KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 127**

Date: **2024 07 08**
File No.: QBG-RG-02180-2018
Judicial Centre: Regina

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BETWEEN:

NASHA OLENIC

PLAINTIFF

- and -

MATTHEW BUTLER and JONATHON TUCHSCHERER

DEFENDANTS

Counsel:

Jeffrey D. Scott, K.C. & Wayne M. Rusnak, K.C. — for the plaintiff
Nicholas M. Cann, K.C. — for the defendants

FIAT — BERGBUSCH J.
July 8, 2024

OVERVIEW

[1] This claim involves allegations of professional negligence arising from the death of Christopher Olenic days after elective surgery. At trial, the court will hear complex medical evidence regarding the alleged causes of Mr. Olenic's death and the applicable standard of care owed by each defendant to the deceased.

[2] The plaintiff applies for leave to call Dr. Rita Selby, a hematologist, to testify at trial. Leave is required because Dr. Selby's expert report was not served at least 60 days before the pre-trial conference, as required by *The King's Bench Rules*. The plaintiff also seeks leave to call four experts to give evidence related to causation. The issues to be decided on this application are the following:

a) Should the court grant the plaintiff leave to call Dr. Selby to give expert evidence at trial?

b) Should the court grant the plaintiff leave to call four experts to provide opinion evidence bearing on causation?

[3] The court may grant leave to a party to call expert evidence at trial even though the expert's report was not served in conformity with *The King's Bench Rules*. This discretionary authority must be exercised on a principled basis, with due consideration for the imperative that cases be adjudicated with the benefit of all relevant and necessary evidence, the right of parties to adequate notice of the case to be met, and the objective that cases be decided in an orderly and timely manner.

[4] I have decided to grant leave in this case, notwithstanding the plaintiff's late service of the expert report, because the proposed expert evidence appears necessary and relevant to a material issue, the plaintiff has provided a satisfactory explanation for the delay, the defendants will not be prejudiced, and the trial, scheduled to commence on September 9, 2024, will not be unduly delayed if the evidence is allowed. Admitting the additional expert evidence will assist the court in adjudicating the case on its merits.

[5] The plaintiff also seeks leave to call four expert witnesses to give medical evidence that bears on the issue of causation in this case. Based on a preliminary review of this anticipated evidence, I have concluded that the plaintiff's proposed expert witnesses will largely provide complementary, not duplicative evidence, and the defendants will not be unfairly prejudiced if this testimony is allowed. However, if the evidence proves to involve some duplication, I would nevertheless exercise my discretion under Rule 9-18(1) of *The King's Bench Rules* to hear these experts because their testimony is likely to assist the court in adjudicating the complex medical causation issues in this case and any prejudice to the defendants can be addressed by an

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award of costs.

BACKGROUND AND PROCEDURAL HISTORY

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[6] Christopher Olenic died on August 25, 2016, at 41 years of age. His medical history included morbid obesity and deep vein thrombosis with pulmonary embolus (which occurred after a motor vehicle accident in 2010), among other things. Mr. Olenic underwent an elective laparoscopic sleeve gastrectomy on August 22, 2016, under the surgical management of Dr. Matthew Butler and the anesthetic management of Dr. Jonathon Tushscherer. Before the operation, Mr. Olenic was taking several medications, including the anticoagulant warfarin. He was instructed to stop taking warfarin five days before the operation, which he did.

[7] The morning of the operation, Mr. Olenic's international normalised ratio [INR] (a measure of the length of time it takes blood to clot) was 1.7. Before the operation, he received one 40 mg dose of enoxaparin subcutaneously to prevent him from developing a blood vessel obstruction.

[8] After the operation, Mr. Olenic immediately complained of pelvic pain. He had a cardiac event that required cardiopulmonary resuscitation (CPR) and was taken back to the operating room for a suspected internal bleed. Arterial bleeding was detected and controlled with clips. However, after the operation, Mr. Olenic developed multiorgan system failure and died on August 25, 2016. According to the final autopsy report, the underlying cause of Mr. Olenic's death was internal bleeding from one of the gastric blood vessels.

[9] This action was commenced on July 27, 2018. The plaintiff, Nasha Olenic, was Mr. Olenic's spouse. She brings the action under *The Fatal Accidents Act*, RSS 1978, c F-11, on behalf of herself and Mr. Olenic's parents. The statement of claim alleges that the defendants failed to meet the requisite standard of care while they

provided medical services to the deceased. The plaintiff alleges that Dr. Tuchscherer and Dr. Butler both acted negligently in proceeding with the operation:

a) when Mr. Olenic had an elevated INR of 1.7;

b) without consulting a hematologist or another physician with similar training; and

c) without obtaining informed consent.

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[10] In their statement of defence, the defendants deny the allegations of negligence and assert, in the alternative, that negligent treatment did not cause or contribute to Mr. Olenic's death.

[11] The statement of claim was amended on December 18, 2020, following questioning. On February 9, 2021, plaintiff's counsel signed a joint request for pre-trial conference. The defendants' counsel signed the joint request on February 26, 2021. The defendants amended their statement of defence on July 21, 2021.

[12] Prior to the pre-trial conference, the plaintiff served expert reports for four witnesses: Dr. Jeff Ginsberg, a hematologist; Dr. Daniel Birch, a general surgeon; Dr. Michael Jacka, an anesthesiologist; and Dr. Anthony Salvian, a vascular surgeon. On July 28, 2021, the defendants filed a notice of objection related to Dr. Salvian.

[13] The pre-trial conference took place on September 9, 2021. No settlement was reached.

[14] After the pre-trial conference, the plaintiff retained Dr. Rita Selby, a hematologist. Dr. Selby produced a report dated May 13, 2022, a copy of which was provided to the defendants' counsel on August 17, 2022. At that time, the plaintiff's counsel advised that his client was not waiving a privilege claim over the report. On May 31, 2023, he confirmed that any claim to privilege was waived and provided a

curriculum vitae for Dr. Selby.

[15] On August 16, 2023, the trial in this matter was scheduled for seven days, beginning on September 9, 2024. On September 13, 2023, the Local Registrar advised counsel that I had been assigned to try this action.

[16] On September 27, 2023, plaintiff's counsel served a notice of application, returnable on a date and time to be determined, seeking an order pursuant to Rule 5-40 of *The King's Bench Rules* for leave to call Dr. Selby to give expert evidence at trial and for leave pursuant to Rule 9-18 to permit Dr. Selby, Dr. Birch, Dr. Ginsberg, and Dr. Salvian to give causation opinion evidence at trial.

[17] Only liability will be in issue at trial, as the parties have reached an agreement on damages. The plaintiff frames the remaining issues as follows:

> (a) Standard of care: Did Dr. Butler and Dr. Tuchscherer provide the requisite standard of care when they decided to proceed with the Operative Procedure knowing Mr. Olenic had an elevated INR of 1.7? and
>
> (b) Causation: But for the elevated INR of 1.7 along with the administration of Enoxaparin, is it likely Mr. Olenic would have survived the arterial bleed? …
>
> (Brief of Law on behalf of the plaintiff, Natasha Olenic, filed February 21, 2024, at para. 14)

ADMISSIBILITY OF EXPERT EVIDENCE

[18] Before addressing the plaintiff's two applications, I will briefly explain what this fiat does not decide.

[19] The decision to admit expert evidence involves a two-step inquiry to determine whether the proposed evidence meets the threshold requirements for admissibility. First, the proponent of the evidence must show that it meets four criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert: *R v Mohan*, [1994] 2 SCR 9.

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Second, the court must fulfil its gatekeeping function by ensuring that the proposed expert will comply with the duty to provide fair, objective, and non-partisan evidence and by determining whether the potential benefits of admitting the evidence justify the risks of doing so: *White Burgess Langille Inman v Abbott and Haliburton Co.,* 2015 SCC 23 at para 24, [2015] 2 SCR 182.

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[20] My ruling on the plaintiff's applications necessarily requires that I consider the relevance and necessity of the proposed expert evidence. Regarding necessity, I must assess whether one expert's anticipated evidence is likely to be duplicative of another's, as I will explain in detail later in these reasons. My conclusions on the criteria of relevance and necessity are necessarily preliminary and I reserve the discretion to revisit these requirements during the trial, after I have had the benefit of hearing the expert testimony and any submissions from the parties in light of that evidence. In addition, the present decision does not consider any exclusionary rules, rule on the experts' qualifications, or bypass the gatekeeping function summarized above, which remain live issues for trial.

APPLICABLE LAW

A. Leave to File Expert Report After Pre-Trial Conference

[21] Rules 5-39 and 5-40 of *The King's Bench Rules* govern the service and filing of expert reports. Among other things, Rule 5-39 specifies the information that must accompany an expert's report, including a summary of the expert's qualifications and opinion, and a statement identifying the area of expertise in which the expert is tendered to offer an opinion. The report must be served in accordance with Rule 5-40. Rule 5-40(2) provides that, unless the court otherwise orders, a party who intends to use the evidence of an expert at trial shall serve a copy of the expert's report not less than 60 days before the pre-trial conference, and rebuttal expert reports shall be served not less than 30 days before the pre-trial conference. If parties file a written agreement

that a productive pre-trial conference is possible without expert reports, the deadlines are 90 days before trial in the case of expert reports and 60 days before trial for expert rebuttal reports: Rule 5-40(3).

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[22] If a party has not complied with Rules 5-40(2) or (3), expert evidence can only be tendered at trial with leave of the court: Rule 5-40(4). The rule applicable to appraisal reports is to similar effect: Rule 5-46(4). The prevailing view is that the trial judge should determine whether to grant leave in such cases: *Baker Hughes Canada Company v Estevan Plastic Products Ltd.,* 2016 SKQB 56 at paras 19-21, 92 CPC (7th) 420. Another rule specific to professional reports that fall within s. 22 of *The Evidence Act*, SS 2006, c E-11.2, also requires such reports to be served prior to the pre-trial conference, failing which they are admissible at trial only with leave of the trial judge: Rule 5-47(3).

[23] Rule 5-40(4) does not specify a test for granting leave to call expert evidence. Moreover, there are only a few reported decisions regarding Rule 5-40 or its predecessor, Rule 284D, and fewer still that discuss the principles that apply when a party requires leave to call expert evidence at trial because of non-compliance with the deadline for serving expert reports.

[24] To provide context for my analysis, a brief word about pre-trial conferences is in order. The purpose of pre-trial conferences in civil proceedings is twofold: first and foremost, to facilitate settlement of the litigation and, second, to manage the litigation if it cannot be settled: Rule 4-12(4). Rule 4-12 emphasizes the importance of efforts to achieve a resolution during the pre-trial conference, by mandating the parties to make a “genuine attempt” to settle the action and specifying four goals of pre-trial conferences, all of which reinforce the objective of settling disputes: see Rules 4-12(1) and (3).

[25] Requiring service of expert reports before the pre-trial conference

facilitates settlement, by ensuring that the parties have exchanged all relevant information before the discussions take place, and allows the parties to assess the relative strengths and weaknesses of their positions. Timely exchange of expert reports also ensures that the parties are ready for trial if they are unable to settle at pre-trial: see *Christensen v Kocay* (1998), 165 Sask R 62 (QB) at para 9 [*Christensen*]; *Regina Police Superannuation and Benefit Plan v Wyatt Co.* (1998), 165 Sask R 74 (QB) at para 24; *Pearson v Pearson*, 2000 SKQB 161 at para 9 [*Pearson*].

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[26] In *Pearson*, Wright J. noted that non-compliance with Rule 284D (the predecessor to the current rule) is common in family law proceedings, as parties often defer incurring the cost of expert reports in the hope that the matter settles at pre-trial. In *Pearson*, the consequence of both parties' non-compliance with the Rule was that the trial had to be adjourned. As for whether leave should be granted, Wright J. commented that all relevant evidence should be before the judge who would adjudicate the dispute. However, it was also essential for the responding party to have sufficient notice to prepare. In the circumstances, granting leave to file the expert evidence was appropriate provided that "... late notice remains adequate notice in terms of preparation. ...": *Pearson* at para 11, citing *Alberta Motor Association Insurance Company v Lenza*, 1990 ABCA 185 at para 6, 74 Alta LR (2d) 218 [*Lenza*].

[27] Wright J. also referred to *Chamberlin v Chamberlin*, 1999 SKQB 19 [*Chamberlin*]. In *Chamberlin*, Wilkinson J. granted leave to a party to call an expert, despite non-compliance with the requirement for notice of expert evidence. Wilkinson J. emphasized that, whenever possible, the court should receive all relevant evidence in order to hold a full and complete hearing, so long as the adverse party had adequate time to respond:

> [124] I relied on *Lenza v. Alberta Motor Assn. Insurance Co.* (1990), 42 C.P.C. (2d) 32, 74 Alta. L.R. (2d) 218 (Alta. C.A.) for the proposition that leave should be granted where late notice remains adequate notice in terms of preparation and that, whenever possible, it

> is best that the trier of fact have all the relevant evidence. I referred also to *Carey v. Richert*, [1996] Y.J. No. 106 (QL) (Q.B.) which held that the best evidence was required in order to have a full and complete hearing, and expert evidence [notice of which was given on the day of trial in that case] would be admitted if there was sufficient time to properly assess the circumstances and allow the opportunity for full cross-examination and response. I referred also to *Scullion v. Scullion* (1995), 12 R.F.L. (4th) 421 (N.B.Q.B.) where expert evidence was admitted despite lack of notice.

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[28] In *Chamberlin*, Wilkinson J. allowed the petitioner to call a business valuator to give expert evidence in rebuttal, despite the petitioner's failure to give timely notice in accordance with the applicable rule. To minimize prejudice to the respondent, the petitioner's expert was required to give his evidence early in the petitioner's case and the respondent's expert was permitted to listen to the testimony by telephone.

[29] In *Lenza*, cited in *Chamberlin* and *Pearson*, the Alberta Court of Appeal sought to balance timely notice and disclosure of expert evidence with the objective that the court should hear all relevant evidence. In Alberta, the rule regarding the disclosure of expert evidence is "prejudice-based," prioritizing the admission of necessary evidence provided that the opposing party is not unduly prejudiced. This was explained in a widely cited decision, *Wade v Baxter*, 2001 ABQB 812 at para 42, [2002] 3 WWR 133:

> [42] *Lenza* confirms that there are strong policy reasons for admitting all relevant and material evidence. An examination of the other decisions discloses that R. 218.1 is still prejudiced-based. Evidence should only be excluded under the Rule if there is prejudice that cannot be negated by an adjournment or some other mechanism. In several of the decisions the Court of Appeal makes note of the fact that an adjournment was not applied for, which invokes two related concepts: firstly that there was probably no prejudice, or else an adjournment would likely have been requested, and secondly that an adjournment can cure many cases of prejudice. The Ontario rule appears to be to the same effect: *Robb Estate v. St. Joseph's Health Care Centre* (1999), 87 O.T.C. 290, 34 C.P.C. (4th) 133.

[30] See also *1159465 Alberta Ltd. v Adwood Manufacturing Ltd.*, 2010 ABQB 133 at Schedule 1 para 2.44, [2010] 12 WWR 296, aff'd 2011 ABCA 259, [2012] 2 WWR 83; *Stewart Estate v TAQA North Ltd.*, 2012 ABQB 87 at para 15, 77 Alta LR (5th) 208, aff'd 2015 ABCA 357 at paras 108-109, [2016] 4 WWR 20.

[31] The Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, provide more detailed guidance regarding late expert reports. Ontario, like Saskatchewan, requires expert reports to be served by a set number of days before the pre-trial conference: see Rule 53.03(1) of the Ontario *Rules of Civil Procedure*. Where Rule 53.03(1) has not been complied with, an expert may only testify with leave of the trial judge. The Ontario rule also specifies the criteria that a non-complying party must meet before the trial judge may grant leave. As explained in *Mohamud v Juskey*, 2023 ONSC 4414 at para 23 [*Mohamud*]:

> [23] Rule 53.08(3) provides that where the requirements of r. 53.01(1) [*sic*] have not been complied with, an expert may not testify with respect to an issue except with leave of the trial judge. Pursuant to r. 53.08(1) leave may be granted if the non-complying party satisfies the court that:
>
> (a) there is a reasonable explanation for the failure to comply; and,
>
> (b) granting leave would not,
>
> (i) cause prejudice to the opposing party that could not be compensated by costs or an adjournment; or,
>
> (ii) cause undue delay in the conduct of the trial.
>
> [Emphasis added]

[32] Prior to March 2022, the Ontario rule stated that the court shall grant leave to a non-compliant party unless doing so would cause non-compensable prejudice or undue delay. The rule now provides that the court may grant leave and requires the non-compliant party to demonstrate a reasonable explanation for the failure to comply. The amendment was adopted to address the chronic challenge that late-filed expert reports cause the court in scheduling and hearing civil trials: see *Mohamud* at paras 28-29.

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[33] Although Rule 5-40 of *The King's Bench Rules* does not prescribe criteria to be met before leave is granted, in my view a party seeking to file an expert report after the pre-trial conference should provide a satisfactory explanation for the delay. Requiring the applicant to provide some explanation is consistent with other decisions of this Court concerning procedural steps taken after the pre-trial conference has been initiated. For example, an applicant is required to provide a satisfactory explanation for the delay when seeking leave to serve a cross-claim or third party claim after a joint request for pre-trial conference has been made: see, *e.g., Husky Oil Operations Limited v Saskatchewan*, 2010 SKQB 88, 351 Sask R 301.

[34] To sum up, pursuant to Rule 5-40(4), the court has discretionary authority to grant leave to call expert evidence, despite non-compliance with the deadlines specified in Rules 5-40(2) and (3). Having regard for the reasons expressed by other judges of this Court for granting or denying leave to call expert evidence at trial where there has been non-compliance, as well as the procedure followed by other courts, I have distilled the following factors for consideration on such applications:

a) Is the expert evidence relevant and necessary for the adjudication of an issue in dispute?

b) Has the tendering party provided a satisfactory explanation for the delay?

c) Will non-tendering parties suffer prejudice that cannot be compensated by an award of costs or remedied by an adjournment?

d) Will admission of the evidence unduly delay the trial?

[35] This is a context-specific exercise, and the weight to be given to these factors may vary depending upon the case. The overarching concern should be to ensure an adjudication on the best evidence while minimizing unfairness to any party.

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[36] I will now review the foregoing factors in deciding whether to grant the plaintiff leave to call Dr. Selby to give expert evidence at trial.

Necessity and Relevance of the Expert Evidence

[37] The plaintiff anticipates that Dr. Selby will offer an estimate of the deficiency of Mr. Olenic's blood clotting factor due to the INR of 1.7. The plaintiff submits that this evidence is relevant to causation and will assist the court in deciding whether it is more likely than not that Mr. Olenic would have survived the arterial bleed but for his elevated INR. I will return to Dr. Selby's expected evidence later in this decision when I discuss whether it is likely to duplicate the evidence of other experts. Consistent with the test for admission of expert evidence, the test for necessity and relevance for the Rule 5-40(4) analysis is not onerous.

[38] In short, I have determined that Dr. Selby's evidence is necessary and relevant to a material issue, causation. This conclusion is for the purpose of deciding the Rule 5-40(4) application only and does not predetermine the issues of relevance and necessity for the purpose of qualifying Dr. Selby to give evidence at trial. Further, Dr. Selby's qualifications and her ability to provide objective evidence remain to be determined at trial.

Satisfactory Explanation for the Delay

[39] The pre-trial conference took place on September 9, 2021. Plaintiff's counsel explained that, when he signed the certificate of readiness, he believed all necessary steps had been completed. Before the pre-trial, the plaintiff had served and filed expert reports in compliance with Rule 5-40(2), including the reports of three experts addressing causation.

[40] After the pre-trial conference, plaintiff's counsel came to believe that an opinion from a subspecialist surgeon experienced in coagulation and anticoagulant

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medication management would more fully advance the plaintiff's position on causation. Dr. Selby produced a report dated May 13, 2022. Plaintiff's counsel then retained an additional physician to provide an opinion, which was completed on July 30, 2022. On August 17, 2022, plaintiff's counsel provided both reports to the defendants' counsel. It is not clear why the plaintiff delayed a few months before providing Dr. Selby's report to the defence. Eventually, plaintiff's counsel retained a third physician to provide a causation opinion, which was provided to defence counsel on January 26, 2023. The plaintiff does not seek leave to call these other two physicians at trial.

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[41] A trial date was scheduled on August 23, 2023. By then, the defendants had been in receipt of Dr. Selby's report for a year.

[42] Several decisions cited by the defendants are distinguishable from the present case. Each is an example of a situation where leave was refused because the requesting party was not diligent or did not have a reasonable explanation for the delay in the circumstances.

[43] In *Wright v Wright*, 2005 SKQB 115, 261 Sask R 155, the respondent sought during closing argument to re-open the trial for the purpose of tendering expert evidence regarding the value of a pension, despite having confirmed shortly before the start of the trial that no expert evidence would be called. The request was made in response to a question by the trial judge and the respondent had not obtained a report from the proposed expert. Not surprisingly, leave was denied.

[44] In *Christensen*, the defendant applied approximately six weeks before the start of a three-week personal injury trial for an order requiring the plaintiff to attend an out-of-province medical examination. In the view of Laing J. (as he then was), a medical examination on the eve of trial was not timely and had an element of unfairness. Justice Laing was also concerned that the opinion of a court-appointed expert would be given extra weight by the jury.

[45] In *Yorkton (City) v Mi-Sask Industries Ltd.*, 2020 SKQB 282 [*Mi-Sask*], the City of Yorkton sought leave to tender an expert report addressing potential environmental damage. The defendants were opposed, contending that the trial, scheduled for five weeks, would have to be adjourned and the report dealt with issues not raised in the pleadings. Robertson J. was evidently concerned by the plaintiff's lack of diligence. He was not persuaded that the plaintiff could not have foreseen the potential for environmental damage at an earlier stage in the litigation. The lawsuit, commenced in 2012, had been actively case managed by a judge since 2017, including by setting timelines for the exchange of expert reports. Granting leave would likely have necessitated an adjournment of the trial so the defendants could respond to the new report. Robertson J. determined that granting the plaintiff leave to call the expert evidence was inconsistent with timely justice and the court's role to counter delay in court proceedings.

[46] The delay in *Mi-Sask* was not as egregious as that in some of the other cases relied upon by the defendants. However, *Mi-Sask* is distinguishable from the present situation because of the greater number of parties involved in that case, the fact that timing of expert reports had been addressed during extensive case management, and the fact that a lengthy trial had been scheduled before the plaintiff raised the issue.

[47] Finally, the defendants cite *Agha v Munroe*, 2022 ONSC 2508, 23 CCLI (6th) 118 [*Agha*], a recent Ontario decision. In *Agha*, the plaintiff's explanation for not having served expert reports before the trial was that the cost of obtaining them was prohibitive. In addition, the plaintiff sought leave for late service of expert reports only after the trial had begun and in relation to reports that had not yet been prepared. Unlike the present situation, the delay in *Agha* was deliberate and the time needed to obtain and serve the reports was unknown. It is readily understandable why the judge in *Agha* was not satisfied with the reasons for the delay: see also *Quinn v Rogers*, 2024 ONSC 1967 at paras 21-22.

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[48] The defendants submit that the relevant time for assessing the plaintiff's diligence is the date of the application for leave, not the date when the plaintiff provided the additional expert report to the defendants' counsel, and that with reference to the correct date, the plaintiff has not been diligent. This argument is not persuasive because the plaintiff acted reasonably in attempting to resolve the leave issue without a formal application and then filed an application promptly once a trial judge was assigned.

[49] After the plaintiff provided Dr. Selby's report to the defendants, there was considerable correspondence between counsel to see whether the new expert evidence affected the parties' settlement positions. When those discussions did not progress, plaintiff's counsel took several steps, including initiating a call with Justice Layh, the judge who presided at the pre-trial conference. Following a conference call on June 23, 2023, Layh J. determined that the trial judge should decide whether to permit Dr. Selby to give opinion evidence.

[50] As previously noted, on August 16, 2023, the Local Registrar advised counsel that the trial was scheduled for September 9-17, 2024. On September 13, 2023, the Local Registrar advised counsel that I had been assigned to try this action. Two weeks later, on September 27, 2023, plaintiff's counsel served the application for leave pursuant to Rule 5-40(4). That was still 11½ months prior to the trial. By delivering the report in August 2022 and by serving the application promptly after a trial judge was assigned, plaintiff's counsel acted with reasonable diligence.

[51] The present situation does not give rise to any of the difficulties evident in the cases the defendants rely upon. In this case, the plaintiff is represented by experienced counsel, who acts extensively for plaintiffs in medical malpractice cases. Plaintiff's counsel obtained and served three expert reports in conformity with *The King's Bench Rules* and believed the plaintiff's case was ready for pre-trial when he signed the certificate of readiness. However, medical malpractice cases can be complex.

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That plaintiff's counsel re-assessed the case after the pre-trial conference and determined another expert opinion would be beneficial is not surprising. After receiving the new report, plaintiff's counsel provided it to the defence with reasonable promptness and made several proposals for moving the file ahead. When those proposals met resistance, the plaintiff served an application for leave shortly after the trial judge was assigned.

[52] In these circumstances, I am satisfied that the plaintiff has been reasonably diligent and has provided a satisfactory explanation for the delay in this case.

Prejudice to the Defendants

[53] The defendants do not argue that they will suffer actual prejudice if the court permits the plaintiff to call Dr. Selby at trial. The defendants have had Dr. Selby's report since August 17, 2022. By the start of the trial, the defendants will have had two years to review the report and obtain rebuttal evidence, if needed. Again, unlike the cases where leave was refused, the defendants have had reasonable notice of Dr. Selby's anticipated opinion evidence and sufficient opportunity to prepare for Dr. Selby's testimony at trial.

[54] I find the defendants will not suffer any prejudice if Dr. Selby is allowed to testify that cannot be compensated with an award of costs.

Trial Delay

[55] The defendants have not suggested they will require an adjournment of the trial if Dr. Selby is permitted to testify. If they do need additional time to call rebuttal evidence, their request could likely be accommodated without vacating the scheduled trial dates. Since the trial will not need to be delayed, the present case is distinguishable from the authorities cited by the defendants. In any event, the bulk of the authorities I

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have reviewed above suggest that the relevant consideration is whether the trial will be unduly delayed if the evidence is allowed. In appropriate cases, an adjournment may be warranted so long as other parties are not unfairly prejudiced. As an adjournment is not required in this case, I will not address this factor any further.

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Conclusion on Leave to File Report of Dr. Selby

[56] Granting the plaintiff leave to call Dr. Selby to give expert evidence at trial will permit the plaintiff to put her best foot forward. Dr. Selby's evidence is relevant and necessary to a material issue, the plaintiff has provided a satisfactory explanation for the delay, the defendants will not be prejudiced if leave is granted, and the trial will not be unduly delayed. Most importantly, hearing the evidence will allow the court to make a just decision on the merits. The plaintiff's application for leave to call Dr. Selby is granted.

B. Leave to Call Multiple Experts

[57] The plaintiff intends to call two experts at trial to give evidence on the standard of care issue. Dr. Birch will provide opinion evidence regarding the standard of care of a general surgeon, while Dr. Jacka will testify regarding the standard of care of an anesthesiologist.

[58] The plaintiff applies for leave to call four experts – Dr. Birch, Dr. Ginsberg, Dr. Salvian, and Dr. Selby – to provide opinion evidence on the issue of causation. Unless the court permits otherwise, only one expert may be called by a party to give opinion evidence "on any one subject": Rule 9-18(1).

[59] Although the evidence of these four experts relates to the issue of causation, that does not necessarily mean that their evidence will be on the same subject. This distinction is illustrated by *Casbohm v Winacott Spring Western Star Trucks*, 2019 SKQB 44, [2019] 9 WWR 714, a personal injury action in which the plaintiff alleged

that he suffered serious injuries in a fall from a stepladder. The cause of the fall was in dispute. The plaintiff sought to file affidavit evidence of two experts on the causation issue, a mechanical engineer and a bio-mechanical engineer. Kalmakoff J. (as he then was) concluded that the evidence of these experts was not on the same subject, reasoning that evidence on the mechanics and engineering of ladders did not overlap with evidence pertaining to injury biomechanics.

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[60] As explained recently by Kilback J., Rule 9-18 exists “because calling multiple experts with the same specialty incurs unnecessary expense, uses up scarce resources, and is ultimately unnecessary to assist the court where an expert with the same specialty has already testified on the same subject matter”: *Harder v Butler* (12 September 2023) Regina, QBG-RG-01454-2014 (Sask KB) at para 45. In that case, Kilback J. concluded that the scope of tender of the two proposed experts overlapped but was not identical and did not sufficiently overlap in a way that would make it unfair to the defendants for the plaintiff to call both experts. He concluded that leave was not required under Rule 9-18. However, he also determined that, if leave had been required, he would have granted it because the degree of overlap of the proposed testimony was not so significant that it would be disproportionate or unfair to the defendants for the plaintiff to call both experts.

[61] In reaching his decision, Kilback J. referred to the factors set out in *K.N.B. v Wu*, 2005 CanLII 5874 (Ont Sup Ct) at para 35 [*K.N.B.*]. In that decision, Justice Ferguson identified a non-exhaustive list of factors to be considered in deciding whether to grant leave to a party to call more than three expert witnesses, a limit imposed by s. 12 of the Ontario *Evidence Act*, RSO 1990, c E.23. The comparable provision in *The Evidence Act* of Saskatchewan is ss. 21(1), which limits the number of expert witnesses who may be called on either side to five without leave of the court. In this case, the plaintiff is not looking to exceed the statutory limit.

[62] The factors identified by Ferguson J. that seem most salient to the present situation are the number of expert subjects in issue, the number of experts each side proposes to call, whether the opposing party will be disadvantaged if leave is granted because the applying party will then have more experts than the opposing party, the degree of duplication in the proposed opinions of different experts, and whether the time and cost involved in calling the experts is disproportionate to the amount at stake in the trial. After reviewing those factors (among others), Ferguson J. granted leave to the plaintiff to call the additional experts. Ferguson J. also observed that it is difficult to assess these factors in advance of the trial, as some expert evidence may turn out to be non-contentious and the extent of overlap is not readily determined before any of the experts have testified. This observation applies to the situation before me.

[63] The defendants refer to *Smith v Obuck*, 2018 ABQB 849 [*Obuck*], which addressed a plaintiff's application to call two experts in physiatry to give evidence at trial. In that case, the trial judge noted at para. 18 that the purpose of the Alberta rule, which is equivalent to Rule 9-18 of *The King's Bench Rules*, is to avoid expense and delay resulting from excessive expert evidence "where unnecessary to assist the Court in arriving at a just result." This concern must be balanced against the plaintiff's right to put its best foot forward: *Obuck* at para 20. The court considered seven questions in deciding whether to grant leave for the second expert to testify. To paraphrase:

a) Is the expert testimony relevant to the subject matter in issue?

b) Can calling both experts be considered "piling on" or duplicative?

c) Does the additional expert evidence add anything to the evidence of the plaintiff's other experts?

d) Is the additional expert evidence required to allow the plaintiff to fairly present its case?

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e) Will the additional expert evidence assist the trial judge?

f) Is allowing the additional expert to testify prejudicial to the defendants?

g) Can any abuse, expense or delay that is determined to have been caused by the calling of the additional expert be addressed by an award of costs at trial?

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[64] In considering the expert evidence the plaintiff seeks to adduce from Dr. Birch, Dr. Ginsberg, Dr. Selby, and Dr. Salvian on causation, I have concluded that the answer to questions a), c), d), e), and g) is a qualified yes, and the answer to questions b) and f) is a qualified no.

[65] The qualification arises from the fact that I am asked to decide whether to grant the plaintiff leave to call these experts before the start of the trial and before each expert testifies as to their qualifications and their opinions. As the trial unfolds, evidence that seemed to be complementary may be revealed to be duplicative.

[66] The defendants do not object to Dr. Birch (general surgeon) and Dr. Ginsberg (anesthesiologist) giving opinion evidence on the issue of causation, so long as their testimony is confined to their scope of expertise and the contents of their reports. The defendants oppose Dr. Salvian's and Dr. Selby's testimony.

[67] In their written submission, the defendants note that the plaintiff seeks leave to tender causation opinion evidence from Dr. Salvian, but not an opinion on the standard of care. The defendants' brief then sets out their objection to Dr. Salvian providing opinion on the applicable standard of care. In short, because Dr. Salvian is a vascular surgeon, the defendants submit he cannot give opinion evidence regarding the standard of care expected of a general surgeon or an anesthesiologist. They rely upon the proposition that the defendant physicians' actions must be evaluated in light of their

particular training or specialty: see *Ter Neuzen v Korn*, [1995] 3 SCR 674 at para 33; and *Baines v Abounaja*, 2023 ONSC 2078 at para 195. I agree with the defendants on this point. As the plaintiff does not intend to have Dr. Salvian testify about the requisite standard of care for either defendant, I see no reason to say anything more about this aspect of the defendants' position.

[68] However, the defendants also object to Dr. Salvian's proposed testimony on causation on numerous grounds. They say Dr. Salvian's evidence would be duplicative of the anticipated opinion evidence of Dr. Birch or Dr. Ginsberg. They also say that the opinion of a vascular surgeon is unnecessary or irrelevant since this specialty differs from the defendants' practice areas. In addition, to the extent that Dr. Salvian will provide an opinion on coagulation or clotting factors, the defendants say that this testimony is outside of his expertise and would be properly given by a hematologist.

[69] In general response, the plaintiff asserts that the causation opinions of Dr. Selby, Dr. Ginsberg, Dr. Birch, and Dr. Salvian are not duplicative. The plaintiff submits that medical conditions can be complex to treat and a number of specialists may be involved. The plaintiff asserts that the four experts each contribute in a distinct way to a full understanding of the issues. The limit on the number of experts must be balanced against the plaintiff's obligation to put its best case forward.

[70] Regarding the alleged duplication of Dr. Salvian's testimony, the plaintiff seeks leave to call Dr. Salvian to provide a causation opinion on whether Mr. Olenic's pre-operative coagulation status worsened the severity of the post-surgical bleed he experienced from a damaged artery. Dr. Salvian is expected to testify that an injured artery responds differently in a patient with normal coagulation factors than in one with abnormal coagulation factors. Dr. Salvian offers the causation opinion that Mr. Olenic's pre-operative coagulation status, in which his clotting ability was reduced due to two

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medications, likely worsened the severity of the post-operative bleed that he experienced from a severed artery. Dr. Ginsberg, Dr. Birch, and Dr. Selby do not explain in their reports how an injured artery's response may vary depending upon the patient's coagulation status because they are not vascular surgeons.

[71] In my view, Dr. Salvian's opinion is likely to complement the other proposed expert evidence and to assist the court to determine whether Mr. Olenic's coagulation status caused or materially contributed to his rapid decline and death.

[72] Regarding Dr. Salvian's qualifications, the plaintiff responds that Dr. Salvian's experience and training as a vascular surgeon, with expertise providing medical and surgical treatment for conditions affecting arteries and veins, qualify him to opine on whether Mr. Olenic's pre-operative coagulation status likely worsened the severity of the bleed he experienced from a damaged artery.

[73] If Dr. Salvian has the requisite expertise by reason of his education, training, and experience to provide opinion evidence on the causation issue, his evidence should not be excluded simply because his specialization differs from that of the defendants. Ultimately, whether the acts or omissions of either of the defendants caused or materially contributed to Mr. Olenic's death (the "but for" test) is a question for the trier of fact: *Athey v Leonati*, [1996] 3 SCR 458 at paras 14-15; *Hander v Kumar*, 2022 SKCA 33 at para 40, 467 DLR (4th) 726. Causation in a medical malpractice case can be complex and Dr. Salvian's evidence may assist me to decide that issue.

[74] Finally, as for the objection that Dr. Salvian's opinion is beyond his expertise, it would be somewhat surprising if a vascular surgeon did not have the requisite expertise to comment on coagulation and clotting factors. However, the scope of Dr. Salvian's expertise is not something I can decide without evidence. The defendants may renew this objection after Dr. Salvian testifies about his qualifications.

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[75] The defendants contend that Dr. Selby's report and evidence is unnecessary for the plaintiff to advance her position at trial. They say that the plaintiff did not ask Dr. Selby to provide an opinion on the question whether Mr. Olenic would have survived the arterial bleed but for his elevated INR of 1.7 and the administration of enoxaparin. As a result, they say Dr. Selby does not have relevant evidence to provide on the issue of causation, as that issue is formulated by the plaintiff. Further, they say that Dr. Selby's evidence, as set out in her report, is "entirely duplicative" of the evidence of Dr. Ginsberg. The defendants say that Dr. Selby and Dr. Ginsberg both provide the same opinion on Mr. Olenic's "reduced coagulation status" and the "impact of coagulation factors." The defendants also argue that Dr. Selby's education, training, and experience are the same as Dr. Ginsberg's, leaving no gap in the plaintiff's expert evidence.

[76] Regarding the potential overlap between Dr. Ginsberg's and Dr. Selby's evidence, Dr. Ginsberg is expected to opine that use of warfarin combined with enoxaparin is likely to increase the risk of bleeding. He will explain that the mechanism of action of these two medications affects blood clot formation in different ways: enoxaparin inhibits a blood clotting factor, while warfarin reduces the availability of vitamin K, which is essential in blood clot formation. Dr. Ginsberg will also offer rebuttal evidence that coagulation factors change exponentially as INR levels change.

[77] The plaintiff asserts that Mr. Olenic's altered coagulation status and the likely consequences of that status are key issues in the action. Dr. Selby is a hematologist with medical leadership work experience in coagulation and anticoagulant medical management. Her opinion is that Mr. Olenic's altered coagulation status – his reduced clotting ability due to residual warfarin effect and the administration of enoxaparin (a blood thinner) – likely worsened the severity of the post-surgical bleed from a severed vessel. Dr. Selby will offer an "estimate" of the deficiency of Mr. Olenic's blood clotting factor due to the INR of 1.7, which is not specifically covered

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by Dr. Ginsberg's reports. It appears that Dr. Selby's evidence will supplement Dr. Ginsberg's. The plaintiff concedes that Dr. Selby's evidence duplicates Dr. Ginsberg's on the likely adverse effect enoxaparin had on Mr. Olenic's clotting ability but submits that Dr. Selby should be permitted to testify on this subject to provide a complete causation opinion.

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[78] In my view, the proposed evidence of Dr. Selby is relevant to the subject matter in issue. The issue is not whether Dr. Selby and Dr. Ginsberg have similar expertise, but whether they will testify on the same subject. Dr. Selby's testimony is likely to be complementary rather than duplicative of other expert evidence for the most part, including Dr. Ginsberg's anticipated evidence. As outlined by the plaintiff, Dr. Selby will testify about discrete matters related to Mr. Olenic's pre-operative coagulation status that are specific to her expertise. The additional evidence is required so that the plaintiff can fairly present her case and it is likely to assist me as the trial judge.

[79] Other factors considered by Ferguson J. in *K.N.B.*, cited above, include the number of experts each party will call and the quantum of damages at stake. I do not consider the prospect that the plaintiff may call more expert witnesses than the defendants to be determinative of the leave issue. Further, I do not have any indication of the magnitude of damages in issue. Given Mr. Olenic's age when he died, the quantum of the loss claimed may be significant. I infer that the number of experts the plaintiff seeks to call is not disproportionate to the loss in issue.

[80] I am persuaded that it would not unfairly prejudice the defendants if the plaintiff is permitted to call the four experts to give evidence on causation.

[81] Given the complexity of the proposed evidence, I am not able to determine with precision the amount of overlap among the plaintiff's expert opinions. The plaintiff concedes that there will be some duplication but has pinpointed areas

where Dr. Salvian and Dr. Selby bring different expertise to bear and will provide distinct opinions. Any unnecessary duplication of the evidence can be compensated through an award of costs, if warranted, at the end of trial.

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[82] If leave is required in this case, I would grant it because the degree of overlap of the proposed testimony is not so significant that it will be disproportionate or unfair to the defendants for the plaintiff to call the four experts. The medical issues in this case are complex and the plaintiff should be permitted to put her best foot forward at trial.

CONCLUSION

[83] The plaintiff's application for leave to call Dr. Selby to give evidence at trial is granted.

[84] The plaintiff's application to call Dr. Birch, Dr. Ginsberg, Dr. Salvian, and Dr. Selby to give evidence at trial on causation is also granted. The plaintiff should be mindful that any unnecessary duplication of the experts' evidence may attract an adverse costs ruling.

[85] Whether the parties' experts are qualified to give opinion evidence remains a live issue to be dealt with during the course of the trial. Nothing in these reasons is intended to prejudge that issue or the court's gatekeeping function.

[86] Costs of these applications will be addressed following the trial.

J.

P.T. BERGBUSCH