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QUEEN'S BENCH FOR SASKATCHEWAN

Citation: 2005 SKQB 384

Date: 20050916
Docket: Q.B.G. 1780/2003
Judicial Centre: Regina

BETWEEN:

MORLEY LEONARD EVANS

PLAINTIFF(RESPONDENT)

- and -

DR. JOHN N. ALPORT, MR. DEAN AST
and DR. CHRIS ANNANDALE

DEFENDANTS(APPLICANTS)

Counsel:

Robert I.L. MacKay
David E. Thera

for the plaintiff(respondent)
for the defendants(applicants)

JUDGMENT
September 16, 2005

KYLE J.

[1] The applicants seek an order under Rules 188 and 189 of the Queen's Bench Rules of Court that the respondent's(plaintiff's) action is barred by reason of the prior expiry of the time limited for commencement of the action.

[2] I note that all material facts are matters of common agreement and while no agreed statement of facts has been filed, those facts are:

1. The applicants were at all material times licenced by the College of Physicians and Surgeons to practice medicine in Saskatchewan and were registered under *The Medical Professions Act, 1981*, S.S. 1980-81, c. M-10.1.
2. The applicants provided medical services to the respondent, Mr. Evans. Dr. Alport terminated his services on October 20, 1988, and Dr. Annandale terminated his services on July 24, 2001.
3. This action was commenced on September 2, 2003, outside the 24 month limitation period provided for in s. 72 of *The Medical Professions Act, 1981*.

[3] On May 1, 2005, s. 72 was repealed and s. 5 of *The Limitations Act, S.S. 2005, c. L-16.1* was proclaimed which, from that day forward, commenced the limitation period on the date when the claim was discovered. Limitation periods which had previously expired were not affected by this change in the law.

[4] I therefore have determined that a determination under Rule 188 and 189 may be made and that the limitation period in issue is that contained in s. 72 of *The Medical Professions Act* as it was prior to the above amendments.

[5] It is conceded by the respondent that the action would be barred if the court declines to find that s. 72 offends the respondent's rights under the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada*

Act, 1982 (U.K.), 1982, c. 11, (the "Charter") s. 7, and it is on this issue that the matter will be determined.

[6] There is ample case authority to the effect that the discovery principle has no application where the start of a limitation period is by statute specified. In this case it was at the last date when medical services were provided.

[7] Attempts to challenge such legislated start times have in general failed as the legislation has usually deemed to be, as a matter of public policy, protective of the profession or public body affected. The *Charter* argument is in essence that such a desire to protect confronts the security of the person provisions of the *Charter* and so it must fail.

[8] In *Filip v. City of Waterloo* (1992), 98 D.L.R. (4th) 534 (Ont. C.A.) the Ontario Court of Appeal held that the right to security of the person under s. 7 of the *Charter* "does not embrace the civil right to bring an action for the recovery of damages for personal injury".

[9] In *Wittman v. Emmott*, [1991] 4 W.W.R. 175 (B.C.C.A.) the British Columbia Court of Appeal held in a similar situation, as set out in the headnote of the case:

The provision in s. 8(1) of the Act for an ultimate limitation of six years for claims against members of the medical profession is a considered response to what the legislature believed to be the excessive exposure of that profession to delayed malpractice actions. The limitation applies to all potential claimants "notwithstanding . . . a postponement or suspension

of the running of time under section 6 [and] 7." To import a discoverability rule into s. 8(1) would be inconsistent with the expressed intention of the legislature and the policy considerations underlying the legislation.

The direct effect of s. 8 is purely economic in that it bars a person from seeking damages, an economic remedy. As such, it is outside the scope of s. 7 of the *Charter*, which protects the "liberty or security of the person". Time limits upon the recovery of damages are not matters which affect "the dignity and worth of the human person," but are matters which properly lie within the realm of general public policy, entailing a balancing of the competing interests of prospective litigants. Such limits deprive no one of a protected right contrary to the principles of fundamental justice.

[10] While I am not bound by either of these decisions I find them to be of compelling persuasive value.

[11] Accordingly, the *Charter* argument will be rejected and because the action is statute barred it will be dismissed with costs pursuant to Rule 189.


J.
L.A. Kyle