Date: 19990310
Docket: CV06705

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

THE PUBLIC TRUSTEE FOR THE NORTHWEST TERRITORIES, ADMINISTRATOR OF THE ESTATE OF RUFUS IRISH, DECEASED, ON BEHALF AND FOR THE BENEFIT OF BERNICE AVIOGANA, RAYMOND FIRTH and CHARLENE FIRTH, NELLIE ELANIK, NORMA GORDON, and DEREK KOWANA

Plaintiffs

- and -

CINDY VINTHERS, YVONNE ELIAS, CHARLES ELANIK, PETER KUNNERT, WAYNEEN HO, WENDY IMHOFF, KATHERINE VEITCH and MARY MACLEOD, JOSIE IRLBACHER, BRAAM JACOB DE KLERK, JANE DOE #1, JANE DOE #2, INUVIK REGIONAL HEALTH BOARD operating hospitals known as THE INUVIK REGIONAL HOSPITAL and SACHS HARBOUR HEALTH CENTRE

Defendants

Application to set aside Statement of Claim; cross-application to renew Statement of Claim and for other relief.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Heard at Yellowknife, Northwest Territories on February 10, 1999

Reasons filed: March 10, 1999

Counsel for the Plaintiff: Sarah A.E. Kay

Counsel for the Defendants
Peter Kunnert, Wayneen Ho
and Braam Jacob de Klerk: Kelly A. Payne

Counsel for the Defendant
Inuvik Regional Health Board
operating hospitals known as
The Inuvik Regional Hospital
and Sachs Harbour Health Centre: Charlene Doolittle, student-at-law

No one appearing for the remaining Defendants

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REASONS FOR JUDGMENT

[1] This is a medical malpractice suit alleging negligence and breach of contract in the medical treatment given to Rufus Irish, deceased.

[2] The Defendant Dr. Wayneen Ho (whose correct name is Wei-Ning Ho) has applied for an order setting aside the Statement of Claim as a nullity. There are cross-applications by the Plaintiffs for (i) renewal of the Statement of Claim or, alternatively, for an order deeming service of the Statement of Claim on Dr. Ho good and sufficient and (ii) amendment of the Statement of Claim to correct the spelling of Dr. Ho's first name.

Background

[3] The series of events which involved the medical treatment of Mr. Irish by the Defendants commenced on October 29, 1994. Mr. Irish died on November 3, 1994.

[4] The Statement of Claim was filed on October 24, 1996. It was amended by order dated January 23, 1997 and again by order dated May 22, 1997. None of the amendments relate specifically to the allegations against Dr. Ho.

[5] The affidavit of attempted service indicates that the process server retained by the agents for counsel for the Plaintiffs was advised on January 31, 1997, by contact with the Inuvik Regional Hospital, that Dr. Ho had left Inuvik.

[6] The affidavit of counsel for the Plaintiffs indicates that on February 10, 1997, counsel for the Defendant Dr. Kunnert advised that he had been retained and that he expected to be retained also for Drs. Ho and de Klerk. At that point he was not aware whether they had yet been served with the Statement of Claim.

[7] Only some of the Defendants were served with the Statement of Claim within the 12 months after it was issued. No application or order was made for renewal of the Statement of Claim.

[8] Dr. Ho was not served with the Statement of Claim until May 8, 1998. It is not clear from the affidavit of service exactly what document was served on her on that date. The affidavit of service refers to the Amended Statement of Claim, while the exhibit attached to it is actually the Amended Amended Statement of Claim.

Should the Statement of Claim be set aside or renewed?

[9] Pursuant to Rule 13, the Statement of Claim was in force for 12 months beginning on the date of its issue. Accordingly, it ceased to be in force after October 23, 1997 as against any Defendants not served.

[10] The Plaintiffs' counsel's affidavit indicates that there was some confusion as to whether the Statement of Claim was in force until May 22, 1998, being one year from the date of the last amendment. Rule 13, however, uses the words "12 months beginning on the date of its issue." The Statement of Claim was issued on October 24, 1996, so that is when the 12 months began to run. There is no indication in the Rules that an amendment changes that, except as provided in Rule 59(2). It provides that when a statement of claim is amended to add or substitute a defendant, the proceeding as against that defendant shall be deemed to begin when he or she was added or substituted. That

would apply notwithstanding that a statement of claim is no longer in force, not having been renewed: *Marois v. Hervieux Estate*, [1997] A.J. No. 949 (Alta. C.A.).

[11] No defendant was added or substituted in this case. Accordingly, it is clear that the Statement of Claim ceased to be in force after October 23, 1997.

[12] Although it appears from the record that other Defendants were served after October 23, 1997, the only application before me is that of Dr. Ho.

[13] The first issue is whether the Statement of Claim is a nullity as against Dr. Ho and should be set aside as a result. I will note first that if it is a nullity, there would seem to be no reason to set it aside; it simply would not be effective as against Dr. Ho.

[14] I have said that the Statement of Claim ceased to be in force after October 23, 1997. That does not make it a nullity: *Nagy v. Phillips*, [1996] 8 W.W.R. 681 (Alta. C.A.).

[15] In *Ternes v. Chouinard* (1995), 33 Alta. L.R. (3d) 392 (Q.B.), Master Quinn found that a validly issued statement of claim not served within the time prescribed by Alberta's Rule 11 could not be struck out. Failure to serve it was held to be an irregularity. Such a statement of claim was said to exist but to be "apparently in a limbo from which there is no redemption."

[16] There is, however, a significant difference between our Rule 13 and the Alberta Rule 11 that was at issue in *Ternes v. Chouinard*. Under Rule 11, an application to renew the statement of claim must be brought during the initial 12 month period.

[17] Under Rule 13, the application to renew is not time-restricted. The Rule says nothing about when the application is to be brought. It does say that the statement of claim may, before or after its expiration, be renewed by order for six months. And it may be further renewed before or after the expiration of the renewed statement of claim.

[18] Therefore, unlike the situation in Alberta, a statement of claim filed in the Northwest Territories can be renewed or "resurrected" any time by an order for renewal.

[19] When the Statement of Claim in this case was served on Dr. Ho on May 8, 1998, it was not in force. That service itself did not resurrect it in any way. I must therefore go on to consider whether I should now make an order renewing the Statement of Claim under Rule 13 so that she can be served.

[20] Obviously there is an issue of delay in this case. The application for renewal was not filed until February 8, 1999, over 15 months after the Statement of Claim ceased to be in force. Service of notice of this action, in the form of one of the amended versions of the Statement of Claim, was effected on Dr. Ho in May of 1998, over six months after the Statement of Claim ceased to be in force.

[21] The delay is a factor to be taken into account. The ultimate considerations are, however, those set out in *Widdell and K.M. Porta-Services Ltd. v. Woodman*, [1983] 4 W.W.R. 20 (Alta. C.A.) with respect to the former Alberta Rule 11, similar to our Rule 13: proof of prejudice to the defendants and the ends of justice in the individual case.

[22] As noted above, there was an attempt made to serve Dr. Ho, or at least to determine her whereabouts, in January of 1997. There is no information in the Plaintiffs' affidavit material as to any further attempts made to locate Dr. Ho or serve her prior to April of 1998, well after the Statement of Claim had ceased to be in force. Counsel for the Plaintiffs says in her affidavit that service was not effected due to inadvertence and miscommunication between her office and that of her former agents (not the same agents as the firm from which counsel appeared before me in Chambers). There was also, as I have noted, some apparent confusion about how long the Statement of Claim was in force.

[23] Once counsel for the Plaintiffs took the matter in hand, it appears that it took only three to four weeks to locate Dr. Ho. That search was hindered by the misspelling of Dr. Ho's first name, obtained from the transcript of the Fatality Inquiry that had been held.

[24] Under Rule 13, I have to be satisfied that Dr. Ho was not served "for any sufficient reason." I am troubled by the lack of any information as to efforts to serve Dr. Ho between January 31, 1997, when the process server learned she was no longer in Inuvik, and April 3, 1998, when counsel for the Plaintiffs took over the matter of service from the agent counsel who had been dealing with it until then. I can only conclude that no efforts were made and that this is a case of neglect or inadvertence on the part of the agents and/or counsel for the Plaintiffs.

[25] There are, however, circumstances suggesting that Dr. Ho might have been aware that there could be litigation arising out of the death of Mr. Irish. There had been a Fatality Inquiry, although the material before me does not indicate when or whether Dr. Ho took part in it. In early February of 1997, counsel for the Defendant Dr. Kunnert wrote to the Plaintiffs' counsel indicating that he expected to be retained for all three

physicians. It is reasonable to think that Dr. Ho would have become aware at that point that litigation was underway.

[26] The only prejudice alleged on behalf of Dr. Ho is the loss of the limitation period which may have accrued if the Statement of Claim is found to be no longer in force. That would apply only to the two year limitation for the negligence action but not to the six year limitation for the action for breach of contract. I would, however, adopt the view of Miller J. In *Cherry and Cherry v. Hurtig*; *Herman and Herman v. Toenders* (1980), 26 A.R. 483 (Q.B.), that loss of a right to claim a limitation period as a defence is not, by itself, prejudice.

[27] There is no evidence before me that suggests that Dr. Ho's defence is more onerous or that it is impeded by the delay that has occurred.

[28] There being no proof of prejudice to Dr. Ho, in my view the ends of justice would not be served by not permitting the Plaintiffs' claims to proceed as against her to a trial on the merits.

[29] Accordingly, I order that the Statement of Claim be renewed for a period of six months as against Dr. Ho commencing the date these Reasons for Judgment are filed. I do this so that Dr. Ho can be served while the Statement of Claim is in force.

[30] The formal order is to be worded in accordance with the provisions of Rule 13.

[31] The application to correct Dr. Ho's name so that she is shown as Wei-Ning Ho in the style of cause and elsewhere in the Statement of Claim is granted.

[32] Although costs normally follow the event, in my view in this case each party should bear their own costs of this application, and I so order.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 10th day of March, 1999

Counsel for the Plaintiffs: Sarah A.E. Kay

Counsel for the Defendants
Peter Kunnert, Wayneen Ho
and Braam Jacob de Klerk: Kelly A. Payne

Counsel for the Defendant
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Defendants

Reasons for Judgment
of the Honourable Justice V.A. Schuler