SUPREME COURT OF NOVA SCOTIA
Citation: *Chan v. White,* 2014 NSSC 383

Date: 20141024
Docket: Hfx No. 265999
Registry: Halifax

Between:

Park Wu (Truman) Chan, Lin Feng and Bonita Chan

Plaintiffs

v.

D. White, S. Couban, Dr. Yuen, D. Jones, J. MacDonald and The Queen Elizabeth II Health Sciences Centre

Defendants

DECISION

Judge:	The Honourable Justice Kevin Coady
Heard:	October 2, 2014, in Halifax, Nova Scotia
Final Decision:	October 24, 2014
Counsel:	Jennifer Langille, for the Plaintiffs Stewart Hayne and Peter LeCain, for the Defendants

By the Court:

[1] This action is a fatal injury claim arising from the death of Michael Chan on May 14, 2005. He was 25 years old at the time. He was an inpatient at the Queen Elizabeth Health Sciences Centre where he was being treated for acute lymphoblastic leukemia. The plaintiffs are members of Michael Chan's family. Dr. White and Dr. Couban are physicians who were involved in Mr. Chan's care in the days leading up to his death. There is no indication that this action was served on Dr. Yuen, D. Jones, J. MacDonald or the Queen Elizabeth II Health Services Centre.

[2] A brief review of Michael Chan's medical history is helpful. He was diagnosed in 2002. He was treated with chemotherapy and by 2003 he was in remission. In 2004 he experienced symptoms that led to a relapse. In 2004 he received a bone marrow transplant. Six months after the bone marrow transplant he developed a leukemic mass in his right cheek. Further chemotherapy and radiation were required. In 2005 Michael Chan again relapsed. Diagnostic tests indicated he had extensive metastatic abnormalities within vertebra and findings suggestive of a tumor in the lower part of his spine. He was admitted to hospital in April, 2005 for the final time. Palliative and pastoral care were provided. The

medical records indicate that Michael Chan was considered terminal during much of his care. On May 14, 2005 Michael Chan went into full respiratory arrest. No resuscitation was attempted and he passed away.

[3] This action was commenced on May 12, 2006. To date little discovery has taken place and the case has not proceeded to trial, notwithstanding the passage of almost 9 years. The plaintiffs have not retained an expert in what is essentially a medical malpractice suit. This action has been allowed to languish on a back shelf.

[4] The plaintiffs allege that Dr. White and Dr. Couban failed to practice to the standard of care required of them and that such failure caused Michael Chan's death. This is not an allegation that these doctors provided negligent cancer care. Rather, their action is rooted in their decisions respecting resuscitation in the face of a predictable respiratory arrest. The Statement of Claim alleges as follows:

> 13. The death of Michael was caused and/or were contributed to by the negligence of doctors, Defendant White and Defendant Couban and Yuen, the particulars of which are as follows:
>
> > a) they failed to fully canvas and ensure that any discussion regarding any No Code Order was fully understood to Michael and that they were clear in getting his instructions that he wished to be resuscitated. As a result, potential life saving efforts were not made that could have preserved Michael's life.
> >
> > b) they failed to regularly evaluate the No Code Order with a mind to whether or not Michael could change his mind in the event that they honestly believe that he did express a wish to be subject to a No Code Order;
> >
> > c) they failed to note Michael's affirmative wish to be resuscitated which were expressed on both April 16th and May 3rd, 2005;

> d) they failed to administer a potential life saving resuscitation and other treatments [which] it appeared Michael was in distress;
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> e) they failed to follow appropriate procedure re documentation and re-evaluation of No Code Orders and adequately obtain Michael's consent for the same; and
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> f) they failed to properly and appropriately deal with Michael's respiratory congestion;
>
> g) they failed to ensure staff and in particular the Defendant Jones and MacDonald, was aware of both Michael's and the family's wishes in the reversal of the April 15, 2005 No Code Order;

The defendant doctors state they provided Michael Chan with the best available care. They assert that his death was caused by terminal acute lymphoblastic leukemia.

[5] The evidence respecting resuscitation in the face of respiratory arrest represents the focus of the plaintiff's claim. In the event of a trial this evidence would be front and center. The medical records suggest that resuscitation was a much discussed option as Michael Chan deteriorated. It appears as if initially he and his family agreed to a non-resuscitation order. The hope of a change in his treatment led to a revocation of that order. The parties disagree as to whether a non-resuscitation order was in place at the time of Michael Chan's death.

[6] The plaintiffs do not suggest that Michael Chan had any likelihood of a cure. Instead they argue that the defendants had the benefit of a competent patient whose

desires for resuscitation were known. They point out that he was young and had opted to prolong the pain if it meant it would prolong his time with his family.

[7] On July 24, 2014 the defendant doctors filed a notice of motion seeking summary judgment on the evidence. Their position on this motion is succinctly stated at paragraph 39 of their August 15, 2014 motion brief:

> This is a matter where the Plaintiffs claim medical negligence. The issues of the standard of care, the actions of the physicians and the cause of death are outside the area of the trier of fact's ordinary experience. The jurisprudence is clear that expert evidence is required to assist the trier of fact in an area outside of their ordinary experience. As such, it is the expert evidence that is required to determine if there is (i) a genuine issue of material fact requiring trial, and (ii) whether the plaintiffs have a real chance of success.

The absence of an expert report is the only ground plead in support of summary judgement.

APPLICATION FOR AN ADJOURNMENT:

[8] The plaintiffs applied for an adjournment at the commencement of this hearing. It was denied with reasons to follow. They argued that this motion was premature and should wait until after discovery of the defendant doctors. They submit it would be "prudent" to wait for discoveries "before retaining an expert so that the appropriate expert can be retained and so that he or she may be able to consider all the relevant evidence when providing his or her opinion." The plaintiffs relied on the Nova Scotia Court of Appeal decision of *Burton Canada*

Company v. Coady, 2013 NSCA 95 and in particular paragraph 86:

> [86] If the motions judge is satisfied that the responding party reasonably requires disclosure, production or discovery, or an opportunity to present expert or other evidence before he is in a position to "put his best foot forward", then the judge should adjourn the motion so that those steps may be taken. Whether the adjournment is without day, or to a fixed date, or attaches conditions and a schedule for production, discovery, and the like, will turn on the judge's appreciation of the circumstances in each case. Of course, if the judge is satisfied that the responding party does not reasonably require further information, and is just procrastinating to forestall summary judgment, then an adjournment should be denied.

Additionally the plaintiffs relied on *Civil Procedure Rule* 55.03 which permits the filing of an expert opinion up to six months before the finish date.

[9] I denied an adjournment because I concluded the plaintiffs were "just procrastinating to forestall summary judgment." This action was filed in 2006 and the plaintiffs have not yet approached an expert. A review of the file suggest that they have done little to advance the case to trial. They too rely on *Burton Canada Company v. Coady*, *supra*, and in particular paragraph 78:

> [78] In my respectful opinion, CPR 13.04 permits the motion for summary judgment to be brought as soon as the pleadings are closed . Each side is then obliged to put his/her best foot forward. A complaint of prematurity, or surprise, or a promise of future evidence will not be enough to defeat the motion. Rather, the judge will hear the motion and if the judge is satisfied that the two stages of the inquiry mandated under *Guarantee* have been met, the judge will be required to grant summary judgment. There is – in those circumstances – no retained inherent jurisdiction to refuse the request for summary judgment, such as there would appear to be in Ontario with the escape valve its Rule provides "unless it is in the best interest of justice for such powers to be exercised only at a trial".

The plaintiffs do not suggest they were taken by surprise by this motion.

[10] It is my view that adjourning this motion to allow pre-trial procedures to run their course would defeat the purpose of summary judgment. In *Barthe v. National Bank Financial Ltd.*, 2007 NSSC 331 Justice Hood concluded that summary judgment is "an expeditious and inexpensive way of obtaining a determination on the merits and should have priority over the discovery process."

APPLICATION TO EXCLUDE EXPERT REPORTS:

[11] The defendants have filed the affidavit of Peter LeCain in support of this motion. He is an associate lawyer at the defendant law firm. Attached as schedules are the expert reports of Dr. Sean Dolan (hematology) and Dr. Reinhard Lohman (hematology). The plaintiffs objected to the admission of these reports on this motion. I ruled that these opinions were not admissible on this motion with reasons to follow.

[12] The plaintiffs relied on *Civil Procedure Rules* 22.15 and 23.08 in support of their position. They argue the manner of providing evidence in a motion under *Rule* 23.08 does not include attaching expert reports to affidavits of other individuals. It is clearly hearsay and is presumptively inadmissible and does not attract a *Rule* 22.15 exception.

[13] The plaintiffs further rely on *MacAulay v. Ali*, 2013 NSSC 271 and in

particular the comments of Justice Wood at paragraphs 7 and 8:

> [7] The deponents of both affidavits had no personal knowledge of the materials attached as exhibits. Their affidavits might be sufficient to prove that the documents were produced in the litigation; however, that is not sufficient to allow them to be admitted for the truth of their contents. *Civil Procedure Rule 22.15(1)* states that the rules of evidence shall apply to the hearing of a motion including any affidavits. Subsection *(2)* permits hearsay on certain motions, none of which are applicable in the present case.
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> [8] The principle that only admissible evidence should be considered on a motion for summary judgment was reiterated by the Nova Scotia Court of Appeal in the recent decision of *Abbott and Haliburton Company v. WBLI Chartered Accountants*, 2013 NSCA 66 (CanLII), 2013 NSCA 66, where the Court stated at para. 159:
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> > A judge hearing a motion for summary judgment should only hear admissible evidence…

I accept the plaintiffs' submissions and will not be considering these expert reports in deciding this motion.

APPLICATION FOR SUMMARY JUDGMENT:

[14] This application is governed by *Civil Procedure Rule* 13.04 which states:

> (1) A judge who is satisfied that evidence, or the lack of evidence, shows that a statement of claim or defence fails to raise a genuine issue for trial must grant summary judgment.
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> (2) The judge may grant judgment for the plaintiff, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
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> (3) On a motion for summary judgment on evidence, the pleadings serve only to indicate the laws and facts in issue, and the question of a genuine issue for trial depends on the evidence presented.
>
> (4) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge. […]

[15] In *Burton Canada Company v. Coady, supra*, the Court discussed the application of this *Rule* at paragraph 27:

> [27] In *Guarantee* the Supreme Court enunciated the test for summary judgment. But because the Court's clear statement of the test is not always reiterated with precision, the Court's words bear repeating. The Court said:
>
> > 27 The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court. See *Hercules Managements Ltd. v. Ernst & Young*, 1997 CanLII 345 (SCC), [1997] 2 S.C.R. 165, at para. 15; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 1998 CanLII 4831 (ON CA), 164 D.L.R. (4th) 257 (Ont. C.A.), at pp. 267-68; *Irving Ungerman Ltd. v. Galanis* (1991), 1991 CanLII 7275 (ON CA), 4 O.R. (3d) 545 (C.A.), at pp. 550-51. Once the moving party has made this showing, the respondent must then "establish his claim as being one with a real chance of success" (*Hercules, supra*, at para. 15).

[16] In *Masontech Inc. v. Affinity Contracting and Environment Ltd.*, 2014 NSSC 164 Justice LeBlanc commented at paragraphs 31 - 33:

> [31] While *Burton* remains the leading case directly interpreting Rule 13.04, I believe the court must incorporate the recent Supreme Court of Canada decision in *Hryniak v. Mauldin*, 2014 SCC 7, in its reasoning on summary judgment on evidence. I note in particular the summarized comments of Karakatsanis J. for the court, at para. 2, calling for
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> > a culture shift … in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails "simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> [32] The court cited "an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation": *Hryniak*, at para. 31, citing *Szeto v. Dwyer*,

> 2010 NLCA 36, at para. 53. Karakatsanis noted that such a principle was applied to the Nova Scotia *Civil Procedure Rules* in *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, with respect to the rules governing discovery and disclosure.
>
> [33] It has already been suggested that *Hryniak* has general application and should be considered in summary judgment applications in Nova Scotia: see e.g. *Proost v. Ferncroft Equities Ltd.*, 2014 NSSC 99; *Pettipas v. Hunter Noel Holdings Ltd.*, 2014 NSSC 70. The discussion of the technical aspects of summary judgment in *Hryniak* is concerned with the Ontario rule, which provides much broader powers to the judge than does Rule 13.04. However, it is clear that the court intended the policy aspects of the decision to be of general application.

These authorities have particular application to this action.

[17] The elements of an allegation of medical malpractice are well established. Justice Coughlan in *Robert v. Brooks*, 2014 NSSC 49 stated that the following four elements are required to establish medical malpractice:

1. There must be a legal duty on the part of the doctor to the patient to exercise care.
2. There must be a breach of that duty of care.
3. The patient must suffer loss or injury.
4. The loss must have resulted directly from the doctors' negligence.

Each of these elements is required for a plaintiff to succeed in a medical malpractice suit. The defendant doctors dispute any breach and any suggestion that their care of Michael Chan caused his death. It is only necessary to address causation in order to decide this motion.

[18] The Supreme Court of Canada discussed causation in *Clements v. Clements*, 2012 SCC 32. Chief Justice McLachlin stated at paragraph 46:

> [46] The foregoing discussion leads me to the following conclusions as to the present state of the law in Canada:
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> (1) As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.
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> (2) Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.

The defendants argue that the plaintiff's failure to obtain an expert opinion on causation results in there being no evidence on causation.

[19] It is well established that expert evidence is required to assist the trier of fact in an area outside of their ordinary experience. In *Cassibo v. Bacso*, 2010 ONSC 6435 Justice Hourigan endorsed this principle at paragraph 18:

> [18] In my view, this is not a case where the trier of fact can, without the benefit of an expert report, determine whether the standard of care has been breached and whether the breach caused or contributed to the plaintiff's damages. This it is a technical area that is not within the ordinary knowledge and experience of a trier of fact. In the absence of an expert opinion it would not be possible for the trier of fact to determine the appropriate standard of care, let alone whether the defendant's actions caused or contributed to any damages suffered by the plaintiff.

[20] In *GlaxoSmithKline Inc. v. Cherney*, 2009 NSCA 68 the plaintiff alleged the defendants drug caused his hair loss. The defendant sought summary judgment on

the basis that the plaintiff did not have an expert report to support causation. Justice Roscoe found that in order to find causation, the trier of fact needed the assistance of an expert. She stated at paragraphs 21- 23:

> [21] With respect, the chambers judge erred in the application of the test for summary judgment by finding that there is a genuine issue of fact to be determined at trial. As in *McNeil v. Bethune*, if the matter were permitted to go to trial, the plaintiff would have no chance of success because he has no evidence to support his allegations that the damages he suffered were caused by or contributed to by any act or omission of the defendant.
>
> [22] It is necessary for the plaintiff to have more than his own anecdotal evidence in a case such as this where the cause of a medical condition, alopecia universalis, is an issue […] However the defendant's application was brought solely on the basis that the plaintiff has no evidence to prove causation, one of the other elements of the tort that the plaintiff would be required to prove at trial.
>
> [23] The point is, that in order to find causation, in this case, the trier of fact will need the assistance of an expert. What causes a medical condition is a scientific matter and outside the experience and knowledge of a judge or jury…

It will be the exception that medical causation can be determined without an expert.

[21] The plaintiffs argue that this case is one of those exceptions. They rely on *Ter Neuzen v. Korn*, [1995] 3 S.C.R. 674. In discussing the need for expert evidence Justice Sopinka commented that in certain cases causation may be established without the assistance of an expert. He stated at paragraphs 40, 41 and 44:

> 40 With respect to the medical profession in particular, Professor Fleming noted, at p. 110:
>
> > Common practice plays its most conspicuous role in medical negligence actions. Conscious at once of the layman's ignorance

> of medical science and apprehensive of the impact of jury bias on a peculiarly vulnerable profession, courts have resorted to the safeguard of insisting that negligence in diagnosis and treatment (including disclosure of risks) cannot ordinarily be established without the aid of expert testimony or in the teeth of conformity with accepted medical practice. However there is no categorical rule. Thus an accepted practice is open to censure by a jury (nor expert testimony required) at any rate in matters not involving diagnostic or clinical skills, on which an ordinary person may presume to pass judgment sensibly, like omission to inform the patient of risks, failure to remove a sponge, an explosion set-off by an admixture of ether vapour and oxygen or injury to a patient's body outside the area of treatment.
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> 41 It is evident from the foregoing passage that while conformity with common practice will generally exonerate physicians of any complaint of negligence, there are certain situations where the standard practice itself may be found to be negligent. However, this will only be where the standard practice is "fraught with obvious risks" such that anyone is capable of finding it negligent, without the necessity of judging matters requiring diagnostic or clinical expertise.
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> …
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> 44 As was observed in *Lapointe*, courts should not involve themselves in resolving scientific disputes which require the expertise of the profession. Courts and juries do not have the necessary expertise to assess technical matters relating to the diagnosis or treatment of patients. Where a common and accepted course of conduct is adopted based on the specialized and technical expertise of professionals, it is unsatisfactory for a finder of fact to conclude that such a standard was inherently negligent. On the other hand, matters falling within the ordinary common sense of juries can be judged to be negligent. For example, where there are obvious existing alternatives which any reasonable person would utilize in order to avoid a risk, one could conclude that the failure to adopt such measures is negligent notwithstanding that it is the prevailing practice among practitioners in that area.

I do not find this action to be one of those that can be established without the assistance of an expert. Michael Chan's leukemia was obviously a very complex disease. The treatment of leukemia is not something that a non-expert would

understand. An expert is necessary to link the plaintiff's concerns about non-resuscitation to the cause of his Michael Chan's death.

[22] I am satisfied that the defendant doctors have established that there is no genuine issue for trial. Additionally, the plaintiffs have not established that they have a real chance of success. Consequently, summary judgment is granted to the defendant doctors.

[23] In the event the parties cannot agree on the costs of this motion, I will accept written submissions.

Coady, J.