CITATION: Ormerod v. Bennett, 2012 ONSC 3987
COURT FILE NO.: 39608
DATE: 2012/07/16

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: MELODY LYN ORMEROD, JOHNATHAN ORMEROD and JASMINE VAN GEFFEN, minors by their Litigation Guardian, Melody Lyn Ormerod, Stacy Rombouts as Litigation Administrator for THE ESTATE OF DEITER ROMBOUTS, STACY ROMBOUTS, CHRISTY VAN GEFFEN, JOHN M. ORMEROD and LILLIAN ORMEROD (Plaintiffs)

-and-

STRATHROY MIDDLESEX GENERAL HOSPITAL, S. GRAHAM, T. TIGCHELAAR, J. MAXTED, JOHN DOW, IAN K. FERGUSON, LONDON HEALTH SCIENCES CENTRE, ST. JOSEPH'S HEALTH CARE LONDON, D. GRAY, JOHN BENNETT AND JANE DOE (Defendants)

BEFORE: JUSTICE H. A. RADY

COUNSEL: Barbara L. Legate and Joni Dobson, for the plaintiffs

Christopher Hubbard, for the defendants

HEARD: April 13, 2012

ENDORSEMENT

Introduction

[1] The defendant, Dr. John Bennett, moves for summary judgment dismissing the plaintiffs' action against him.

[2] This is a medical malpractice action arising from the death of John Ormerod on July 9, 2001. The case is scheduled to proceed to trial for twelve weeks in January, 2013.

[3] The plaintiffs allege that Mr. Ormerod died because of a delay in diagnosing and referring him to surgery for a perforated bowel. Dr. Bennett was added as a defendant on November 17, 2005, more than two years after Mr. Ormerod's death, following examinations for discovery of some of the defendant physicians.

The Facts

[4] On June 28, 2001, Mr. Ormerod attended the emergency department of the Strathroy Middlesex General Hospital with complaints of stomach pain and frequent bowel movements.

[5] Dr. Tigchelaar diagnosed a possible bowel infection, appendicitis or diverticulitis. Mr. Ormerod was admitted to the hospital where he was to be assessed by Dr. Ferguson, his family doctor, the next morning.

[6] After seeing him on June 29, 2001, Dr. Ferguson arranged for his patient to be sent to St. Joseph's Hospital in London for a CT scan. Dr. Bennett interpreted the CT scan, attempted to drain an abscess using a transrectal drainage procedure and interpreted a repeat CT scan. Dr. Bennett spoke to Dr. Ferguson on the telephone regarding the first CT scan, before attempting the drainage procedure and follow up CT scan. Dr. Bennett then returned Mr. Ormerod to the care of his physicians in Strathroy. He had no further involvement in his care.

[7] Later that day, Dr. Ferguson advised Mr. Ormerod and his wife that Mr. Ormerod had a perforated bowel requiring immediate surgery. No anaesthetist was available in Strathroy and as a result, Mr. Ormerod was sent to London Health Sciences Centre. On June 30, 2001, Dr. Gray performed surgery. However, Mr. Ormerod's condition deteriorated and he died on July 9, 2001. The cause of death was multi-organ failure due to septic shock, overwhelming sepsis and a ruptured diverticulitis.

[8] This action was commenced on June 27, 2002. Dr. Bennett was not named as a defendant. On October 21, 2005, the plaintiffs brought a motion to add Dr. Bennett as a defendant. They alleged that Dr. Bennett was an employee of St. Joseph's Hospital. The claim was subsequently amended to allege that Dr. Bennett was, in the alternative, an agent of the hospital.

[9] The essence of the plaintiffs' case against Dr. Bennett is that he should have called Dr. Ferguson before sending Mr. Ormerod back to Strathroy. This deprived Dr. Ferguson of an opportunity to explore whether Mr. Ormerod could undergo surgery at St. Joseph's Hospital, which could have meant earlier intervention.

Dr. Bennett's Position on the Motion

[10] Dr. Bennett submits that the plaintiffs' claim is doomed to fail because the action was brought against him more than two years after Mr. Ormerod's death, which is the limitation period in the *Trustee Act*. Further, the claim that St. Joseph's Hospital is vicariously liable for Dr. Bennett's alleged negligence cannot succeed because the law in Ontario establishes that a hospital can only be responsible for the acts or omissions of its employees. Because Dr. Bennett is an independent medical practitioner with hospital privileges, it is submitted that the hospital cannot be found vicariously liable.

The Plaintiffs' Response

[11] The plaintiffs submit that the court may extend the limitation period where special circumstances exist and there is no prejudice to the defendant. They argue that the reason why Dr. Bennett was not added as a defendant when the claim was first issued is important. They say it was because Dr. Bennett's role in Mr. Ormerod's care was not made clear from the medical records or from the statement of defence of the physicians originally named as defendants. They analogize this to a case of fraudulent concealment. They submit that it was only when Dr. Ferguson was examined for discovery and some criticism of Dr. Bennett may have surfaced, that they knew of his involvement and possible negligence. Finally, they say that there is no prejudice.

[12] On the issue of vicarious liability, the plaintiffs submit that where a doctor is an agent through whom the hospital carries out a non-delegable duty of care, the hospital will be liable for any breach of that duty by the doctor. The regulations made under the *Health Insurance Act* require a hospital to provide, without charge to the patient "laboratory, radiological and other diagnostic procedures, together with the necessary interpretations". Accordingly, the plaintiffs say that a hospital is obliged to engage the expertise of a radiologist and may be found liable for his negligence.

The Law Respecting Summary Judgment

[13] As a result of the 2010 amendments to the *Rules of Civil Procedure*, summary judgment is available if the moving party demonstrates that there is no genuine issue requiring a trial. The court is permitted to weigh the evidence, make findings of credibility and draw reasonable inferences.

[14] In December, 2011, the Court of Appeal released five decisions on the amended rule, providing guidance on its interpretation and in particular, when the new powers are to be used. For convenience, the decisions are cited as *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 and it sets out what is being called the full appreciation test.

[15] The court, sitting as a five member panel, identified three broad categories of cases said to be amenable to summary judgment. These are:

- cases where the parties agree that it is appropriate to determine the action by way of a motion for summary judgment;
- cases where a claim or defence is shown to be without merit; and
- cases where the full trial process is not required in the "interest of justice".

[16] Additionally, the court is to continue to apply certain well established evidentiary obligations that may be summarized as follows:

- there is a burden on the responding party to lead evidence of specific facts showing that there is a genuine issue requiring trial;

- it is not sufficient for a responding party to rely on the pleadings, or to advise that further or better evidence will be available at trial. The responding party must offer an organized set of facts, in affidavit material or other evidence, to demonstrate that there is a genuine issue requiring trial;

- the responding party must "put its best foot forward" and "lead trump or risk losing", in order to establish that his or her claim is one with a real chance of success;

- the court is entitled to assume that the record before it contains all the evidence that the parties would present at trial;

- the court is required to take a "hard look" at the evidence and *shall* grant summary judgment if there is no genuine issue requiring a trial.

[17] The Court of Appeal identified several kinds of cases that require the machinery of a trial in order to have a full appreciation of the evidence. They are those with:

- a voluminous record;
- a large number of witnesses;
- different theories of liability advanced against multiple defendants;
- numerous factual issues;
- credibility determinations central to the dispute; and
- an absence of reliable documentary evidence.

The Law

[18] Section 38 of the *Trustee Act* provides as follows:

> 38. (1) Except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to do, and the damages when recovered shall form part of the personal estate of the deceased; but, if death results from such injuries, no damages shall be allowed for the death or for the loss of the expectation of life, but this proviso is not in derogation of any rights conferred by Part V of the *Family Law Act*.

> (2) Except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of his or her person or to another person's property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong.
>
> (3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.

[19] It has been held that the doctrine of discoverability has no application and cannot be used to extend the two year limitation period: *Waschkowski Estate v. Hopkinson Estate* (2000), 47 O.R. (3d) 370 (C.A.)

[20] However, the doctrine of special circumstances is sometimes invoked to extend a limitation. This common law doctrine is available to extend the time to bring an action otherwise barred by the *Trustee Act* and it survived the enactment of the *Limitations Act, 2002*. See *Birkur Cholim Jewish Volunteer Services v. Langston* (2009), 94 O.R. (3d) 401 (C.A.) and *Swain Estate v. Lake of the Woods District Hospital* (1992), 9 O.R. (3d) 74 (C.A.).

[21] In *Deaville v. Boegeman* (1984), 48 O.R. (2d) 725 (C.A.), the court had this to say about special circumstances:

> A number of courts have made rather heavy weather out of the meaning of "special circumstances" and have sought to establish conditions or detailed guidelines for the granting of relief after the expiry of the limitation period. This is a discretionary matter where the facts of the individual case are the most important consideration in the exercise of that discretion. While it is true that the discretion is not one that is to be exercised at the will or caprice of the court, it is possible to outline only general guidelines to cover the myriad of factual situations that may arise.

[22] In *Iannou v. Evans* (2007), 50 C.P.C. (6th) 358 (S.C.J.) Justice Perell reviewed the authorities respecting special circumstances and made the following comments:

> Having read the leading cases listed at the beginning of these reasons for decision, it seems to me that the courts have felt it unnecessary and perhaps undesirable to define special circumstances with much specificity. The joinder of a party after the expiry of a limitation period is a discretionary matter where the most important consideration is the facts of the particular case: *Deaville v. Boegeman*. However, circumstances justifying amendments after a limitation period has passed will be rare, and the discretion to allow the joinder is to be

exercised very sparingly: *Basarsky v. Quinlan, Deaville v. Boegeman, Robertson v. O'Rourke, Swiderski v. Broy Engineering Ltd., Weldon v. Neal, Bartucci v. John Doe.*

What seems clear, however, is that special circumstances are the facts of the particular case that make it in the interests of justice to, in effect, displace the defendant's entitlement to rely upon a limitation period defence.

The case law about special circumstances reveals that the court may consider the totality of the factual background to the proceedings. The conduct and circumstances of the parties are relevant considerations.

With respect to the defendant, in determining whether to join a party after the expiry of a limitation period, the absence of prejudice to the defendant is relevant to whether there are special circumstances. However, by itself, the absence of prejudice does not establish the prerequisite of special circumstances: *Mazzuca v. Silvercreek Pharmacy Ltd; Swiderski v. Broy Engineering Ltd.* In other words, in a court's determination of whether to join a party after the expiry of a limitation period, absence of prejudice is: (a) both a prerequisite element; and (b) also a relevant but not a necessary or sufficient determinant of the existence of special circumstances.

The conduct of the party seeking to amend the statement of claim and the knowledge of his or her counsel at the time of the commencement of the proceedings are relevant to whether there are special circumstances: *Mazzuca v. Silvercreek Pharmacy Ltd.* In *Mazzuca,* Cronk, J.A. stated at para. 42:

> At the same time, proof of the absence of prejudice will not guarantee an amendment. Rather, when a change of parties is sought after the expiry of a limitation period, the circumstances of all affected parties should be examined to determine, on the facts of the individual case, whether sufficient special circumstances are present to support the requested amendment. In those cases where leave is sought to add, delete or substitute a new party, the examination of special circumstances involves consideration of the knowledge of both the moving party and her agents at the time of the commencement of the proceedings regarding the proper parties to be named and of the opposing party in relation to the nature of the true claim intended to be advanced. [Citations omitted.]

[23] The plaintiffs rely on *Buell v. CIBC Wood Gundy Securities Inc.*, [1998] O.J. No. 2861 (Gen. Div.). In that case, the plaintiffs relied on the doctrine of concealed fraud to defend against a motion for summary judgment on the basis that a limitation period had expired. Justice Cameron described the doctrine in these terms:

> Where a defendant has have [sic] been guilty of fraud or other wilful or conscious wrongdoing which is unknown to the person injured at the time of its commission and the defendant has knowingly or recklessly concealed that wrongdoing to prevent its detection, the period of limitation does not begin to run until the existence of the cause of action has become known to the plaintiff, provided the plaintiff is not estopped by the doctrine of laches.
>
> The fraud to which the principle applies is to be given a broad interpretation and covers conduct which having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other. The fraudulent concealment may arise from the manner in which the act which gives rise to the right of action is performed. There has to be some abuse of a confidential relationship, some intentional imposition or some deliberate concealment of facts.

[24] In this case, I did not understand the plaintiffs to suggest that Dr. Bennett misconducted himself. However, the plaintiffs do suggest that given the relationship of doctor to patient, it would be unconscionable to permit the doctor to rely on the limitation period.

[25] I prefer the words of Justice Molloy in *Robertson v. O'Rourke* (1997), 14 C.P.C. (4th) 182; appeal dismissed [1998] O.J. No. 1999 (C.A.). She discussed special circumstances as including a consideration of why the plaintiff did not name someone as a defendant. She noted the following:

> The reason for the plaintiff's failure to bring action against a defendant within the limitation period is an important consideration in determining whether to grant leave to amend. If the defendant is itself responsible in some way for the plaintiff's oversight in allowing a limitation period to expire, this will often be sufficient by itself to meet the "special circumstances" test, particularly when the plaintiff had been misled or lulled into a false sense of security. In *Glassman v. Honda Canada Inc.* the plaintiff sued a Canadian subsidiary of a Japanese company well within the applicable limitation period. The named defendant requested and was given an extension of time to file its statement of defence and did not deliver the defence until four months after the limitation period had expired. The plaintiff did not know until after delivery of the statement of defence that the proper party was the parent company in

> Japan. The court found special circumstances to exist in that case. A similar conclusion was reached by the court in *Jairam v. Bubulal.* In that case, the plaintiff did not originally name a Mr. Varma as a defendant in the action because plaintiff's counsel was led to believe from information provided by Varma that he was uninsured at the time of the accident. This, along with the fact that Varma had been given very early notice of the plaintiff's claim, was found to constitute special circumstances. [Citations omitted.]

[26] In order to succeed, the plaintiffs must also establish that there is no non-compensable prejudice to Dr. Bennett. The authorities are clear on this. See for example, *Mazzuca v. Silvercreek Pharmacy Ltd.,* [2001] O.J. No. 4567 (C.A.).

Analysis

[27] I have concluded that the motion for summary judgment must be dismissed, for several reasons.

[28] First, the reason why the plaintiffs did not originally name Dr. Bennett is an important consideration. In this case, the defendants themselves are responsible for that failure. I do not consider this to be a case of fraudulent concealment. As already noted, there is no suggestion that Dr. Bennett misconducted himself. However, there was an unfortunate coincidence of events that conspired to mislead the plaintiffs.

[29] Obviously, the plaintiffs would have known of Dr. Bennett's involvement in Mr. Ormerod's care from a review of the medical records. However, there is nothing in the records to alert the plaintiffs to any potential negligence on his part.

[30] In their original statement of defence and crossclaim, the originally named defendant doctors stated that Mr. Ormerod made two trips to St. Joseph's Hospital for two different procedures. The defence also suggested that Mr. Ormerod was transferred directly from St. Joseph's Hospital to the London Health Sciences Centre for surgery.

[31] It was only at Dr. Ferguson's examination for discovery (conducted after the expiry of the two year limitation) that the plaintiffs learned of facts suggesting that a cause of action existed against Dr. Bennett. They learned for the first time that there was only one trip to St. Joseph's and a return to Strathroy, from where Mr. Ormerod was sent to London Health Sciences Centre.

[32] Furthermore, Dr. Ferguson testified at his examination for discovery that Dr. Bennett contacted him to advise that Mr. Ormerod had diverticulitis and a pelvic abscess, which was probably secondary to perforated diverticulitis. Dr. Bennett advised that he was going to attempt a percutaneous drainage of the abscess.

[33] Consequently, Dr. Ferguson decided against a surgical referral at that juncture, preferring to await instead the results of the drainage procedure. After Mr. Ormerod was

returned to Strathroy, Dr. Bennett and Dr. Ferguson discussed the results of the drainage. Dr. Bennett expressed some reservations about whether it had been successful. Dr. Ferguson testified that had he spoken to Dr. Bennett before Mr. Ormerod was returned to Strathroy, he would have explored the possibility of his patient remaining in London and having surgery at St. Joseph's.

[34] At his examination for discovery, Dr. Gray testified that he and Dr. Ferguson expressed frustration that Dr. Bennett had not spoken to Dr. Ferguson while Mr. Ormerod was still in London. The significance of this evidence is that surgery was delayed. The plaintiffs seek to establish that earlier surgical intervention would have led to a better outcome.

[35] This was all evidence within the defendants' knowledge and not reasonably available to the plaintiffs until after the limitation period expired. I am satisfied that this constitutes special circumstances.

[36] It is no answer for counsel for Drs. Ferguson and Gray to say that there will be no criticism of Dr. Bennett's care from them during trial. They will undoubtedly be cross-examined on the issue.

[37] I am also satisfied that there is no non-compensable prejudice to Dr. Bennett. The evidence shows that after the statement of claim was served, Dr. Bennett was interviewed by the chief of radiology, Dr. Taves, about his involvement in Mr. Ormerod's care. The hospital records were secured and placed in safekeeping.

[38] While Dr. Bennett does not recall if Dr. Taves mentioned a lawsuit, he acknowledged that it was not common for Dr. Taves to inquire about a case after it was completed and he would have wanted to know the reason for Dr. Taves' inquiry. It seems reasonable to conclude that, at a minimum, Dr. Bennett knew that an investigation into the circumstances of Mr. Ormerod's death was being conducted. It is more likely that Dr. Bennett was made aware of the proceedings.

[39] Dr. Bennett has also acknowledged that his recollection of the events would be reliant on the clinical record and there is no suggestion that any records have been lost or destroyed.

[40] Finally, the Canadian Medical Protective Association had early notice of the claim.

[41] Given my conclusion that special circumstances exist, it follows that the motion for summary judgment is dismissed. It is not necessary to deal with the plaintiffs' alternate theory of liability.

[42] I will receive brief written submissions on costs, first from the plaintiffs by July 31, 2012 and from Dr. Bennett by August 14, 2012.

Justice H. A. Rady

Date: July 16, 2012