COURT FILE NO.: 03-CV-257585 C M 1
DATE: 20050822

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
SHAIROSE JAMAL, TRUSTEE OF THE ESTATE OF KARIM JAMAL, DECEASED, SHAIROSE JAMAL PERSONALLY, AND ALYNA JAMAL, BY HER LITIGATION GUARDIAN, SHAIROSE JAMAL	)	***Tripta S. Chandler*** - - for the Plaintiffs/Respondents
Plaintiffs	)	
- and -	)	
SCARBOROUGH HOSPITAL - GRACE DIVISION, SUNNYBROOK & WOMEN'S COLLEGE HEALTH SCIENCES CENTRE, NORTH YORK GENERAL HOSPITAL, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTRY OF HEALTH AND LONG-TERM CARE, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO, AS REPRESENTED BY THE MINISTRY OF PUBLIC SAFETY AND SECURITY, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO, DR MICHAEL BRZOZOWSKI, DR TYLER ROUSE, DR LUIS CARLOS HERRERA ROBLES, ALSO KNOWN AS DR LUIS ROBLES, DR J. DOE AND DR JANET HUX	)	***Lesley M. McIntosh*** - - for Her Majesty the Queen in Right of Ontario - - Defendant/ Moving Party ***Michael K. McKelvey*** and ***Barbara Walker-Renshaw*** - - for Scarborough Hospital – Grace Division, Sunnybrook and Women's College Health Sciences Centre and North York General Hospital - - Defendants/ Respondents
Defendants	)	
	)	**HEARD:** April 13 and 14, 2005

REASONS FOR DECISION

CULLITY J.

[1] This was the fourth of the SARS motions in which her Majesty the Queen in Right of Ontario ("the Crown") moved under Rule 21.01 (1) (b) to strike claims on the ground that the statements of claim disclosed no reasonable cause of action. The motion was heard together with the very similar motion of the Crown in Action No. 04-CV-272774 CM2 commenced by Angela Henry, as executrix and trustee of the estate of Pheaneus Lloyd Henry, deceased, and on her own behalf. The causes of action pleaded against the Crown are substantially the same in each of the two actions.

[2] In this action, the plaintiff, Shairose Jamal, sues as personal representative of her late husband, Karim Jamal who allegedly died at Sunnybrook & Women's College Health Sciences Centre on April 30, 2003. It is alleged that he contracted the disease when attending at one of the three defendant hospitals to obtain treatment for an apparently unrelated illness suffered by his daughter and, subsequently, visiting her after she was admitted as a patient. Mrs Jamal also claims damages pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3 on her behalf and that of her daughter, Alyna Jamal, who is a minor.

[3] Claims are also made against hospitals and the individuals named as defendants. The latter are physicians who allegedly were involved in the treatment of Mr Jamal at one, or another, of the three defendant hospitals. The causes of action pleaded against all of the defendants are for " the joint and/or several negligence and/or breach of contract and/or medical malpractice and/or hospital malpractice" that allegedly caused the death of Mr Jamal.

[4] The particulars pleaded against the Crown are, in my judgment, referable only to the cause of action in negligence. They consist of alleged defaults of the Crown in failing, for example:

> (a} to have adequate contingency plans in place to deal with SARS;
>
> (b) to properly fund or staff hospitals to permit adequate treatment and control of infectious diseases;
>
> (c) to issue consistent directives to health care providers;
>
> (d) to provide adequate protective equipment to hospital employees;
>
> (e) to warn and protect members of the public again SARS;

> (f) to communicate relevant information with respect to the course of the disease; and
>
> (g) to properly and adequately comply with the provisions of the *Public Hospitals Act,* R. S. O. 1990, c. P. 40.

[5] As in the other SARS motions, the Crown's motion to strike is founded on the proposition that it is plain and obvious that proof of the allegations of fact pleaded would not be sufficient to establish a duty of care owed by the Crown.

[6] For the purposes of this motion I adopt, and incorporate, in these reasons my discussion in *Williams v. The Attorney -General of Canada* (together with *Arbarquez v. Her Majesty the Queen in Right of Ontario and Laroza v. Her Majesty the Queen in Right of Ontario* – released concurrently with these reasons) of the test to be applied in motions under rule 21.01 (1) (b) and my comments there on the special requirements of pleading tortious liability against the Crown. I am also satisfied that it is not plain and obvious that reasonable foreseeability of harm to Mr Jamal could not be found if the allegations of fact in the statement of claim are proven. These allegations assume the existence of a private law duty of care which is predicated on the existence of a relationship of proximity between the parties as well as on the requirement of forseeability. Apart from the inferences to be obtained from the particulars of negligence pleaded, the principal allegations that might have been directed at the existence of a private law duty of care appear to be that:

> 1. The Crown, as represented by the Ministry of Health and Long-Term Care, was at all material times responsible for administering the healthcare system and for the provision of healthcare services to the public in Ontario, including the regulation of public hospitals and disease control and prevention. It is alleged that, at all material times, Crown owned and/or operated and/or had the care, custody and control of the defendant hospitals.
>
> 2. The Crown, as represented by the Ministry of Public Safety and Security, was at all material times responsible for the creation, implementation and enforcement of protocols, regulations and/or procedures maintained for the protection of the public. At all material times, the Commissioner of Public Safety was responsible for establishing, co-ordinating and implementing public province safety initiatives within the Province.
>
> 3. The Crown at all material times had jurisdictional and regulatory powers over the establishment, maintenance, and management of the defendant hospitals.

[7] By themselves, these allegations, if proven, might establish a duty owed to the public but would not, I think, extend to the creation of a relationship of proximity. The allegation in the first of the paragraphs that the Crown owned the hospitals is untenable as a matter of law and will be struck. No facts are pleaded that would support the assertion that the Crown operated the hospitals in any meaningful sense but the question whether it had control at such times should be left to be tried.

[8] The statement of claim in this action differs from those considered in the decisions in *Williams v. The Attorney-General of Canada et al, Arbarquezs v. Her Majesty the Queen in Right of Ontario* and *Laroza v. Her Majesty the Queen in Right of Ontario* (released concurrently with this decision) in that there are few explicit allegations of any intervention by, or acts of, the Crown in connection with the SARS outbreak. As I have indicated in my reasons on the other motions, I believe that the existence, and nature and extent of any such intervention may have relevance to the existence of the element of proximity that must be found if the Crown was to be subject to a private law duty of care owed to the plaintiffs. In addition to the unparticularised allegation of a misrepresentation, it is implicit in the particulars of negligence pleaded that some such intervention is alleged to have occurred. Reference is made to the formulation, and negligent dissemination of Directives, a refusal to allow healthcare providers and administrators access to data collected with respect to SARS patients, and the enforcement of ineffective and inappropriate quarantine measures.

[9] With some hesitation – but on balance - I do not believe I would be justified in striking the claims against the Crown in this case on the ground that insufficient facts have been pleaded to support the existence of a relationship of proximity between the Crown and the plaintiffs. In reaching this decision, I have been influenced by the requirement to read the pleading generously and, also, by the guidance provided by the Divisional Court in *Eliopoulos* and *Larcade* to which I referred in my reasons in *Williams*.

[10] Despite recent decisions - such as *Cooper v. Hobart,* [2001] 3 S.C.R. 537, *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 and *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 - which have considered the issue of proximity in the context of statutory duties owed to the public, the application of the relevant principles to acts and omissions of Ministers and Ministries under statutes governing their powers and responsibilities has not yet received a great deal of judicial attention.

[11] In *Hunt v. Carey*, [1990] 2 S.C.R. 959, at para 52, Wilson J. suggested that:

> …where a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

[12] As I indicated in my reasons in *Williams*, I do not accept that the existence of statutory powers and duties owed to the public - such as those in the *Ministry of Health and Long-Term Care Act,* R.S.O. 1990, c. M.26 - is sufficient in itself to create a relationship of proximity between the Crown and any members of the public who may be affected by their exercise. I do not, however, exclude the possibility that, in a particular factual context, proximity may arise from the action, or inaction, of the Minister in implementing policy decisions that have been made in the course of such exercise. Although, when compared with the pleadings in *Williams, Arbarquez* and *Laroza*, the statement of claim is less explicit on the facts that might give rise to the relationship, I believe that both the nature, and the relative novelty, of the issue require that it be considered on the basis of a full evidential record and not be disposed of solely by an examination of the plaintiffs' pleading.

[13] It may be that the plaintiffs' success or failure in this action will ultimately turn on the characterization of the acts and alleged omissions of the Crown as policy, or operational, at the second stage of the *Anns* enquiry. The distinction is one of degree and the line is particularly difficult to draw when, as here, the majority of the allegations of negligence relate to omissions to act. As was the case in *Williams*, I am satisfied that certain of the alleged particulars of negligence assume the existence of a private law duty to make policy decisions. These are as follows:

> - a failure to have any or any adequate plan of action to deal with SARS (para 38 C (a));
>
> - a failure to properly fund or staff hospitals to permit adequate monitoring, treatment and control of infectious diseases such as SARS (paragraph 38 C (t));
>
> - a failure to warn or protect members of the public against a disease which they knew or should have known was both readily communicable and potentially fatal (para 38 C (aa));
>
> - a failure to plan or implement a system of measures to protect either patients or visitors from the foreseeable and serious risk of a disease which they knew or should have known was readily communicable and potentially fatal (para 38 C (bb)).

[14] I will strike these paragraphs of the statement of claim. Some, or all, of the remaining allegations may fall on the policy side of the line but, in my judgment, this is not sufficiently obvious and the question, like that of proximity, should only be decided after a full consideration of the evidence of the decisions made by the Crown's representatives and officials in the light of the various governing statutes. Accordingly, the characterization of the decisions reflected in such allegations must be left to a trial.

[15] Towards the end of the statement of claim, it is also pleaded that a duty of care arose by virtue of the special skill, judgment and/or knowledge which the defendants possessed or

professed to possess and on which the plaintiffs reasonably relied. No details of such special skill, judgment or knowledge are given. Following that statement, it is alleged that the defendant negligently misrepresented to the plaintiffs the nature and extent of the SARS epidemic and virus and that the plaintiffs relied on such misrepresentations and sustained injuries and losses in consequence. No particulars of the alleged misrepresentations are provided. These bald allegations in the statement of claim – included, no doubt, for the purpose of touching as many bases as possible - are, in my opinion, insufficient to support a relationship of proximity or to constitute separate causes of action that are adequately pleaded. They call to mind the comment of Epstein J. in *Aristocrat* (at para 77):

> In reading the statements of claim one has the image of the plaintiffs throwing jelly at a wall with the hope that something will stick. Such an approach does not comply with the rules of pleading. It also explains why I have found the various causes of action to have been improperly pleaded.

[16] Finally, in paragraph 47 of the statement of claim, the plaintiffs plead and rely on "the principle of strict liability". A finding to this effect could not, in my judgment, be made against the Crown on the basis of the facts pleaded.

[17] For the above reasons, the motion to strike the claims against the Crown in their entirety is dismissed but are there will be an order striking the paragraphs in the statement of claim that are listed in the Appendix .

[18] Costs may be spoken to or, if counsel would prefer to make their submissions in writing, those of the plaintiffs should be made within 10 days within the release of these reasons and the moving party will have a further 10 days in which to reply.

Appendix

The following paragraphs, and references, in the statement of claim are struck to the extent that they are expressed to apply to the Crown alone, or as one of the defendants:

- paragraphs 38 C (a), (t), (aa) and (bb)

- paragraphs 46 and 47

- all references to breaches of contract, medical malpractice and hospital malpractice in relation to the claims against the Crown, and the reference in paragraph 7 to the Crown's ownership of the defendant hospitals

CULLITY J.

Released: August 22, 2005

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Plaintiffs

- and -

SCARBOROUGH HOSPITAL - GRACE DIVISION, SUNNYBROOK & WOMEN'S COLLEGE HEALTH SCIENCES CENTRE, NORTH YORK GENERAL HOSPITAL, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO AS REPRESENTED BY THE MINISTRY OF HEALTH AND LONG-TERM CARE, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO, AS REPRESENTED BY THE MINISTRY OF PUBLIC SAFETY AND SECURITY, HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF ONTARIO, DR MICHAEL

BRZOZOWSKI, DR TYLER ROUSE, DR LUIS CARLOS HERRERA ROBLES, ALSO KNOWN AS DR LUIS ROBLES, DR J. DOE AND DR JANET HUX

Defendants

REASONS FOR DECISION

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