

CITATION: Jamal Estate v. The Scarborough Hospital, 2009 ONCA 376
DATE: 20090507
DOCKET: C48013

COURT OF APPEAL FOR ONTARIO

Sharpe, Juriansz and LaForme JJ.A.

BETWEEN:

Sairose Jamal, Trustee of the Estate of Karim Jamal, deceased, Shairose Jamal,
personally, and Alyna Jamal, by her Litigation Guardian, Shairose Jamal

Plaintiffs

and

Scarborough Hospital – Grace Division, Sunnybrook & Women’s College Health
Sciences Centre, North York General Hospital, Her Majesty the Queen in Right of the
Province of Ontario as represented by the Ministry of Health and Long-term Care, Her
Majesty the Queen in Right of The Province of Ontario as represented by the Ministry of
Public Safety and Security and Her Majesty the Queen in Right of the Province of
Ontario, Dr. Michael Brzozowski, Dr. Tyler Rouse, Dr. Luis Carlos Herrera Robles, also
known as Dr. Luis Robles, Dr. J. Doe and Dr. Janet Hux

Defendants

Kate Cahill for the plaintiffs

Lise G. Favreau, Kim Twohig and Leslie McIntosh for the Defendants

Heard: February 25, 2009

On appeal from the order of Justice Maurice Cullity of the Superior Court of Justice
dated August 22, 2005

Sharpe J.A.:

[1] This appeal, heard together with four other similar appeals,¹ raises the issue of whether Ontario can be held liable for damages suffered by individuals who contracted SARS during the outbreak of that illness in 2003.

[2] Karim Jamal contracted SARS in mid-March 2003, and died on April 30, 2003. This action, brought by his estate trustee and family members, names Ontario, three hospitals and several doctors as defendants. The claim alleges that Ontario was negligent by failing to protect Jamal from the SARS virus.

[3] As in *Williams v. Ontario* and the other related appeals, Ontario moved under Rule 21 to strike out the “consolidated” statement of claim (“the claim”) on the ground that the facts as pleaded did not establish that Ontario owed the plaintiffs a private law duty of care.

[4] The motion judge incorporated his reasons for decision in *Williams*, and struck out those portions of the claim that he found dealt with duties owed by Ontario to the public as a whole. However, relying on the decision of the Divisional Court in *Eliopoulos (Litigation Trustee of) v. Ontario (Minister of Health and Long-Term Care)* (2005), 76 O.R. (3d) 36, he refused to strike out substantial parts of the negligence claim against Ontario.

¹ *Williams v. Ontario* (C44220); *Abarquez v. Ontario* (C48011); *Larozza v. Ontario* (C48010); and *Henry v. Ontario* (C48012). As the *Williams* appeal fell within the jurisdiction of this court and as it was in the interests of justice to have all appeals heard by the same court at the same time, the appeals that fell within the jurisdiction of the Divisional Court were, on consent, ordered to be heard by this court at the same time as the *Williams* appeal a special case, pursuant to Rule 22. The judgments on all five appeals are being released at the same time.

[5] As in the *Williams* and the other related appeals, Ontario relies on the reversal of the Divisional Court's *Eliopoulos* judgment by this court, holding that while Ontario did owe a public law duty to promote health and protect against the spread of the West Nile virus, there was no relationship of proximity between the plaintiff and Ontario capable of giving rise to a private law duty of care: (2006), 82 O.R. (3d) 321 ("*Eliopoulos*") (leave to appeal denied: [2006] S.C.C.A. No. 514).

[6] As the underlying facts and issues raised on this appeal are essentially the same as those dealt with in *Williams*, I adopt the reasons given in *Williams* and will not repeat the background facts and legal analysis which is common to both appeals.

[7] The claim alleges that following a hospital visit, Karim Jamal contracted SARS on March 16 or March 17, 2003, was diagnosed with SARS on or about April 4, 2003, and that he died on April 30, 2003.

[8] As noted by the motion judge, the claim makes few explicit allegations of any actions of Ontario in connection with the SARS outbreak. The claim essentially rests upon general assertions that the Ministry of Health and Long-Term Care is responsible for administering the health care system and for the provision of health care services to the Ontario public, including the regulation of public hospitals and disease control and prevention and has regulatory powers over the establishment, maintenance and management of the defendant hospitals. The claim also alleges that the Ministry of Public Safety and Security is responsible for the creation, implementation and

enforcement of protocols, regulations and or/procedures maintained for the protection of the public and that the Commissioner of Public Safety was responsible for establishing, coordinating and implementing public safety initiatives within the Province of Ontario.

[9] The claim fails to relate those general allegations to events that occurred during the SARS crisis. It does, however, contain certain particulars of Ontario's alleged negligence, conveniently summarized in Ontario's factum as follows:

- (i) failure to have any plan or any adequate plan to deal with SARS;
- (ii) failure to properly fund or staff hospitals to permit adequate monitoring, treatment and control of infectious diseases;
- (iii) failure to create information sharing and tracking system(s), for example, for daily surveillance of patients and hospital employees, and for communication between the provincial government and hospital employees, and between different levels of government;
- (iv) failure to provide proper or any leadership in directing the management of the outbreak of SARS, or to have created a provincial disease centre and failure to issue adequate directives to health care providers;
- (v) failure to provide adequate protective equipment to hospital employees and visitors;
- (vi) failure to enforce provincial mandates and protocols dealing with infectious diseases;
- (vii) failure to limit the use of quarantine methods and failure to prevent patients and hospital employees for re-entering the community;
- (viii) failure to warn members of the public; and
- (ix) breach of the requirements of the Public Hospitals Act.

[10] Ontario argues that the claim should have been struck out in its entirety because it fails to allege any material facts to support a claim in negligence. While I see considerable merit in that submission, I prefer to dispose of this appeal on substantive rather than procedural grounds.

[11] To the extent that the claim does allege facts against Ontario, the allegations add nothing to what was alleged in *Williams*. For the reasons given in *Williams*, I conclude that it is plain and obvious that Ontario did not owe Karim Jamal a private law duty of care and that the claim against Ontario should be struck out and the action against Ontario dismissed.

[12] Accordingly, I would allow Ontario's appeal, and as against Ontario, strike the claim in its entirety and dismiss the action.

[13] If the parties are unable to agree as to costs, we will receive brief written submissions, from Ontario within fifteen days and from the respondent within ten days thereafter.

“Robert J. Sharpe J.A.”
“I agree R.G. Juriansz J.A.”
“I agree H.S. LaForme J.A.”

RELEASED: May 7, 2009