

CITATION: Taylor v. Canada (Attorney General), 2011 ONCA 181
DATE: 20110304
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COURT OF APPEAL FOR ONTARIO

Armstrong J.A. (In Chambers)

BETWEEN

Kathryn Anne Taylor

Plaintiff (Moving Party)

and

The Attorney General of Canada

Defendant (Moving Party)

Proceeding under the *Class Proceedings Act, 1992*

Kirk M. Baert, for the plaintiff

Paul Evraire, Q.C., for the defendant

Heard: December 13, 2010

INTRODUCTION

[1] This class action has had a tortured procedural history. The parties come to the Court of Appeal jointly seeking to leapfrog the Divisional Court by way of a motion for leave to have a special case determined pursuant to rr. 22.01 and 22.03 of the *Rules of Civil Procedure*.

[2] The issue, which they seek to have determined, is what is required in a statement of claim for regulatory negligence to satisfy the relationship of proximity between the plaintiff and the defendant.

[3] The parties are in agreement that the common law authorities in this province on the issue of proximity in the regulatory context are in conflict or, at least, in a state of divergence. They submit that certain decisions of this court are in conflict with each other and with a recent decision of the British Columbia Court of Appeal.

[4] At the outset, I state unequivocally that it will be a rare case where rr. 22.01 and 22.03 will be invoked to bypass the Divisional Court's appellate jurisdiction.

THE BACKGROUND AND PROCEDURAL HISTORY OF THIS CASE

[5] The plaintiff is a representative of a class of persons who claim to have suffered injury as a result of the implantation of temporomandibular joints in their jaws. The claim is brought against the Attorney General of Canada for alleged negligence of Health Canada in the exercise of its regulatory duties, statutory powers and responsibilities under the *Food and Drug Act*, R.S.C. 1985, c. F-27. The plaintiff in her statement of claim seeks declaratory relief, mandatory orders and damages.

[6] On September 5, 2007, Cullity J. of the Superior Court of Justice (the "motion judge") certified the action as a class proceeding pursuant to s. 5 of the *Class*

Proceedings Act, 1992, S.O. 1992, c. 6: Taylor v. Canada (Minister of Health) (2007),
285 D.L.R. (4th) 296.

[7] In concluding that the plaintiff had pled a reasonable cause of action in negligence, the motion judge said at paragraphs 39 and 40:

The allegations [in the Statement of Claim] are consistent with an interpretation that Health Canada's failure to take steps to enforce the regulations and its directions to the distributor of the devices – despite its knowledge that they were being breached – facilitated the continued sale of the devices and thereby created a risk to the health of the intended recipients. Health Canada's alleged failure to enforce the regulations when it was aware that sales of the implants were continuing after it had given notice of breaches on a number of occasions over a period of six or seven years, could only have encouraged the importer/distributor to believe that it could ignore its statutory obligations, and Health Canada's warnings, with complete impunity. In these circumstances, I believe it would be open to a court to find that Health Canada's course of conduct – including the dissemination of the misinformation in its database – increased the risk to the health of the plaintiff and other potential recipients of the implants and gave rise to a relationship of proximity with them.

It is possible that the plaintiff will not be able to prove the allegations of fact in the statement of claim – or that a different complexion may be placed on them when all the evidence on each side is before the court at trial. These are not matters I am concerned with on this motion. On the basis of the pleading alone, I do not consider it to be plain and obvious that Ms. Taylor has no chance of success in establishing that a relationship of proximity – as required to establish a private law duty of care – existed in connection with operational acts of Health Canada. I believe this conclusion is consistent with the cases I have cited, and others

such as *Sauer v. Canada (Attorney General)*, [2007] O.J. No. 2443 (C.A.); *Swanson Estate v. The Crown* (1991), 80 D.L.R. (4th) 741 (F.C.A.); and *Williams v. Canada (Minister of Health)* (2005), 76 O.R. (3d) 763 (S.C.J.).

[8] In *Sauer*, referred to in the above quotation, a proposed class action was commenced on behalf of cattle farmers alleging negligence against the Federal Crown for its failure in respect of the regulation of cattle feed. Goudge J.A., writing for the court, said at paragraphs 58 to 62:

Canada bases its appeal on the proposition that both of Sauer's claims attack legislative decisions – one to regulate in a certain way, and one not to regulate until a certain date – and that, as such, it is plain and obvious that neither can attract tort liability.

I disagree that, at this stage of the proceedings, this conclusion is plain and obvious and that Sauer's claims must fail.

There is no doubt that Sauer's assertion of a private law duty of care on Canada must meet the two-stage test derived from *Anns, supra*.

At the first stage, Canada does not seriously contest the foreseeability requirement. However, it does argue that there can be no relationship of sufficient proximity between commercial cattle farmers in Canada when Canada makes legislative decisions.

On the other hand, Sauer argues that he has pleaded the facts required to show sufficient proximity between Canada and commercial cattle farmers to raise a *prima facie* duty of care. In particular, he points to the many public representations by Canada that it regulates the content of cattle feed to protect commercial cattle farmers among others. He says this shows that Canada was acting with their interests in mind rather than

the broad public interest. Sauer says that Canada's public assumption of a duty to Canadian cattle farmers to ensure the safety of cattle feed yields the conclusion that it is not plain and obvious that his claim of a *prima facie* duty of care will not succeed. I agree.

[9] The defendant in this case applied for leave to appeal the order of the motion judge before Greer J. of the Divisional Court. Greer J., in refusing leave to appeal, adopted this court's reasons in *Sauer*. See *Taylor v. Canada (A.G.)* (2007), 289 D.L.R. (4th) 567 at para. 29.

[10] At the time of the leave to appeal motion before Greer J., this court had not yet heard argument in the appeals from *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.) and *Attis v. Canada (Minister of Health)*, [2007] O.J. No. 1744 (S.C.). *Drady* involved an intended class action involving a similar medical device as the one at issue in this case. The same motion judge (Cullity J.) dismissed Drady's claim in part on the basis that it was plain and obvious that the pleading disclosed no cause of action because the plaintiff had been unable to identify the implant manufacturer as one regulated by Health Canada.

[11] It was two months later that the motion judge released his reasons in this case – reaching the opposite result. In this case, the motion judge observed that Ms. Taylor's allegations were virtually identical to those in *Drady*. In the result, Taylor succeeded where Drady had failed, because Ms. Taylor had been able to identify the manufacturer of the implant as one regulated by Health Canada.

[12] On appeal, *Drady* was heard in this court with *Attis*, a breast implant case. In both cases, the plaintiffs appealed the Superior Court decisions, which held that the federal crown did not owe a private law duty of care to the recipients of the medical devices in issue. The court dismissed both appeals on September 30, 2008. See *Drady* (2008), 300 D.L.R. (4th) 443, leave to appeal refused [2008] S.C.C.A. No. 492 and *Attis* (2008), 93 O.R. (3d) 35, leave to appeal refused [2008] S.C.C.A. No. 491.

[13] In *Drady*, Lang J.A., writing for the court, made specific reference to the reasons of the motion judge in this case and rejected his notion of proximity at para. 52:

I conclude that the motion judge erred to the extent he assumed that, without more, conduct that increases risk creates a relationship of proximity.

[14] In *Drady*, the court referred to the adequacy of the plea of proximity in *Sauer* at para. 42:

Proximity was also adequately pleaded in *Sauer* on the basis of the many express public representations by the government that it was acting for the explicit purpose of protecting the commercial cattle farmers. These representations supported the plaintiff's allegation that the government assumed a private law duty to act on behalf of the farmers.

[15] In reference to the pleadings in *Drady*, Lang J.A. concluded at para. 54:

The pleadings do not allege that any of the three communications came to the appellant's attention or to the attention of any specific member of the public. Nowhere does the appellant plead a specific representation made to him by Health Canada. Moreover, nowhere does the appellant

assert reliance, other than by pleading that members of the public generally relied on Health Canada to implement its public law duties. In the absence of a specific representation or reliance on Health Canada regarding the safety of the implant, in my view, it is plain and obvious that the appellant cannot establish a direct and close relationship of proximity that makes it just and fair to impose a private law duty of care on Health Canada.

[16] On the basis of this court's decisions in *Drady* and *Attis*, the defendant moved in December 2009 before the motion judge to reconsider the certification of the action as a class proceeding pursuant to s. 5(1)(a) of the *Class Proceedings Act*, i.e. whether the Statement of Claim discloses a cause of action. In reasons dated January 11, 2010¹, the motion judge struck the statement of claim subject to any amendment to remedy the pleadings. The motion judge made specific reference to *Sauer*, *Drady* and *Attis* at paragraphs 27 and 34 of his reasons:

In reaching this conclusion, I have not overlooked the decision in *Sauer v. Canada*, [2007] 225 O.A.C. 143 (C.A.) which counsel were not able to reconcile with *Drady* and which I had, at certification, described as consistent with my conclusion on proximity.

...

In two subsequent cases I have heard since then, *Sauer* has been described by defendant's counsel as wrongly decided. That is obviously not a finding that is open to me. *Sauer* has, moreover, been referred to – and its correctness has not been questioned – in a number of subsequent cases in the Court of

¹ *Taylor v. Canada*, 2010 ONSC 4799.

Appeal including *Williams v. Canada*, [2009] O.J. No. 1819, *Attis, Drady and Heaslip Estate v. Mansfield Ski Club Inc.*, [2009] O.J. No. 3185.

[17] Pursuant to the decision of January 11, 2010, the plaintiff moved to amend the statement of claim. In reasons delivered on September 7, 2010², the motion judge granted leave to amend the statement of claim. The motion judge described the amendments to the statement of claim at paragraph 57 of his reasons as follows:

[57] The proposed amendments are intended, in part, to meet the criticisms of the Court of Appeal in *Drady* relating to the inadequacy of the prior pleading to justify a finding of proximity on the facts as pleaded. For this purpose, the amendments take cognizance of the emphasis that the Court of Appeal gave to the importance of pleading representations relied on by the plaintiff and the distinction that the court drew between the pleading in *Sauer* – or at least the references to it in the reasons of Goudge J.A. – and in *Drady* and this case.

[18] Finally, the motion judge offered his own opinion of the *Sauer*, *Drady/Attis* conundrum at para. 74:

By way of a general comment, I doubt whether any rational individual not bound by *stare decisis* would understand why it should be considered fair and reasonable to impose a duty of care on a government regulatory body in *Sauer* but not in this case when the amendments are made. The question of proximity was not even considered by an experienced judge to merit discussion at first instance in *Sauer* and the Court of Appeal had no doubt that proximity had been sufficiently pleaded. Any distinctions to be drawn on the words of the

² Reported alongside the January 11 reasons at 2010 ONSC 4799.

pleadings appear to me to be sufficiently close to hair-splitting as to be incompatible with the principles propounded in *Hunt* – at least as far as they have been traditionally applied in cases in which the Crown was not the moving party.

[19] Following the order granting leave to amend the statement of claim, notice of application for leave to appeal dated September 15, 2010 was filed in the Divisional Court. No action has been taken in respect of that application pending the outcome of this motion for special leave.

[20] Although not part of the procedural history of this action, it is appropriate to refer at this point to the decision of the British Columbia Court of Appeal in *Knight v. Imperial Tobacco Canada Ltd.* (2009), 313 D.L.R. (4th) 695. The judgment was released on December 8 – one month prior to the motion judge’s release of his reasons striking out the statement of claim in the case at bar. In *Knight*, the British Columbia Court of Appeal upheld a pleading against the federal crown for negligent misrepresentation and negligent development of tobacco strains for mild and light cigarettes. In a five judge court, Tysoe J.A., writing for the majority, at para. 58 made specific reference to the motion judge’s discussion of proximity:

On this point, I respectfully agree with the comments of Mr. Justice Cullity in *Taylor v. Canada (Minister of Health)* (2007), 285 D.L.R. (4th) 296 (Ont. S.C.J.), leave to appeal denied (2007), 289 D.L.R. (4th) 567, 233 O.A.C. 111:

[44] Inaction by governmental bodies with statutory powers conferred for the protection of

the public will not ordinarily engage a duty of care even though harm to individuals is reasonably foreseeable. Absent a statutory provision, or implication, to the contrary, any duty to exercise the powers will be owed to the public and not to private individuals. The missing element – proximity – may, however, be supplied if, by a course of conduct in a purported exercise of the powers, the agency creates, or contributes to, a foreseeable risk of harm to a discrete group.

In that case, Cullity J. certified a class proceeding against Canada in respect of a claim that the conduct of Health Canada in connection with implants intended for insertion in temporomandibular joints increased the risk to the health of the consumers of the implants. Here, it is similarly alleged that the conduct of Canada increased the risk of health to cigarette smokers who purchased light and mild cigarettes.

THE POSITION OF THE PARTIES

[21] The plaintiff and the defendant have moved jointly for leave to have a special case determined by this court pursuant to rr. 22.01 and 22.03 which provide:

22.01(1) Where the parties to a proceeding concur in stating a question of law in the form of a special case for the opinion of the court, any party may move before a judge to have the special case determined.

(2) Where the judge is satisfied that the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, the judge may hear and determine the special case.

...

22.03(1) A motion under rule 22.01 may be made to a judge of the Court of Appeal for leave to have a special case

determined in the first instance by that court and the judge may grant leave where subrule 22.01(2) is satisfied and where the special case raises an issue in respect of which,

- (a) there are conflicting decisions of judges in Ontario and there is no decision of an appellate court in Ontario;
- (b) there is a conflict between decisions of an appellate court in Ontario and an appellate court of another province, or between decisions of appellate courts of two or more other provinces; or
- (c) one of the parties seeks to establish that a decision of an appellate court in Ontario should not be followed.

[22] The parties submit that there is conflict between the Court of Appeal's decision in *Sauer* on the one hand and its decisions in *Drady* and *Attis* on the other hand. The plaintiff seeks to establish that *Drady* and *Attis* ought not to be followed. She submits that the *Sauer* approach to proximity should be adopted because her pleadings comport with the *Sauer* pleadings. The defendant, on the other hand, seeks to establish that *Sauer* ought not to be followed and that the *Drady/Attis* approach should govern as those cases appropriately raise the test for proximity to a higher level.

[23] In effect, both parties take the position that *Sauer* and *Drady/Attis* cannot co-exist as the law of Ontario and this court must settle the issue.

[24] Finally, they argue that they satisfy the requirements of r. 22.03(1)(b) to the effect that there is a conflict between *Drady* and *Attis* in this court and *Knight* in the British Columbia Court of Appeal which needs to be addressed.

[25] Whether the parties are correct in their submissions on these issues is, of course, not for me to decide sitting as a single judge on the motion. It may well be that this court will satisfy itself that *Sauer* and *Drady/Attis* can co-exist.

CONCLUSION

[26] I indicated at the outset of these reasons that it will be a rare case where rr. 22.01 and 22.03 will be invoked to bypass the Divisional Court's appellate jurisdiction. Indeed, counsel for both parties were unable to provide me with a single case either granting or denying special leave in these particular circumstances.

[27] The parties have indicated to me that this litigation has already become a procedural marathon. If the case was to follow through the normal course in the Divisional Court with leave to appeal and appeal in the Divisional Court, followed by the inevitable application for leave to appeal to this court and the appeal in this court, then several more months – if not a couple of years – will have passed. This action was commenced in December 1999 and pleadings have not yet closed. So much for access to justice!

[28] It is time to get this case moving ahead. Also, counsel advises me that there are 30 other cases “waiting in the wings” for this issue to be resolved. The stating of a special case will permit the case to move past the pleading stage in a substantially shorter period of time than would otherwise be the case if it were left to proceed through the normal appellate process. I have no doubt that in the particular circumstances, this would be a desirable course to follow.

[29] However, I must first be satisfied that rr. 22.01 and 22.03 permit me to grant leave to have a special case determined by this court. There is a problem with the language of r. 22.03(1), which I repeat in part for convenience:

A motion under rule 22.01 may be made to a judge of the Court of Appeal for leave to have a special case determined *in the first instance* by that court ... [Emphasis added.]

[30] The problem is in the words, “to have a special case determined in the first instance”. The motion judge has already addressed the issue of proximity as a first instance judge. Does that mean that the parties are now foreclosed from obtaining an order from this court to determine the issue in the first instance? Can there be more than one first instance hearing? While a literal reading of these words suggests that the parties are not entitled to the order they seek, I prefer to take a more liberal construction of r. 22.03(1) as is mandated in r. 1.04(1):

These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[31] Under r. 22.03(1), I think it is reasonable, in these particular circumstances, to view the special case as a request to have the issue determined afresh in the first instance. While a special case could be viewed as an appeal from the order of the motion judge, I am prepared to accept that the position of the parties taken in post-argument submissions could be treated by this court as a separate motion or application.

[32] The circumstances here lead me to exercise my discretion in what I consider to be a rare exception. To do so satisfies the objective of r. 22.01(2):

Where the judge is satisfied that the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, the [Court of Appeal] may hear and determine the special case.

[33] Finally, I turn to the question of whether the case otherwise fits the requirements of r. 22.03(1). Clause “c” of r. 22.03(1) is satisfied in that both parties seek to establish that particular decisions of this court should not be followed.

[34] The circumstances of this case that lead me to exercise my discretion in favour of granting leave include the current state of the jurisprudence at the appellate level on an important issue of law, the inevitability that this issue will have to be decided by this court in this proceeding, the fact that an additional step – an appeal to the Divisional

Court – will add significant expense to the proceeding and is very unlikely to assist in the ultimate determination of the issue by this court, the enormous delay and expense that have already occurred in this case, the importance of the case and, finally, the fact that both parties are consenting to the matter being heard by this court as a first instance motion.

DISPOSITION

[35] An order will go pursuant to rr. 22.01 and 22.03 granting leave to the parties to have a special case determined by this court as follows:

- (i) What are the requirements in a statement of claim to establish sufficient proximity between the plaintiff and the defendant in a claim brought against a governmental body for regulatory negligence?
- (ii) Does the amended statement of claim in this case satisfy those requirements?

[36] In accordance with the agreement of the parties, there shall be no award of costs of this motion.

Paul P. Luchinsky J. Q.