

CITATION: Abarquez v. Ontario, 2009 ONCA 374

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COURT OF APPEAL FOR ONTARIO

Sharpe, Juriansz and LaForme JJ.A.

BETWEEN:

Emma Abarquez, Terry Abarquez, Jerome Abarquez, Bernard Abarquez, Lester Abarquez, Alison Abarquez, Geraldine Arellaro, Nita Barut, Charlito Barut, Charlene Joy Barut, Janis Bell, Mary Bevins, Bernie Bevins, Melissa Bevins, Terryi Bond, Margaret Boynton, James Boynton, Kim Campbell, Ronald Phillip Campbell, Kyle Campbell, Shannon Campbell, by her litigation guardian Kim Campbell, Connor Campbell, by his litigation guardian Kim Campbell, Irene Cancino, Money Choi, Kenny Choi, Eugene Choi, Ada Chung, Iain MacKenzie-Gray, Rosabel Corpuz, George Santiangco, Jordan Santiangco, by his litigation guardian, Rosabel Corpuz, Avelina Darang, Catherine Cosico, Linda Deeks, Tim D'eon, Paisley Marshall D'eon, Emily D'eon, by her litigation guardian Tim D'eon, Hamish D'eon by his litigation guardian Tim D'eon, Adriene Dey, Ritchell Docil, Dale Docil, Velma Dyer, Laura Dyer, Elaine Notice, Danae McKenzie, Clinton Dyer, Mark Dyer, Carlton Dyer, Connold McKenzie, Sarah Jane Findlay, Rosalie Francis, Yvette Fray, Sylvia Gordon, Robert Gordon, Kimberly Gordon, Geraldine Hubble, Gordon Hubble, Christopher Hubble, by his litigation guardian Geraldine Hubble, James Hubble, by his litigation guardian Geraldine Hubble, Carolyn Jamieson, Kenneth Jamieson, Margaret Joseph St.-Clair, Onisha Edwards, Yasmin Khan, Azad Khan, Sacha Khan, Krystal Khan, Caila Khan by her litigation guardian Yasmin Khan, Deborah Kinsella, Okryong Kwak, Lucia Lagman, Ruben Ordinario, Ramir Bugarin, by his litigation guardian Lucia Lagman, Raisa Bugarin, by her litigation guardian Lucia Lagman, Evelyn Quiazon, Lau Boon Lam, Ching Wah Lam, Carolina Lam, George Leid, Connie Leroux, Paul Leroux, Megan Leroux, by her litigation guardian Connie Leroux, Matthew Leroux, by his litigation guardian Connie Leroux, Chelsea Leroux, by her litigation guardian Connie Leroux, Xia Luo, Thelma Maderal, Darlina Veloso, Edarlina Maderal, Christine Martin, Juji Menez, ~~Jovito Menez~~, Jovito Jr. Menez, Christopher Menez, by his litigation guardian Juji Menez, Mark Anthony Menez, by his litigation guardian Juji Menez, Naomi Stevens, Rosemarie Mines, Agnes Mines-Litigio, Shelda Patoir, Moinca Patoir, Nancy Petrov, Paul Petrov, Christopher Petrov, Tania Petrov, Tommy Petrov, Elaine Rivera, Sharon Rivera, Emerson Rivera, Esther Rosete, Lester Rosete, Leonardo Rosete, Jhoan Salvanera, Romelia Salvanera, Silverio Salvanera, Romsel Salvanera, Carminea Salvanera, Viorica Serbanescu, Sorin Serbanescu, Hannah Serbanescu, Iris Serbanescu, by her litigation guardian Viorica Serbanescu, Felipe Somera, Janice Sora, Jason Sora, by his litigation guardian Janice Sora, Kristen Sora, by

her litigation guardian Janice Sora, Jonathan Sora, Susan Sorrenti, Anne-Marie St. Louis, Guy St. Louis, Nicole St. Louis, Hali St. Louis, Lesley Takhar, Patricia Tamlin, Nataliya Tarutina, Vitaliy Tarutin, Ganna Tarutina, by her litigation guardian Nataliya Tarutina, Ilona Tarutina, by her litigation guardian Nataliya Tarutina, Eila Trovato, Joseph Trovato, Melissa Trovato, Alyse Trovato, Katri Koivunurmi, Lorena Tuarez, Donna Wojciechowicz, Henry Wojciechowicz, Michael Tang in his own capacity and as Executor of the Estate of Tecla Lin, Wilson Tang, Minglong Zhang, Howard Luo by his litigation guardian Xia Luo, ~~Zihe~~ Zihe Zhang by his litigation guardian Xia Luo.

Plaintiffs (Respondents)

And

Her Majesty The Queen in Right of Ontario

Defendant (Appellant)

Elizabeth McIntyre and Katie Gibson, for the respondents

Lise G. Favreau, Kim Twohig and Leslie McIntosh, for the appellant

Heard: February 25, 2009

On appeal from the order of Justice Maurice Cullity of the Superior Court of Justice dated August 22, 2005 and reported at (2005), 257 D.L.R. (4th) 745.

Sharpe J.A.:

[1] This appeal, heard together with four related appeals,¹ raises the issue of whether Ontario can be held liable for damages suffered by nurses who contracted SARS during the outbreak of that illness in 2003.

¹ *Williams v. Ontario* (C44220) (“*Williams*”); *Laroza v. Ontario* (C48010); *Henry v. Ontario* (C48012); and *Jamal v. Ontario* (C48013). As it was in the interests of justice to have all appeals heard by the same court at the same time, on consent, the appeals that fell within the jurisdiction of the Divisional Court, including this appeal were

[2] The plaintiffs are nurses and family members of nurses who contracted SARS between March 2003 and July 2003. They sue Ontario for damages in negligence and for breach of their s. 7 *Charter* rights. Ontario moved to strike out the amended statement of claim (the “claim”) on the ground that it was plain and obvious in law that the province did not owe the plaintiffs a private law duty of care and that there was no *Charter* breach.

[3] The motion judge heard Ontario’s motion together with the motion in *Williams v. Canada (Attorney General)* (2005), 76 O.R. (3d) 763 (S.C.), and the other cases on appeal. He incorporated his reasons for decision in *Williams* when disposing of this motion. The motion judge struck out certain portions of the claim on the ground that they dealt with duties owed by Ontario to the public as a whole. However, he refused to strike out substantial portions of the claim and allowed the action to proceed both in negligence and for breach of s. 7 of the *Charter*.

[4] Ontario appeals to this court and, as in the *Williams* appeal, argues that the legal landscape changed after the motion judge’s ruling with this court’s judgment in *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2006), 82 O.R. (3d) 321 (“*Eliopoulos*”), which overruled the judgment of the Divisional Court: (2005), 76 O.R. (3d) 36, upon which the motion judge relied.

[5] These reasons should be read together with my reasons for judgment in *Williams*. I will not repeat the facts and analysis common to both appeals.

FACTS

[6] Fifty-three of the named plaintiffs were registered nurses employed in Toronto-area hospitals in the period from March to July, 2003. The plaintiff nurses allege that they suffered serious injury to their health from SARS. One of them, Tecla Lin, died of the disease. The other ninety-five named plaintiffs are family members of those nurses. They assert *Family Law Act*, R.S.O. 1990, c. F.3, claims for loss of care, guidance and companionship.

[7] The plaintiffs' allegations can be summarized as follows:

- The Ministry of Health and Long Term Care ("MOHLTC") and Provincial Operations Centre ("POC") failed to provide nurses with timely information about SARS;
- The Directives Ontario issued to hospitals were inadequate and exposed the plaintiffs to the risk of contracting SARS;
- The MOHLTC and POC was an employer/supervisor under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("*OHSA*"), and failed to ensure the nurses' health and safety in the hospitals;
- The Ministry of Labour failed to enforce the Directives and occupational health and safety standards;
- Ontario breached the nurses' s.7 *Charter* rights by exercising discretion in bad faith and for improper motives.

ISSUES

[8] This appeal raises two issues:

- (1) Is it plain and obvious that Ontario did not owe the plaintiff nurses a private law duty of care to support a claim in negligence for damages?

(2) Is it plain and obvious that Ontario did not violate the plaintiff nurses' s. 7 *Charter* right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice?

ANALYSIS

[9] The plaintiffs argue that their case is distinguishable from both *Williams* and *Eliopoulos*, each of which involved claims relating to the spread of an infectious disease brought by ordinary members of the public. The nurses argue that as front-line health care workers who had daily and direct contact with patients, they were particularly vulnerable to the risk posed by SARS. They were legally required to care for patients and to subject themselves to that risk. They had no choice but to follow Ontario's detailed and mandatory Directives. They argue that Ontario's direct intervention into their workplace gave rise to a relationship of proximity sufficient to ground a duty of care and a claim in negligence.

1. Duty of care

(a) Does the claim fall within an existing or analogous category?

[10] The plaintiffs allege that Ontario knew or should have known that the nurses would rely on the detailed and mandatory Directives to protect themselves from SARS and that the Directives were negligently inadequate. They submit that this claim corresponds to the well-recognized category of negligent misrepresentation and, therefore, it is not necessary to engage in a full *Cooper-Anns* analysis to assess whether

there was a relationship of proximity between the plaintiffs and Ontario: *Cooper v. Hobart*, [2001] 3 S.C.R. 537, at paras. 31 and 36 (“*Cooper*”).

[11] A claim for negligent misrepresentation typically involves a claim for economic loss flowing from the plaintiff’s detrimental reliance on a statement of fact made by the defendant in circumstances where the defendant ought reasonably to have foreseen that the plaintiff would rely on the representation and where reliance by the plaintiff was, in the particular circumstances of the case, reasonable: *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (“*Hercules Management*”).

[12] In my view, the plaintiff’s submission that the claim advanced is the equivalent of or analogous to negligent misrepresentation cannot be sustained.

[13] I note first of all that words “negligent misrepresentation” do not appear in the claim. Nor, on my reading, does the claim clearly allege the necessary factual ingredients for that cause of action, as described above, either directly or by way of inference.

[14] More fundamentally, this submission rests upon an entirely untenable characterization of the legal nature of Ontario’s Directives. The Directives were promulgated by the Chief Medical Officer of Health pursuant to the powers conferred at the time by the *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7, (“*HPPA*”) ss. 24 and 86 (see now s. 77.7(1)). The Directives were not representations of fact. They were directed to hospitals in the areas of the province subject to the SARS threat and aimed at protecting the Ontario public as a whole from the spread of that disease by

laying down standards to be applied by hospitals, health care facilities and health care professionals.

[15] The plaintiff nurses were required to comply with the Directives. So too were their employers, the hospitals in which they worked. The Directives made no representations of fact as to what would happen if they were followed or not followed. The plaintiff nurses, like all residents of the province, no doubt hoped that the standards created by the Directives would be effective in containing SARS and in protecting them from infection. However, given the legal character of the Directives, it is simply not arguable in law that any reliance the nurses placed upon them could ground an action for negligent misrepresentation.

[16] I conclude, therefore, that the legal viability of the plaintiffs' claim in negligence gains no support from an existing or analogous category, but must instead satisfy the two-step *Cooper-Anns* test.

(b) Proximity

[17] I need not repeat here the overview of the two stage *Cooper-Anns* test for finding a duty of care set out in *Williams*. In this case, as in *Williams*, Ontario accepts that the harm alleged by the plaintiffs was foreseeable. However, Ontario argues that it was not in a relationship of proximity with the plaintiff nurses.

(i) The Directives

[18] The plaintiffs submit that even if we do not accept the negligent misrepresentation argument, proximity is established by reasonable reliance. They argue that when Ontario

intervened in the day-to-day operations of the hospitals where the plaintiffs worked by issuing Directives to mandate the specific procedures the plaintiff nurses were to employ, Ontario was under an obligation to be mindful of their interests. The plaintiffs plead that they relied on Ontario to “avoid and minimize” the risk the plaintiffs faced and that Ontario owed them a duty of care to be mindful of their safety.

[19] In my view, this argument fails essentially for the same reason as the negligent misrepresentation argument, and more generally, for the same reason that the Directives triggered no private law duty of care as explained in *Williams*.

[20] As we held in *Eliopoulos* and *Williams*, while Ontario is obliged to protect the public at large from the spread of communicable diseases such as West Nile Virus and SARS, Ontario does not owe a individual residents of the province who contract such diseases a private law duty of care giving rise claims for damages. This is equally true for nurses and other health care workers in the province. Nurses were, by virtue of their profession, in the eye of the SARS storm, but they had no higher claim to have their health protected by Ontario than any other resident of the province. To the extent that the statement of claim rests upon assertions that Ontario was negligent in the manner it which it managed the SARS crisis or that there was a general duty of care owed by Ontario to protect the health of nurses and that the Directives failed to do enough to protect them from getting SARS, it must be struck.

[21] The plaintiffs argue that their relationship with Ontario during the SARS crisis was different from the relationship Ontario had with the general public. They submit that by issuing the Directives and giving nurses detailed instructions on the procedures they were to adopt, Ontario engaged itself in a direct relationship with the nurses sufficient to trigger a common law duty of care to protect the nurses from contracting SARS. The nurses had no choice but to follow the Directives and their health and safety was immediately affected by the manner in which the statutory authority to issue the Directives was exercised. Does the immediate and direct application of the Directives to the conduct required of the nurses distinguish the nurses from the general public and give rise to a private law duty of care to ensure the health of the nurses?

[22] To assess this argument, it is necessary to examine the precise nature of the allegations made in the claim. The claim alleges generally “that the Defendant owed the Plaintiff nurses a duty of care with respect to the information it had as a result of the [SARS] alert and with respect to the content of the Directives” (para. 18). It is further alleged that “[a]s the Directives were mandatory, the Hospitals and Plaintiff nurses were required to comply with them” and that Ontario “therefore knew or should have known that the Plaintiff nurses would rely on the terms of the Directives in the precautions they took to protect themselves from SARS” (para. 20).

[23] The claim then goes on to particularize the manner in which Ontario failed to meet the standard of care. While this appeal involves the duty of care, not the standard of care, the particulars of alleged negligence are relevant as they provide a gateway to

understanding the nature of the claim asserted against Ontario. The particulars of alleged negligence may be summarized as follows:

- The Directives were not drafted by a committee with appropriate background and sufficient expertise, including expertise regarding worker health and safety;
- Premature relaxation of precautionary measures and allowing improper considerations, such as tourism and other economic concerns, to influence the content of the Directives;
- Failure to adopt an adequate definition of SARS;
- Failure to require that SARS patients be treated in hospitals sufficiently equipped for such use, including by being equipped with anterooms, negative pressure ventilation and doors to end rooms which closed properly;
- Failure to communicate appropriate information in a timely manner;
- Failure to provide adequate direction regarding:
 - the use, maintenance and removal of personal protective equipment including properly fit-tested respirators;
 - cleaning measures;
 - entering and exiting the rooms of SARS patients; and
 - high-risk procedures such as intubations;
- Failure to require that SARS patients be placed in single, negative pressure rooms with proper ante rooms;

- Failure to require that nurses wear respirators that would adequately protect them and that were properly fit-tested;
- Failure to recognize the stress and fatigue nurses were under, including by failing to mandate longer breaks and limitations on overtime;
- Failure to freeze transfers of patients between and within hospitals in a timely manner; and
- The Directives failed to require:
 - communication of their terms to all health care workers;
 - training for their implementation; and
 - a rationale for changes from previous Directives thus undermining confidence in the Directives and resulting in lessened compliance with them;

[24] These allegations are more specific in nature than those made in *Williams* but they do not differ in kind. As in *Williams*, the plaintiffs essentially allege that Ontario generally mismanaged the SARS crisis, which resulted in the nurses contracting SARS. The difference between the nurses in this case and the ordinary members of the public in *Williams* is that because of their occupation, the nurses were at greater risk of contracting SARS. However, that is a risk they incur by virtue of their calling. It is not a risk Ontario created when it promulgated the Directives or determined how to deal with the SARS problem

[25] The protection of the health of the public at large was by law the dominant concern of the Chief Medical Officer of Health when he issued the Directives. He and others exercising statutory powers to deal with SARS had to weigh and balance a myriad of competing interests and endeavour to arrive at a position that best satisfied the interests of the public at large.

[26] When developing a public policy and elaborating standards in relation to the containment of SARS, the interests of Ontario's compassionate and courageous nurses were but one of the myriad of factors to be weighed and balanced. As has been held in the long line of cases considered in *Williams*, the very nature of a duty by a public authority to the public at large is ordinarily inconsistent with the imposition of a private law duty of care to any individual or group of individuals.

[27] Recognizing a duty of care to protect the health of the nurses would raise the potential for conflict with the overarching duty to the public at large. Where recognizing a private law duty of care on the part of a public authority towards a certain class of individuals could conflict with the public authority's overarching duty, proximity does not exist and no private law duty should be found. In *Cooper*, at para. 44, the Supreme Court of Canada rejected a duty to individual investors on the part of the Registrar of Mortgage Brokers as such a duty was found to "potentially conflict with the Registrar's overarching duty to the public". In *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 ("*Edwards*"), at para 14, a private law duty of care by the Law Society to the victim of a dishonest lawyer was excluded on the ground that "[d]ecisions made by the

Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties”. In *Syl Apps Secure Treatment Centre v. B.D.*, [2007] 3 S.C.R. 83 (“*Syl Apps*”), especially at paras. 28 and 41, the Supreme Court rejected a private law duty on the part of a social worker and court-ordered service provider entrusted with the care of a child in need of protection towards the child’s parents on the ground that such a duty would create a potential conflict with the service-providers’ transcendent statutory duty to promote the best interest of the child in their care. In each of these cases, there was a foreseeable risk of harm and the plaintiffs were individuals directly and immediately affected by the actions of the public authority, yet no duty of care was found.

[28] In the present case, the potential for conflict is obvious. Health care workers are already significantly at risk when it comes to containing an infectious disease. As the plaintiff nurses point out, they were legally required to treat SARS patients and, given the nature of that disease, they were thereby exposed to the risk of contracting the disease. To impose a private law duty of care upon Ontario to safeguard the health of the nurses would conflict with the overriding public law duty to pronounce standards that are in the interest of the public at large. Simply put, the interests of nurses, like the interest of investors in *Cooper*, the clients in *Edwards* and the parents in *Syl Apps*, cannot be prioritized over the general public interest, yet that would be the effect of finding that they were owed the special consideration in the formulation of health care policy that a private law duty of care would entail.

[29] While Ontario was obliged to do its best to protect the public at large from the spread of SARS, this claim rests on the untenable proposition that Ontario owed the individual plaintiffs a general common law duty of care affording them the right to sue for damages as a result of contracting SARS. Accordingly, in addition to the paragraphs struck out by the motion judge, I would strike out paragraphs 12 (a), 12 (b) and 13 to 26.

(ii) Was Ontario a “supervisor” under the OHSA

[30] The plaintiffs allege that Ontario’s conduct in the management of SARS put it in the position of an “employer” or a “supervisor” under the *OHSA*, and that proximity can be inferred from that relationship.

[31] The *OHSA* imposes obligations on employers and supervisors to ensure safety in the workplace. “Employer” and “supervisor” are defined in s. 1(1) as follows:

“employer” means a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services and a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services;

“supervisor” means a person who has charge of a workplace or authority over a worker.

[32] The motion judge found that while Ontario was not the “employer” of the nurses, it was not plain and obvious that Ontario was not their “supervisor” on the basis that the Directives governed matters such as equipment to be used and clothes to be worn, and laid down extensive and detailed precautionary measures nurses were required to take in relation to the treatment of patients.

[33] The hospitals that employed the nurses, supervised their day-to-day working conditions and bore immediate responsibility for the safety of their workplace are autonomous entities under the *Public Hospitals Act*, R.S.O. 1990, c. P.40. I agree with Ontario's submission that it is plain and obvious that the Directives issued during the SARS crisis could not alter the legal autonomy of the hospitals or amount to an assumption of control by Ontario over their day-to-day operation. The general power to mandate standards for the control of infectious diseases simply cannot be equated with the kind of direct involvement in the day-to-day management of employees that being an employer or supervisor entails. The Directives to the hospitals may well have had an impact upon workplace safety but that is far removed from taking "charge" over a workplace or assuming employer-like "authority" over a worker. Ontario is simply too far removed from the day-to-day operation of the hospitals and the day-to-day working conditions of nurses to be a supervisor under the *OHSA*.

[34] Having "charge of a workplace" so as to become a supervisor involves "hands-on authority" akin to that exercised by an employer: *R. v. Walters*, [2004] O.J. No. 5032 (S.C.), at para. 18; *R. v. Adomako*, [2002] O.J. No. 3050 (Ct. J.), at paras. 17-18 ("*Adomako*"). Having "authority over a worker" so as to become a supervisor includes the authority to promote workers, discipline workers, schedule work, deal with employee complaints, grant employees' leaves of absences and determine how an individual is paid: *R. v. Furtado*, [2007] O.J. No. 3122 (Ct. J.), at para. 25; *Adomako* at para. 17. It is

not pleaded that Ontario exercised functions of this nature and quality in relation to the plaintiffs.

[35] Accordingly, in addition to the paragraphs struck out by the motion judge in relation to this aspect of the claim, I would strike out paragraphs 12(c) and 27 to 30.

(ii) Minister of Labour's Duty to Enforce the OHSA

[36] In a related argument, the plaintiffs say that a private law duty can be implied from the Minister of Labour's power to enforce the *OHSA*.

[37] The motion judge refused to strike these allegations on the ground that public authorities with powers of inspection and enforcement under industrial safety statutes have been found to owe duties to the individuals that the legislation was designed to protect: *Ingles v. Tukuluk Construction Ltd.*, [2000] 1 S.C.R. 298; *Swanson v. Canada*, [1992] 1 F.C. 408 (C.A.); *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2, at pp. 8-11.

[38] There are two problems with this analysis. First, it appears to have been tied to the motion judge's finding that Ontario was a "supervisor," as he recognized, at para. 23, that except as a supervisor, any duty of inspection owned by Ontario would be to the public, not the plaintiffs. As I have concluded that the allegation that Ontario was a "supervisor" must be struck, it would follow that the failure to inspect allegation also falls.

[39] Second, the cases cited by the motion judge all involved negligent inspections by building inspectors who had a duty to perform adequate inspections. It is not alleged in the claim that the Ministry undertook inspections and conducted them negligently, but

rather that the Ministry simply failed to carry out any inspections. I agree with Ontario that as any duty on the Minister of Labour to inspect was owed to the public as a whole, the allegation of failure to inspect cannot establish proximity and a private law duty of care.

[40] Accordingly, I would strike out paragraphs 12(d) and 31 to 36 of the claim.

(c) Residual Policy Concerns

[41] As I have decided that the relationship between the parties is not sufficiently proximate to give rise to a private law duty of care, it is not necessary to consider whether there exist residual policy concerns for negating a duty of care. I would observe, however, that striking the claim does not leave the plaintiffs without a legal remedy. The *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Sch. A, is a comprehensive no-fault insurance scheme that provides specified benefits to workers and survivors of deceased workers, for workplace injuries.

2. Section 7 of the *Charter*

[42] To establish a breach of s. 7 of the *Charter*, the pleadings must, at a minimum, set out both a deprivation of life, liberty or security of the person and a violation of the principles of fundamental justice. The claim alleges that Ontario exercised its discretion regarding the content of the Directives “in bad faith and for improper motives”, particularized as follows:

The Defendant prematurely reduced the requirements for wearing protective equipment in order to minimize SARS for

public relations purposes, including concerns regarding tourism and other economic impacts of SARS.

[43] The motion judge struck portions of the *Charter* claim alleging that Ontario failed to pay adequate regard to the health and safety of health care workers but found that the allegation set out above was capable of amounting to an allegation of “arbitrariness”, identified as a principle of fundamental justice in *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 (“*Chaoulli*”).

[44] The key issue here is whether the claim pleads facts capable of supporting a denial of the principles of fundamental justice.

[45] In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, at para. 8, McLachlin C.J. described the requirements for a principle of fundamental justice:

First, it must be a legal principle. This serves two purposes. First, it ‘provides meaningful content for the s. 7 guarantee’; second, it avoids the ‘adjudication of policy matters’... Second, there must be sufficient consensus that the alleged principle is ‘vital or fundamental to our societal notion of justice’... The principles of fundamental justice are the shared assumptions upon which our system of justice is grounded. They find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens. Society views them as essential to the administration of justice... [T]he alleged principle must be capable of being identified with precision and applied to situations in a manner that yields predictable results.

[46] In that case, the court found that while the “best interests of the child” is a legal principle, it is only one factor to be considered among others in cases involving children, and thus could be subordinate to other concerns. Accordingly, it is not a foundational principle vital or fundamental to societal notions of justice, nor is it susceptible to precise and predictable application.

[47] In *Chaoulli*, McLachlin C.J. and Major J. (Bastarache J. concurring) accepted arbitrariness as a principle of fundamental justice against which laws that impinge upon rights guaranteed by s. 7 can be measured. They offered the following definition, at para. 127: “A law is arbitrary where ‘it bears no relation to, or is inconsistent with, the objective that lies behind [it].’ To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect.” Binnie and Lebel JJ. (Fish J. concurring) agreed with this definition but disagreed with its application to strike down a Quebec law curtailing the right to obtain insurance for private health care services in the province. The seventh and deciding voice was that of Deschamps J., who decided the case under Quebec’s *Charter of Human Rights and Freedoms* without commenting on s. 7.

[48] I do not read the sharply divided judgment in *Chaoulli* as authority for departing from the dominant strand in the jurisprudence, reflected by *R. v. Marmo-Levine*, [2003] 3 S.C.R. 571, at para. 96 where McLachlin C.J. stated that s. 7 of the *Charter* does not allow the courts to “engage in a free-standing inquiry under s. 7 into whether a particular legislative measure ‘strikes the right balance’ between individual and societal interests in

general”. See also *Trang v. Alberta (Edmonton Remand Centre)* (2007), 412 A.R. 215, at paras. 32-35.

[49] To serve as a principle that is both “capable of being identified with precision and applied to situations in a manner that yields predictable results” and that also avoids questioning the balance struck between individual and societal interests, “arbitrariness” must be given a narrow and specific meaning. The measure challenged must bear *no relation to*, or be *inconsistent* with, the objective that lies behind the legislation. When dealing with a crisis like SARS, governments have to consider the public interest as a whole. I agree with Ontario’s submission that the province had multiple objectives when dealing with the SARS emergency. While public health was clearly the dominant concern, the economic impact of SARS on Toronto and on the province was a legitimate factor to weigh in the balance. A government activity is not “arbitrary” because it minimizes certain interests or gives preference to one interest over another.

[50] In my view, the claim does not plead facts capable of supporting a finding of arbitrariness, so defined. The claim does not plead that the Directives were “arbitrary,” and the bad faith/improper motive allegation amounts to no more than a claim that Ontario gave too much weight to one aspect of the public interest and not enough to another.

[51] Accordingly, in addition to the paragraphs struck out by the motion judge, I would strike out paragraphs 1(c), 2(b), 12(e), and 37 to 40 of the claim.

CONCLUSION

[52] For the foregoing reasons, I conclude that it is plain and obvious on the facts pleaded in the claim that although Ontario is obliged to protect the public at large from the spread of communicable diseases, Ontario did not owe the plaintiffs a private law duty of care giving rise claims for damages a result of the issuance of the Directives or as a supervisor under the *OHSA*, nor did it owe the plaintiffs a private law duty to enforce the *OHSA* through the Ministry of Labour. I also conclude that the plaintiff has no claim under s. 7 of the *Charter* and that in law this claim has no prospect of success.

[53] Accordingly, I would allow Ontario's appeal, strike the entirety of the respondent's statement of claim, and dismiss the action.

[54] If the parties are unable to agree as to costs, we will receive brief written submissions, from Ontario within fifteen days and from the plaintiff within ten days thereafter.

“Robert J. Sharpe J.A.”

“I agree R.G. Juriansz J.A.”

“I agree H.S. LaForme J.A.”

RELEASED: May 7, 2009