Citation: Khan v Saint Boniface Hospital, 2025 MBCA 40
Date: 20250502
Dockets: AI25-30-10178;
AI25-30-10180

IN THE COURT OF APPEAL OF MANITOBA

***B E T W E E N**:*

FAIZAN KHAN, as Litigation Guardian for ARMAAN WEISSHAAR-KHAN, and the said FAIZAN KHAN personally and KRISTY WEISSHAAR	)	
	)	***G. MacKenzie** and*
	)	***J. Syrtash***
	)	*for the Appellants/Applicants*
	)	*(via videoconference)*
(Plaintiffs) Appellants/Applicants	)	
	)	***K. L. Dixon** and*
- and -	)	***T. Reimer***
	)	*for the Respondent*
SAINT BONIFACE HOSPITAL	)	
	)	***B. Brannagan***
(Defendant) Respondent	)	*on a watching brief*
	)	*for A. Awadalla, B Hosseini,*
- and -	)	*A. Musleh, A. Chopra,*
	)	*S. Taylor, L. Whittaker,*
A. AWADALLA, B. HOSSEINI, A. MUSLEH, A. CHOPRA, S. TAYLOR, L. WHITTAKER, J. CHARISON, G. LI, M. FAROOQUI, K. LEWIS, J. BARKER, S. FOGG, C. DOWNS, A. DUTHIE, C. TAYLOR, L. BAUER, N. KJARTANSON and J. DOES 1-6	)	*J. Charison, G. Li and M. Farooqui*
	)	
	)	*Chambers motions heard:*
	)	***March 13, 2025***
	)	
	)	*Decision pronounced:*
(Defendants)	)	***May 2, 2025***

TURNER JA

[1] In the Court of King's Bench, the case management judge denied the plaintiffs' motion to compel the defendant, Saint Boniface Hospital (the hospital), to provide the identities of the defendants, J. Does 1-6 and K. Lewis (collectively, the unidentified defendants).

[2] The plaintiffs filed a notice of appeal, as they wish to appeal that decision. The hospital filed a notice of motion seeking an order that the plaintiffs are required to obtain leave before they are permitted to continue with the appeal. The parties agree, as do I, with the hospital's position that leave is required given that this is a proposed appeal of an interlocutory order. Therefore, this matter proceeded as a chambers proceeding before me in which the plaintiffs are seeking leave to appeal.

Background

[3] The litigation is a medical malpractice suit involving an infant born with a cognitive disability. The claim alleges that the defendants were negligent in the treatment and care of the infant plaintiff and the plaintiff mother while they were at the hospital during labour and delivery. All the individual defendants (including the unidentified defendants) were doctors or nurses who made entries in the medical records over the course of the labour and delivery.

[4] In the Court of King's Bench, the matter proceeded to case management. The plaintiffs brought a motion before the case management judge pursuant to rule 31.06(2) of the MB, *King's Bench Rules*, Man Reg 553/88 [the *KB Rules*], for an order compelling the hospital to provide disclosure of the identities of the unidentified defendants. Rule 31.06(2) of the *KB Rules* states:

Identity of persons having knowledge **31.06(2)** A party may on an examination for discovery obtain disclosure of the names	**Identité des personnes ayant connaissance des faits** **31.06(2)** Sauf ordonnance contraire du tribunal, une partie qui interroge au préalable peut

and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise.	obtenir la divulgation des noms et adresses des personnes dont on pourrait raisonnablement s'attendre à ce qu'elles aient connaissance des opérations ou des événements en litige dans l'action.

[5] In her decision, the case management judge noted that the plaintiffs were not seeking to identify the unidentified defendants on the grounds that they were potential material witnesses. Rather, they were seeking the identities to amend their statement of claim to name them as defendants and proceed to question them at examinations for discovery. The plaintiffs acknowledged in their brief and at the hearing before the case management judge that this was their litigation strategy.

[6] The case management judge went on to state that, on the record before her, she could not find any basis for the unidentified defendants to be named defendants; however, the issue could be revisited if new information or circumstances came to light.

Analysis

[7] Interlocutory appeals are exceptional. Parties do not have an unlimited right to appeal unfavourable decisions that are made during the course of litigation.

[8] In 2021, the Manitoba Legislature enacted *The Court Practice and Administration Act (Various Acts Amended)*, SM 2021, c 40, s 3, which was intended to discourage interlocutory appeals given that they can increase delay, expense and complexity of litigation (see *Kinnarath v People's Party of Canada*, 2024 MBCA 2 at para 12).

[9] The test with respect to a motion for leave to appeal an interlocutory order is set out in *Knight v Daraden Investments Ltd*, 2022 MBCA 69 at para 22:

> (1) Does the proposed ground of appeal have arguable merit? and
>
> (2) Is it of sufficient importance to warrant the attention of a full panel of this Court?

Arguable Merit

[10] The question of whether a proposed ground of appeal has arguable merit must start with a consideration of the standard of review.

[11] An order made by a case management judge is afforded significant deference, unless there has been a misdirection or a decision that is so wrong as to amount to an injustice (see *Perth Services Ltd v Quinton*, 2009 MBCA 81 at para 25). As stated by Mainella JA in *Hapko v Boel*, 2024 MBCA 110 at para 33:

> Robust case management has long been seen as an essential aspect to the orderly administration of justice. Often with complex cases, case management judges become familiar with the history and details of the litigation. As a result of that advantage, they are entitled to significant deference in their management of the litigation or, to use the vernacular, "elbow room" provided their discretion is exercised judicially (*Berscheid v Government of Manitoba*, 2022 MBCA 12 at para 81).

[12] In *Sawridge Band v Canada (CA)*, 2001 FCA 338, Rothstein JA wrote: "Case management judges must be given latitude to manage cases. [The] Court will interfere only in the clearest case of a misuse of judicial

discretion" (at para 11; see also *Winnipeg (City) v Caspian Projects Inc*, 2021 MBCA 33 at para 21; *Green v University of Winnipeg*, 2017 MBCA 18 at para 8).

[13] In the present case, the case management judge considered the appropriate law and applied it to the facts before her.

[14] In her role as case management judge, she considered the most just, expeditious and least expensive manner the litigation could proceed, as required by rule 1.04 of the *KB Rules* (see also *Hryniak v Mauldin*, 2014 SCC 7). She noted that the plaintiffs had been provided with full documentary disclosure and had conducted their examination of the hospital's representative; therefore, this was not a case where the plaintiffs were prevented from advancing their claim. In addition, she recognized the possibility that further information could come to light as a result of examinations of the named defendants or from an expert's review of the evidence. Should that occur, she left open the opportunity to revisit her decision.

[15] In addition, the proposed appeal may be rendered moot by the natural progression of the litigation. The plaintiffs will move on to examine the individual defendants. They will likely engage an expert to review the medical records already in their possession. Through the process, they may be able to articulate the relevance of the conduct of the unidentified defendants, at which point, if the hospital continues to refuse to identify them, the case management judge has indicated she will revisit her decision.

[16] In my view, there is little merit to the argument that the case management judge's decision amounts to an injustice and is a case of a misuse

of judicial discretion. Therefore, the proposed interlocutory appeal does not meet the first part of the test for granting leave to appeal.

Sufficient Importance

[17] On the second part of the test, this Court has followed the approach of the Saskatchewan Court of Appeal in *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2002 SKCA 119 at para 6:

> Is the proposed appeal of **sufficient importance** to the proceedings before the court, or to the field of practice or the state of the law, or to the administration of justice generally, to warrant determination by the Court of Appeal?
>
> - does the decision bear heavily and potentially prejudicially upon the course or outcome of the particular proceedings?
> - does it raise a new or controversial or unusual issue of practice?
> - does it raise a new or uncertain or unsettled point of law?
> - does it transcend the particular in its implications?
>
> [emphasis in original]

[18] Applying these criteria to the present case, the issue raised by the plaintiffs does not raise a new, controversial, unusual or unsettled point of practice or law.

[19] The plaintiffs assert that there is sufficient importance because there are currently two other obstetrical negligence cases before the Court of King's Bench where some unidentified defendants, J. Does, are included as defendants.

[20] The case management judge specifically stated that her decision was based on the evidence and arguments before her on this case. If the plaintiffs

in the other matters pursue similar motions in case management, it will be up to those case management judges to determine the issue on the facts before them. As the case management judge's decision here was highly fact-driven, I am not persuaded that it has any significant precedential value.

[21] Finally, given the case management judge's openness to revisiting her decision should additional information emerge, I cannot conclude that the decision bears heavily and potentially prejudicially on the course or outcome of the proceedings.

[22] In my view, the proposed appeal is not of sufficient importance as to warrant the attention of a full panel of this Court at this time.

Conclusion

[23] The plaintiffs' motion for leave to appeal is denied, with costs.

Turner JA