

Citation: Grennan v. Reddoch and
Whitehorse General Hospital
2002 YKCA 0016

Date: 20021213
Docket: 00-YU434
00-YU435

COURT OF APPEAL FOR YUKON TERRITORY

BETWEEN:

**SIMON EDWARD GRENNAN, ADMINISTRATOR OF
THE ESTATE OF MARY-ANN GRENNAN, DECEASED**

RESPONDENT
(PLAINTIFF)

AND:

**DR. ALLON REDDOCH
WHITEHORSE GENERAL HOSPITAL**

APPELLANTS
(DEFENDANTS)

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Braidwood
The Honourable Mr. Justice Hall

C.E. Hinkson, Q.C. and
N.L. Trevethan

Counsel for the Appellant,
Dr. Allon Reddoch

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R.D. Gibbens

Counsel for the Respondent

Place and Dates of Hearing:

Vancouver, British Columbia
October 21-23, 2002

Place and Date of Judgment:

Vancouver, British Columbia
December 13, 2002

Written Reasons by:

The Honourable Madam Justice Ryan

Concurred in by:

The Honourable Mr. Justice Braidwood
The Honourable Mr. Justice Hall

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

[1] This is an appeal by the appellants, Dr. Reddoch and the Whitehorse General Hospital, from the judgment of Moreau J. pronounced March 21, 2000. In a decision rendered before trial Moreau J. refused to dismiss a substantial part of the respondents claim on a point of law.

[2] Mary-Ann Grennan had been a patient at the Whitehorse General Hospital from September 8 to September 11, 1995 during which time the appellants provided medical services to her. Ms. Grennan died on April 28, 1996. The respondent, as administrator of the estate of the deceased Mary-Ann Grennan, brought an action against the appellants Dr. Reddoch and the Whitehorse General Hospital claiming damages pursuant to ss. 5 and 6 of the Yukon *Survival of Actions Act*, R.S.Y. 1986, c. 166, for the wrongful death of Mary-Ann Grennan.

[3] The writ and statement of claim were filed on September 5, 1997. The statement of claim alleged that the appellants were negligent in the treatment of the deceased and that their acts, errors or omissions constituted a breach of contract, causing her injury, loss, damage and her death.

[4] In his statement of defence Dr. Reddoch pleaded:

8. In the further alternative and in further answer to the whole of the Statement of Claim herein, Dr. Reddoch says that there are no damages recoverable pursuant to the *Survival of Actions Act* R.S.Y. 1986, c. 166, and pleads and will rely upon the provisions of section 5 thereof.

9. In the further alternative and in further answer to the whole of the Statement of Claim, Dr. Reddoch says that there are no damages recoverable and pleads and relies upon the provisions of the *Estate Administration Act*, R.S.Y. 1998, c. 7.

[5] On February 21, 2000 the respondent, with the consent of the appellants, brought an application to decide a point of law pursuant to Rule 34 of the British Columbia **Supreme Court Rules**¹. Rule 34 states:

- (1) A point of law arising from the pleadings may, by consent of the parties or by order of the court, be set down by praecipe for hearing and disposed of at any time before the trial.
- (2) Where, in the opinion of the court, the decision on the point of law substantially disposes of the whole action or of any distinct claim, ground of defence, set-off, counterclaim or reply, the court may dismiss the action or make any order it thinks just.

[6] In light of paragraphs 8 and 9 of Dr. Reddoch's statement of defence, the Court was asked to determine whether the

¹ Section 37 of the *Judicature Act*, R.S.Y. 1986, c. 96, provides that the **British Columbia Rules of Court** shall apply to all matters before the Yukon Supreme Court.

respondent estate was entitled to maintain a claim for the recovery of damages representing the deceased's future lost earnings pursuant to the Yukon ***Survival of Actions Act***; and if so, whether s. 59(3) of the ***Estate Administration Act***, S.Y. 1998, c. 7, precluded the recovery of such claim.

[7] In her judgment released March 21, 2000 Madam Justice Moreau held that the Yukon ***Survival of Actions Act*** supported a claim for loss of future earnings and that s. 59(3) of the ***Estate Administration Act*** did not preclude the recovery of such a claim. The essential portion of the order reads:

- (1) the plaintiff estate is entitled to maintain a claim for the recovery of damages representing the deceased's future lost earnings, pursuant to the Yukon *Survival of Actions Act*, R.S.Y. 1986, c. 166; and
- (2) that s. 59(3) of the *Estate Administration Act*, S.Y. 1998, c. 7 does not preclude the recovery of such claim.

[8] The appellants filed notices of appeal but did not pursue the appeal until the completion of the trial. The action was heard 11 months later by Mr. Justice Irving. On February 28, 2001, he found the appellants liable in negligence to the estate of the deceased. He awarded damages on the basis of a sum which represented the deceased's future loss of earnings.

[9] The appeal from the finding of liability by Mr. Justice Irving was heard at the same time as this appeal. The judgment in the appeal from liability is being handed down simultaneously with the judgment in this appeal.

[10] Since the decision in the appeal from liability renders academic the decision on the point raised by this appeal, I will state very briefly my opinion with respect to the issues raised on this appeal.

The Relevant Sections of the *Survival of Actions Act* and the *Estate Administration Act*

[11] The relevant sections of the ***Survival of Actions Act*** are the following:

2. (1) All causes of action vested in a person who dies after the commencement of this Act, survive for the benefit of his estate.

(2) The rights conferred by subsection (1) are in addition to and not in derogation of any rights conferred by the Fatal Accidents Act.

* * *

5. Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the deceased person or the estate are recoverable and, without restricting the generality of the foregoing, the damages recoverable shall not include punitive or exemplary damages or damages for loss of expectation of life, for pain and suffering, or for physical disfigurement.

6. Where the death of a person was caused by the act or omission that gave rise to the cause of action, the damages shall be calculated without reference to any loss or gain to his estate consequent on his death, except that there may be included in the damages awarded an amount sufficient to cover the reasonable expenses of the funeral and the disposal of the body of the deceased if those expenses were, or liability therefor was, incurred by the estate.

[Emphasis added.]

[12] The ***Estate Administration Act*** came into force on April 1, 1999. This was almost two years after the statement of claim was filed in the case at bar. The relevant sections are the following:

59. . . .

(2) Subject to subsection (3), the executor or administrator of a deceased person may continue or bring and maintain an action for all loss or damage to the person or property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, be entitled to, including an action in the circumstances referred to in subsection (4).

(3) Recovery in an action under subsection (2) must not extend to the following:

- (a) damages in respect of physical disfigurement or pain or suffering caused to the deceased;
- (b) if death results from the injuries, damages for the death, or for the loss of expectation of life;
- (c) damages in respect of expectancy of earnings after the death of the deceased

that might have been sustained if the deceased had not died.

[Emphasis added.]

The Reasons for Judgment

[13] The Chambers judge concluded that s. 5 of the ***Survival of Actions Act*** permitted the recovery of damages representing future lost earnings. In so finding the Chambers judge relied on the decision of the Alberta Court of Appeal in ***Duncan Estate v. Baddeley*** (1997), 145 D.L.R. (4th) 708. The ***Duncan*** case dealt with similar Alberta legislation. At the time the relevant provisions of the ***Survival of Actions Act***, R.S.A. 1980, c. S-30 provided:

2. A cause of action vested in a person who dies after January 1, 1979 survives for the benefit of his estate.

* * *

5. If a cause of action survives under section 2, only those damages that resulted in actual financial loss to the deceased or his estate are recoverable and, without restricting the generality of the foregoing, punitive or exemplary damages or damages for loss of expectation of life, pain and suffering, physical disfigurement or loss of amenities are not recoverable.

[Emphasis added.]

[14] The Chambers judge noted that while the Yukon statute used the phrase "actual pecuniary loss" and the Alberta statute used the phrase "actual financial loss", the words "financial" and "pecuniary" could be used interchangeably. She found the *Duncan* case on point and persuasive.

[15] The issue in *Duncan*, as here, was whether a claim for future loss of earnings or the capital loss of future earning capacity is an "actual financial loss." Mr. Justice Kerans, writing for the majority, held that it was. He said at pp. 710 and 712:

Section 2 of the *Survival of Actions Act*, R.S.A 1980, c. S-30, provides that "[a] cause of action vested in a person who dies ... survives for the benefit of his estate". By these words, the Legislature put an end to the old, and much challenged, rule of the common law that a personal cause of action does not survive the death of the victim. The Legislature, however, hedged that big bet. Section 5 of the statute limits the new rule to "... only those damages that resulted in actual financial loss to the deceased or his estate ... ". The question before us is whether the loss of the capacity to earn income creates an "actual financial loss".

Côté J.A. for a majority of a panel in this Court in *Galand Estate v. Stewart*, [1993] 4 W.W.R. 205, observed that the claim in a case like this is for the present loss of the *ability to earn*, which is very real and has financial consequences.

* * *

In my view, the loss of the ability to earn a livelihood is not only real and palpable but can be

valued in commercial terms. Indeed, Judson J. in *The Queen in right of Ontario v. Jennings*, [1966] S.C.R. 532 at 546, 57 D.L.R. (2d) 644 at 656 (S.C.C.) described the ability to earn a living as a "capital asset". The conception of this ability as intangible property helped drive the Canadian decision to award damages for its loss. See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452. In sum, I agree with Lord Scarman when, in *Pickett v. British Rail Engineering Ltd.*, [1979] 1 All E.R. 774 (H.L.) at 798, he said:

Whether a man's ambition be to build up a fortune, to provide for his family, or to spend his money on good causes or merely a pleasurable existence, loss of the means to do so is a genuine financial loss.

In my view, the office of the section is to rid the surviving action of any claim that is notional or fictive (e.g. punitive and exemplary damages) or that is for non-pecuniary loss.

[Emphasis of Kerans J.A.]

[16] The appellants disagree with this conclusion. They submit that a claim for future loss of earnings by the estate of the deceased is a claim in the nature of general damages and is a contingent claim. They say that "actual" pecuniary loss is a loss that is "real" as opposed to "prospective". It would therefore include actual wage loss, but not loss of future wages.

[17] Counsel for the appellants relied on the recent decision of the Nova Scotia Court of Appeal to make their point. In *MacLean v. MacDonald*, [2002] N.S.J. No. 76; 2002 NSCA 30, the

issue was whether the estate of a deceased person could recover damages relating to the deceased's lost earning capacity in its action under the ***Survival of Actions Act***, R.S.N.S. 1989, c. 453. The relevant portions of that Act provided:

2. (1) Except as provided in subsection (2), where a person dies, all causes of action subsisting against or vested in him survive against or, as the case may be, for the benefit of his estate.

...

4. Where a cause of action survives for the benefit of the estate of a deceased person, only damages that have resulted in actual pecuniary loss to the estate are recoverable, and in no case are damages recoverable for
 - (a) punitive and exemplary matters;
 - (b) loss of expectation of life;
 - (c) pain and suffering.

[Emphasis added.]

[18] The distinguishing feature of the Nova Scotia legislation is that it deals with "actual pecuniary loss to the estate". Counsel for the respondent submitted that this distinction made the reasoning in the ***MacLean*** case irrelevant to this appeal. While I agree that the phrases being interpreted are different, the ***MacLean*** case is useful for its analysis of the

word "actual" in the phrase in question. As to that point Cromwell J.A. said this, at paras. 112-116:

The appellants submit that the word "actual" may be used in the sense of "real" and that a loss may be real even though it is prospective: see *Duncan v. Baddeley* (1997), 145 D.L.R. (4th) 708 (Alta. C.A.). Kerans, J.A. opined in that case that the exclusion of losses other than those which are 'an actual financial loss' is meant "... to rid the surviving action of any claim that is notional or fictive (e.g. punitive and exemplary damages) or that is for non-pecuniary loss." (at 712). However, in applying this reasoning to Nova Scotia's legislation, two difficulties arise.

First, that interpretation makes the phrase "actual pecuniary loss to the estate" superfluous. Punitive damages and damages for pain and suffering and loss of enjoyment of life are expressly excluded by specific language in the Nova Scotia legislation: see ss. 4(a), (b), (c). It follows that if the phrase 'actual pecuniary loss to the estate' is meant only to exclude exemplary and non-pecuniary damages, it adds nothing to the specific exclusions of these matters.

Second, this interpretation, in the context of the Nova Scotia Act, makes the word "actual" redundant. If all that was intended was to exclude non-pecuniary losses, why add the word 'actual' to modify the word 'pecuniary'? A pecuniary loss is, by definition, not a non-pecuniary loss, so limitation of recovery to pecuniary loss would have excluded recovery for non-pecuniary losses.

With all due respect, it seems to me to be a poor definition of a phrase that renders it redundant and an even poorer definition of a word that renders it meaningless. Yet these are the consequences if the reasoning of *Duncan v. Baddeley* is applied to the wording of the Nova Scotia survival statute.

I think a more plausible interpretation results from paying attention to the legal parlance surrounding claims for lost earning capacity. Such claims, while relating to "real" losses, have always been treated as an element of the general damages award because they are not capable of precise calculation. Such claims have been recognized as relating to the loss of potential or of prospective earnings. The use of the word 'actual' to describe such losses while perhaps not completely implausible strikes me as, at best, a curious choice of words.

[19] I note here that the same category of damages as mentioned in para. 113 of the reasons for judgment of Cromwell J.A. as excluded by the Nova Scotia legislation are excluded by the Yukon legislation in s. 5 of the Act in question.

[20] I find the analysis of Cromwell J.A. compelling. In ***Re Rizzo & Rizzo Shoes Ltd.***, [1998] 1 S.C.R. 27, Major J. commented, at para. 21:

Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously

with the scheme of the Act, the object of the Act, and the intention of Parliament.

[21] The Yukon *Survival of Actions Act* abrogated the common law rule that the estate of a deceased person could not sue or be sued for any tort committed by or against the deceased in his or her lifetime. By its language s. 5 of the Act is designed to confine the damages recoverable where a cause of action survives for the benefit of the estate. As Cromwell J.A. concluded in *MacLean*, the interpretation of s. 5 urged upon us by the respondent would render the word "actual" meaningless. A more plausible interpretation of s. 5 is to recognize that claims for lost earning capacity are not capable of precise calculation. They are thus claims which relate to potential or prospective earnings. Their loss cannot be said to give rise to an "actual" loss.

[22] For that reason I would allow the appeal. The Chambers judge ought to have held that the respondent estate was not entitled to maintain a claim for the recovery of damages representing the deceased future lost earnings. It follows that had it been necessary the award for damages in this case, which was based solely on loss of earning capacity, would also be set aside.

[23] I echo the sentiments of Mr. Justice Hall, expressed in para. 55 in the accompanying judgment, with respect to costs in this case.

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Mr. Justice Braidwood"

I AGREE:

"The Honourable Mr. Justice Hall"