

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ANN LAPIERRE, Administrator of the Estate of Marc-Andre
Lapierre, Deceased, DANIEL LAPIERRE and ANN LAPIERRE

Plaintiffs

-and-

FORT SIMPSON HOSPITAL, FORT SIMPSON HOSPITAL operating under the name and style of FORT SIMPSON HEALTH CENTRE, FORT SIMPSON HEALTH CENTRE, MACKENZIE REGIONAL HEALTH SERVICE, MACKENZIE REGIONAL HEALTH SERVICE operating under the name and style of DEH CHO HEALTH & SOCIAL SERVICES, DEH CHO HEALTH & SOCIAL SERVICES, DEH CHO HEALTH & SOCIAL SERVICES operating under the name and style of FORT SIMPSON HEALTH CENTRE, MACKENZIE REGIONAL HEALTH SERVICE operating under the name and style of FORT SIMPSON HEALTH CENTRE, DEH CHO HEALTH & SOCIAL SERVICES operating under the name and style of FORT SIMPSON HOSPITAL, MACKENZIE REGIONAL HEALTH SERVICE operating under the name and style of FORT SIMPSON HOSPITAL, STANTON REGIONAL HOSPITAL, YELLOWKNIFE HEALTH AND SOCIAL SERVICES, YELLOWKNIFE HEALTH AND SOCIAL SERVICES operating under the name and style of STANTON REGIONAL HOSPITAL, DR. DAVID WONG, DR. MATTHEWS, DR. MATTHEWS PROFESSIONAL CORPORATION, DR. MATTHEWS PROFESSIONAL CORPORATION practising medicine under the name of DR. MATTHEWS, DR. SYLVIAN CHOUINARD, DR. NICOLE CHATEL, DR. JOHN DOE A, DR. JOHN DOE A PROFESSIONAL CORPORATION, DR. JOHN DOE A PROFESSIONAL CORPORATION practising medicine under the name of DR. JOHN DOE A, DR. JOHN DOE B, DR. JOHN DOE B PROFESSIONAL CORPORATION, DR. JOHN DOE B PROFESSIONAL CORPORATION practising medicine under the name of DR. JOHN DOE B, DR. JOHN DOE C, DR. JOHN DOE C PROFESSIONAL CORPORATION, DR. JOHN DOE C PROFESSIONAL CORPORATION practising medicine under the name of DR. JOHN DOE C, ROSE LANG, D. CRANCH, NURSES A, B, and C, LABORATORY TECHNICIANS A, B, C and D, MEDFLIGHT LTD., MEDFLIGHT LTD. ATTENDANTS A, B, C, D, AND E

Defendants

Transcript of the Oral Decision of the Honourable J.Z. Vertes, sitting in Yellowknife, in the Northwest Territories, on the 6th day of April, A.D. 2005.

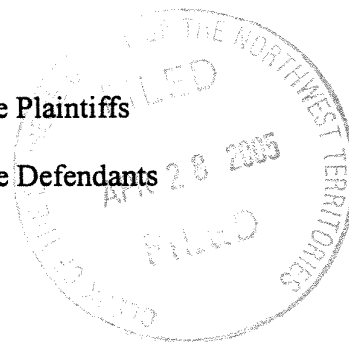
APPEARANCES:

Ms. E. Olszewski:

Counsel for the Plaintiffs

Mr. J. Rossall:

Counsel for the Defendants



1 THE COURT: I want to thank you both, Counsel,
2 for your submissions, and I am ready to give my
3 decision on the motion. I will ask the reporter
4 to prepare a transcript of my decision for the
5 file and for your reference.

6 These reasons address the defendants' motion
7 for summary judgment based on the ground that the
8 action is statute-barred under Section 6(2) of
9 the *Fatal Accidents Act*. That statute says an
10 action may not be brought after two years from
11 the death of the deceased.

12 This is a medical malpractice action against
13 the three defendant doctors. The death occurred
14 on January 17th, 1996, but the action was not
15 commenced until August 27, 1998.

16 Counsel are well aware of the guiding
17 principles with respect to summary judgment
18 motions. The question I must answer is whether
19 there is a genuine issue for trial. In the
20 context of this application, the question can be
21 framed as follows: Is it beyond doubt that if
22 the case went to trial, the claim would fail
23 because of the limitation defence?

24 In this case, defendants' counsel argued
25 that the plaintiff had, well before the expiry of
26 the two-year period from the date of death,
27 formed the opinion that there was negligence and

1 delay in the diagnosis and treatment of her son.
2 She had been provided with information to support
3 that opinion. Defendants' counsel submitted
4 that, contrary to the assertions of the
5 plaintiff, there was no need to await the
6 investigation report by the Medical Council,
7 received by the plaintiff in June of 1998, to
8 know that there was a cause of action. That
9 report added nothing but confirmation of what the
10 plaintiff had already concluded.

11 Plaintiff's counsel submitted that it was
12 only after the plaintiff had received the
13 investigation report that she formed the opinion
14 that her son's death was wrongful. Prior to
15 that, she may have been suspicious and angry, but
16 that is not the same thing as an appreciation
17 that she had a cause of action.

18 These are, admittedly, very terse summaries
19 of the extensive submissions of counsel; but for
20 the purposes of these reasons, those reflect the
21 sum and substance of the submissions.

22 Counsel accept for purposes of this motion
23 that the discoverability principle applies to the
24 limitation period contained in the *Fatal*
25 *Accidents Act*.

26 The discoverability principle postpones the
27 running of a statutory limitation period until

1 the plaintiff knows, or by reasonable diligence
2 ought to have known, the material facts upon
3 which to bring an action. That is a question of
4 fact depending on the circumstances of each
5 particular case. In medical malpractice cases,
6 it seems to me that the plaintiff may not have
7 acquired the necessary facts until a professional
8 advisor, such as a lawyer or a medical
9 consultant, has determined that there are grounds
10 for thinking that there had been negligence. In
11 some cases, however, it will be possible to know
12 the material facts without a professional
13 opinion. In any event, the plaintiff is expected
14 to act with due diligence in acquiring the facts.

15 Here, what the evidence shows is that the
16 plaintiff had formed certain concerns even before
17 her son's death. She pursued those concerns
18 after the death. She asked questions of
19 professionals. The responses she received led to
20 more questions. She alleges that in 1997, still
21 within the limitation period, she had been
22 advised by the President of the Medical Council
23 to await the result of the investigation into her
24 son's treatment. She, of course, did not receive
25 those results until after the statutory period
26 had expired.

27 In my opinion, this evidence is not

1 conclusive of the question as to whether there is
2 no genuine issue for trial. It does not convince
3 me that there is no genuine issue with respect to
4 (a) whether the plaintiff acted with due
5 diligence, or (b) when it can be said that the
6 limitation period started to run.

7 I have, in previous cases, referred to the
8 Ontario Court of Appeal judgment in *Aguonie v.*
9 *Galion Solid Waste Material Inc.* (1998), 156
10 D.L.R. (4th) 222, as counsel have on this
11 application. I think that case provides some
12 guidance here.

13 In *Aguonie*, the Court stated that the
14 application of the discoverability rule to the
15 facts of a particular case necessarily requires a
16 finding of fact about when the plaintiff
17 discovered the facts in respect of the claim or,
18 through due diligence, ought to have discovered
19 the facts. On a motion for summary judgment, the
20 moving party must establish that there is no
21 issue of material fact which requires a trial for
22 its resolution. The Court in *Aguonie* pointed out
23 that it is not the function of the motions judge
24 to resolve the issue of fact, but rather to
25 determine whether a genuine issue of fact exists.

26 Numerous cases have held that it is not
27 appropriate for a motion judge, hearing an

1 application for summary judgment where the
2 application of the discoverability rule is
3 central to its resolution, to resolve that issue.
4 In my opinion, the plaintiff has presented
5 evidence in this case that raises issues of
6 material fact which require a trial in order to
7 evaluate credibility, to weigh the evidence, and
8 to draw factual inferences.

9 What the defendants are asking me to do is
10 to resolve the issue when the evidence presented
11 raise substantial questions about it. Those
12 questions should be resolved at a trial. The
13 motion for summary judgment is therefore
14 dismissed.

15 Now, Counsel, do you wish to address the
16 question of costs, because as you know, the rules
17 provide certain cost consequences on an
18 unsuccessful summary judgment motion, or would
19 you be content with simply a direction that costs
20 be left to the trial judge?

21 MS. OLSZEWSKI: I'm satisfied with that
22 direction.

23 THE COURT: I'm sorry?

24 MS. OLSZEWSKI: I'm satisfied with that
25 direction.

26 MR. ROSSALL: I think that's probably fair,
27 sir.

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THE COURT: Then costs will be left to the
discretion of the trial judge. Thank you again,
Counsel.

MS. OLSZEWSKI: Thank you.

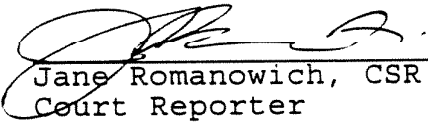
THE COURT: Is there anything else you
require today?

MR. ROSSALL: No thank you, sir.

MS. OLSZEWSKI: Thank you.

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Certified Pursuant to Rule 723
of the Rules of Court



Jane Romanowich, CSR(A), RPR
Court Reporter