

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Richard v. British Columbia*,
2014 BCSC 1290

Date: 20140714
Docket: S024338
Registry: Vancouver

Between:

William Joseph Richard and W.H.M.

Plaintiffs

And

Her Majesty the Queen in the Right of the Province of British Columbia

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Fenlon

Reasons for Judgment

Counsel for the Plaintiffs:

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Place and Date of Hearing:

Vancouver, B.C.
December 13, 2013
March 28, 2014

Place and Date of Judgment:

Vancouver, B.C.
July 7, 2014

I. INTRODUCTION

[1] The parties to this class proceeding jointly seek the Court's opinion on whether the estates of deceased class members can pursue a claim under the court approved settlement agreement. This application is made under Rule 9-3 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009.

II. BACKGROUND

[2] This class action began in 2002. It was certified in 2005. The parties signed a settlement agreement in October 2009, which the Court approved in July 2010 (the "Settlement Agreement"). The certified class is defined as:

All persons resident in British Columbia, who were confined to the provincial institution more recently known as the Woodlands School on or after August 1, 1974, and who, while so confined, suffered physical, sexual, emotional and/or psychological abuse and have suffered injury, loss or damage as a result thereof.

[3] The parties' agreed statement of facts is attached as Schedule A. Those facts specifically concern three deceased class members (V.T., T.A., and F.G.) but properly raise the general issue of whether class members' estates can pursue claims under the Settlement Agreement.

[4] The three class members were alive when the parties signed and the Court subsequently approved the Settlement Agreement. They had each retained counsel to pursue claims on their behalf under the Settlement Agreement. They were also listed by name as class members who intended to pursue a claim in an application made on September 12, 2011, to extend the claims deadline.

[5] Class counsel had investigated the three class members' claims and proposed to the Province to resolve their claims under the informal claims process that class counsel and the Province had developed. However, the three class members died before their claims were resolved.

[6] Each class member died without a will but is survived by family members who would be beneficiaries of their estates if Letters of Administration were obtained.

These family members have indicated to class counsel that they wish to make a claim under the Settlement Agreement on behalf of the deceased class member's estate. However, they wish to have a preliminary ruling on the eligibility of estates under the Settlement Agreement before incurring further legal expense to pursue a claim.

III. ANALYSIS

[7] I will deal in turn with each of the plaintiffs' three arguments in support of their position that the estates of deceased class members may pursue a claim under the Settlement Agreement:

1. The claims are contract claims that survive a class member's death;
2. Even if the claims are tort claims, they are settled amounts that can be sued on by the estate in debt; and
3. Estates are members of the defined class and therefore have standing to pursue claims.

1. Are the claims in contract or tort?

[8] At common law, tort claims for personal injury compensation do not survive the claimant's death and cannot be pursued by the deceased claimant's estate. The plaintiffs agree that this is a well settled principle of law: *Stenhouse v. Strachan* (1999), 31 E.T.R. (2d) 130, [1999] B.C.J. No. 2657 (S.C.); *Moss v. Chin* (1994), 99 B.C.L.R. (2d) 332, 1994 CanLII 1400 (S.C.) at para. 28; *Allan Estate v. Co-operators Life Insurance Company*, 1999 BCCA 35.

[9] In contrast, some contract claims survive death. Justice Lambert reviewed the history of the common law on this point in *Allan Estate* and stated at para. 45:

[45] In summary, the common law is that an action could not be maintained in tort by the personal representative of a deceased plaintiff but could be maintained in contract for a debt or other sum payable under contract if the claim was to remedy a loss to the estate of the deceased person caused by the breach of contract, but not if the claim was to remedy a loss arising from harm suffered by the person of the deceased and not by his

or her estate. So, from the same breach, some of the losses might be barred after the death of the plaintiff and some might not. The losses would have to be properly categorized and properly pleaded.

[10] In *Allan Estate* the issue was whether certain claims against a disability insurer could be brought by the estate, including a claim for wrongful repudiation of the defendant's contractual obligations under the disability policy. The claim was therefore a "contract claim" in the broad sense of the term. However, the Court of Appeal concluded that whether the cause of action was grounded in tort or contract was not determinative. Rather, what mattered was whether the claim related to harm suffered by the deceased's estate as opposed to harm suffered by the deceased's person. Justice Lambert wrote at para. 79:

[79] The question that must be asked in relation to each of those three causes of action is whether the wrong, as pleaded, could give rise to a claim for loss or damage that could properly be categorized as diminishment of Ms. Allan's estate at the date of her death, or whether, on the other hand, the loss or damage claimed must necessarily be categorized as being in the nature of compensation for the personal hurts inflicted on Ms. Allan. If the former, then the claims properly survive Ms. Allan's death. If the latter, then they do not.

[11] Accordingly, the plaintiffs cannot succeed by simply establishing that the deceased class members' claims are "contract claims" in the sense that they are being brought pursuant to the Settlement Agreement. Rather, the question to answer is whether claims under the Settlement Agreement give rise to loss or damage that can be categorized as diminishment of the class member's estate at the date of his or her death.

[12] I begin by noting that both parties referred in argument to s. 59 of the *Estate Administration Act*, R.S.B.C. 1996, c. 122 [EAA]. The EAA altered the common law to allow a deceased person's estate to pursue actions other than "damages in respect to physical disfigurement or pain and suffering caused to the deceased". This matter was heard on March 28, 2014. Neither party alluded to the pending repeal of the EAA on March 31, 2014 and the enactment of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [WESA]. However, I conclude that nothing turns on this change in legislation because the WESA also precludes a deceased's

personal representatives from recovering “damages in respect to non-pecuniary loss”, which includes damages for pain and suffering.

[13] Are the class members’ claims for pain and suffering such that they do not survive the class member’s death? I conclude that the answer to that question is “yes”.

[14] The Settlement Agreement focusses entirely on compensation for physical and psychological harm. Class members can only advance claims to compensate for psychological and physical suffering.

[15] Paragraph 2 of the Settlement Agreement provides:

2. In order to be eligible for compensation, the claim must establish one or more of the following requirements:
 - a. The class member was the subject of misconduct of a sexual nature by a Woodlands employee, volunteer or, subject to paragraph 3, resident;
 - b. The class member was the subject of misconduct of a physical or psychological nature by a Woodlands staff member or volunteer;
 - c. The class member suffered physical or psychological injury reasonably attributable to negligence in the operations or management of Woodlands, where such injury is more than de minimis or trivial.

[16] The Settlement Agreement makes no reference to claims for loss of income or other economic loss prior to a class member’s death. While class counsel submitted that past loss of wage claims were “rolled into” the Settlement Agreement, the language of the Settlement Agreement does not support that submission.

[17] In addition, the July 7, 2010 court order approving the Settlement Agreement expressly provides that the Settlement Agreement is the exclusive remedy for class members’ claims against the defendant for compensation for physical, sexual, and psychological abuse while at the Woodlands School. It further provides that “class members are deemed to irrevocably release, remise, acquit and forever discharge the defendant... from any and all liabilities, actions, positive actions, liens, suits, claims, costs, court order interest, expenses, debts, damages, and compensation of

whatever kind....” In short, if any pecuniary losses were incurred by the class members (and it is conceded that would be unlikely), claims for compensation for such losses were given up as part of the Settlement Agreement.

[18] While it may seem unfair that the deceased claimants’ estates will not be able to recover on their behalf, there is a policy reason for barring such recovery. Damages in such cases are meant to provide some comfort to the person who suffered the physical and psychological distress. The law concludes that payment of damages to the estate of a person who has suffered such distress no longer serves that purpose. I am bound by that law.

2. Are the claims for settled amounts?

[19] The plaintiffs argue that a claimant’s estate can still pursue a claim for pain and suffering if a fixed sum had been awarded at the time of the claimant’s death. In effect, at that point the original tort claim is converted to a debt owed by the defendant.

[20] The plaintiffs rely on *Sindhar v. Brar*, 2002 BCCA 378 (also known as *Singh v. Brar*) [*Brar*]. In that case the plaintiff in a personal injury action died after a settlement agreement was reached but before the settlement funds were paid. This Court had approved the settlement of \$681,171. ICBC had deposited the settlement funds with a structured settlement broker, but the funds had not been released because the settlement agreement and release were not yet signed.

[21] The plaintiff’s estate argued that the claim was merged in the judgment approving the settlement and that as a result the *EAA*’s prohibition against proceeding with a tort claim after the plaintiff’s death did not apply.

[22] The Court of Appeal agreed that a final settlement had been reached, followed by a final court order, and that the legal dispute had ended. Further, the Court of Appeal followed authority favouring the finality that comes with determining a damage award at a specific point in time, and not allowing that determination to be revisited: *Brar* at para. 17.

[23] I do not find *Brar* analogous to the case before me. In the present case, the deceased class members have not settled their claims. The Settlement Agreement does not fix a set sum of money payable to each class member. Rather, it sets out a process for summarily resolving each class member's unique claim for compensation.

[24] The Settlement Agreement does not even assume that every class member is entitled to compensation. Rather, entitlement must be proved through the process in the Settlement Agreement.

[25] The process for proving and quantifying a claim is described in paragraphs. 5-13 of the Settlement Agreement, which read in part:

5. The Province shall be provided with a copy of each Claim. The Province shall have 45 days after the date it receives the Claim ... to provide a response The Response shall include a brief attaching any documents, Woodlands files, expert reports, affidavits, or other credible information that the Province says disputes eligibility or assists in determining the amount payable...
6. The Adjudicator may consider the materials provided to him or her whether or not such materials would be admissible in a court of law.
7. Assessment of eligibility and entitlement shall be determined on a balance of probabilities ...
8. Eligibility and entitlement under this agreement shall be determined by an adjudicator.... The Adjudicator shall be one of two or more Judges of the Supreme Court of British Columbia appointed by the Chief Justice of the Supreme Court of British Columbia The Adjudicators may establish a process for management of the hearing of the Claims so as to ensure a fair, just and timely hearing of the Claims on the merits There shall be no appeal from the decision of an Adjudicator.
9. The Adjudicator may request further material from the Class Members or the Province ...
10. The Claim under paragraph 2 shall include the Class Member's assessment of their category and amount payable. The Province's Response shall include the assessment of the category and amount payable.
11. ... the Class Member and the Province may have negotiations about the amount payable at any time prior to the Adjudicator's issuance of a decision. If the Class Member and the Province are able to agree to the amount payable, the Adjudicator shall issue an award in the agreed amount without further review of the materials.

...

13. The Adjudicator will make best efforts to render decision without 30 days of receipt of all material and the oral hearing, whichever is later.

[26] The three deceased class members whose circumstances are detailed in the agreed statement of facts had taken steps on a without prejudice basis to settle their claims. However, no amount had been agreed upon. The Settlement Agreement provides for categories of injuries and ranges of compensation based on where a claimant's injuries fit on a scale of categories from 1 through 12. However, it cannot be said that the deceased class members' claims were "at an end" regarding damages. Entitlement had not yet been established, let alone a damage award fixed under one of the categories of compensation.

[27] In summary, the Settlement Agreement does not fix a damage award for each class member. Rather, it creates a process for determining both entitlement and the appropriate damage award. The Settlement Agreement does establish the quantum of damages payable for particular categories of injury, if proven. However, each class member's entitlement to a damage award, and the appropriate quantum if entitled, is in issue until the formal adjudication process contemplated under the Settlement Agreement is completed.

[28] I find support for this conclusion in the majority decision in *Monahan Estate v. Nelson*, 2000 BCCA 297. In that case the plaintiff in a personal injury action died after trial but before judgment was delivered. The question was whether the plaintiff's death affected the damage award. The trial judge antedated the judgment to the last day of trial, thus preserving a damage award for pain and suffering that would ordinarily have died with the plaintiff. The Court of Appeal found that because the plaintiff's claim for pain and suffering had not been determined prior to the plaintiff's death (unlike in *Brar*), the plaintiff's claim to such damages died with him and they were not recoverable by the estate.

3. Are estates included in the class definition?

[29] The class is defined as:

All persons resident in British Columbia, who were confined to the provincial institution more recently known as Woodlands School on or after August 1,

1974, and who, while so confined, suffered physical, sexual, emotional and/or psychological abuse and have suffered injury, loss or damage as a result thereof.

[30] The plaintiffs submit that the opening reference to “all persons” is broad enough to encompass estates. They rely on s. 29 of the *Interpretation Act*, R.S.B.C. 1985, c. 238 which provides that: “person” includes ... the personal or other legal representatives of a person to whom the context can apply according to law”.

[31] I conclude that estates are not persons within the class definition for two main reasons. First, the *Interpretation Act* applies to statutes, not to agreements and court orders. Second, the natural meaning of the words used to define the class does not support the inclusion of estates. Estates were not “confined” to Woodlands School and cannot have suffered “physical, sexual, emotional and/or psychological abuse”.

[32] Even if the class definition could be deemed ambiguous, the context within which the Settlement Agreement was created does not support interpreting it to include estates. The Province asserted, and the plaintiffs did not contradict the assertion, that no reference was made during the approval process to deceased members being able to continue with claims. The parties undoubtedly anticipated a speedier resolution of all of the outstanding claims. Nonetheless, the Settlement Agreement arose from events that took place as far back as the 1970s and the potential for some class members to pass away before resolution of their claims should have been within the parties’ contemplation. An express provision would be expected if the parties intended estates to have the right to continue claims under the Settlement Agreement.

[33] The documents drafted by the parties to assist class members in making a claim are instructive in this regard. A form entitled “Representative & Lawyer Information” states:

REPRESENTATIVE

If the Class Member’s personal representative is completing the form, please provide the following contact information and attach documentation establishing legal representation. All further communication will be to the legal representative, unless a lawyer is retained.

☐ Power of Attorney ☐ Representation Agreement ☐ Committee ☐ Litigation Guardian

Notably, this form only includes categories of living persons' representatives.

IV. CONCLUSION

[34] I conclude that the estates of deceased class members like V.T., T.A., and F.G. cannot pursue claims under the Settlement Agreement.

The Honourable Madam Justice L.A. Fenlon

SCHEDULE "A"

No. Action No. SO24338
Vancouver Registry

In the Supreme Court of British Columbia

Between

William Joseph Richard and W.H.M.

Plaintiffs

and

Her Majesty the Queen in the Right of the Province of British Columbia

Defendant

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

AGREED STATEMENT OF FACTS

1. This Agreed Statement of Facts concerns three class members in a class action settlement. These are V.T., T.A. and F.G. Each of these class members was alive at the time that a class action settlement agreement was signed by the Representative Plaintiff and by the Province and was approved by the Court, but each claimant subsequently passed away before any settlement of their respective claims was reached with the Province and before a formal claim was submitted to the Adjudicators under the Settlement Agreement. These claimants are collectively referred to as the "Deceased Claimants".

2. There is a dispute between the Representative Plaintiff and the Province as to the eligibility of estates under the Settlement Agreement. Counsel have agreed to submit a special case under Rule 9-3 for this Honourable Court's opinion as to a question of law or fact.

3. This class action was commenced August 2, 2002. It was certified on March 17, 2005. The class definition was amended on February 29, 2008, and an appeal from this amendment was dismissed on April 30, 2009. A copy of the order amending the class definition is attached as Exhibit A. The certified class definition, as amended, states that this action includes:

"All persons resident in British Columbia, who were confined to the provincial institution more recently known as the Woodlands School on or after August 1,

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1974, and who, while so confined, suffered physical, sexual, emotional and/or psychological abuse and have suffered injury, loss or damage as a result thereof.”

4. A settlement agreement was signed by the Representative Plaintiff and the Province on October 9, 2009, and this agreement was approved by the Court on July 7, 2010 (the “Settlement Agreement”). A copy of the Court’s approval order, dated July 7, 2010, which incorporates the Settlement Agreement into the order is attached as Exhibit B.

5. The claims deadline under the Settlement Agreement was originally set for September 19, 2011. The claims deadline has been extended several times by court order. By reasons dated November 4, 2011, the deadline was extended to September 19, 2012. By reasons dated October 3, 2012, the deadline was extended to September 19, 2013. At the most recent court appearance on December 13, 2013, the deadline was extended until March 28, 2014.

6. The Deceased Claimants were alive and were class members on the date that the Settlement Agreement was signed on October 9, 2009, and on the date of settlement approval on July 7, 2010. They each retained counsel to pursue claims on their behalf under the Settlement Agreement.

7. The Deceased Claimants were listed by name in the affidavit #5 of Alicyn Cumming, sworn September 2, 2011. This affidavit was served on the Province in support of an application before Chief Justice Bauman on September 12, 2011, to extend the claim deadline, both on behalf of the Deceased Claimants, and also on behalf of other listed class members.

8. Counsel investigated the claims of the Deceased Claimants, and made a proposal to the Province to resolve their claims under the informal claims process that counsel for the Representative Plaintiff and the Province had developed.

9. The Deceased Claimants died before their claims were resolved through the informal claims process or submitted under the process provided by the Settlement Agreement.

10. The Deceased Claimants each died without a will. They are each survived by family members who would be entitled to be beneficiaries to the proceeds of their estates if Letters of Administration were obtained. These family members have indicated to class counsel that they

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wish to make a claim under the Settlement Agreement on behalf of the estate of their late sibling or child. These family members have indicated that they are willing to obtain Letters of Administration, but that they are unwilling to incur this cost prior to a ruling from this Honourable Court as to potential eligibility of estates to make claims under the Settlement Agreement.

11. Before submitting these claims for formal adjudication by the adjudicators under the Settlement Agreement, the Representative Plaintiff and the Province wish the Court's opinion on the eligibility of estates under the Settlement Agreement.

The Claim of V.T.

12. The brother of V.T. retained Klein Lyons to pursue a claim on behalf of V.T. under the Settlement Agreement on April 17, 2011.

13. Klein Lyons reviewed V.T.'s file, and wrote counsel for the Province on October 30, 2013 on a without prejudice basis. This was pursuant to the informal claims process that the parties have developed. Specifically, Klein Lyons wrote to the Province to provide a summary of the claim, and to make a proposal as to an amount that Klein Lyons would be prepared to recommend to V.T. as compensation.

14. The Province responded to this proposal on January 9, 2014, on a without prejudice basis.

15. Klein Lyons sought instructions from V.T. in respect of the Province's response, and was advised by V.T.'s brother on January 22, 2014 that V.T. had died on January 4, 2014. Klein Lyons notified the Province of V.T.'s passing on January 22, 2014.

16. V.T. is survived by two brothers. They wish to assert a claim on behalf of the estate of their late sister under the Settlement Agreement.

The Claim of T.A.

17. The mother of T.A. retained Klein Lyons on October 15, 2010.

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18. Klein Lyons reviewed T.A.'s file, and made a proposal to the Province on May 22, 2013 under the informal claims process. In support of this proposal, Klein Lyons provided an affidavit from a witness sworn September 25, 2012 and an expert report, dated April 8, 2012.

19. The Province responded on August 16, 2013 on a without prejudice basis.

20. On August 19, 2013, Klein Lyons was advised by T.A.'s mother that T.A. had passed away on November 15, 2012. Klein Lyons notified the Province of T.A.'s passing on August 19, 2013.

21. T.A.'s mother wishes to pursue a claim on behalf of the estate of her late son under the Settlement Agreement.

The Claim of F.G.

22. The caregiver of F.G. retained Klein Lyons on January 18, 2010.

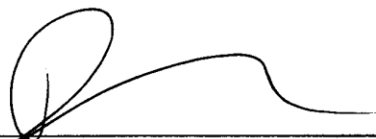
23. Klein Lyons reviewed F.G.'s file, and made a proposal to the Province on February 15, 2013 under the informal claims process.

24. The Province responded on March 8, 2013 on a without prejudice basis.

25. Subsequently, Klein Lyons was advised by F.G.'s caregiver that F.G. had passed away on April 7, 2012. Klein Lyons advised the Province of F.G.'s passing on May 9, 2013.


26. F.G. is survived by two brothers who wish to pursue a claim on behalf of the estate of their late brother under the Settlement Agreement.

Date: Feb 26, 2014



Signature of Counsel for the Representative Plaintiff

Date: Feb 26, 2014



Signature of Counsel for the Province