CITATION: Barbulov v. Huston, 2010 ONSC 3088
COURT FILE NO.: CV-09-378669
DATE: 20100528

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DRAGO BARBULOV, Plaintiff

AND:

WIFRED PAUL HUSTON, aka WILFRED PAUL HUSTON, Defendant

BEFORE: Justice Newbould

COUNSEL: *Carlin McGoogan* and *Christopher Du Vernet*, for the Plaintiff

Bradley Phillips, for the Defendant

HEARD: May 20, 2010

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ENDORSEMENT

[1] The plaintiff moves for summary judgment on a claim of negligence against the defendant solicitor. The defendant requests that the action be dismissed. There are two issues. The first is whether the defendant owed a duty of care to the plaintiff, who was named as attorney in his father's power of attorney and who later incurred legal fees in appealing a decision of the Consent and Capacity Board regarding the care to be given to his father in his dying days. The second is on the assumption that there was a duty of care owed to the plaintiff, whether the defendant was negligent. For the reasons that follow, I have concluded that there was no duty of care owed to the plaintiff and that in any event, the plaintiff has not established that the defendant was negligent.

[2] On consent of the parties at the outset of the motion, I ordered that the name of the defendant be changed to Wifred Paul Huston a.k.a. Wilfred Paul Huston.

Relevant Factual Background

[3] The defendant was the solicitor for the plaintiff's father who died in April 2009. The plaintiff's father emigrated from Serbia in 1970 and could neither read nor write English. He had a very low level of spoken English. In February 1995, the plaintiff's father and mother retained the defendant to draft a will for each of them. The defendant attended at the father and mother's home to take instructions. The evidence of the plaintiff is that he and his sister also attended. It is contested whether a power of attorney was discussed at that meeting. On February 28, 1995, the father and mother attended at the defendant's office to execute the wills. The plaintiff went with them. The father also that day executed a power of attorney for personal care and for property. The plaintiff and his mother were named as trustees of the father's will and as attorneys in his powers of attorney. The plaintiff says that it was only at this second meeting when the powers of attorney were discussed. What was discussed on that second occasion is contested.

[4] On August 18, 2008, some thirteen years after the father's power of attorney for personal care was signed, he was admitted to the St. Joseph's Health Centre suffering from brain damage due to a lack of oxygen. His four treating physicians and two independent neurologists all determined that his level of cognitive function was severely impaired such that he was not able to communicate or participate in any interaction and there was no medical cure for his loss of cognitive abilities. When he was admitted to the hospital, his family was asked about a power of attorney for personal care. The plaintiff says that he reviewed the power of attorney and realized that it did not reflect his father's wishes and he became concerned that the physicians would use the power of attorney as an excuse to terminate his father's life support. He told the physicians that his father did not have a power of attorney.

[5] Under the *Health Care Consent Act, 1996,* consent to treatment is required, either from the person being treated if the person is capable or from the person's substitute decision maker if the person is incapable. Section 21(1) of that *Act* provides that a person who gives or refuses consent to treatment on behalf of an incapable person's behalf shall do so in accordance with the following principles:

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> 1. If the person knows of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, the person shall give or refuse consent in accordance with the wish.
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> 2. If the person does not know of a wish applicable to the circumstances that the incapable person expressed while capable and after attaining 16 years of age, or if it is impossible to comply with the wish, the person shall act in the incapable person's best interests.

[6] In the absence of a power of attorney setting out the father's wishes, the physicians commenced a Form G Application to the Consent and Capacity Board to determine the father's best interests, and a plan of treatment was proposed in the application. At the outset of the hearing of the Board, the plaintiff produced the power of attorney. Based upon the terms of the power of attorney, Dr. Cirone, who participated at the hearing of the Board as the attending physician for the father, proposed a revised plan of treatment with reduced medical intervention than had previously been proposed in the Form G Application to conform to the wishes expressed in the power of attorney. The Board ordered that this revised plan be implemented based on its conclusion that the power of attorney reflected the father's wishes.

[7] The plaintiff retained counsel to appeal the decision of the Board to the Superior Court of Justice because, he asserted, the power of attorney did not reflect his father's wishes. In reasons released April 9, 2009, Brown J. held that the Board erred in concluding that the power of attorney expressed his father's prior capable wishes. Brown J. reviewed the evidence before the Board and held that there was no evidence in the record to support the Board's conclusion that the plaintiff explained the power of attorney to his father. The plaintiff gave evidence before the Board denying discussing the power of attorney with his father. Further evidence before the Board relied upon by Brown J. in his decision was that the father did not read the power of attorney, had limited command of written English and did not have the power of attorney translated to him before he signed it. Brown J. made no finding of what the father's prior capable wishes were, only that there was no evidence that the father was aware of the terms in the power of attorney that he signed.

[8] In light of the decision that there was no power of attorney expressing the father's prior capable wishes, Brown J. was required to determine under section 21(2) of the *Health Care*

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Consent Act, 1996 what was in the best interests of the father. He concluded that the decision of the Board on this issue was reasonably supportable and that the Board's conclusion that the family members were misguided by their hope of recovery for the father was reasonable on the evidence before the Board. He held that the Board's conclusion that the plaintiff had failed to act in accordance with the best interests of his father in giving or refusing consent to treatment was a reasonable one and he directed the plaintiff to give or refuse consent to treatment for his father in accordance with the treatment plan which was contained in the clinical summary attached to the Form G Application to the Board. Brown J. did not make any costs award of the appeal.

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[9] The plaintiff sues for the legal expenses incurred by him in prosecuting the appeal, amounting to approximately $30,000.

[10] There are two primary issues. The first is whether in law a duty of care was owed by the defendant to the plaintiff. The second is whether, assuming there was such a duty of care, the defendant was negligent and whether such negligence caused damage to the plaintiff.

Duty of Care

[11] There is apparently no case in Canada or the U.K. dealing with the issue of a solicitor's duty of care owed to an attorney named in the power of attorney of the solicitor's client.

[12] Whether there was a duty of care owed by the defendant solicitor to the plaintiff, the son of the defendant's client, requires a consideration of the test enunciated by Lord Wilberforce in *Anns v. Merton London Borough Council*, [1978] A.C. 728. This test has been adopted in Canada and was described in *Kamloops v. Nielson*, [1984] 2 S.C.R. 2 by Wilson J. as follows:

> (i) Is there a sufficiently close relationship between the parties (the local authority and the person who has suffered the damage) so that, in the reasonable contemplation of the authority, carelessness on its part might cause damage to that person? If so,
>
> (ii) Are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

[13] *Cooper v. Hobart*, [2001] 3 S.C.R. 537 revisited the *Anns* test and discussed the considerations to be taken into account in determining whether a duty of care should be held to exist. McLachlin C.J.C. and Major J. dealt at length with this. The headnote from the SCC succinctly describes their judgment. It provides:

> In assessing whether a duty of care should be imposed, the approach set out in Anns is still appropriate in the Canadian context. Different types of policy considerations are involved at each stage of *Anns*. At the first stage, the question is whether the circumstances disclose reasonably foreseeable harm and proximity sufficient to establish a prima facie duty of care. The proximity analysis focuses on factors arising from the relationship between the plaintiff and the defendant, including broad considerations of policy. The starting point for the proximity analysis is to determine whether there are analogous categories of cases in which proximity has previously been identified. If no such cases exist, the question then becomes whether a new duty of care should be recognized in the circumstances. In order to recognize a new duty of care, mere foreseeability is not enough. The plaintiff must show proximity -- that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. They must be grounded in the governing statute when there is one.
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> If the plaintiff is successful in establishing a prima facie duty of care, the question at the second stage is whether there exist residual policy considerations which justify denying liability. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. The second stage of *Anns* will seldom arise, as questions of liability will be determined primarily by reference to established and analogous categories of recovery. Where a duty of care in a novel situation is alleged, it is necessary to consider the second stage of the *Anns* test.

[14] What are the relevant circumstances in this case? The plaintiff and his mother were present when the power of attorney was signed by the plaintiff's father. They were named as attorneys and also executors of his will. The purport of the evidence of the plaintiff is that his father had told him that the only requirement for a power of attorney was that he and his mother should have complete discretion in making decisions about his father's person and property in the event that his father was not able to do so and that he conveyed those instructions to the defendant who assured him that that was the effect of the power of attorney. The provisions of

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the power of attorney were considerably different from that, as I shall discuss in dealing with the question of whether the defendant was negligent, as they provided for the cessation of treatment in a number of situations and did not provide for discretion in the plaintiff or his mother.

[15] Do these circumstances disclose reasonably foreseeable harm to the plaintiff if the defendant were negligent and, if so, was there sufficient proximity as discussed in *Cooper* for a duty of care to be established? The starting point is to determine whether there are analogous categories of cases in which proximity has previously been identified.

[16] Courts have held solicitors acting for one party in transactions, often involving real estate, liable to another party in a transaction who is not the solicitor's client, usually in circumstances in which the solicitor had undertaken to do something in the interests of the other party. See, for example, *Tracy v. Atkins* (1977), 83 D.L.R. (3d) 46, affirmed 105 D.L.R. (3d) 632 (B.C.C.A.). Such a situation in my view is not analogous to the circumstances involving the claim of the plaintiff against Mr. Huston. Mr. Huston did not undertake to do anything in the interests of the plaintiff.

[17] Courts have also found a solicitor liable to a named beneficiary in a will in circumstances in which the negligence of the solicitor for the testator resulted in the gift to the beneficiary failing. See, for example, *White v. Jones*, [1995] 1 All E.R. 691. I do not think that these cases can be said to be analogous. A designated beneficiary is someone with an independent benefit or interest who can reasonably be seen to be harmed if the solicitor is negligent. There is no benefit or interest accorded to an attorney in a power of attorney.

[18] In determining whether liability should be extended to a new situation, there are two passages from the SCC that are helpful. In *Martel Building Ltd. v. Canada*, [2000] 2 S.C.R. 860, Iacobucci and Major JJ. writing for the court stated at para. 50:

> So as to infuse the term "proximity" with greater meaning, the courts take into account a variety of factors in ascertaining whether the relationship between two parties gives rise to a prima facie duty of care. See McLachlin J. in *Norsk*, supra, at p. 1153:

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> • In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. And they will insist on sufficient special factors to avoid the imposition of indeterminate and unreasonable liability.

[19] In *Cooper*, McLachlin C.J.C and Major J., writing for the court, stated at paras 31 and 34:

> ... sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.
>
> …
>
> Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

[20] In my view, there is not sufficient proximity to impose a duty of care on Mr. Huston in favour of the plaintiff. Mr. Huston did not undertake to look after the plaintiff's interests. He was concerned solely with the interests of the plaintiff's father. The plaintiff was acting in the meetings with the defendant as a translator or messenger on behalf of his father. He was not there in any personal capacity with a separate interest that needed protection. There would not have been any expectation that the defendant was looking out for the plaintiff's interest, and there was no representation that he was.

[21] In many instances, there could be a conflict between the wishes of a grantor of a power of attorney and the wishes of the named attorney at the time the power is granted or to be exercised, and the expression of the grantor's wishes in the power of attorney can protect the grantor. For the solicitor to owe a duty to the named attorney could be in conflict with the solicitor's duty to the grantor. It could not be expected that a solicitor advising a grantor of a power of attorney would owe a duty of care to the named attorney.

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[22] The position of an attorney under a power of attorney is somewhat akin to the position of an executor in that each acts on behalf of others. Normally an executor or an attorney under a power of attorney is entitled to reimbursement from the estate or grantor of the power of attorney for all acts reasonably taken by the executor or attorney in the course of their duties. That would normally be in the contemplation of both the solicitor and the executor or attorney. The estate or the person on whose behalf an executor or attorney acted would normally have a negligence action against the negligent solicitor for expenses incurred by the executor or attorney caused by the negligence of the solicitor. In these circumstances, there would be no need to create a separate duty of care on the part of the solicitor to the executor or attorney to protect them against expenses properly incurred by them.

[23] As well, a causal connection reasonably foreseeable at the time of the execution of the power of attorney between the solicitor not following the wishes of the father and resulting legal expenses incurred as here in appealing a decision of the Consent and Capacity Board would appear to be remote. If the power of attorney did not express the father's wishes, as the plaintiff contended, an appeal from the Board's decision on the basis that the plaintiff alone could decide what was in the best interests of his father was doomed to fail. There was no power of attorney giving the plaintiff that authority. Once the matter became a decision for the Board, the plaintiff had no over-riding decision making authority. See *M. (A.) v. Benes* (1999), 46 OR. (3d) 271 at para. 46 (C.A.).

[24] I need not consider the second test in *Anns* as to whether there would be a policy reason against recognizing a duty of care in the circumstances of this case.

[25] I conclude that there was no duty of care owed to the plaintiff by the defendant and on that basis the action should be dismissed.

Alleged Negligence

[26] Assuming there was a duty of care owed by the defendant to the plaintiff, was the defendant negligent and was damage caused to the plaintiff by such negligence?

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[27] The power of attorney was signed fifteen years ago and people's memory of what took place back then by necessity cannot be crystal clear. There is a difference in evidence as to what was discussed.

[28] Under the new rules regarding summary judgment, in determining whether there is a genuine issue requiring a trial, a court is to consider the evidence submitted by the parties and the judge may weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence unless it is in the interest of justice for such powers to be exercised only at a trial. On this motion neither side takes the position that the matter should proceed to a trial. Both contend that the contested evidence should be decided in their favour.

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[29] The power of attorney was a standard form said by Mr. Huston to have been prepared by his partner who was an experienced estates lawyer. The power of attorney appointed the plaintiff and his mother as attorneys for his father's personal care. It stated that it was only to be used in the event that he was unable to act for himself due to disability of any kind. It provided a number of specific instructions, including the following:

CONDITIONS AND RESTRICTIONS

3. This Power of Attorney is only to be used in the event I am unable to act for myself due to disability of any kind.

SPECIFIC INSTRUCTIONS

4. I, direct my family, my physician, my executor and all concerned others as follows:

(a) If I am not longer able to make decisions for my own future, if I am no longer able to communicate, if I am unable to care for myself, if there is no reasonable expectation of my recovery from extreme physical or mental disability of incapacity, if circumstances exist that render me incapable of rational existence, if I am afflicted with (irreversible) injury, disease, illness or condition, then I want my attorney to respect my wishes listed below.

Where the application of measures of artificial life support would primarily serve to prolong the moment of my death, then let this document

> stand as an expression of my thoughts, intentions, wishes and directions – that I do not wish to endure any prolonged period of pain and suffering. I sign this document from my own free will while I am of sound mind and emotionally competent to make such decisions.
>
> (b) If any of these situations specified in paragraph 1 should arise, I direct that I be allowed to die and not be kept alive by medications, artificial means or invasive measures of any kind.
>
> (c) Measures of extending life that I particularly do not wish, and which are to be withheld, withdrawn or discounted include:
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> (i) electrical or mechanical resuscitation of my heart;
> (ii) nutritional feedings;
> (iii) artificial mechanical respiration where my brain can no longer sustain breathing;
> (iv) radiation, chemotherapy and similar forms of treatment;
> (v) treatment for an illness or disease which I contracted when I was already afflicted with a terminal illness.
>
> (d) I do ask that medication be administered to alleviate pain, suffering or distress even though this may hasten the moment of my death.
>
> (e) I want the wishes and directions expressed in this power of attorney and the spirit of this document carried out to the fullest extent permitted by law. In so far as these are not legally enforceable, I nevertheless request that those responsible for me at such time will regard themselves as morally bound by these provisions, so that they will carry out these wishes to the fullest extent possible.
>
> …
>
> (g) If any of the situations specified in this document should occur, I appoint the attorney named herein as my attorney to carry out my thoughts and wishes, including obtaining a court order, if necessary, to discontinue or forbid artificial life support measures that would primarily serve to prolong the moment of my death.
>
> …

[30] In his affidavit sworn March 18, 2010 in support of the motion for summary judgment, the plaintiff stated that there were two meetings, the first being at the family home and the second being at Mr. Huston's office. He said that at the first meeting there was a discussion about a will but no discussion regarding a power of attorney. He said that at the second meeting

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his parents each signed a will that had been prepared for them. After the wills had been signed, Mr. Huston suggested that his father sign powers of attorney for personal care and property and then printed off two power of attorney forms which appointed the plaintiff and his mother as attorneys. He said that his father advised him that the only requirement he had for a power of attorney was that he and his mother be appointed as his personal representatives and that they have complete discretion in making decisions about his father's person and his property in the event that his father was unable to do so. He said he advised Mr. Huston that these were his father's instructions, which had been given to him by his father in Serbian, and that Mr. Huston assured him that "his father's understanding of the effect of the power of attorney was correct". He said that was the sole explanation of the form's contents that Mr. Huston provided.

[31] The plaintiff's evidence on his examination for discovery held on February 5, 2010, a little more than one month before his affidavit was sworn, was somewhat different. At that time he said that when the power of attorney for personal care was presented to him, he started reading it and he said it did not make sense because it looked like it was not offering him or his mother any options. He said that he objected to the terms. He said he told Mr. Huston that it looked like a recipe for euthanasia and that Mr. Huston replied that that was not the case and it gave him and his mother authority to make all decisions on behalf of his father. He said that Mr. Huston told him that it was a standard form and that the terms could be ignored as he could make all decisions on behalf of his father and that he and his mother would have all authority to decide what happens and when.

[32] Mr. Huston's evidence, first given on his examination for discovery, was that there were two meetings. He thought that the first meeting was at his office. He said that a power of attorney for personal care was discussed at the first meeting, along with a discussion of a will, and that while he could not recall details of the conversation, the plaintiff's father made clear to him, through his son, that he did not wanted his life prolonged. His evidence on this was somewhat equivocal because he also stated that his father wanted all steps being taken to prolong his life regardless of whether he was mentally capable or physically capable in the hospital or not. He also said that the father did not want any medical intervention and that he wanted to go

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quietly with dignity. Mr. Huston said that he recorded the instructions that he was provided on a checklist, which he now cannot locate.

[33] Mr. Huston also said on his discovery that he could not recall discussing specific clauses with the plaintiff or his father as to the circumstances that would render him incapable. He said he understood that the directions given to the attorneys in the power of attorney would be binding. When asked if he explained this to the father, he said he certainly did in the sense that the father's main concern was that he wanted his son and his wife involved in the process and that "he fully understood that he was giving them the power to make these decision".

[34] I have difficulty with the evidence of both the plaintiff and Mr. Huston. I doubt if any of them remember much at all of the two meetings in 1995. I do not accept the evidence of the plaintiff that a power of attorney was not discussed at the first meeting. It would be normal for a power of attorney to be discussed with a client at the time a will was being discussed and not something raised only after the will was signed. The power of attorney presented for signature at the second meeting already contained the names of the plaintiff and his mother as attorneys, and that is not something that would have occurred if, as said by the plaintiff, the document was simply printed off by Mr. Huston at the second meeting. It is clear from his cross-examination that the plaintiff was not certain whether the powers of attorney had been prepared when they arrived at the second meeting and he conceded that it was possible that they had been previously prepared. The power of attorney that was signed had as a typed date the ___ day of March and this was changed by pen to read the 28th day of February. The first meeting was a week or so before the second meeting and it is likely that the power of attorney was prepared after the first meeting in anticipation of a further meeting on some day in March.

[35] On his cross-examination, the plaintiff said that during his discussion with Mr. Huston in which he was told that he could ignore the terms of the power of attorney and that he and his mother would have all authority to decide what happened and when, he said he told his parents that he had a friend who told him of a friend who had been in a coma who had disregarded advice from the doctors to "pull the plug" and that the friend had later come out of the coma. He said he was sure that that was brought up during the meeting with Mr. Huston and not many

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years later. However, in his evidence before the Consent and Capacity Board on January 21, 2009, the plaintiff denied discussing the power of attorney with his father and said that the discussion regarding the person in a coma had taken place only four or five years earlier, which would have been nine or ten years after the power of attorney was executed.

[36] The plaintiff also testified before the Board when asked whether his father endorsed the specific instructions in the power of attorney- "Only in the event that he's incapable of a rational existence". That answer is inconsistent with the plaintiff's other evidence.

[37] I have considerable doubts about the evidence of Mr. Huston as well. It is apparent from the transcript of his discovery, and even from his subsequent affidavit, that he has little memory of what took place regarding the discussions that he had with the plaintiff and his father regarding the power of attorney. I do not think he had the extent of recall he claimed to have had. His obvious inconsistencies in what he said are evidence of that. While he said that one thing that was made clear to him was that the plaintiff's father did not want to prolong his life with medical interventions, he also said that the father wanted steps taken to prolong his life regardless of whether he was mentally capable or physically capable. While he said that he understood that the directions in the power of attorney would be binding on the attorney and that he explained this to the plaintiff's father, he also said that the main concern of the plaintiff's father was that he wanted his son and his wife involved in the process and that the plaintiff fully understood that he was giving them the power to make these decisions.

[38] The plaintiff asserts that Mr. Huston cannot possibly have a clear recollection of a five minute discussion fifteen years earlier without any notes available as to what was discussed. I think that is a fair criticism. I believe that Mr. Huston's evidence, as with the evidence of the plaintiff, is far more reconstruction than recollection and I put little weight on what Mr. Huston said he could recall being discussed.

[39] In the end, however, I cannot accept the evidence of the plaintiff that Mr. Huston told him to ignore the terms of the power of attorney and that he and his mother would have complete discretion as to what would happen regarding treatment for his father once his father became incapable. It is implausible that a solicitor would prepare a document and then tell the plaintiff

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that he could ignore its terms. There would have been no reason for Mr. Huston to do that and I do not accept that it occurred.

[40] Mr. Huston swore an affidavit on April 6, 2010, much of it being no more than argument based upon his reading of various documents, including the transcript of the hearing before the Consent and Capacity Board, the decision of Brown J. on the appeal from the decision of the Board and the transcript of the examination for discovery of the plaintiff. He acknowledged that his prior recollection that the first meeting was at his office was not correct and that his memory had been refreshed by looking at the examination for discovery of the plaintiff. He disagreed with the plaintiff's purported recollection of discussions he claimed to have had with Mr. Huston. Mr. Huston stated in his affidavit that had issues or concerns about the language in the power of attorney been raised prior to its execution, he would have redrafted the document in accordance with instructions provided by the client. He denied ever suggesting that the power of attorney could be ignored or that the attorneys would have carte blanche to make any and all decisions without being bound by the terms of the power of attorney. While I do not believe that that Mr. Huston actually recalls much of the second meeting, I do accept that he would not have told the plaintiff to ignore the terms of the power of attorney or that the plaintiff and his mother would be free to make all decisions without being bound by its terms.

[41] I recognize that in his decision on the appeal from the Consent and Capacity Board, Brown J. referred to the evidence before the Board and the evidence that the plaintiff had a discussion with Mr. Huston and formed the understanding that decisions would be left to his mother and himself. That may have been what Brown J. took from the evidence before the Board, but the matter to be determined now must be determined on all of the evidence in the record. I have rejected the evidence of the plaintiff as to what he said he was told by Mr. Huston regarding the meeting of the power of attorney.

[42] On the record before me, I am not satisfied that the plaintiff has established that his father had wishes regarding the terms to be included in the power of attorney, that those terms were provided on his behalf by the plaintiff to Mr. Huston and that Mr. Huston drew a power of attorney conflicting with what he was told the father wanted.

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[43] The defendant raises the *Limitations Act, 2002*. He takes the position that under section 24(2), as the claim is based on acts or omissions that took place before January 1, 2004, the former 6 year limitation period expired before that date and thus no proceeding may now be commenced. In my view, whether or not the limitation provisions in force prior to January 1, 2004 apply, the result is the same in that there is no limitation problem faced by the plaintiff. Under the previous limitation provisions, the cause of action would not arise until damage had occurred, which in this case could not have been before the appeal from the Consent and Capacity Board was taken in February 2009. This action was started later that year. It is likely, however, that the 2 year limitation period provided for in the *Limitations Act, 2002*, is applicable. Section 5 of that Act provides that a claim is discovered on the day the claimant first knew or ought to have known that damage had occurred. Damage could only have occurred once the decision of the Consent and Capacity Board was made and thus the action was commenced within the time limitations covered by the new legislation.

Conclusion

[44] The action is dismissed. The defendant is entitled to his costs of the action. If costs cannot be agreed, written submission may be made by the defendant within 10 days and the plaintiff shall have 10 further days to respond in writing.

NEWBOULD J.

Date: May 28, 2010

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