plaintiffs file motion for an order allowing other portions of the Inquest evidence to be read in at trial in the same manner, as examination for discovery.

- March 2010–motion to read in additional evidence from the Inquest abandoned.

- March 11, 2010–counsel for the defendants requests of counsel for the plaintiffs answers to the outstanding undertakings identified in his letter dated October 17, 2008 and asks whether the plaintiffs intend to rely on the Soder

Inquest Report, because if they do, the defendants expect to bring a motion to determine the admissibility of that report.

- September 1, 2010–counsel for the plaintiffs provides to counsel for the defendants a number of answers to undertakings, as well as the psychological assessment report of Dr. Dell Ducharme, upon which the plaintiffs intend to rely.

- February 4, 2011–counsel for the defendants asks counsel for the plaintiffs for copies of the medical charts requested at the examinations for discovery, and seeks updated medical, educational and counselling records. He also reminds counsel for the plaintiffs that if the plaintiffs intend to rely on the Soder Inquest Report, the defendants expect to bring a pre-trial motion concerning its admissibility.

- May 2, 2011–counsel for the plaintiffs advises counsel for the defendants that the plaintiffs will provide releases to allow the defendants to obtain medical charts, and that the plaintiffs will obtain and produce updated school and counselling records. He also confirms the plaintiffs' intention to use the Soder Inquest Report at trial, and produces the Life Care Plan/Future Care Cost Analysis of Karen Penner. He further advises of available dates in September for another pre-trial conference.

- September 20, 2011–the defendants file motion seeking a determination prior to trial as to the admissibility of the Soder Inquest Report (the Soder motion).

- June 15, 2012–pre-trial conference conducted. The presiding judge notes that issues regarding the admissibility of the Soder Inquest Report should be dealt with by a *voir dire* in advance of trial, and that the defendants continue to seek a number of records from the plaintiffs.

- November 20, 2012–further pre-trial conference conducted.

- January 7, 2013–the plaintiffs produce some medical records, and their counsel indicates that he is writing to other physicians and medical practitioners to obtain updated records.

- July 12, 2013–counsel for the defendants requests of counsel for the plaintiffs an authorisation to obtain additional medical records, and an update on the records identified in letter dated January 7, 2013 as being sought by the plaintiffs.

- October 15, 2014–*voir dire* heard with respect to the admissibility of the Soder Inquest Report, as well as Dr. Soder's report dated February 10, 2004 on the standard of care regarding Ian's treatment (the Soder Dmytriw Report), and the Inquest Report—which was intended to be tendered as the necessary factual foundation for the Soder Inquest Report.

- February 5, 2015–decision rendered on the *voir dire*, determining as inadmissible at trial the Soder Dmytriw Report, the Soder Inquest Report and the Inquest Report (see *Dmytriw et al v Odim et al*, 2015 MBQB 24).

- March 12, 2015–counsel for the defendants advises counsel for the plaintiffs that the defendants intend to object to the admissibility of Dr. LeBlanc's report dated July 22, 2004 regarding standard of care, on the basis that he relied on the reports of Dr. Soder.

- March 2015–from this time until early 2016, counsel for the plaintiffs thoroughly reviews the file to familiarise himself with the matter, as he had assumed conduct from another lawyer with his firm in the fall of 2014.

- July 27, 2015–counsel for the defendants seeks a reply to his letter dated March 12, 2015.

- February 3, 2016–counsel for the defendants confirms agreement regarding the use of some of the Inquest testimony as if examination for discovery of the defendants and requests of counsel for the plaintiffs responses to his letters dated July 12, 2013, March 12, 2015 and July 27, 2015, along with medical records from all of Ian's health professionals, and his educational records and income tax returns.

- Summer 2016–counsel for the plaintiffs begins search for expert in pediatric cardiac surgery regarding standard of care.

- November 2016–by this time, counsel for the plaintiffs has had discussions with two potential experts, with no commitment from them to provide an opinion.

- November 18, 2016–the defendants file motion for dismissal of the action for delay.

- November 29, 2016, and January and February 2017–counsel for the plaintiffs provides medical and educational records to counsel for the defendants.

- December 11, 2018–motion for dismissal for delay heard by a master.

- January 17, 2019–the master's decision on delay motion delivered.

- September 12, 2019–appeal from the master's decision heard by the motion judge.

- October 7, 2019–the motion judge's decision on appeal from the master delivered, dismissing motion for dismissal for delay.

[13] The plaintiffs have had three lead lawyers during the litigation. Initial counsel acted from 1995 to 2002, following which the second lawyer acted until the fall of 2014, at which time the third lawyer assumed conduct. That said, aside from an early change, the same firm has represented the plaintiffs throughout (although current counsel, with another firm, appeared on the motion for dismissal for delay).

The *QB Rules*

[14] The pertinent portion of r 24 governing motions for dismissal for delay, which was in effect prior to January 1, 2018, stated:

> **Motion**
> **24.01(1)** The court may on motion dismiss an action for delay.
>
> **Grounds**
> **24.01(2)** On hearing a motion under this rule, the court may consider,
>
> (a) whether the plaintiff has unreasonably delayed the prosecution of the action;
>
> (b) whether there is a reasonable justification for any delay;
>
> (c) any prejudice to the defendant; and
>
> (d) any other relevant factor.

[15] Effective January 1, 2018, r 24 was amended to provide, in part:

> **Dismissal for delay**
> **24.01(1)** The court may, on motion, dismiss all or part of an action if it finds that there has been delay in the action and that delay has resulted in significant prejudice to a party.
>
> **Presumption of significant prejudice**
> **24.01(2)** If the court finds that delay in an action is inordinate and inexcusable, that delay is presumed, in the absence of evidence to the contrary, to have resulted in significant prejudice to the moving party.
>
> **What constitutes inordinate and inexcusable delay**
> **24.01(3)** For the purposes of this rule, a delay is inordinate and inexcusable if it 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.

Dismissal for long delay
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.

Excluded time
24.02(2) A period of time, not exceeding one year, between service of a statement of claim and service of a statement of defence is not to be included when calculating time under subrule (1).

Excluded time — period under disability
24.02(3) Any period of time when a person is under disability is not to be included when calculating time under subrule (1).

Transitional — no application to motions before January 1, 2019
24.02(4) The court may only apply subrule (1) in a motion to dismiss an action for delay that has been brought after January 1, 2019.

[16] Rule 1.02(2) is the general transitional provision:

> **Transitional provisions**
> **1.02(2)** These rules apply to a proceeding, whenever commenced, except that where a proceeding is commenced before a rule comes into force, the court may, on motion, order that the proceeding, or a step in the proceeding, be conducted under the rules that governed immediately before the rule came into force.

[17] The objective of the *QB Rules* is set out in r 1.04(1):

> **General principle**
> **1.04(1)** These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

The Authorities

Pre-Amendment

[18] The law governing motions for dismissal for delay under the former rule was summarised in *Mauer v McDougall*, 2001 MBCA 2, adopting the approach set out in *Law Society (Manitoba) v Eadie*, 1988 CarswellMan 157 (CA) (at paras 10-11):

> There is no dispute as to the applicable law. In *Law Society of Manitoba v. Eadie*, [1988] 6 W.W.R. 354; 54 Man.R. (2d) 1 (C.A.), this court outlined the factors to be taken into account on a motion for delay (at para. 16):
>
> > Amongst the matters which should be taken into account on a motion such as this are:
> >
> > (i) the subject matter of the litigation;
> >
> > (ii) the complexity of the issues between the parties;
> >
> > (iii) the length of the delay;
> >
> > (iv) the explanation for the delay;

> (v) the prejudice to the other litigant.
>
> But as Twaddle J.A., writing for the court, noted (at para. 15):
>
> > For myself, I prefer to put all relevant considerations into a balance and decide, as a single question, whether it is just to take away from the litigant responsible for the delay the right to have his case determined on its merits. This involves, of course, the difficult task of balancing the basic right of that litigant with the right of the other party not to have his rights prejudiced by undue delay.
> >
> > See as well *Hughes and Hughes v. Simpson-Sears Ltd.* (1988), 54 Man.R. (2d) 5 (C.A.), *Singh v. Transcona Dodge Chrysler (1980) Ltd. et. al*. (1992), 73 Man.R. (2d) 74; 3 W.A.C. 74 (C.A.), *Pank- hurst v. Matz et. al.* (1991), 71Man.R. (2d) 271 (C.A.), *Jacobson Estate v. Freed et. al.* (1994), 97 Man.R. (2d) 197; 79 W.A. C. 197 (C.A.), and *Hansen v. Manitoba Hydro* (1993), 85 Man.R. (2d) 261; 41 W.A.C. 261 (C.A.).
> >
> > In this case, as in all others like it, there are three key interrelated issues, namely, the explanation for the delay, whether the delay is unreasonable, and the prejudice, if any, to the defendants as a result of the delay. While all elements are important, the issue of prejudice is often decisive.

[19] The overriding principle was that essential justice be done between the parties (*Dubois v Manitoba Lotteries Corporation et al*, 2009 MBCA 108 at paras 18-24).

[20] It was also recognised that a defendant always has the option of taking the initiative and bringing the matter on for determination rather than waiting for a dilatory plaintiff, and that a defendant who fails to do so may be deprived of having the action dismissed for delay (*Dubois* at paras 23, 37).

[21] Pre-amendment, a court was required to consider both specific and inherent prejudice. If the prejudice was inherent, it had to be weighed to

determine whether it was significant or minimal in character (*Mauer* at para 20).

[22] This Court, in *Mauer*, also confirmed the need for personal injury claims to be tried without delay because of concern about the quality of the evidence of the parties and the medical evidence (see paras 18-19; and *Dubois* at paras 28-30).

Post-Amendment

[23] The current rule is similar, but not identical to, the delay rule 4.31 of the Alberta, *Rules of Court*, Alta Reg 124/2010, vol 1:

> **Application to deal with delay**
> **4.31(1)** If delay occurs in an action, on application the Court may
>
> (a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
>
> (b) make a procedural order or any other order provided for by these rules.
>
> **4.31(2)** Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.

[24] Rule 4.31 was examined in some detail in *Humphreys v Trebilcock*, 2017 ABCA 116, where the Alberta Court of Appeal identified the essential questions which must be asked to determine whether an action should be dismissed for delay (at paras 150-56):

> **4. Essential Rule 4.31 Queries**
>
> In order to apply r. 4.31 an adjudicator must answer six distinct questions.
>
> First, has the nonmoving party failed to advance the action to the point on the litigation spectrum that a litigant acting reasonably would have attained within the time frame under review?
>
> Second, is the shortfall or differential of such a magnitude to qualify as inordinate?
>
> Third, if the delay is inordinate has the nonmoving party provided an explanation for the delay? If so, does it justify inordinate delay?
>
> Fourth, if the delay is inordinate and inexcusable, has this delay impaired a sufficiently important interest of the moving party so as to justify overriding the nonmoving party's interest in having its action adjudged by the court? Has the moving party demonstrated significant prejudice?
>
> Fifth, if the moving party relies on the presumption of significant prejudice created by r. 4.31(2), has the nonmoving party rebutted the presumption of significant prejudice?
>
> Sixth, if the moving party has met the criteria for granting relief under r. 4.31(1), is there a compelling reason not to dismiss the nonmoving party's action? This question must be posed because of the verb "may" in r. 4.31(1).

[25] However, more recent Alberta authorities have stressed that "[t]here are many different ways that a Master or chambers judge can analyze a delay application [and that] there is no universal mandatory formula" (*Transamerica Life Canada v Oakwood Associates Advisory Group Ltd*, 2019 ABCA 276 at para 15) (see also *Fraser v Jeffries*, 2019 ABCA 368 at para 14; *Xpress Lube & Car Wash Ltd v Gill*, 2019 ABQB 898 at para 45; *Alston v Haywood Securities Inc*, 2020 ABQB 107 at paras 38-39; *4075447*

Canada Inc v WM Fares & Associates Inc, 2020 ABCA 150 at para 13; and *Alderson v Wawanesa Life Insurance Company*, 2020 ABCA 243 at para 22).

[26] In *Transamerica*, the Alberta Court of Appeal, after expressing concern that the first two questions in *Humphreys* may be difficult to apply to particular cases and that they "may merely give an artificial air of certainty to the simple question: Has there been delay?" (at para 20), wrote (at para 21):

> The objective of the exercise must be remembered. It is to determine whether the delay is inordinate, inexcusable, or otherwise, has caused significant prejudice to the defendant. Any particular class of proceedings will include some that proceed quickly, some that proceed slowly, and a great many in the middle. In determining the reasonable expectation of progress for the purpose of striking out an action for delay, regard must be had to all categories. Delay is not fatal just because the litigation has not progressed to the point that the "fastest" or even the "average" proceeding of that type would have reached. In order to be struck, the action must generally fall within the slowest examples of that type of proceeding, and it must be so slow that the delay justifies striking out the claim. Further, even very short delays can be grounds for striking the action if significant prejudice has resulted. "Significant prejudice" remains the ultimate consideration.

[27] The Court stated the requirement for prejudice succinctly (at para 2):

> . . .
>
> Under R. 4.31(1)(a) the Court may dismiss an action for <u>any</u> delay if there is "significant prejudice". If the delay is found to be "inordinate and inexcusable", then R. 4.31(2) creates a presumption of "significant prejudice". *Under either part of the rule, significant prejudice is a precondition to dismissal for delay*.
>
> [italics added]

[28] A similar analysis was conducted by Martin J in *DL et al v CP et al*, 2019 MBQB 42, with respect to the current rule (at paras 33-34):

> To recap, for the motions here, under the new Rule, there are two routes to dismissal for delay. The first route is similar but not identical to the old Rule; the moving party proves some delay and proves that that delay resulted in significant prejudice. In other words, delay plus serious prejudice. The second route requires proving inordinate and inexcusable delay only, thus invoking a presumption of significant prejudice. In other words, statutorily, inordinate and inexcusable delay equates to significant prejudice.
>
> The second route is the material shift in the Rule, focusing the inquiry squarely on delay rather than actual or inherent prejudice. It still, however, leaves the nature of the issues in the action and the circumstance of the case as relevant factors for determining whether the delay is inordinate and inexcusable (Rule 24.01(2)). It follows then that delay factors set out in *Dubois* remain applicable under the new Rule 24.01 scheme.

The Motion Judge's Decision

[29] The motion judge concluded that the former rule applied essentially because all of the delay occurred, and the delay motion was filed, before r 24 was amended. He also stated that the rule amendments "tempered" the impact of pre-amendment authorities (at para 33).

[30] The motion judge determined that there were two periods of delay that had not been adequately explained:

- First, he found delay that had only been partially accounted for between January 2008 (when the plaintiffs' severance motion was dismissed) and September 2011 (when the defendants filed the Soder motion). Although counsel for the plaintiffs attested

that, during that period, he was reviewing Inquest transcripts, answering most of the undertakings on liability and a few on damages, and the parties were coming to agreement about portions of the defendants' Inquest evidence that could be used in lieu of examination for discovery, the motion judge found that "three years seems somewhat long for that to occur, especially when counsel for the defendants was then seeking further damage disclosure" (at para 49).

- Second, delay had not been explained to the motion judge's satisfaction for the period from February 2015 (when the decision on the Soder motion was delivered) until November 18, 2016 (when the motion for dismissal for delay was filed). Counsel for the plaintiffs explained that he reviewed the file for the balance of 2015 after February and began an extensive search for other experts in the summer of 2016. By the time the delay motion was filed, he had been successful in speaking with two experts, but no experts had been retained. The motion judge found that "I have difficulty accepting that [counsel for the plaintiffs] was as diligent as he may have been during this period in searching for new experts" (at para 54).

[31] The motion judge stated that any delay after the filing of the delay motion was not relevant, except to note that if experts had been retained, that "may have been helpful in permitting the plaintiffs to argue that they have purged the delay" (at para 57).

[32] The motion judge also observed that during the time the Soder motion was being pursued (September 2011 to February 2015), most of the other activity on the file ceased. He found no urgency in the defendants' requests for school and medical records, and noted that they brought no motion to compel production. He inferred that "given the significance of the relief sought in the Soder motion, both sides were content to hold other matters in abeyance until they received a decision on the issue" (at para 51).

[33] More generally, he concluded (at para 74):

> The approach of the defendants on the record before me has been to refrain from keeping the plaintiffs' feet to the fire at various points in this litigation, especially when the focus of the case was on the severance motion and the Soder Motion. By taking that approach, there has been tacit, perhaps unintentional, support for the plaintiffs' approach in letting other matters slide while the interlocutory motions are proceeding.

[34] On the issue of prejudice, the motion judge found no specific prejudice resulting from the delay and, after indicating that he was not prepared to assume that there were "all sorts of records from which witnesses will be able to refresh their memories" (at para 60), said this about inherent prejudice (at paras 61-62):

> I do however accept the comments of counsel for the plaintiffs when he argues that the defendants have at least had the opportunity to commit the plaintiffs' memories to writing. The plaintiffs have been discovered on liability, and assuming that the discovery was properly conducted, the defendants should have received the plaintiffs' factual position on liability as it stood in 2005. As to their own recollections, having learned of the claim at least in 2002, if not before, the plaintiffs would have been able to refresh their own memories at that time and conduct their own investigations to prepare their defence. On the question of

> liability, the plaintiffs have agreed that certain parts of the examination of Drs. Odim and Giddins at the inquest would suffice for their purposes, so at least on the question of liability, the prejudice on both sides as to memory of events should have been reduced.
>
> The same cannot necessarily be said on the question of damages, especially when the plaintiffs have been slow in providing undertakings. However, the bulk of the undertakings left outstanding at the time that the motion was brought involved a request that the plaintiffs particularize and quantify their various claims and the outstanding requests for medical records. There is no evidence before me that the medical records are not available, even at this late date.

[35] Although noting that the limitation period for the claim of Ian, as a minor, would not have expired until 2014, the motion judge largely rejected the argument made by the plaintiffs that this was a relevant factor. He correctly observed that a plaintiff is expected to diligently pursue a claim once commenced.

[36] As for the nature of Ian's circumstances, the motion judge stated that he took into account in the weighing necessary to make his decision "the severe effect of a dismissal order on a young man with significant challenges in his life" (at para 79).

[37] Ultimately, when the motion judge balanced all of the factors, he found that "it is in the interests of justice to give the plaintiffs one last chance" (at para 80), allowed the appeal and dismissed the motion.

Positions of the Parties

[38] The defendants contend that the motion judge erred in law by applying the wrong legal principles, namely by applying the former, rather than the current rule.

[39] The defendants also say that the motion judge committed palpable and overriding errors of fact by finding that: the case is complex; there were only five years of unexplained delay; the defendants were content to hold matters in abeyance from September 2011 to February 2015; and, generally, there was tacit support by the defendants for the plaintiffs' delay.

[40] The defendants further assert that the motion judge made errors in principle in his assessment of inherent prejudice, specifically: taking an unduly narrow consideration of inherent prejudice; failing to consider the specific nature of the evidence that will be required at trial; concluding that all relevant recollections and information on material events have been preserved or recorded because examinations for discovery on liability have been conducted; and failing to consider the impact on the defendants of the failure to provide material records and information, in order to have independent assessments conducted on a timely basis.

[41] The plaintiffs maintain that the motion judge made no errors in principle or palpable and overriding errors of fact. His discretionary decision is entitled to deference and there is no basis upon which this Court should intervene.

Standard of Review

[42] A decision regarding a motion for dismissal for delay is discretionary and is entitled to deference on appeal (*Dubois* at para 16). As stated in *McIntyre v Frohlich et al*, 2013 MBCA 20 (at para 49):

> This appeal concerns discretionary decisions under [*The Limitation of Actions Act*, CCSM c L150] and the [*QB Rules*]. Therefore, the standard of review for appellate intervention is one of deference. Unless there is an error in principle or a misapprehension of the facts, the decisions should not be overturned unless they are so clearly wrong as to amount to an injustice. An error in principle is an error in law, which calls for the standard of review of correctness. This court may intervene when there is a misapprehension of the facts that is a palpable and overriding error. See *Elsom v. Elsom*, [1989] 1 S.C.R. 1367; *Zhang v. Chik et al.*, 2012 MBCA 28, 280 Man.R. (2d) 26; *Timmerman v. Selkirk and District Planning Area Board et al.*, 2008 MBCA 52, 228 Man.R. (2d) 77; and *Homestead Properties (Canada) Ltd. v. Sekhri et al.*, 2007 MBCA 61, 214 Man.R. (2d) 148.

See also *Glenwood Label & Box Mfg Ltd v Brunswick Label Systems Inc et al*, 2019 MBCA 12 at para 4.

[43] With respect to the standard of review applicable to the issue of prejudice in the context of a delay motion, in *HB Fuller Company v Rogers (Rogers Law Office)*, 2015 ONCA 173, Weiler JA began by citing the usual standard of review, but added (at para 19):

> . . . Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 27.

Weiler JA went on to conclude that the judge had committed errors in his analysis regarding prejudice, which rose to a level that warranted appellate intervention.

[44] Interpretation of a court rule involves a question of law, reviewable on a standard of correctness (*Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123 at para 11; and *Thoreson v Alberta (Infrastructure)*, 2020 ABCA 146 at para 16).

Analysis

Application of the Former or the Current Rule

[45] In deciding whether the former or current rule applied, the motion judge correctly referenced the applicable transitional provision, r 1.02(2).

[46] Broad comments about transitional provisions can be found in *Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51. McLachlin CJC, for the majority, affirmed that transitional provisions do not attract special rules of interpretation that are different from other legislation, and the search is always for the intention of the legislator. She also made the following remarks (at para 17):

> . . . Transitional provisions are enacted to catch those who fall between the cracks created by two pieces of legislation. They ensure that these individuals are not left in legal limbo, uncertain of their rights and with no applicable law. . . .

[47] The presumption under r 1.02(2) that a current court rule applies reflects basic principles of statutory interpretation that no one has a vested

right in any procedure (Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Markham: LexisNexis, 2014) at 802).

[48] The approach to be taken in applying transitional provisions similar to r 1.02(2) has been well articulated by other Canadian courts. In three cases from the Northwest Territories, two of which addressed the application of a transitional rule in the context of a motion for dismissal for delay (*Gorf v Treeshin*, 2002 NWTSC 4; and *Rowe v Rowe*, 2007 NWTSC 78), the Court held that the onus is on the party seeking to deviate from the presumption that a new rule applies to show that there are "compelling reasons" (*Rowe* at para 17) to do so, an example being that he or she is "caught in a 'Catch-22' situation or a procedural or logistical quandary" (*Gorf* at para 30), or to show that "the application of new procedural rules . . . would 'cause an injustice or disadvantage a litigant in what the Court considers to be an unfair or arbitrary way'" (*Fullowka v Royal Oak Mines Inc*, 1997 CarswellNWT 17 at para 22 (SC)). In *Fullowka*, the Court noted that the result would have been the same regardless of which iteration of the rule applied (see para 14), and proceeded to apply the new rule, on the basis that there was no compelling reason not to do so.

[49] Ontario caselaw identifies a test of "compelling reasons" or "special" or "serious" prejudice, or "serious injustice or procedural unfairness" for a court to exercise its discretion under the former transitional provision in section 156(3) of the Ontario, *Courts of Justice Act, 1984*, SO 1984, c 11, (the *Ontario Act*) and override the general premise that a current rule applies (*Marshall v Hoffman*, 1985 CarswellOnt 435 at para 7 (SC); *Seaway Trust Co v Feldman*, 1985 CarswellOnt 510 at para 6 (SC (H Ct J));

and *Primavera v Aetna Casualty Co of Canada*, 1985 CarswellOnt 421 (SC) at paras 18, 29).

[50] Although the plaintiffs rely on *Brandiferri v Wawanesa Mutual Insurance, et al*, 2011 ONSC 3200 in support of their position that the former rule should apply, that decision is readily distinguishable as it dealt with 2010 changes to the Ontario, *Rules of Civil Procedure*, RRO 1990 Reg 194 (the *Ontario Rules*) and, notably, section 156(3) of the *Ontario Act* was no longer in effect and the amendments contained no other specific transitional provision. The judge, in *Brandiferri*, therefore relied on general rules in that jurisdiction (rr 1.04 and 2.03 of the *Ontario Rules*) which provide, respectively, for the rules to be liberally construed and for discretion in a court to dispense with compliance with any rule at any time.

[51] Other Ontario cases have disagreed with the view that the above general provisions should be interpreted to provide for the application of old rules, preferring basic principles of statutory interpretation that court rules are procedural in nature and are intended to have retrospective effect. For example, in *Onex Corp v American Home Assurance Co*, 2009 CarswellOnt 8098 (Sup Ct J), Belobaba J concluded that he could "not accept the defendants' submission that rules 1.04 and 2.03 can operate as 'transitional provisions' akin to s. 156(3) in the 1984 reforms" (at para 18). Many subsequent cases have cited *Onex* with approval (*Alymer Meat Packers Inc v Ontario*, 2010 ONSC 649; *Brown's Cleaners and Tailors Ltd v Omers Realty Corp et al*, 2010 ONSC 1073; *Frangione v Vandongen et al*, 2010 ONSC 2823; and *Curle et al v Gustafson et al*, 2015 ONSC 884).

[52] Turning to the motion judge's reasons for applying the former rule, he stated (at para 33):

> . . .
>
> a) A motion for delay is different from many interlocutory motions. It focuses on how litigants have conducted themselves during the course of the litigation up to the time that the motion is brought. A delay motion is unlike many procedural motions which are designed to assist the parties in preparing their respective cases for trial. A delay motion is designed to end the litigation without the need for a trial.
>
> b) A motion for delay is based upon how the litigants have acted in the past. In my respectful submission, it is unfair to assess a litigant's conduct by using principles different from the principles which were commonly applicable at the time of the conduct. Just as a person cannot normally be branded a criminal for performing an act which at the time was perfectly legal, the conduct of a litigant should not be judged by a law that may impose stricter standards than existed when the conduct occurred, especially when the order requested would summarily end the action.
>
> c) Even though the defendants argue that an appeal from a Master is a "fresh hearing" and they are therefore not prohibited from raising a new argument in this court, the fact is that the defendants made their motion when the pre-amendment version of Rule 24 existed. It is not unfair to apply the rule upon which they relied at the time that they brought their motion.
>
> d) This is not a case where some of the conduct occurred after the enactment of the new rule. It is a case in which all of the conduct occurred under the predecessor rule. The new rule became effective on January 1, 2018. The delay motion was filed in November 2016 based upon conduct which had occurred before then.

[53] In my view, the motion judge erred in law by not identifying the presumption that the current rule applies and, further, by failing to recognise that there must be a compelling reason, such as a legal limbo or serious or special prejudice for the former rule to apply.

[54] In not addressing whether there were such reasons to apply the former rule, the motion judge failed to consider whether the current rule is significantly different from the former rule and whether the application of the current rule, on the facts of this case, would have a material impact.

[55] Starting with current r 24.01(1), is there a compelling reason, such as a legal limbo and or serious or special prejudice, that would result from the application of that rule, such that the former rule should be applied?

[56] The amendments to r 24.01 do not create a legal limbo, as both the former and current rules provide a framework within which to address a motion for dismissal for delay. Furthermore, in key respects, current r 24.01(1) remains substantially the same as the former rule; under current r 24.01(1), like the former rule, prejudice remains a central tenet, in that the rule speaks directly to delay that has resulted in "significant prejudice". That being the case, the treatment of prejudice in time-honoured decisions such as *Eadie* and *Dubois* remains applicable and important.

[57] As I will later explain, on a proper analysis of this case, there has been very lengthy unexplained delay that has resulted in significant inherent prejudice. As a consequence, the action would be dismissed regardless of whether current r 24.01(1) or the former rule applied. Thus, there is no compelling reason to apply the former rule.

[58] Therefore, I conclude that the motion judge erred by granting an order under r 1.02(2) that the former rule applied, and by not applying current r 24.01(1).

[59] I add this with respect to current r 24.01(2). While the introduction of a presumption of significant inherent prejudice in cases of "inordinate and inexcusable" delay is a departure from the former rule, there is authority which pre-dates the amendments that supports the proposition that lengthy unexplained delay will typically lead to a finding of inherent prejudice. For example, in *DeCorby v Richardson Greenshields of Canada*, 1994 CarswellMan 230 (CA), Philp JA, in finding inherent prejudice sufficient to dismiss an action for delay, stated (at para 5):

> However, it is not necessary to decide whether or not specific prejudice to [the defendant] has been established on the record. In our view, in the circumstances of this case inherent prejudice must be presumed. The delay in this case is inordinate; and it remains unexplained.

[60] A determination as to whether current r 24.01(2) applies is again a fact-driven matter. Counsel, in their facta and oral submissions, did not specifically address the meaning of "inordinate and inexcusable" and whether the delay here can be characterised as such. However, given the lengthy unexplained delay in the particular circumstances of this case, I would conclude that the delay has been "inordinate and inexcusable", as defined in r 24.01(3)—it has been "in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case". Moreover, the presumption prescribed by current r 24.01(2) has not been rebutted. Therefore, the same result, namely dismissal, would also ensue

applying current r 24.01(2). Once again, there is no compelling reason not to apply that rule.

[61] Having said all of this, I recognise that, in a different fact situation, it may be appropriate to grant an order that the former rule applies.

Alleged Palpable and Overriding Errors

Complexity

[62] The defendants assert that the motion judge erred in rejecting their characterisation of this litigation as straightforward. The motion judge's finding regarding complexity is entitled to deference absent palpable and overriding error. He acknowledged that the law in the area is not complicated, but found that the facts are. He noted that a number of expert witnesses would be required and "[t]he fact that the parties have spent a significant amount of time arguing about whether the plaintiffs' expert is an appropriate witness suggests to me that this case is not as simple as the defendants contend" (at para 45). In my view, the motion judge was entitled to reject the defendants' characterisation of the case as not complex; no palpable and overriding error has been established. Nonetheless, the complexity of the case is limited by the fact that it arises from a single surgery and that the applicable law is well settled.

Period of Unexplained Delay

[63] I agree with the defendants' assertion that the motion judge made a palpable and overriding error in finding that there was only five years of

unexplained delay–as well as in his related determination that there was tacit acceptance by the defendants of much of the overall delay.

[64] Apart from producing some records and documents in 2010, 2013 and again shortly after the motion for dismissal for delay was filed, the plaintiffs have not advanced this action since the examinations for discovery were conducted in 2005. While they undoubtedly had to change course in early 2015 after the Soder Dmytriw report was found to be inadmissible, they still have not produced any further expert report on liability–not even since the delay motion was filed approximately four years ago, in November 2016. No real explanation has been provided for the delay in moving the case forward, including in the production of the various records that were requested, other than that the defendants were prepared to wait.

[65] However, the evidence does not support an inference that the defendants were content to leave matters in abeyance or that there was acceptance of the delay during the periods that the severance motion and the Soder motion were being dealt with, or otherwise. Counsel for the defendants made repeated requests throughout for the documents regarding damages that the plaintiffs had agreed to produce at the examinations for discovery.

[66] In explaining his finding that there had been tacit acceptance of the delay by the defendants, the motion judge referred to three letters sent by counsel for the defendants to counsel for the plaintiffs on March 12, 2015, July 27, 2015 and February 3, 2016, and found that counsel for the defendants' failure to provide a clear warning that the defendants intended to move to dismiss the claim for delay supported a conclusion that "it was business as usual, namely the periodic and casual engagement between the parties that

had gone on during the 13 years that had preceded the decision on the Soder motion" (at para 78). Although there was no warning or threat, counsel for the defendants, in those letters, in fact, attempted to move the matter along. In the first two letters, he put the plaintiffs on notice that the defendants objected to admission of Dr. LeBlanc's report, and then followed up a few months later seeking the plaintiffs' intentions in that regard. In the third letter, he confirmed those portions of the Inquest evidence that would be used as examination for discovery of the defendants, and again requested responses to his letters dated July 12, 2013, March 12, 2015 and July 27, 2015.

[67] The current status of the action is that examinations for discovery of the plaintiffs on liability have been conducted but are not complete, and there has been no examination for discovery on damages. On the standard of care, the plaintiffs have only Dr. LeBlanc's report, and its admissibility is challenged. While two expert reports have been produced regarding damages, counsel for the defendants (during oral submissions and without objection by counsel for the plaintiffs) characterised these as "temporal" reports that speak to Ian's condition and needs but do not address damages in the context of causation. Counsel for the defendants also submitted (again without objection) that some of the requested medical, educational and financial records requested remain outstanding.

[68] Therefore, the period of delay has been very lengthy. For many years, well beyond the five years identified by the motion judge, that delay has not been satisfactorily explained.

Inherent Prejudice to the Defendants

[69] As detailed in *HB Fuller*, the failure to properly deal with inherent prejudice can lead to reversible error.

[70] The defendants say that the motion judge did not adequately consider inherent prejudice resulting from the possibility of fading memories. This is particularly so given the nature of the evidence that will be required from third party witnesses "in order to permit the Defendants fair opportunity at trial to defend the claim as pleaded against them, which includes [evidence of] alleged discussions with and between health care administrators, health care professionals, patients and third parties". The statement of claim alleges that the parents had contact with others within the hospital system who failed to adequately advise them of risks associated with the surgery. Given the very lengthy delay, its impact on the memories of such potential witnesses is concerning. However, as neither the plaintiffs nor the defendants have identified any of these witnesses or their anticipated evidence, it is difficult to assess the inherent prejudice stemming from their possible involvement.

[71] That said, I am persuaded that the motion judge erred when addressing the impact of the delay on the memory of the parties. Much of this claim is about informed consent, which relies on the recollections of the parties as to what was said. This is not simply a case that depends on records. The motion judge found that concerns about fading memories were answered because the parties had been examined for discovery. However, it is not sufficient simply to say that a transcript of discovery evidence is available to assist a party with their recollection of events. Delay affects memories even where those transcripts are available (*Algoma District School Board v Algoma*

Insurance Brokers Ltd, 2018 ONSC 7414 at paras 79-81). Furthermore, in this case, the defendants' examinations for discovery are, by agreement, limited to 61 pages of evidence given at the Inquest in 1996. That testimony is almost 25 years old. It cannot be of meaningful assistance in addressing inherent prejudice associated with the defendants testifying at trial.

[72] I also agree with the defendants that the motion judge's comment that "[t]here is no evidence before me that the [outstanding] medical records are not available even at this late date" (at para 62) does not adequately consider the issue of inherent prejudice associated with damages. Rather, given the passage of time and the delay in producing records, I find the statement of this Court in *Mauer* to be apt: "With the best of goodwill and assuming all the potential witnesses are available to testify, it is simply too much to expect after this very long delay that precise and detailed evidence of the kind that will be required will be available" (at para 13).

[73] In addition, although the motion judge recognised the defendants' "[living] for 17 years with the unflattering notoriety of being defendants in a civil action", he also stated that "their downside is that they may have to live with that notoriety for another year or two before they are given the opportunity to erase it after a trial" (at para 72). I am persuaded that, in so doing, he did not fully consider the inherent prejudice to the defendants, as private litigants, of having the action loom over them for so many years—and whether it was limited or significant. As noted in *Bodnarek v Health Sciences Centre et al*, 2004 MBQB 229 at para 19, private litigants are much more likely to suffer inherent prejudice as a result of delay than an institutional defendant (see also *Hughes v Simpson-Sears Ltd* (1988), 52 DLR (4th) 553 (Man CA) at 560). Moreover, there is no evidence which indicates that this

matter will proceed to trial in "[a] year or two" (at para 72). As I have outlined, the plaintiffs have not yet secured the expert reports that they have been seeking regarding liability or any reports on the issue of causation and damages, and examinations for discovery are not complete.

[74] Having found these errors that tainted the motion judge's analysis, it becomes necessary to reweigh the evidence regarding inherent prejudice (*HB Fuller* at para 45; and *Carioca's Import & Export Inc v Canadian Pacific Railway Limited*, 2015 ONCA 592 at para 6). I am satisfied that the inherent prejudice resulting from the lengthy unexplained delay is significant. More than 26 years have passed since the material events occurred, and more than 18 years have elapsed since the statement of claim was filed. This has resulted in significant impairment in the ability of the defendants to defend themselves, in the context of a personal injury claim, where the memories of the parties are key. In addition, citing *Hughes* at p 560, quoting *Biss v Lambeth Health Authority,* [1978] 2 All ER 125 at 131, "There comes a time when (the defendant) is entitled to have some peace of mind and to regard the incident as closed." Surely 18 years is that time, especially since, as noted by the master in her reasons for decision dismissing the action, "this case remains a very long way from the finish line".

Conclusion

[75] There has been delay in this case resulting in significant inherent prejudice such that the action should be dismissed under current r 24.01(1). I would also order dismissal applying current r 24.01(2).

[76] As this Court has previously stated, "there is a strong public interest in promoting the timely resolution of disputes in our civil justice

system" (*Glenwood Label* at para 5). And essential justice between these parties calls for dismissal of the action.

[77] For the foregoing reasons, I would allow the appeal and dismiss the action for delay. I would award one set of costs payable by the plaintiffs to the defendants.

"Simonsen JA"

I agree: _____

I agree: "leMaistre JA"

COURT OF APPEAL
PROVINCE OF MANITOBA
WINNIPEG
R3C OP9

CORRIGENDUM

December 7, 2020

TO WHOM IT MAY CONCERN:

Re: *Ian Dmytriw et al v Jonah NK Odim et al*
2020 MBCA 112
Docket No. AI19-30-09375
Released: November 18, 2020

The attached decision replaces the previous decision which was released November 18, 2020.

"Gordon Dmytriw" was added to the style of cause to read as follows:

IAN DMYTRIW, an infant who sues by his father and next friend, GORDON DMYTRIW, GORDON DMYTRIW and RHONDA DMYTRIW

(Plaintiffs) Respondents

Paragraph 3 also was changed to read as follows:

> [3] In February 2002, Ian, by his father, and both of his parents, Gordon and Rhonda Dmytriw (the parents), in their own capacity, issued the statement of claim against a number of defendants. The action has since been discontinued against all defendants other than Drs. Odim and Giddins (the defendants).