

IN THE SUPREME COURT OF NORTHWEST TERRITORIES

BETWEEN:

JOHN EARL ELLINGSON and JANICE LOUISE
ELLINGSON as administrators of the Estate of Mary
Katherine Tilson (nee Ellingson), deceased.

Plaintiffs

- and -

SUMMIT AIR CHARTERS LTD. and JOANNE
FRANCES MacKINNON as Administratrix of the Estate of
John Ernest Bidwell, deceased.

Defendants

Application seeking a determination of a question of law on the interpretation of s.31
of the *Trustee Act*, R.S.N.W.T. 1988, c. T-8.

Heard at Yellowknife, NT: January 12, 2005

Reasons filed: January 21, 2005

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

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D. Bruce Garrow

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REASONS FOR JUDGMENT

[1] The plaintiffs have brought this application pursuant to the *Rules of Court* seeking a determination of a question of law. The question concerns the interpretation of a statutory provision that was originally enacted in 1903. That statutory provision is today set forth in s.31 of the *Trustee Act*, R.S.N.W.T. 1988, c. T-8:

31(1) The executors or administrators 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 case of libel and slander, in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do.

(2) The damages when recovered under subsection (1) form part of the personal estate of the deceased.

[2] The question of law, as posed in the plaintiffs' Notice of Motion is:

“Whether section 31 of the Trustee Act permits claims for the past and future loss of available estate surplus and loss of expectation of life”.

[3] Such a claim is often called a “lost years” claim, as in *Duncan Estate v. Baddley* [1997] A.J. No. 339 (Alta C.A.). Such claims have, at times, been permitted in other common-law jurisdictions; however, not any longer. There is extensive case law on the topic from other jurisdictions and these cases have been exhaustively reviewed for me by counsel on this application, both in their written briefs and in oral submissions, and for this I am indebted to counsel. As the topic relates to “survival of actions” legislation, each case from another jurisdiction necessarily relies upon the then extant legislation of that jurisdiction. There has not been any judicial determination or interpretation of s.31 of the *Trustee Act* in this jurisdiction since its enactment in 1903.

Although a number of reported decisions of this Court make reference to such claims being advanced pursuant to s.31 of the *Trustee Act*, no such claims have been judicially determined. See *Stewart Estate v. Stewart Estate* [1994] N.W.T.J. No. 23; *Irish v. MacKenzie Hotel* [1997] N.W.T.J. No. 82; *Norn v. Stanton Regional Hospital* [1998] N.W.T.R. 355; *Holan Estate v. Stanton Regional Hospital* 2002 NWTSC 26; and *Irish Estate v. Vinthers* 2003 NWTSC 54. Counsel agree, then, that the proper interpretation of s.31 remains open.

[1] The history of the common law, the enactment of “survival of actions” legislation and “wrongful death” legislation, judicial interpretation of those enactments and subsequent amendments to those enactments has been reviewed in many reported cases from other jurisdictions, most recently in *Duncan Estate*, in *Allen Estate v. Co-operators Life Insurance Co.* 1999 BCCA 35 (B.C.C.A.), in *MacLean v. MacDonald* (2002) 211 D.L.R. (4th) 474 (N.S.C.A) and in *Ferrainolo v. Olsen* 2004 ABCA 281 (AltaC.A.). It is not my intention to repeat such an extensive review in these reasons.

[2] I start with the factual context of the present application. Counsel have put before the Court a factual foundation for purposes of this application. The plaintiffs are the administrators of the estate of Mary Tilson who was killed in a plane crash in the Northwest Territories on October 8, 2000. The plaintiffs are also the parents of Mary Tilson. The defendant Summit Air Ltd. was the owner and operator of the aircraft. All three persons aboard the aircraft, including Mary Tilson, were killed instantly. The defendant Summit Air Ltd. admits liability for the accident which resulted in the death of Mary Tilson.

[3] The plaintiffs commenced these proceedings by filing a Statement of Claim on October 7, 2002. Its contents indicate that the action is brought pursuant to s.31 of the *Trustee Act* and also pursuant to the *Fatal Accidents Act* R.S.N.W.T. 1988, c. F-3 for the benefit of Mary Tilson's estate and also for the benefit of the plaintiffs as parents of Mary Tilson.

[4] Historically, the common law did not allow action against a tortfeasor for wrongfully causing a death. The harsh reality was that the surviving dependants of the deceased could not recover from the wrongdoer any damages, or any compensation for the loss that they had suffered by the wrongful death.

[5] Also, historically at common law there was a rule — in Latin *actio personalis moritar cum persona* — which stated that a personal cause of action died with the person. The harsh result of this rule was that a person's estate was denied the benefits of any existing cause of action vested in the person before he or she died.

[6] In the common law world generally, legislators stepped in to address these two harsh realities. In the case of the first mentioned rule above, the legislature created a new statutory cause of action to deal with that situation by enacting a “wrongful death” statute, now commonly called the *Fatal Accidents Act*. This occurred in the Northwest Territories in 1884. The gist of this new statutory cause of action for wrongful death can be gleaned from the words of sections 2, 3 and 4 of the present *Fatal Accidents Act*:

2. Where the death of a person is caused by a wrongful act, neglect or default that, if death had not resulted, would have entitled the person injured to maintain an action and recover damages in respect of the injury, the person who would have been liable if death had not resulted is liable to an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to culpable homicide.

3.(1) An action brought under this Act

(a) shall be for the benefit of the spouse, parent or child of the person whose death was caused by a wrongful act, neglect or default; and

(b) subject to section 8, must be brought by and in the name of the executor or administrator of the deceased.

(2) In an action brought under this Act, a judge may award damages that are proportional to the injury resulting from the death of the deceased to the persons for whom and for whose benefit the action is brought.

4.(1) In an action brought under this Act a judge may, in addition to damages awarded under subsection 3(2), award damages in respect of

(a) medical or hospital expenses of the person injured that would have been recoverable as damages by that person if he or she had not died; and

(b) the funeral expenses of the deceased incurred by a person for whom or for whose benefit the action is brought.

[7] To address the harsh consequences of the second mentioned common law rule above, the legislators did not create any new cause of action but provided simply that any existing cause of action that had already vested in the person at the time of his or her death could continue to be maintained by the person's estate (hence the designation of such legislation as "survival of actions" legislation). This occurred in the Northwest Territories in 1903.

[8] The words of the present statute are essentially the same as those enacted in 1903:

31(1) The executors or administrators 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 case of libel and slander, in the same manner and with the same rights and remedies as the deceased would if living have been entitled to do.

(2) The damages when recovered under subsection (1) form part of the personal estate of the deceased.

[9] In my view it is important to remember that the *Fatal Accidents Act* is truly "wrongful death" legislation whereas s.31 of the *Trustee Act* is not — it is "survival of actions" legislation. If the legislature had intended that a person's estate have a new

cause of action based upon the person's wrongful death, then surely the legislature could have said so in clear words, as it did in the *Fatal Accidents Act*.

[10] In my view the clear intention of the legislature in enacting this survival of actions legislation in 1903 was to preserve causes of action subsisting prior to the person's death, and not to provide for a new cause of action based on the person's wrongful death.

[11] A 1918 case in Ontario considered survival of actions legislation in identical terms to that of s.31 of our *Trustee Act*. The deceased had been killed "almost instantly" in an automobile accident. His administrator sued for \$248. special damages for funeral expenses and other expenses "in connection with the death and burial" and \$2,000 damages "for the death of the deceased". The Court, in dismissing the action, stated:

"This statute was passed to prevent the wrongdoer escaping liability by reason of the death of the person injured, and not for the purpose of creating a new right of action.

Obviously no person, if living, could maintain an action by reason of his death or for his funeral expenses".

England v. Lamb [1918] O.J. No. 69 at para 10-11.

[12] While it is true that over the years the legislators in some common law jurisdictions (not the Northwest Territories) subsequently enacted amendments exempting from claims brought under survival of actions legislation any damages based on the person's death, upon my reading of the original enactment such exceptions were not necessary as those situations were not included in the first place.

[13] This was the view of Locke J. in 1956 in *Cairney v. MacQueen*. After the House of Lords decision in *Rose v. Ford* in 1937, which held that a "lost years" claim was available under survival of actions legislation, some provinces, including British Columbia, enacted express exclusions for lost years claims under survival of actions legislation. Locke J. held that such exclusions were superfluous. In his reasons (dissenting on a different issue) he stated:

"These exceptions in the amendment of 1934 did not include damages for loss of expectation of life but, by an amendment (c.2 of

the Statutes of 1941-42), this was added and, in addition, a further exception, “if death results from such injuries, to damages for the death”. Since the rights of the personal representatives were only those which the deceased would have had if living, the last mentioned exception would appear to have been superfluous”.

Cairney v. MacQueen [1956] S.C.R. 555 at 567

[14] A similar view was held by those charged by the Uniform Law Conference of Canada with drafting a Uniform Survival of Actions Act in the 1960's. A report of those Commissioners in 1961 considered the question of survival of claims for loss of future earnings (what is now termed a “lost years” claim) following death. They were of the view that such claims did not survive death:

“At least one of the provinces excludes damages for death and compensation for expected earnings subsequent to death. We think this exclusion is not necessary because these items are not included in the first place; they are not surviving rights. Manitoba provides that the damages are to be calculated without reference to the loss or gain to the victim’s estate consequent of the death. We think this is sound but it may not be necessary”.

Report of the Alberta Commissioners, “Proceedings of the 43rd Annual Meeting of the Conference of Commissioners on Uniformity of Legislation in Canada, August 1961”, at p.110.

[15] In *Allen Estate v. Cooperators Life Insurance Co.* 1999 BCCA 35, the British Columbia Court of Appeal was asked to decide whether punitive damages could be claimed under the B.C. equivalent of our s.31 of *Trustee Act* or were excluded. The B.C. statute had several express exclusions e.g. for a lost years claim, but no express exclusion for punitive damages. Lambert J.A., in holding that there could be no claim for punitive damages, stated that the absence of an express exclusion is not determinative of the meaning of the statutory provision:

“The provision does not create any new cause of action. Its purpose is solely to prevent those causes of action which would have abated with the death from suffering that abatement. In short, the provision keeps alive, for the benefit of the estate of the deceased, the particular causes of action covered by the provision “in the same manner and with the same

rights and remedies as the deceased would, if living, be entitled to”, which would otherwise have abated with the death”. at para 59

...

“In some Provinces punitive damages are specifically excluded by the survival of actions legislation, in others they are specifically permitted, and in others they are not mentioned. The fact that they are not specifically excluded by the British Columbia legislation does not alter my view that they are implicitly excluded by a consideration of the common law before the legislation was enacted and by a consideration of the terms of the legislation itself”. at para 74

[16] I agree, and in my view it is irrelevant that the NWT legislature has not enacted an express exclusion from the provisions of s.31 *Trustee Act* for “lost years” claims arising from wrongful death. Such an exclusion is unnecessary. No such claim was included in the legislative enactment in the first place. It was not a claim that the deceased had while living, and was therefore incapable of being continued under s.31 of the *Trustee Act*. Any express exclusion would be superfluous. When plaintiffs’ counsel herein submits that the fact that the NWT legislature has not excluded lost years claims under the *Trustee Act*’s s.31 “speaks volumes”, I can agree — but for an entirely different reason than counsel making that submission. Such an exclusion is unnecessary and superfluous.

[17] It must be remembered that even the seminal decision of the House of Lords in *Rose v. Ford* stated that the English statute of 1934 (equivalent to s.31 of our *Trustee Act*) did not create a cause of action. The cause of action which survived was not based on Miss Rose’s death, because a victim could not, logically, sue for his or her own death. Miss Rose died four days after the tort. Before her death a cause of action vested in her against the tortfeasor. “The cause of action is not the deceased’s death but damage before death”. (at p.856).

[18] *Rose v. Ford* was followed in Ontario in *Major v. Bruer* [1938] O.R. 1 (C.A.). At that time, of course, decisions of the House of Lords were binding in Canada. The Court of Appeal in *Major* was bound by *Rose v. Ford* to allow a claim for damages

for loss of expectation of life. But Mr. Major, too, died four days after the tort, and the cause of action against the tortfeasor had by then vested in him (indeed, he had already issued a writ against the tortfeasor). That cause of action continued, for the benefit of his estate, by operation of the then Ontario equivalent of s.31 of our *Trustee Act*.

[19] In the present case, according to the facts put before the Court for purposes of this application, Mary Tilson was killed instantly at the time of the plane crash. It cannot be said there was any cause of action vested in her prior to her death.

[20] I acknowledge that in some of the cases involving instant death of the victim, it is said that a cause of action for wrongful death vested in the victim “at the moment before death”. I admit to some difficulty with such a metaphysical construct. It is fictive, in any respectful view.

[21] Did the NWT legislature in 1903 intend for surviving causes of action that a person had *while living* to include a cause of action that arose only on death? On a plain reading of the statute I would say no. The type of claim sought here — a “lost years” claim arising from wrongful death — is not today preserved by s.31 of the *Trustee Act*, and never was.

[22] Therefore, strictly on a reading of the words of s.31 of the *Trustee Act* and on the basis of statutory interpretation, I would answer the question of law posed by the plaintiffs on this application in the negative. In addition, in my view there are important policy grounds for holding that such a claim is not available in tort law and in this regard I am persuaded by and would adopt the reasoning of Cromwell JA in *MacLean v. MacDonald*.

[23] This is not to say there should be no recovery against the defendants on account of the wrongful death of Mary Tilson. That is a matter of the adjudication of the claim that these plaintiffs bring in these proceedings under the *Fatal Accidents Act*.

[24] For the foregoing reasons, the question posed by the plaintiffs on this application:

“Whether section 31 of the *Trustee Act* permits claims for the past and future loss of available estate surplus and loss of expectation of life”.

is answered “no”.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT
this 21st day of January 2005

Counsel for the Plaintiffs: Kevin P. Feehan, Q.C. and Karen Lajoie
Counsel for the Defendants: D. Bruce Garrow

S-0001-CV2002000300

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