IN THE COURT OF APPEAL OF MANITOBA

Coram: Scott C.J.M., Huband and Steel JJ.A.

B E T W E E N:

KARL MAUER

(Plaintiff) Respondent

- and -

JOANNE McDOUGALL

(Defendant) Appellant

AND BETWEEN:

KARL MAUER

(Plaintiff) Respondent

- and -

PETER J. MANASTYRSKY

(Defendant) Appellant

M. G. Finlayson ✓
for the Appellants

N. A. Cuddy
for the Respondent

Appeals heard:
December 14, 2000

Judgment delivered:
January 15, 2001

PER CURIAM

1 The issue before this court is whether the motions court judge erred in law in failing to dismiss the plaintiff's actions for delay.

The Facts

2 The appeals involve two actions which are claims for personal

injuries arising out of two different motor vehicle accidents. The first (the Manastyrsky action) occurred on March 11, 1986; the second (the McDougall action) on December 16, 1992. The plaintiff was also involved in three other motor vehicle accidents on September 12, 1980, April 26, 1990, and April 27, 1994.

3 In the Manastyrsky action, the statement of claim was issued in February 1988. It claims "serious personal disabling injuries" including whiplash injury and aggravation of a pre-existing injury suffered as a result of a previous automobile accident (presumably the accident of September 12, 1980). A statement of defence was filed in May 1988. No step was taken thereafter by the plaintiff to advance the litigation until the spring of 1999 following a request on behalf of the defendant Manastyrsky for a notice of discontinuance.

4 The statement of claim in the McDougall action was filed in December 1994, shortly before the expiration of the two-year limitation period. It too claimed that the plaintiff sustained a whiplash injury to his cervical spine and aggravation and exacerbation of pre-existing injuries. McDougall did not file a statement of defence as an indefinite extension of time was granted by the plaintiff's counsel "pending breakdown of negotiations"; in fact, no negotiations took place despite several efforts by the Manitoba Public Insurance Corporation (MPIC), the insurer of both defendants, to obtain particulars. MPIC's request made in July 1998 for a notice of discontinuance brought no response. In the result, the defendants filed their motion to dismiss in March 1999.

5 The master dismissed the Manastyrsky action for delay, but rejected the defendant's similar motion in the McDougall proceedings. Both unsuccessful parties appealed to the Court of Queen's Bench. In May 2000 the motions court judge dismissed the defendant's appeal in the McDougall action and allowed the plaintiff's appeal in the Manastyrsky action; in the result, neither action was dismissed for delay.

6 In his brief oral reasons, the motions court judge noted that liability was not an issue in either case (though perhaps not technically correct in the McDougall proceeding, this is of no consequence in terms of these reasons). As to the lack of medical information from the plaintiff, he held:

> Counsel tries to advance the position that the reason this was so is because no medical information was provided. There is nothing in the material indicating that the reason that there was no independent medical examination was because no reports were provided. Plain and simple, the reason there was no independent medical examination is because the defendant never asked for it.

7 He concluded that as a result of the McDougall accident in 1992:

> ... any independent medical examination trying to establish damages resulting from the 1986 accident [the Manastyrsky action] becomes tainted in any event by the subsequent accident. So the delay after 1992, I do not see how that correlates to any suggested prejudice as there was no independent medical examination.

8 Finally, in the McDougall proceeding (where no defence was filed pursuant to an arrangement with plaintiff's counsel), he held:

> ... one has to ask what step could Mauer have taken against

> McDougall? Presumably he could have noted default. It is hard to understand why a defendant would come into court complaining that the plaintiff has not noted default.

9 The defendants appeal.

The Decision

10 There is no dispute as to the applicable law. In *Law Society of Manitoba v. Eadie* (1988), 54 Man.R. (2d) 1, 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 (C.A.), *Pankhurst v. Matz et al.* (1991), 71

Man.R. (2d) 271 (C.A.), *Jacobson Estate v. Freed et al.* (1994), 97 Man.R. (2d) 197 (C.A.), and *Hansen v. Manitoba Hydro* (1993), 85 Man.R. (2d) 261 (C.A.).

11 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.

12 Before this court counsel for the defendants noted that there was unexplained delay of great length in both proceedings. The plaintiff's explanation that he had "neither the time, the inclination, nor the energy" to be able to deal with litigation issues was inadequate and one, in any event, that is belied by the medical reports which were provided following commencement of the defendants' motions to dismiss for delay.

13 Finally, as to prejudice the defendants argue that the motions court judge ignored evidence of actual prejudice since there are contradictions in some of the medical reports and related information provided to the court, involving treatment that occurred 10 to 15 years ago. There are not two accidents, but five to be taken into account. With the best of goodwill and assuming all the potential medical 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.

14 Counsel for the plaintiff relied on the following well-known

statement by this court in *Tower Estates Ltd. v. Canadian General Insurance Co.* (1989), 62 Man.R. (2d) 159 (at para. 10):

> This court's function in matters of this kind is to ensure that a judge exercised his discretion on a proper understanding of the facts and on proper legal principles.

15 Reliance is also placed on *Singh v. Transcona Dodge Chrysler,* where Twaddle J.A. stated (at para. 35):

> It is undoubtedly the duty of this court to prevent injustice. In the vast majority of cases, however, justice will have been achieved when the judge in motions court applied the fundamental principle. If there is no error in its application, justice will ordinarily result. Only in the most exceptional of circumstances will it be necessary for this court to set aside an order in accord with principle.

See as well *Pankhurst v. Matz.*

16 Plaintiff's counsel argued that what this court is being asked to do is to interfere with the exercise of judicial discretion by substituting our view for that of the motions court judge. Counsel suggested that this court should not be "too quick" to interfere with the exercise of judicial discretion since it would send the wrong message to the profession and encourage meritless appeals.

17 In our opinion, the motions court judge committed several errors of law in his reasons for decision. In the Manastyrsky action, the motions court judge seems to have totally overlooked the issue of prejudice, both specific and inherent, in light of the very long delay and the apparent

contradiction in the voluminous medical reports ultimately provided by the plaintiff.

18 In particular, the motions court judge makes no mention of the prejudice inherent in a delay of 11 years in a personal injury action. Even if liability is not in issue, inherent prejudice can still occur with respect to the assessment of damages. Delay can impair a defendant's ability to defend his or herself in relation to the assessment of damages because the ability to obtain an independent assessment on a timely basis is impaired, or the ability to test or challenge the plaintiff's subjective complaints may be impaired.

19 Pertinent to this case is the following observation by Morse J. in *Stechkewich v. Freeth* (1991), 77 Man.R. (2d) 76 (Q.B.), dealing with an action where there was delay of nine years (at para. 20):

> The courts in Manitoba have repeatedly stressed the need for personal injury accidents to be tried without undue delay, the sort of delay which has occurred in this case. Although no specific prejudice has been established by the defendant, there is inherent prejudice in delay, particularly in such a long delay as has occurred here. ... There must surely be a deterioration in the quality of the evidence, not only so far as the parties are concerned but also so far as the medical evidence is concerned.

20 It is correct that where the prejudice is inherent in character, it must be weighed to determine whether it is significant or minimal in character. See *Pankhurst v. Matz* and *DeCorby v. Richardson Greenshields of Canada and Moffat* (1994), 92 Man.R. (2d) 274 (C.A.). However, no

such balancing of factors took place in this case since the motions court judge did not consider the possibility of inherent prejudice. Given the 11-year delay, compounded by the inevitable difficulty in distinguishing between the injuries suffered by the plaintiff both before and after the accident in question, this was an error in law.

21 With respect to the McDougall proceedings, the motions court judge seemed to assume that the court was simply dealing with two motor vehicle accident actions in which liability was admitted, but this seriously underestimates the difficulties of apportionment since the plaintiff was involved in not just two, but five accidents, stretching back in time to 1980.

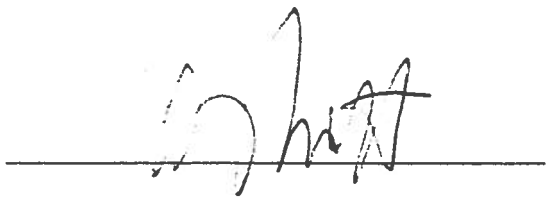
22 His statements respecting the onus on the defendants to request independent medical reports are clearly wrong. MPIC was requesting medical information from the plaintiff. There is no point in the defendants demanding an independent medical examination until medical information had been provided by the plaintiff. His emphasis in the McDougall action to the fact that no defence had been filed is difficult to follow since the defendant was operating under an indefinite extension of time. In our opinion, there was no legal impediment to the defendants in such circumstances moving to dismiss for delay.

23 Balancing all the factors as we are required to do, there has been undue delay in such circumstances as to require that the plaintiff's right to have his cases determined on the merits be eliminated. These two actions cried out for early resolution. The plaintiff's failure to take any steps to

move the actions along until forced into action by the defendants is a case of "too little too late."

24 We comment briefly on one other matter. Counsel for the plaintiff objected to the fact that the defendants presented "new issues" to this court that had not been argued before the Queen's Bench judge. But this is not so – the issues remain the same, namely, whether there had been unreasonable delay, the explanation for it, and the issue of prejudice. While it is true that the arguments advanced by the defendants dealt with a number of submissions that were not as well developed, if at all, before the Queen's Bench judge, the fact remains that the legal issue before both courts was the same. The fact that counsel before this court made a more convincing and better researched argument is hardly a valid reason for us to decline to correct errors in law.

25 The appeal is accordingly allowed with respect to both actions with costs.



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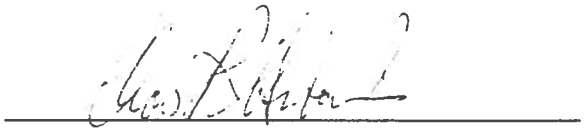

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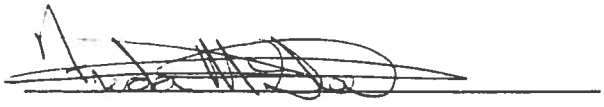

J.A.