The Public Trustee for the NWT et al v. *Vinthers et al*, 2003 NWTSC 54

Date: 2003 09 25
Docket: CV 06705

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, 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, 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 by the Plaintiffs for leave to amend the statement of claim to include a claim under the *Trustee Act*, R.S.N.W.T. 1988, c.T-8.

Heard at Yellowknife, NT on August 28, 2003.

Reasons filed: September 25, 2003

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

Counsel for the Plaintiffs:	Joe Miller
Counsel for the Defendants Peter Kuhnert, Wei-Nung Ho and Braam Jacob de Klerk:	Jon P. Rossall
Counsel for the Defendants Inuvik Regional Health Board and	

Vinthers, Elias, Imhoff, Veitch,
MacLeod and Irlbacher: Garth Malakoe

The Public Trustee for the NWT et al v. *Vinthers et al*, 2003 NWTSC 54

Date: 2003 09 25
Docket: CV 06705

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, 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, 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

REASONS FOR JUDGMENT

[1] This is an application by the Plaintiffs for leave to amend again the statement of claim in this action. The history of the amendments made to date to the statement of claim is, putting it charitably, unfortunate and unusual, a factor I have taken into account in deciding that the further amendments proposed should be allowed.

[2] This action was commenced in October of 1996 and arises out of the death of Rufus Irish on November 3, 1994. It is a medical malpractice action, in which it is alleged that some or all of the Defendants were negligent in their treatment of or dealings with Mr. Irish, thereby causing his death. Examinations for discovery have not yet been completed.

[3] The Public Trustee was appointed administrator of Mr. Irish's estate in May 1996. There is no issue as to his appointment.

[4] The statement of claim in its present form contains a claim by the Public Trustee on behalf of the surviving children of the deceased. The amendments at issue would add to the statement of claim the following:

1. a paragraph in which the Public Trustee as administrator of the estate of Rufus Irish claims the value of the loss of earning capacity of the deceased;

2. a paragraph which states that the Plaintiffs rely on both the *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3 as amended, and the *Trustee Act*, R.S.N.W.T. 1988, c. T-8 as amended;

3. an amendment to the prayer for relief to state that damages are claimed on behalf of the estate of Rufus Irish as well as the other persons for whose benefit the existing action is brought.

[5] In the result, the Plaintiffs want to advance two claims: one under the *Fatal Accidents Act* on behalf of the survivors of Mr. Irish and one under the *Trustee Act* on behalf of the estate of Mr. Irish. There is no dispute that the statement of claim in its present form sets out the facts in support of the claim under the *Fatal Accidents Act*, although it does not refer to the *Act.* Whether it also already sets out the facts in support of the claim under the *Trustee Act* is one of the issues raised on this application.

[6] The Defendants oppose this application and argue that the proposed amendments would result in the addition of both a new plaintiff and a new cause of action. They point out that the applicable limitation period has expired and say that the amendments should not be allowed.

[7] The Plaintiffs argue that the proposed amendments do not add a new party or a new cause of action. Therefore, the Plaintiffs claim, no limitation issue arises or, if one does, the amendments should be allowed in any event.

[8] An earlier amendment to the statement of claim (which has been amended twice before) complicates this application. Originally, the statement of claim named as Plaintiffs (i) the Public Trustee for the Northwest Territories, Administrator of the Estate of Rufus Irish, deceased, and (ii) the surviving children of the deceased by the Public Trustee as Guardian of their estates.

[9] In January 1997, the style of cause was amended to what it is now. It now describes the Plaintiffs as the Public Trustee for the Northwest Territories, Administrator

of the Estate of Rufus Irish, deceased, on behalf of and for the benefit of the named surviving children.

[10] Counsel for the Plaintiffs was not able to enlighten me as to the reason for the amendment and the documents filed in support of the ex parte application for the amendment do not assist. It would be reasonable to infer from the amendment that the action was no longer being brought on behalf of the estate, but only on behalf of the surviving children.

[11] In the original statement of claim, paragraph one stated:

> The Plaintiff, the Public Trustee for the Northwest Territories is Administrator of the Estate of Rufus Irish, deceased, pursuant to Letters of Administration granted by the Supreme Court of the Northwest Territories on the 1st day of May, 1996, and brings this action on behalf of the Estate of Rufus Irish and upon behalf of and for the benefit of his surviving children, ... [the six named surviving children].

[12] Somehow, and without any court order authorizing it, paragraph one has, since the first amended statement of claim in January 1997, come to read:

> The Plaintiff, the Public Trustee for the Northwest Territories is Administrator of the Estate of Rufus Irish, deceased, pursuant to Letters of Administration granted by the Supreme Court of the Northwest Territories on the 1st day of May, 1996, and as Guardian of the Estates of Bernice Aviogana, Raymond Firth and Charlene Firth, and brings this action on behalf of the Estate of Rufus Irish and upon behalf of and for the benefit of his surviving children, ... [the six named surviving children].

[13] The important point from this is, however, that paragraph one does say that the Public Trustee brings the action on behalf of both the estate and the surviving children.

[14] The first issue is whether the proposed amendments add a new plaintiff or a new cause of action.

[15] The Plaintiffs say that the Public Trustee is the Plaintiff in this action for purposes of both the *Fatal Accidents Act* claim and the *Trustee Act* claim. They say as well that the cause of action is the same for both claims, i.e. negligence, and that the Public Trustee is simply expanding on his claim for damages. Thus, they argue, the proposed amendments do not add a new plaintiff or a new cause of action.

[16] To consider this argument, it is necessary to compare the two claims. Under the *Fatal Accidents Act*, liability for damages is imposed where the death of a person is caused by a wrongful act, neglect or default that would have entitled the injured person to

sue and recover damages had he not died (s. 2). Under section 3, an action brought under the *Act* must be for the benefit of the spouse, parent or child of the deceased and it must be brought by and in the name of the executor or administrator of the deceased. Section 7 requires particulars of the persons for whom and on whose behalf the action is brought and an affidavit by the plaintiff stating that those are the only persons entitled or who claim to be entitled to the benefit of the action. In this case, the s. 7 affidavit was filed along with the original statement of claim.

[17] The other claim arises out of s. 31(1) of the *Trustee Act* which provides that the administrator of a deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased, except in certain cases, as the deceased would, if living, have been entitled to do. Any damages recovered form part of the personal estate of the deceased [s. 31(2)].

[18] Therefore, under the *Fatal Accidents Act*, the administrator of the estate brings the action on behalf of the survivors of the deceased for losses suffered by them as a result of the death. Under the *Trustee Act*, the administrator brings the action on behalf of the estate for losses suffered by the deceased. The beneficiaries of the action brought by the administrator will not necessarily be the same under the two pieces of legislation.

[19] Richard J. commented on the difference between the two claims in *Irish v. MacKenzie Hotel*, [1997] N.W.T.J. No. 82 (S.C.), where the application before him was to add an action by an estate under the *Trustee Act* to an action already brought under the *Fatal Accidents Act* [at para. 16]:

> In the situation which surrounds the present application, there is not but one plaintiff or one kind of plaintiff. Different types of plaintiffs - - not just different types of damages - - are contemplated by the distinct causes of action created by the Fatal Accidents Act and the Trustee Act. The cause of action created by the Fatal Accidents Act was enacted for the benefit of dependants; the cause of action maintained or continued by s. 31 of the Trustee Act is for the benefit of the deceased's estate. (These may or may not be the same persons. That they are partially or entirely the same person(s) in a given case is irrelevant.) Each type of plaintiff can seek out the tortfeasor, armed with his/her own yardstick to prove his/her own damages, but each must do so within the limitation period.

[20] Similarly, in *Weiss v. Czarniecki*, 2000 ABQB 661, Hawco J. dealt with an action brought by the deceased's dependants by their next friend. The plaintiffs applied to have the next friend appointed as administrator ad litem of the deceased's estate and for an amendment to the statement of claim to assert that the estate had suffered losses including loss of the deceased's earning capacity. Hawco J. found that there was a new party - the estate - and that new party was putting forward a claim which, although based on the same facts, was an additional claim since the existing action was brought only on behalf of

the dependants. Accordingly, he held that the proposed amendments gave rise to a new cause of action.

[21] In *Hu (next friend of) v. Wang*, 2003 ABCA 171, the statement of claim contained a dependancy claim. One of the dependants was represented by his next friend. The next friend became the administrator of the deceased's estate and an application was brought to amend the statement of claim to advance a claim on behalf of the estate for loss of the deceased's future income, pursuant to Alberta's *Survival of Actions Act*, R.S.A. 1980, c. S-30, which governs such claims. The Court of Appeal stated that the amendment sought to add a new party, the administrator, notwithstanding that he was also named in the original suit as next friend, and a new cause of action, citing *Weiss* v. *Czarniecki, supra*. The rationale was that the administrator's capacity in the two roles was totally different, as was the nature of the claim he wished to assert.

[22] In this case, the Plaintiffs argue that the Public Trustee, as administrator of the estate of Mr. Irish, is already a party. That is true, but the style of cause specifies that he has brought the action on behalf of and for the benefit of the surviving children. He now proposes to pursue an action for the estate. Applying the reasoning in *Hu*, his capacity as a representative in the two roles is different, as is the nature of the claims asserted.

[23] While it is correct that the cause of action in this case is negligence, it must also be demonstrated that each plaintiff has a cause of action, in other words is entitled to the benefit of the cause of action. In *Scotia Mortgage Corporation* v. *Goss*, [1987] A.J. No. 932 (Q.B.), Master Funduk defined cause of action as "a set of facts which, if established, would entitle the plaintiff to some form of relief". The surviving children and the estate must be shown to come within, respectively, the *Fatal Accidents Act* and the *Trustee Act*, as part of the set of facts which, if established, would entitle them to some form of relief. They do that through the administrator of the estate, but it is not the administrator who has the cause of action.

[24] Further, Rule 15(b) requires that the style of cause in a pleading set out the capacity in which the plaintiff sues if it is a representative capacity. The style of cause in this case clearly shows the Public Trustee, as administrator of the estate, to be representing the surviving children. At the very least, it is not clear from the style of cause that the "real" or beneficial plaintiffs are both the estate as a separate entity and the surviving children.

[25] The Defendants put in evidence an excerpt from the examination for discovery of the Public Trustee, where he said that his understanding is that he was bringing the action as a representative action under the *Fatal Accidents Act* as administrator on behalf of all the dependants of the deceased. However, the transcript indicates that the Public Trustee was asked that question in the context of his relationship to the dependants of the

deceased and whether he was their guardian. His answer, viewed in that context, does not indicate to me that he was admitting that the action was not brought on behalf of the estate or that there was no intention to do so. I therefore place no significance on his answer for purposes of this application.

[26] The Plaintiffs also argue that the essentials of a claim by the estate under the *Trustee Act* are contained in the statement of claim as it now stands. They point again to the fact that the Public Trustee is described as the administrator of the estate in the style of cause. They point to paragraph one of the statement of claim which, as I have said above, states that the administrator brings this action on behalf of the estate as well as for the benefit of the surviving children. They also point to the prayer for relief, which claims "on behalf of the persons for whose benefit this action is brought" general damages for loss of expectation of life. It should be noted that the clause originally specified those damages as $50,000.00, but that from the time of the first amendment in January of 1997, that monetary figure has been omitted from the amended statement of claim without a court order authorizing the change.

[27] With reference to the claim for loss of expectation of life, the Plaintiffs rely on the Defendant physicians' acknowledgment, in paragraphs 54 and 55 of those Defendants' brief, that in Ontario the Courts have left open the question whether loss of earning capacity falls within the scope of loss of expectation of life. They also refer to *Holan Estate* v. *Stanton Regional Health Board*, [2002] N.W.T.J. No. 24 (S.C.), where Vertes J. described a claim under s.31(1) of the *Trustee Act* as being for damages for shortened, or loss of, expectation of life. As I read the case, however, he was considering general damages under that heading. He considered the claim for loss of future working capacity separately, under the heading "Loss of Financial Support".

[28] In any event, I am prepared to say that the claim for damages for loss of expectation of life could be interpreted as a claim based on loss of future earning capacity.

[29] It is probably fair to say from all of the above that the statement of claim contains a hint that the estate is claiming damages for loss of expectation of life. A claim based on the *Trustee Act* is not, however, clearly set out. What is set out in the statement of claim is, however, relevant to the second issue, which is whether the amendments should be permitted.

[30] For the foregoing reasons, I conclude that the proposed amendments do add a new plaintiff in the form of the estate itself. I also conclude that they add a new cause of action under the *Trustee Act*.

[31] I now turn to consider whether the amendments should be allowed notwithstanding the provisions of the *Fatal Accidents Act* and the *Trustee Act*, both of which impose a limitation period of two years from the date of death for the commencement of actions.

[32] The Plaintiffs rely in part on s. 32 of the *Judicature Act*, R.S.N.W.T. 1988, c.J-1, in arguing that the Court may permit amendments notwithstanding the expiry of a limitation period. In my view, however, that section is not applicable because the proposed amendment in this case does involve a change of parties - the addition of the estate itself as a party.

[33] The test for amending pleadings was referred to by Vertes J. in *Norn v. Stanton Regional Hospital*, [1998] N.W.T.J. No. 88 (S.C.); a court can exercise its power to do so if there are "special circumstances", especially lack of prejudice.

[34] The leading case, cited in *Norn*, is *Onishenko Estate v. Quinlan*, [1972] S.C.R. 380, commonly known as *Basarsky*. In *Basarsky*, the Supreme Court said that where there are special circumstances, an amendment may be allowed to add a claim despite the expiry of a limitation period. Some of the "special circumstances" that led the Court to say the amendment should be allowed in that case also exist in this case. Some do not, specifically the fact that in *Basarsky* the defendants admitted liability. Seldom, if ever, are two cases exactly the same. In my view the special circumstances that favour the proposed amendments in this case are the following:

- all the facts relating to the negligence of the defendants and their liability for Mr. Irish's death were set out in the original statement of claim;

- the style of cause in the original statement of claim did name as a plaintiff the administrator of the estate separately and not only as representing the surviving children;

- despite the fact that the statement of claim was amended to specify that the administrator of the estate was acting on behalf of the surviving children, paragraph one has always stated that the administrator was bringing the action on behalf of the estate as well as the surviving children;

- there has always been a claim in the prayer for relief for damages for loss of expectation of life;

- the defendants were given financial particulars of the loss of earning capacity claim in August 2000 and matters relevant to that claim were canvassed by them during the examinations for discovery, although without prejudice to their right to oppose the amendment to add the claim under the *Trustee Act*;

- the administrator was properly appointed prior to the expiry of the limitation period and could have brought the action under the *Trustee Act* within the limitation period.

[35] No prejudice was alleged by the defendants save for that which might be inherent in the delay in bringing this application only now, some nine years after the death of Mr. Irish.

[36] Having found that there are special and, I would even say, unusual circumstances in this case, I allow the proposed amendments. I also direct that the Plaintiffs amend the style of cause to reflect clearly that the action is brought on behalf of the estate as well as the surviving children.

[37] The Defendants also maintain that the claim by the estate for damages for loss of earning capacity is a claim not available under the *Trustee Act*. At the Chambers hearing before me, counsel were of the view that this point would require lengthy argument and they agreed that I should rule first on whether the amendments would be permitted and then on whether the availability of the claim should be dealt with on a pre-trial application or should await the trial.

[38] Although the question whether the claim is available under the *Trustee Act* is a legal question, and no one suggested that the answer to it would depend on the facts presented at trial, it may transpire that the evidence presented in this case will not substantiate the claim in any event. Since the evidence about loss of earning capacity will involve evidence such as the deceased's employment history and potential, which is also relevant to the claim of the surviving children, the claim under the *Trustee Act* is not likely to entail a separate body of evidence. In all the circumstances, I leave resolution of this issue to the trial judge.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
24th day of September 2003

Counsel for the Plaintiffs: Joe Miller
Counsel for the Defendants
Peter Kuhnert, Wei-Nung Ho

and Braam Jacob de Klerk: Jon P. Rossall

Counsel for the Defendants
Inuvik Regional Health Board and
Vinthers, Elias, Imhoff, Veitch,
MacLeod and Irlbacher: Garth Malakoe

CV 06705

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, 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, 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

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