

Case Comment: Decock v. Alberta

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Decock v. Alberta, [2000] A.J. No. 419 (C.A.), online: QL (AJ)

Banister suffered an eye injury while in Banff. He went to the local hospital where he was examined, but not treated, and told to proceed to a hospital in Calgary for treatment. He alleged that his eye injury was aggravated by not being treated in Banff and by being treated negligently in Calgary. Decock suffered seizures, was seen at the Banff hospital but turned away “without treatment”, and was found dead later that afternoon. Schmitz was pregnant and attended at a Calgary hospital three times in four days suffering from severe abdominal pain and bleeding. She was twice examined by medical personnel, but turned away without treatment. On the third visit she was examined, informed that she was carrying a dead foetus, and discharged. On the fourth visit Schmitz waited 90 minutes for a doctor. Scott alleged that after undergoing brain surgery in Toronto, he was injured en route to Calgary because he had to ride in a sitting position rather than a prone position as ordered by his physician. Brown attended at a Calgary hospital complaining of tingling in her arms and legs, facial numbness and chest pains. She was seen by doctors but kept in Emergency rather than being admitted as an inpatient. Later that day she suffered a massive stroke and died.

These individuals (or their representatives) independently commenced medical malpractice actions. All of the actions included as named defendants the Queen in Right of Alberta, the Honourable Ralph Klein (at all relevant times Premier of Alberta) and the Honourable Shirley McClellan (at all relevant times Minister of Health of Alberta).

Klein and McClellan applied pursuant to Rules 38 and 129 of the Alberta Rules of Court for an order removing them as named defendants in each of the actions and either striking the claims as against them or amending the claims to delete specified portions. The chambers judge allowed the applications.¹ He held that all of the allegations against Klein were predicated on vicarious liability and that Klein, as an officer of the Crown, could not be held liable for the acts of his subordinates. He held that Klein and McClellan

should not have been named in their personal capacities, so they had been ‘improperly joined’ in the actions within the meaning of Rule 38. He held that the office of Premier is not a suable entity, although the office of Minister of Health could be.

The plaintiffs appealed. On April 25, 2000, in a 2/1 decision the Alberta Court of Appeal allowed the appeal and denied the application to strike the claim as against Klein and McClellan.

Russell J., writing for the majority, discussed the following issues.

The proper use of Rules 38 and 129

Although Rule 38 (which permits the Court to strike out the name of any party improperly joined in an action), and Rule 129 (which permits the Court to strike out pleadings which do not disclose a cause of action or are frivolous, vexatious, embarrassing, or an abuse of process) appear to share an overlapping effect, the purpose of the Rules is very different. Rule 38 is designed to ensure that the proper parties are included within a claim, while Rule 129 is designed to ensure that the pleadings reveal a valid cause of action between those parties. If it is not necessary for a person to be a party to a claim for the court to “effectually and completely” decide the matter then that person can be removed as a defendant pursuant to Rule 38(3).

The concepts of direct and vicarious liability for torts involving Crown officers and agents

One government officer or agent cannot be held vicariously liable for the tortious actions of another. However, liability in tort will always fall firstly upon the individual tortfeasor, and the development of vicarious liability has not obviated this general rule. Where direct liability in tort is alleged against government officers or agents, they may properly be named personally as defendants along with the Crown. While there may be good policy reasons against permitting claims against Crown servants or officers for torts committed in connection with their official functions,

currently there is no such immunity under Alberta law, and whether such immunity should be granted should be left to the legislature.

The proper convention for naming Crown officers or agents personally in tort actions

Where alleging direct tortious liability against the individual, the individual should be named. Where alleging vicarious liability of the Crown for the acts of the individual, the individual's office should be pleaded. Where alleging direct or vicarious liability of the Crown, the Crown should be named as well.

Russell J. held that the office of Minister of Health is capable of being sued, but that the office of Premier is not (the former being a creature of statute, the latter not).

Russell J. then addressed this application, and held that naming Klein and McClellan personally was not improper because the Statements of Claim included allegations that Klein and McClellan had direct duties of care which they breached. Russell J. held that the allegations against them were not restricted to vicarious liability; and that Klein and McClellan could be 'essential parties' under Rule 38 even though the Crown would be vicariously liable for them.

Russell J. held that the high threshold to have a claim struck under Rule 129 was not met. All of the necessary elements of a cause of action in negligence had been pleaded, and the application of Rule 129 presumes that the plaintiffs will prove at trial what they have pleaded. It was not clear, on the face of the pleadings, that the claims against Klein or McClellan revealed no reasonable cause of action, or were scandalous, frivolous, vexatious, embarrassing or an abuse of process. Her Ladyship commented that while it may be tempting to conclude that the allegations against Klein and McClellan arose from decisions made in their policy making roles, for which they could not be held liable, rather than in their personal capacities, a determination to strike the claims against them on this basis could not be made without evidence.

Irving J., in his dissenting judgment accepted essentially the same test for striking an action under Rule 129, but held that the threshold for striking out was met on the facts of this case, because the allegations against Klein and McClellan were either:

- allegations of vicarious responsibility for negligent diagnosis, treatment and advice of doctors or nurses named in the actions, which allegations are not legally actionable against Crown officers or agents; or

- Allegations of negligent management, operation or staffing of hospitals, which allegations are not legally actionable against Crown officers or agents because s. 27 of the Hospitals Act says that a hospital board "has full control of that hospital and final authority affecting all matters pertaining to the operation of the hospital."

Irving J. also held that because Klein and McClellan were improperly joined in these actions, Rule 38 could be used to remove their names from the actions.

Comment

This case has attracted a level of public and media attention which, in retrospect, probably will be seen as more than was warranted. It has been widely characterized as a 'split decision' on whether the Premier and Minister of Health of Alberta can be sued personally for cutting health care funding. However, when read closely something quite different—more modest, but nevertheless interesting—is revealed.

The similarities between the majority and minority judgements are as important to understanding the case as the differences between them. The entire Court of Appeal panel seems to agree that:

- Rule 129 is the appropriate instrument for determining whether to strike actions where the existence of a legally sustainable cause of action is disputed;
- the threshold for success on a Rule 129 application is high; but
- allegations restricted to vicarious liability against Crown officers or agents will meet the threshold.

The differences between the majority and minority judgments relate primarily to the characterization of the pleaded particulars of negligence against Klein and McClellan. The majority judgment found that some of the allegations pointed to direct liability of Klein and McClellan, and that the existence of such allegations sufficed to preserve the claims against them. By contrast, Irving J. characterized exactly the same allegations against Klein and McClellan as pointing exclusively towards vicarious liability or negligent hospital operation, neither of which were sufficient to preserve the claims. Since the judgments quote the pleadings in issue, readers can form their own opinions about which position is more persuasive.

Both judgments share a sense of significant skepticism about the long-term viability of the actions against Klein and

McClellan, although the minority judgment is, obviously, more negative than the majority.

Probably the most interesting issue raised by this case, looking forward, is whether statutory provisions like s. 27 of the Hospitals Act can be used by a government or its officers or agents as a defence against allegations of negligently funding, structuring or overseeing health care delivery. This issue is raised explicitly by Irving J., but is not mentioned in the majority judgment, and it is unclear

whether it was even argued by counsel in chambers or on appeal. In any event, this issue is bound to receive careful attention if any of these actions proceed to summary judgment or trial, and is worth watching for.

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1. *Decock v. Alberta*, [1997] A.J. No. 484 (Q.B.), online: QL (AJ).