

CI 00-01-20981

THE QUEEN'S BENCH
WINNIPEG CENTRE

BETWEEN:

TRINIDAD HUMARANG,

Plaintiff,

- and -

TERRENCE MCDOWELL
and MACINNES BURBIDGE,

Defendants.

REASONS FOR DECISION delivered by The Honourable
Mr. Justice MacInnes, held at the Law Courts Complex, 408
York Avenue, in the City of Winnipeg, Province of Manitoba,
on the 14th day of April, 2003.

APPEARANCES:

MR. T. LACH, for the Plaintiff

MR. M. FINLAYSON and MR. D. COWARD, for the Defendants

MR. B. JONES, for Manitoba Health Services Commission

1 APRIL 14, 2003

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3 THE COURT: On May 29, 1993, the plaintiff, now
4 deceased, while shopping at Tutti-Frutti in The Forks
5 Market, slipped and fell and suffered personal injury as a
6 result. She retained, allegedly, a lawyer by the name of
7 Terrence McDowell to act on her behalf and to bring action
8 with respect to the injuries which she suffered, seeking
9 damages in compensation for them. Mr. McDowell did not
10 commence action within the limitation period and ultimately
11 the plaintiff retained other counsel, Mr. Wilder, to
12 commence action against Mr. McDowell and his firm. That
13 action was commenced.

14 In the course of her treatment for the personal
15 injuries which she suffered, the plaintiff received both
16 hospital and medical care for which Manitoba Health Services
17 Commission is out of pocket something in the order of
18 \$180,000.

19 Some time ago, and certainly by August of 2001,
20 Mr. Wilder, representing the plaintiff, informed Manitoba
21 Health that it appeared to him that there would be a
22 conflict between the interests of the plaintiff and the
23 interests of Manitoba Health Services Commission in
24 advancing the plaintiff's claim. He indicated in a letter
25 written to Manitoba Health Services Commission that he was
26 going to seek to attempt a mediated settlement and that in
27 pursuing that felt that there would be a conflict between
28 his client and the interests of Manitoba Health Services.
29 That letter is contained as an exhibit to the affidavit of
30 Karen Dyck, sworn August 9, 2002, and filed in these
31 proceedings, that is, in this application or appeal, by the
32 appellant. The letter is Exhibit "F" to her affidavit and
33 is a letter dated August 21, 2001.

34 Thereafter, apparently, the applicant, Manitoba

1 Health, sought to have itself added as a named plaintiff in
2 the action between Ms. Humarang and Mr. McDowell and sought
3 to amend the statement of claim which had previously been
4 issued so as to set up more expressly the basis of a claim
5 for recovery of the Manitoba Health Services Commission
6 account. The application for amendment, including the
7 adding amendment of Manitoba Health as a named plaintiff,
8 was heard before Master Sharp and dismissed, and it now
9 finds its way before me by way of appeal from Master Sharp's
10 decision.

11 Having read the material filed by counsel for both
12 Manitoba Health and for the defendants, and heard their
13 submissions, it would appear that the scheme under the
14 Health Services Insurance Act of Manitoba respecting third-
15 party claims provides, firstly, that an insured person must
16 have suffered bodily injury due to the negligence of another
17 person, the third party, and must have received insured
18 hospital, medical or other health services as a result. And
19 in this case, of course, Ms. Humarang did fall within that
20 category of insured person. And the third party would have
21 been Tutti-Frutti and/or perhaps The Forks Market.

22 In that scenario, the insured person, Ms.
23 Humarang, may sue the third party to recover the cost of
24 such insured services, both past and future. The scheme
25 then provides that if the insured person is going to sue for
26 these damages, the insured person must give the Minister of
27 Health written notice to that effect not less than 60 days
28 before suing; and further, that where the insured person
29 sues and so claims, he or she must serve a copy of the
30 statement of claim on the Minister not less than seven days
31 after suit is commenced.

32 As well, there is provision in what I call the
33 scheme of the legislation that where an insured person does
34 not sue the third party for such damages, the Minister may

1 do so. The Minister has two years from the date the bodily
2 injuries are suffered within which to sue the third party
3 and can apply for and get an extension to sue upon
4 satisfying a judge that the Minister did not know that the
5 cause of action had arisen.

6 When I apply the scheme of the legislation to the
7 circumstances here, I note the following:

8 Firstly, while Ms. Humarang clearly had the right to
9 sue and to sue the third party, that did not occur, and
10 there is no evidence, therefore, that there was any notice
11 given to the Minister that she was intending to sue, nor was
12 there any service of a statement of claim following suit
13 because, as I say, no suit was brought. And the fact that
14 no suit was brought is what forms the subject matter of the
15 present action.

16 In addition, there is no evidence that the
17 Minister brought suit, nor is there any application having
18 been made by the Minister. The Minister had two years from
19 the date the bodily injuries were suffered -- so that would
20 be approximately May 29, 1995 -- in which to sue, and even
21 after the passage of that date had the right to apply for an
22 extension if it could satisfy a judge that it did not know
23 that a cause of action had arisen.

24 There is also general provision in the Limitations
25 of Actions Act which gives a prospective plaintiff the right
26 to seek an extension under the Limitation of Actions Act by
27 apply for such extension within one year of learning of the
28 material facts relevant to the action.

29 In this case it is clear that Manitoba Health
30 Services Commission knew of the plaintiff's action, not
31 against the original tortfeasor but against the current
32 defendants, by, at the very latest, August 21, 2001, which
33 would be the date of Mr. Wilder's letter, and indeed, given
34 the language of the letter, undoubtedly at a date prior to

1 that.

2 For purposes of seeking any extension, that or
3 perhaps an earlier date, depending upon the evidence, would
4 have been the trigger date for the Minister applying either
5 under the scheme of the legislation or under the scheme of
6 the legislation and in conjunction with the Limitation of
7 Actions Act for an extension to be able to sue the
8 tortfeasor as the scheme contemplates. As I have said, that
9 was not done and, indeed, to this date has not been done.
10 And, of course, the Minister is now out of time for that
11 purpose.

12 In its application, the Minister is saying all we
13 want to do is be added as a plaintiff so that all of the
14 parties will be before the court because there is an issue
15 to be litigated in which the Minister has an interest. And
16 he says that on the basis that Mr. Wilder has advanced or
17 expressed the view that the statement of claim of the
18 plaintiff as against McDowell does indeed cover the claim or
19 account of Manitoba Health Services Commission, but that
20 since Mr. Wilder says that there is a conflict, it is
21 important that Manitoba Health or the Minister be entitled
22 to have a presence in the litigation to properly advance the
23 interests of Manitoba Health Services Commission.

24 It seems to me that that is not at all the
25 situation. And if it were, the Minister or Manitoba Health
26 do not have to be added as a party at all. The situation
27 simply, as I see it, is this: If Mr. Wilder is right in his
28 argument, in other words, if, on the basis of the statement
29 of claim as framed, the court can be satisfied that the
30 hospital and medical account of Manitoba Health Services is
31 included as part of the plaintiff's claim against McDowell,
32 then that claim will be advanced and will be determined by
33 the court and the plaintiff will have the obligation that it
34 does under the Act to account for the monies received on

1 account of the outstanding medical and hospital account.
2 And if that is the case, then Manitoba Health is protected
3 whether a named party or not.

4 On the other hand, if the statement of claim as it
5 exists does not advance that claim, then to add Manitoba
6 Health as a named plaintiff now and allow it to amend its
7 statement of claim so as to advance the claim would be to
8 enable it to advance something that does not exist and,
9 thereby, to advance a claim after the Limitation of Actions
10 Act has passed, without having made an application for
11 extension under that Act.

12 As I see it, Manitoba Health cannot have it both
13 ways. If the claim as framed includes MHSC's account, it's
14 in. If it doesn't, then it had the opportunity to get
15 itself in, or to get its claim in, by virtue of the
16 provisions in both the relevant legislation and the
17 Limitations Act, but it has not done so. And to allow it to
18 do so at this time would be to allow it to advance a claim
19 after the limitation period has expired.

20 The business about the alleged conflict of
21 interest is, in the scheme of things, a red herring. What I
22 mean by that is: One, Mr. Wilder has said, I included
23 MHSC's claim in the statement of claim. He is going to have
24 a difficult time now arguing that he did not. And if he
25 did, then he is obligated under the Act, Section 102(1),
26 which requires the consent to settlement of the Minister if
27 there is going to be a settlement, and Section 105, which
28 says the plaintiff cannot abandon the claim without the
29 consent of the Minister.

30 So if he is satisfied that it is in, whether for
31 settlement purposes or at trial, there is nothing to prevent
32 counsel for Manitoba Health to participate to represent the
33 interests of Manitoba Health even though it is not a named
34 party to the litigation, and Mr. Wilder is caught in the

1 position, or his client is, where they cannot complete a
2 settlement nor can they abandon the claim without the
3 consent of the Minister. As I have said, if it's not in,
4 it's not in, and to allow the amendment now sought would be
5 to allow Manitoba Health to bring a cause of action that is
6 not otherwise brought after the limitation period expires.

7 In the circumstances, the appeal from the order of
8 Master Sharp is dismissed. The defendants will have their
9 costs according to the tariff in any event of the cause.

10 (PROCEEDINGS CONCLUDED)

CERTIFICATE OF REASONS

These are my reasons for judgment in the case of
TRINIDAD HUMARANG v. TERRENCE MCDOWELL AND MACINNES
BURBIDGE.

MACINNES, J.

CERTIFIED COURT TRANSCRIPT
FROM THE OFFICE OF
TRANSCRIPTION SERVICES UNIT

J. P. P. P. P.
TRANSCRIPTION SERVICES UNIT