

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

ANGELA HENRY, EXECUTRIX AND
TRUSTEE OF THE ESTATE OF
PHEANEUS LLOYD HENRY, DECEASED
AND ANGELA HENRY, PERSONALLY

Plaintiffs

- and -

SCARBOROUGH HOSPITAL - GRACE
DIVISION, MARKHAM STOUFFVILLE
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 AND HER MAJESTY THE
QUEEN IN RIGHT OF THE PROVINCE OF
ONTARIO

Defendants

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)
) *Tripta S. Chandler* - - for the
) Plaintiffs/Respondents
)
)

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)
)
) *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 and Markham Stouffville
) Hospital - - Defendants/Respondents
)
)

) **HEARD:** April 13 and 14, 2005
)

REASONS FOR DECISION

CULLITY J.

[1] This, the fifth and last of the decisions in the SARS motions that will be released concurrently, was heard together with that in *Shairose Jamal et al v. Her Majesty the Queen in*

Right of Ontario et al. The facts of the two cases are similar in that the plaintiff has commenced proceedings against the defendants for damages arising out of the death of her husband who allegedly contracted SARS during the outbreak in Toronto, and its vicinity, in 2003. Mrs Henry claims damages against the defendants on behalf of her husband's estate and, on her own behalf, pursuant to the *Family Law Act*, R.S.O. 1990 c. F. 3.

[2] The factual allegations with respect to the cause of Mr Henry's death, and the circumstances in which it occurred, are that, after his daughter - who resided with him and with the plaintiff - was advised that, in the course of her work at Scarborough Hospital - Grace Division, she been exposed to the SARS virus, the family voluntarily went into quarantine. Mr Henry subsequently developed a high fever on or about March 29, 2003 and, on April 2, 2003 he was admitted to Markham Stouffville Hospital with a diagnosis of suspected SARS. Mr Henry died there on May 25, 2003 and it was confirmed that he had contracted SARS.

[3] As in the *Jamal* action, the plaintiff claims that the death was caused by " the joint and/or several negligence and/or breach of contract and/or medical malpractice and/or hospital malpractice of the Defendants". The particulars pleaded against the Crown, and the other factual allegations relating to the Crown, are substantially identical to those in the *Jamal* action.

[4] As I have indicated, the motions in the two proceedings were heard together and in each the Crown moved to strike the claims pursuant to rule 21.01 (1) (b) on the ground that the statement of claim disclosed no reasonable cause of action against the Crown. Counsel for the Crown relied on the same specific ground in each case - namely, that proof of the facts pleaded would not be sufficient to establish that the Crown owed the private law duty of care to Mr Henry that would be required for a cause of action in negligence, and that the facts pleaded would not give rise to any other cause of action.

[5] Counsel did not suggest that the issues in the motion were, in any material respect, distinguishable from those in *Jamal*. I am of the same opinion and, for the reasons given for my decision on that motion, this motion to strike the statement of claim in its entirety will also be dismissed. There will be an order striking the paragraphs in the pleading that are equivalent to those struck in *Jamal*.

[6] 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 of the release of these reasons and counsel for the Crown will then 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 19 C (a), (t), (aa) and (bb)

- paragraphs 40 and 41

- all references to breaches of contract, medical malpractice and hospital malpractice in relation to the claims against the Crown, and the reference in paragraph 5 to the Crown's ownership of the defendant hospitals

CULLITY J.

Released: August 22, 2005

COURT FILE NO.: 04-CV272774 CM2

DATE: 20050822

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Defendants

REASONS FOR DECISION

CULLITY J.

Released: August 22, 2005