Base v. *Hadley et al*, 2006 NWTSC 04

Date: 2006 01 24
Docket: S-0001-CV-07483

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GEORGINA BASE

Plaintiff

- and -

DR. DONALD HADLEY, DR. CLARENCE MOISEY, STANTON REGIONAL HEALTH BOARD and THE STANTON REGIONAL HOSPITAL

Defendants

Application by Defendants for summary judgment.

Heard at Yellowknife, NT on December 2, 2005.

Reasons filed: January 24, 2006

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

Counsel for the Plaintiff: William E. McNally
Counsel for the Defendants
Drs. Hadley and Moisey: Jonathan P. Rossall
Counsel for the Defendants
Stanton Regional Health Board and
The Stanton Regional Hospital: Peter D. Gibson

Base v. *Hadley et al*, 2006 NWTSC 04

Date: 2006 01 25
Docket: S-0001-CV-07483

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

GEORGINA BASE

Plaintiff

- and -

DR. DONALD HADLEY, DR. CLARENCE MOISEY, STANTON REGIONAL HEALTH BOARD and THE STANTON REGIONAL HOSPITAL

Defendants

REASONS FOR JUDGMENT

[1] The summary judgment applications before me are for dismissal of all or some of the Plaintiff's claims against the Defendants in this medical malpractice action. The action arises out of a tubal ligation performed on the Plaintiff in 1986 when she was 15 years old. The Defendant Dr. Hadley performed the procedure. The Defendant Dr. Moisey was the Plaintiff's pediatrician and he referred her to Dr. Hadley. The procedure was performed at the Defendant Stanton Regional Hospital, which was administered at the relevant time by the Defendant Stanton Regional Health Board. I will refer to Stanton Regional Hospital and the Stanton Regional Health Board collectively as the "Stanton Defendants".

[2] This action was commenced on December 22, 1997, against Dr. Moisey and the Stanton defendants. On June 14, 1999, an amended statement of claim was filed adding Dr. Hadley as a defendant. By order of Richard J. of this Court made January 31, 2001, the Plaintiff was granted leave to file an amended amended statement of claim within 15 days of that order being granted. For reasons not explained, the amended amended statement of claim was not filed until October 27, 2003. However, I understand from the submissions made on behalf of the Defendants that they are content that January 31, 2001, be considered the filing date of the amended amended statement of claim.

[3] The Plaintiff sets out three causes of action in her pleadings. The first is that the Defendants breached the standard of care required and are therefore liable to her in negligence. The second is an action in battery, based on the allegation that the tubal ligation was performed without the Plaintiff's or her guardian's consent, informed or otherwise. The third cause of action is for breach of fiduciary duty by the Defendants.

Factual background

[4] At the hearing of this application, issues were raised about some of the evidence contained in the Plaintiff's motion materials. Rule 176(1) says that a party responding to a summary judgment application must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial. The Plaintiff filed her own affidavit on the motion, but also sought to rely on excerpts from the examinations for discovery of some of the Defendants or their representatives and documents which were not made exhibits to her affidavit.

[5] In my view, a document that is not an exhibit to an affidavit or, even if it is an exhibit, is hearsay evidence being put forward for the truth of its contents, is inadmissible. This would apply, for example, to the report of Dr. Jones attached to the Plaintiff's affidavit. There is, however, nothing in the Northwest Territories Rules of Court that prohibits the use of transcripts of examinations for discovery. Counsel referred me to the Ontario case of *Grant v. Kerr*, [2001] O.J. No. 5162 (Sup.Ct.). However, insofar as that case dealt with a party attempting to introduce evidence from his own examination for discovery in opposition to a summary judgment application, the ruling was based on Ontario's Rule 39.04, which expressly prohibits that. In any event, the Plaintiff here does not seek to rely on her own examination for discovery. The rest of the decision in *Grant*, disallowing use of the examination for discovery evidence of the opposing party, was based on the unfairness of the responding party introducing the moving party's examination for discovery evidence after the moving party had already argued its case.

[6] In this case, the Plaintiff included in her materials the excerpts from the Defendants' examinations. None of the Defendants requested an adjournment to file responding material or because they were taken by surprise. In my view it is open to the Plaintiff to rely on the Defendants' examinations for discovery or excerpts therefrom, just as it is open to the Defendants to rely on the Plaintiff's examination for discovery or excerpts therefrom.

[7] The Plaintiff's evidence is contained in her affidavit filed in response to this application, her cross-examination on that affidavit and excerpts from her examination for

discovery placed before the Court by the defendant physicians. The Plaintiff says that she suffered from a liver condition since childhood. In her affidavit, she says that she recalls that Dr. Moisey met with her and her mother in March 1986. At the time, she was 14 years old and in grade 8. Dr. Moisey told her that if she became pregnant either she or the baby would die. He recommended that she undergo a tubal ligation but did not explain the consequences of the operation. Other forms of birth control were not discussed. She translated what Dr. Moisey said, as best she could, to her mother, who spoke and understood only Dogrib. There was no interpreter present.

[8] From the cross-examination on the Plaintiff's affidavit, it emerges that during the interview with Dr. Moisey, although she translated for her mother, she neither knew what a tubal ligation was, nor how to translate it into the Dogrib language.

[9] The Plaintiff says, based on information and belief, that the tubal ligation was performed by Dr. Hadley in October 1986, when she was 15 years old. She says she has no recollection of meeting with Dr. Hadley or of the procedure being performed. Counsel for the Stanton Defendants argued that it is illogical and not credible that she would not recall the operation, absent any explanation for that. He submitted that she should be fixed with knowledge of the operation as at the time it was performed. That, however, is a matter of credibility which I am not able to determine on this application. It is possible that a finding will be made at trial that the Plaintiff does not recall the meeting with Dr. Hadley or the procedure itself and did not discover until much later that it had been performed.

[10] The Plaintiff turned 19 years of age on August 27, 1990.

[11] In her affidavit the Plaintiff says further: "Although I do not recall the exact date, I believe that sometime in 1995, I discovered that I had been irreversibly and unnecessarily sterilized without informed consent being provided". In her examination for discovery, the Plaintiff says that she discovered this in a conversation with her sister or sisters. There appears to be some confusion as to exactly when the conversation took place, but she maintains that she applied for legal aid very shortly afterwards and the evidence is that her application was made July 5, 1995. Again, the evidence about the timing of her discovery that the tubal ligation had been performed may give rise to credibility issues, but that is not something that can be resolved on the application before me.

[12] What happened after the Plaintiff applied for legal aid in July 1995 has led to litigation against certain lawyers who were involved with her case. Whatever the reason, it was not until late December 1997 that counsel then representing the Plaintiff obtained

her hospital records. Although no information on the point is provided in the Plaintiff's affidavit, it appears that sometime after that she learned that the hospital file does not contain an executed consent form for the tubal ligation.

Test on summary judgment application

[13] The test on a summary judgment application is whether there is a genuine issue for trial. Under Rule 176(1), the respondent, the Plaintiff in this case, must put evidence before the Court showing that there is a genuine issue requiring a trial. However, the onus is on the applicant, the Defendants in this case, to establish that there is no genuine issue for trial: *923087 N.W.T. Ltd. v. Anderson Mills Ltd.*, [1997] N.W.T.J. No. 31 (S.C.). They must establish that their case is manifestly clear and beyond doubt.

[14] The judge hearing an application for summary judgment is entitled to assume that the parties have put their best foot forward. As I said in *Bodnariuk v. Gray*, [2003] N.W.T.J. No. 6 (S.C.), that does not mean that the responding party cannot present additional or better evidence at trial, but only that the judge hearing the summary judgment application is entitled to assume that the evidence the party presents is all that is available and proceed to make a decision based on it.

Limitations defence

[15] The Defendants say that there are no triable issues because the Plaintiff's action was commenced after expiry of the relevant limitation periods. Those periods are two years for the negligence and battery actions and six years for the action based on breach of fiduciary duty (it being an action grounded on an equitable ground of relief not otherwise specifically dealt with in s. 2): *Limitation of Actions Act*, R.S.N.W.T. 1988, c. L-8, sections 2(1)(d) and (h). In the case of the actions in negligence and battery, the action must be commenced within two years after the cause of action arose. In the case of breach of fiduciary duty, subsection (h) of s. 2(1) provides that the action must be commenced within six years after the discovery of the cause of action. Section 5 of the *Act* also provides that where a person is under disability at the time the cause of action arises, the person may bring the action within two years after they first ceased to be under disability. This applies to an individual who is a minor at the time the cause of action arises.

[16] The Defendants also seek summary judgment because they allege that the Plaintiff has no cause of action based on breach of fiduciary duty and there is no triable issue in that regard.

The negligence claim

[17] The Plaintiff's counsel conceded that the claim in negligence was filed outside the two year limitation period. The Plaintiff was aware, by July 1995, that the tubal ligation had been performed and what the consequences of it were. She sought legal aid to determine what her options were. There is no suggestion that she was not aware of any facts material to that claim. The statement of claim was not, however, filed until after July 1997 and is therefore out of time.

[18] There is therefore no triable issue arising out of that claim. The application for summary judgment on the claim in negligence is allowed and the claim is accordingly dismissed.

The claim in battery

[19] The Plaintiff opposes the application for summary judgment on the claim in battery and seeks to maintain that claim against Dr. Hadley.

[20] The Defendants, as I noted above, raised issues about the credibility of the Plaintiff's claim that she has no recollection of the operation. They say that the Plaintiff must have known about the operation at the time it was performed and therefore, since she was under disability as a minor at that time, the limitation period commenced when she reached the age of majority, thus in 1990. That, however, is a trial issue which cannot be resolved on this application.

[21] For purposes of this application, I am of the view that I must accept as fact the Plaintiff's assertion that she has no recollection and was not aware of the operation until July 1995 when it was revealed to her in discussions with her sister or sisters. In light of the assertion in her affidavit that she learned in 1995 that she had been irreversibly and unnecessarily sterilized without informed consent being provided, it would appear that at that point she was aware, or believed, that she had been sterilized without proper consent. The Defendants, while not conceding that the limitation period started to run then, say in effect that is the latest that it could possibly start to run.

[22] The Plaintiff, however, relies on the common law doctrine of discoverability (which is also reflected in s. 2(1)(h) of the *Limitations Act*, as set out above). Under that doctrine, a statutory limitation period does not begin to run until the material facts on which the cause of action is based have been discovered, or ought to have been

discovered by the plaintiff by the exercise of reasonable diligence: *Huet v. Lynch*, [2000] A.J. No. 329 (C.A.).

[23] The Plaintiff takes the position that the limitation period did not commence until December of 1997, when she or her then counsel reviewed her hospital file and discovered that no executed consent form was in it.

[24] The Plaintiff had discovered, by July 1995, that the tubal ligation had been performed. She believed that informed consent had not been provided, according to her affidavit. Exactly how she came to that conclusion is not clear on the material before me, however, absence of informed consent amounts to no consent at all. So the Plaintiff knew in July 1995 the material facts to establish a claim in battery. The absence of a consent form on the hospital file is simply evidence relevant to whether the Defendants had consent to perform the procedure on the minor Plaintiff; it is not a new material fact, but rather evidence relevant to the facts she already knew.

[25] It is clear from her legal aid application of July 5, 1995 that the Plaintiff wanted access to her medical records. In *Morton v. Cowan*, [2001] O.J. No. 4635, (Ont. Sup. Ct.), it was said that the principle that the limitation period starts to run when the plaintiff discovered, or ought to have discovered by the exercise of reasonable diligence, the material facts, imports an objective standard. There is no evidence of any impediment to the Plaintiff obtaining her medical records within the two years following July 1995. Even if the absence of the consent form could be considered a material fact, in my view the Plaintiff knew of the importance of the medical records and had ample time within the two years following July 1995 to obtain and review them. Thus, there is no basis upon which to extend the commencement of the limitation period.

[26] Accordingly, I find that the limitation period for the claim in battery commenced at the latest in July 1995 and no triable issue arises as to it commencing later than that. Since the statement of claim was not filed until December 22, 1997, outside the two year limitation, summary judgment is granted on the claim in battery and it must be dismissed.

The claim for breach of fiduciary duty

[27] Assuming that it is found at trial that the Plaintiff did not discover that the tubal ligation had been performed until July of 1995, the limitation period, being six years, for the claim for breach of fiduciary duty started to run then. The amended statement of claim filed June 14, 1999 pleads in paragraph 29 that there was a fiduciary relationship between the Plaintiff and each of the Defendants. The amended amended statement of

claim, the filing of which, as I have said, is deemed to have taken place at the time of the order issued by Richard J. on January 31, 2001, pleads breach of the fiduciary duty and particularizes the breach with the same particulars underpinning the negligence claim. Therefore, whether one considers the claim to have been properly pleaded in the amended statement of claim or not until the amended amended statement of claim, it was commenced within the limitation period. There is, at least, a triable issue in that regard.

[28] Drs. Hadley and Moisey also argue that the Plaintiff has put forward no facts upon which a breach of fiduciary duty on their part could be found. The Stanton Defendants, for their part, argue that the Plaintiff cannot succeed in her claim that their relationship with her was a fiduciary one; they say there is no evidence that they owed her a fiduciary duty.

[29] The leading case on fiduciary duty in the context of medical professionals is *Norberg v. Wynrib*, [1992] 2 S.C.R. 226, which involved a physician who gave drugs to a patient in exchange for sex. Two of the five judges who decided the case did so on the basis of breach of a fiduciary relationship. McLachlin C.J.C., in stating that the relationship of a physician to his or her patient is a fiduciary one, described the hallmark of such relationships as "trust" - the trust of a person with inferior power that another person who has superior power and responsibility will exercise that power for his or her good and in his or her best interests. After reviewing the applicable jurisprudence, Justice McLachlin set out the characteristics of a fiduciary relationship:

1. the fiduciary has scope for the exercise of some discretion or power;

2. the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;

3. the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[30] The defendant physicians concede that their relationship with the Plaintiff was a fiduciary one. They were clearly in a position of power over her as their patient. In advising and performing the tubal ligation, they were in a position to affect her vital practical interests. Her ability to have children falls within that description. Finally, the fact that the Plaintiff was in a position of vulnerability cannot be questioned. She was not merely a patient but also a minor. The parent from whom consent to the procedure may or may not have been sought did not understand English and was not, according to the Plaintiff's evidence, given the assistance of an appropriate interpreter.

[31] What the defendant physicians dispute, however, is whether the Plaintiff has any chance of success at trial in showing that they breached the fiduciary relationship. They say that there must be some evidence that they abused the fiduciary relationship in a sinister or improper way, or that they exploited it for their own interests, before a breach can be found.

[32] In her analysis of fiduciary relationships in *Norberg*, McLachlin C.J.C. noted that the fact that one party in a fiduciary relationship holds power over the other is not in and of itself wrong, but what will be wrong is if the risk inherent in entrusting the fiduciary with such power is realized and the fiduciary abuses the power which has been entrusted to him or her.

[33] In *Norberg*, Chief Justice McLachlin also resisted any strict pronouncement of the scope of a physician's fiduciary obligations. For example, although accepting that in that case the sexual relationship between physician and patient was a breach of the fiduciary obligations of the physician, she declined to say that all sexual involvement would be a breach, "particularly given that the scope of such obligations can only be determined on a case by case basis, having reference to the degree of power imbalance and patient vulnerability present in the relationship under examination" (paragraph 89). She also disagreed that the scope of fiduciary obligation should be restricted to matters akin to the duty not to disclose confidential information.

[34] The decision of the Supreme Court of Canada in *McInerney v. MacDonald*, [1992] 2 S.C.R. 138 also suggests a case-dependant view of what obligations the fiduciary relationship between physician and patient may involve. There, the Court said that among the duties that arise from the special relationship of trust and confidence between doctor and patient is the duty of the doctor to act with utmost good faith and loyalty and to reveal to the patient that which in his best interests it is important that he should know. That was said in the context of disclosure of medical records to a patient, but as the Court said, no fixed set of rules and principles apply and fiduciary relationships and obligations are shaped by the demands of the situation.

[35] Given that the scope of the fiduciary relationship will depend on the specific circumstances of the case, in my view what amounts to a breach of the duties owed by the fiduciary to the beneficiary must also depend on the circumstances and the demands of the situation.

[36] All the Plaintiff has to do is show that there is a triable issue. She says that the physicians breached their fiduciary duty by advising and performing a procedure that was not medically necessary in light of other methods of birth control, failing to explain the consequences of the procedure and failing to obtain proper consent to the procedure. If she establishes the necessary facts, it is open to her to argue that the physicians did not act in her best interests or that in proceeding without any or proper consent, they abused her position of vulnerability.

[37] The defendant physicians say in their Rebuttal Brief that in their opinion it was in the best interests of the Plaintiff to have the tubal ligation if she, her mother and the Department of Social Services agreed. That, it is argued in the Brief, is the sum total of the evidence regarding their state of mind. The Defendants are in the best position to show what, if any, consent was given for the procedure. There is no evidence before me as to what consent they say they had, save for a notation from a consultation report apparently made by Dr. Hadley that, "patient understands and agrees", which is contradicted by the Plaintiff's evidence referred to earlier. If the physicians did perform the tubal ligation without proper consent or without the mother's or Social Services' consent, only they can answer why they did so. There is no evidence before me on that issue, nor is the burden on the Plaintiff to present that evidence.

[38] In *McInerney*, the provision of information to a patient was considered part of the physician's fiduciary duty. Although the remedy sought in that case was simply disclosure of the patient's medical records, it is reasonable to infer that the Court would consider the refusal by a physician to make such disclosure to a patient a breach of that duty if the Court was not satisfied that the physician had acted in good faith: paragraph 37. On that basis, it seems to me that it is arguable that establishing breach of a fiduciary duty need not require proof of a sinister or improper motive, or one of self-interest, but simply a lack of good faith in the sense of a failure to put the patient's best interests first. Further, it is arguable that performing a procedure as drastic as a tubal ligation on a young girl where there are other alternatives, without disclosure of the irreversibility of the procedure and without proper or any consent having been obtained, is not in the patient's best interests. At least there is a *prima facie* case of breach of the fiduciary duty to act in the best interests of the patient.

[39] The Defendants say that the issues of lack of consent and the choice of medical procedure are aspects of the battery and negligence claims. However, there is authority to the effect that the co-existence of a tort claim based on the same facts does not rule out a claim based on breach of fiduciary duty. For example, in *Norberg*, McLachlin C.J.C. said that while the majority of the Court of Appeal and Sopinka J. in that case suggested

that the fiduciary duties to which the doctor was subject went no further than his duties in tort or contract, they offered no basis for this suggestion in principle, policy or authority, appearing to rest their case on the assumption that the only additional duties which a fiduciary relationship could impose would be akin to the duty of confidence. That view, she said, is neither defended nor reconciled with the authorities. In *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, Gonthier J. said that a breach of fiduciary duty cannot be automatically overlooked in favour of concurrent common law claims.

[40] In *Prete v. Ontario (Attorney General)* (1993), 110 D.L.R. (4th) 94 (Ont. C.A.), Carthy J.A. in the majority decision said that *M.(K.) v. M.(H.)* is clear authority for the right to pursue a claim for relief which is not limitation barred despite the fact that an alternative head for the same claim is statute barred.

[41] Thus, in my view, it is at least arguable that the claim for breach of fiduciary duty can stand on its own, even if the facts on which it is based also underlie the tort claims for battery and negligence which, as I have found, are barred by the *Limitations Act*.

[42] For the above reasons, I find that there is a triable issue arising from the Plaintiff's claim for breach of fiduciary duty against the defendant physicians.

[43] The Stanton Defendants argue that they owed no fiduciary duty to the Plaintiff and that the Plaintiff is bound to fail on that ground.

[44] In *Huet v. Lynch, supra*, Wittman J.A. held that it is sufficient to establish simply the possibility of a fiduciary relationship between the plaintiff and various non-physician health care providers (nurses and health care institutions) as a component of a genuine issue to be tried. In this case, there is evidence from the Hospital's representative on examination for discovery that at the relevant time, the Hospital had policies on the subject of patient consent generally, minor patient consent and interpretation for non-English speakers. One of the policies made it the responsibility of a designated nurse to ensure the consent form for a surgical procedure was correctly completed and that the patient understood the consent and the procedure to be performed.

[45] The Plaintiff in this case was a minor, a child, in the care of the Hospital and its nurses at the relevant time. It is at least arguable that the Hospital held power over the Plaintiff and was in a position and bound by its own policies to ensure that she and her guardian fully understood what was being done to her and that appropriate consent was obtained. In my view, the Hospital policies referred to above are evidence on which it could be argued that the nurses had an obligation to do much more than simply file the

consent on the patient's file, as submitted by counsel for the Stanton Defendants. I am satisfied that there is a triable issue as to the existence of a fiduciary relationship and its breach.

[46] For the foregoing reasons, the application for summary judgment is granted as to the actions in negligence and battery. It is dismissed as to the action for breach of fiduciary duty.

[47] As success is divided, I would be inclined to order that the parties each bear their own costs. However, should counsel wish to make submissions, they may do so by arranging an appearance before me for that purpose. As an alternative, written submissions may be filed within 40 days of these reasons for judgment being filed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
24th day of January 2006

Counsel for the Plaintiff: William E. McNally
Counsel for the Defendants
Drs. Hadley and Moisey: Jonathan P. Rossall
Counsel for the Defendants
Stanton Regional Health Board and
The Stanton Regional Hospital: Peter D. Gibson

S-0001-CV-07483

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN:

GEORGINA BASE

Plaintiff

- and -

DR. DONALD HADLEY, DR. CLARENCE MOISEY, STANTON REGIONAL HEALTH BOARD and THE STANTON REGIONAL HOSPITAL

Defendants

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