CITATION: Langenecker v. Sauvé, 2011 ONCA 803
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COURT OF APPEAL FOR ONTARIO

Doherty, Armstrong and Hoy JJ.A.

BETWEEN

Peter Langenecker, Joanne Langenecker, Elisabeth Langenecker, and Franz Langenecker

Plaintiffs (Appellants)

and

Dr. S. Sauvé, Dr. P. Luke, Dr. White, Nurse K. Kiegel R.N., University Hospital and London Health Association

Defendants (Respondents)

Alan L. Rachlin, for the appellants

Julie Parla and Gillian Kerr, for the respondents Sauvé and Luke

Heard: December 1, 2011

On appeal from the order of Justice John F. McGarry of the Superior Court of Justice dated February 16, 2011, dismissing the action for delay, with reasons reported at 2011 ONSC 867.

Doherty J.A.:

I

[1] The appellant, Peter Langenecker, was seriously injured in a motorcycle accident in June 1994. He was treated at the University Hospital in London, Ontario by Dr. Sauvé, Dr. Luke (the respondents) and others. In June 1995, he sued the respondents and others alleging that their negligence had caused him serious and permanent injuries and disabilities. Some 15 years later, in September 2010, the respondents brought a motion under Rule 24.01 seeking an order dismissing the action for delay. By the time the motion was brought, the respondents were the only remaining defendants in the action. The motion judge granted the motion and dismissed the action. The appellants appeal.

[2] I would dismiss the appeal. The motion judge correctly stated the test to be applied on a motion to dismiss for delay. The chronology of the relevant events was not in dispute. The motion judge considered the explanations offered by counsel for the appellants for the various delays and he considered the respondents' prejudice claim. The motion judge decided that the delay was inexcusable. That conclusion was reasonably open to him. The motion judge also considered and rejected the submission that the nature and reliability of the evidence still available (medical and hospital records), and the narrow factual issue on which liability would turn, rebutted the presumption of prejudice to the defendants flowing from the long delay. The motion judge rejected this submission because he found there were potential sources of evidence other than the medical records that were lost to the defendants through the passage of time. The motion

judge's finding that the appellants had not rebutted the presumption of prejudice was not unreasonable.

II

[3] An order dismissing an action for delay is obviously a severe remedy. The plaintiff is denied an adjudication on the merits of his or her claim. Equally obviously, however, an order dismissing an action for delay is sometimes the only order that can adequately protect the integrity of the civil justice process and prevent an adjudication on the merits that is unfair to a defendant.

[4] The test under Rule 24.01 for dismissal of an action for delay is well established and is taken from English case law: see e.g. *Saikaley v. Commonwealth Insurance Co. et al.* (1978), 21 O.R. (2d) 629 (H.C.); *Armstrong v. McCall et al.* (2006), 213 O.A.C. 229; *De Marco v. Mascitelli* (2001), 14 C.P.C. (5th) 384 (Ont. S.C.); *Allen v. Sir Alfred McAlpine & Sons, Ltd*. [1968] 1 All E.R. 543 at 556.

[5] The language used to describe the appropriate test varies slightly in the authorities. I prefer the language of Lord Diplock in *Allen*, at p. 556, where he described the exercise of the power to dismiss for delay in these terms:

> It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues

> in the litigation will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if it were allowed to continue.

[6] The first type of case described by Lord Diplock refers to those cases in which the delay is caused by the intentional conduct of the plaintiff or his counsel that demonstrates a disdain or disrespect for the court process. In dismissing cases which fall within this category, the court effectively declares that a continuation of the action in the face of the plaintiff's conduct would constitute an abuse of the court's process. These cases, thankfully rare, feature at least one, and usually serial violations of court orders. This case does not fall into that category.

[7] The second type of case that will justify an order dismissing for delay has three characteristics. The delay must be inordinate, inexcusable and such that it gives rise to a substantial risk that a fair trial of the issues in the litigation will not be possible because of the delay: see *De Marco,* at paras. 22, 26; *Armstrong*, at paras. 11-12.

[8] The inordinance of the delay is measured simply by reference to the length of time from the commencement of the proceeding to the motion to dismiss. Most litigation does not move at a quick pace. Some litigation, because of the issues raised and/or the parties involved, will move even more slowly than the average case. It is fair to say that many medical malpractice actions are among those cases that move slowly. However, even accepting that litigation customarily moves at a somewhat stately pace and that this kind of litigation can move even more slowly than most, there can be no doubt that 15 years

from the commencement of the action to the motion to dismiss constitutes inordinate delay.

[9] The requirement that the delay be "inexcusable" requires a determination of the reasons for the delay and an assessment of whether those reasons afford an adequate explanation for the delay. As LaForme J. explained in *De Marco*, at para. 26, explanations that are "reasonable and cogent" or "sensible and persuasive" will excuse the delay at least to the extent that an order dismissing the action would be inappropriate.

[10] In assessing the explanations offered, the court will consider not only the credibility of those explanations and the explanations offered for individual parts of the delay, but also the overall delay and the effect of the explanations considered as a whole. For example, in this case, the appellants offered a "sensible and persuasive" explanation for part of the lengthy delay in completing the discovery process, but offered little by way of cogent explanation for the many other lengthy delays that occurred in the course of the 15 years since this action was commenced.

[11] The third requirement is directed at the prejudice caused by the delay to the defence's ability to put its case forward for adjudication on the merits. Prejudice is inherent in long delays. Memories fade and fail, witnesses become unavailable, and documents and other potential exhibits are lost. The longer the delay, the stronger the

inference of prejudice to the defence case flowing from that delay: *Tanguay v. Brouse*, 2010 ONCA 73, at para. 2.

[12] In addition to the prejudice inherent in lengthy delays, a long delay can cause case-specific prejudice. In this case, the respondents led evidence on the motion that their expert had died in June 2009 and that counsel for the respondents had been unable to find a replacement. The respondents argued that their inability to obtain an expert was caused by the delay in the prosecution of the claim and resulted in prejudice to their defence. Clearly, if the appellants' delay left the respondents in a position where they could not obtain a medical opinion in a medical malpractice case, that delay would cause serious prejudice to the defence. I will return to this submission below.

III

[13] In his reasons, the motion judge, at para. 9, correctly set out the applicable legal principles. He then reviewed briefly, but accurately, the chronology and explanations offered for the delay. With respect to those explanations, the motion judge did not address each separately, but did say, at para. 16:

> [T]he plaintiff has clearly failed to move the action forward in an appropriate manner and I agree with the defendants that there has been an inordinate delay which has not been caused by any extraordinary events but simply the usual hurdles that must be overcome in prosecuting an action.

[14] I understand the motion judge to be indicating that none of the explanations offered convinced him that any difficulties in moving the case forward went beyond "the usual hurdles" encountered in the prosecution of a claim. Those "usual hurdles" could not excuse a 15-year lapse between the initiation of the action and the motion to dismiss. Put differently, the motion judge assessed the explanations offered as amounting to no more than a description of the usual problems encountered by litigants (e.g. prodding an expert to provide a report) and did not amount to "reasonable and cogent" explanations for the inordinate delay that had occurred in this case.

[15] The motion judge's conclusion that the delay was "inexcusable" is one part fact finding and one part judgment. Both attract deference in this court. The appellants have not demonstrated that the motion judge fell into any factual error. Nor have they convinced me that he acted unreasonably in characterizing the delay in this case as inexcusable. By reasonable, I mean an assessment of the relevant facts that "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47.

[16] Counsel for the appellants (who was not counsel prior to the appeal) made his most forceful submissions when addressing the question of prejudice. He argued that the ready inference of prejudice to the defence flowing from a lengthy delay was rebutted in this case because the relevant evidence was found almost entirely in the medical records which had been preserved. He also made the point that the respondents had been

examined for discovery many years ago and could refer to the discovery transcripts to refresh their memory.

[17] In support of his submission, counsel observed that two experts, one for each side, had been able to give written opinions on the reasonableness of the doctors' conduct based on the medical records. Counsel submitted that it must follow that those records contain substantially the entire evidentiary story.

[18] I do not agree that because an expert can offer an opinion based on the medical records that it must follow that those records contain the entire or even close to the entire evidentiary story. The expert's ability to offer an opinion based on the medical records says nothing about whether those records provide an accurate or complete basis upon which to assess the reasonableness of the respondent doctors' conduct and the care they provided.

[19] Before the motion judge, the respondents led evidence that the medical decisions under attack in the lawsuit were the product of ongoing discussions among various members of the critical care team. This is the procedure normally followed in teaching hospitals such as the University Hospital in London. According to the respondents' evidence, these discussions would not necessarily be recorded in the hospital records and could have augmented or modified information available in those records. The respondents argued before the motion judge that some of the individuals involved in

these team discussions, including the doctor primarily responsible for the appellant's care, had not been sued and, therefore, their recollections had not been memorialized in a discovery transcript.

[20] The motion judge was persuaded that prejudice to the defence should be presumed from the lengthy delay. He said, at para. 15:

> In light of the type of evidence required to be led by the defendants, I am satisfied there is a fair presumption that their recollection, and those of their supporting witnesses would be severely impacted by the passage of some 16 years.

[21] There was evidence to support this finding and it cannot be characterized as unreasonable.

[22] On the question of prejudice, the motion judge ultimately concluded, at para. 16:

> The plaintiff has failed to rebut the presumption of prejudice resulting from a delay of 16.5 years and the action is therefore dismissed.

[23] I think this passage reflects the proper approach. The lengthy delay itself generated a presumption (or perhaps more accurately a strong inference) of prejudice to the respondents' ability to fully present their defence to the allegations. The appellants attempted to rebut that inference by reference to the nature of the evidence available even after 15 years and to the fact that the respondents had been examined for discovery years earlier. The motion judge found that the attempted rebuttal failed in the face of the respondents' evidence as to the potential significance of testimony dependent upon

witnesses' abilities to recall statements and observations made by various persons jointly responsible for Mr. Langenecker's treatment during the ongoing team meetings held when he was in the hospital over sixteen years earlier.

[24] Counsel for the appellants also argued that the motion judge erred in finding actual prejudice to the respondents flowing from the death of their expert witness and their inability to retain a new expert. Counsel submits that the affidavit of the law clerk filed on behalf of the respondents did not contain any admissible evidence to support the inference of actual prejudice flowing from the death of the respondents' expert.

[25] The motion judge did not make any finding of actual prejudice based on the death of the expert and the purported inability to replace that expert. I do not think he made a finding one way or the other on the validity of that claim. It was not necessary for him to do so because he was satisfied that the presumption of prejudice flowing from the inordinate delay had not been rebutted and was sufficiently strong to give rise to a substantial risk that the respondents could not fairly present their case so long after the relevant events. It is, therefore, unnecessary to decide whether the law clerk's affidavit provided an adequate evidentiary basis for a finding of prejudice based on the death of the expert and the alleged inability to replace that expert.

IV

[26] The motion judge applied the right test. His fact finding and his assessment of those facts reveal no reversible error. I would dismiss the appeal. The respondents are entitled to their costs on the appeal, if demanded, in the amount of $10,300, inclusive of relevant taxes and disbursements.

RELEASED: "DD" "DEC 19 2011"

"Doherty J.A."
"I agree Armstrong J.A."
"I agree Alexandra Hoy J.A."