IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Gillott Estate v. Faulkner Estate, 2008 NSSC 332

Date: 20081028
Docket: 299271
Registry: Kentville

Between:

Stephen William Gillott, Executor of the Estate of Harry William Gillot and Daniel Rolland Gillot and Darlene Maxine Trefry, Executors of the Estate of Annie Maxine Gillott

Plaintiff

v.

The Estate of Mark Wade Faulkner, by his personal representative Donna (Faulkner) Sanford

Defendant

and

Donna Darlene Benjamin, Patricia Louise Benjamin and Jack Sheppard on behalf of the deceased, Justin William Benjamin

Applicant

Judge:	The Honourable Justice Charles Haliburton
Heard:	October 28, 2008 at Kentville, Nova Scotia
Written Decision:	November ##, 2008
Counsel:	Andrew Waterbury, solicitor for the applicant Derrick Kimball, solicitor for the plaintiff

By the Court:

[1] This is an application on behalf of the Estate of Justin William Benjamin to be joined in an action which has already been commenced in the name of the Estate of Harry William Gillott, SK Number 299271, as plaintiff.

[2] It apparently raises a novel issue with respect to the appropriate interpretation to be given to Section 10 of the ***Fatal Injuries Act***, R.S.N.S. 1989, c. 163, as amended.

[3] Section 10 of the ***Act*** provides:

> "Not more than one action shall lie for and in respect to the same subject-matter of complaint and every such action shall be commenced within twelve months after the death of the deceased person."

[4] It is argued by Mr. Kimball on behalf of the Gillott estate that the subject matter of the complaint relates to the death of a particular person.

[5] The cause of action proposes, as I understand it, that it is the fatal injury of some particular person that gives rise to or that permits the continuation of an action in the name of that person for injuries suffered in an accident or as a result of a civil claim arising against some other person in negligence or tort.

[6] The sections of the *Act* which I think are relevant in considering this application are Sections 3, 4 and 5 in terms of defining whom it is that is entitled and what the basis is of that arising entitlement.

[7] Section 3, in its opening words says: "Where the death of **a person**", and I would emphasize "a person", and then it concludes after having said that it is caused by the wrongful act, neglect or default of another in circumstances, and I am not quoting from the ***Act***, but in circumstances that would have given rise to a claim by that deceased person against the other, then it preserves an action, and the Section concludes with words that refer again to "the death", being singular.

[8] Section 4(1) says: "Such action shall be brought by and in the name of the Executor or administrative of", again singular, "the person deceased".

[9] Subsection 2 says: "If there is no executor", etc., "such action may be brought by and in the name or names of the spouse, common-law partner, parent or child of such person." Again, an ordinary reading of the Section seems to suggest that all that is singular. It does not suggest that there may be more than one spouse or more than one common-law partner that may have entitlement, although obviously parents and children would have to be interpreted as being in the plural.

[10] Subsection 5(1) says: “Every action brought under this Act shall be for the benefit of the spouse, common-law partner, parent or child”, same sort of wording as in 4(2).

[11] I agree with the proposition advanced by Mr. Kimball on behalf of the plaintiff in the present action which has been commenced that the action arises from the death of a particular person in the circumstances contemplated by the Section. That Section 10 is essentially a limitation section, limiting the time, within which everyone having an entitlement arising under the ***Act*** will commence their respective actions.

[12] The limitation with respect to one action, I would interpret as meaning then, that there will be no more than one action lying for the benefit of those persons surviving a particular father, child, or person from whom they would have anticipated receiving some benefit had they survived. That is to say, that each family, anybody claiming to have suffered a loss deriving from the death of a particular person, is obliged to join in one action.

[13] If there are multiple deaths arising from an accident or from some wrongful action of the defendant, then each of those deaths would give rise to separate actions and all those actions would have to be commenced within one year.

[14] In my view that is a logical interpretation in as much as granting the application which is brought today to have Ms. Bowes’ clients joined as plaintiffs in the action which has been commenced by Mr. Kimball would arguably require that all those plaintiffs become Mr. Kimball’s clients. There would be an obvious conflict of interest in the person of the advocate, the counsel, representing various plaintiffs who have different interests arising from different deaths and perhaps with very different rights.

[15] Difficult enough for one counsel to adequately represent all the members of one family let alone attempts to spread their expertise among different families.

[16] The same as Mr. Waterbury has pointed out, likely the end result will be that another action will be commenced in relation of the other death or deaths arising from the same accident and a court would likely choose to consolidate those actions in the sense of treating them as one global claim against whatever basket of money there may be to respond to those claims.

[17] But it would make sense, it seems to me, that the two families or the three families, however many families there are, interested in the matter arising from one particular accident, would carry their own actions. It clearly becomes a matter with cost consequences and so on.

[18] Another point was made that it may cause a race to the court house steps or a race to the court registry to get your action filed before somebody else filed if they are not all to be consolidated in one action in the manner sought. I do not think that argument has any merit.

[19] To think of it in the converse, if only one action is allowed with respect to a death arising from a particular accident, then obviously there would be a race to get your documents filed in the court registry for your own client, for one of those beneficiaries or one of those families, before another family gets there with their claim because then they would be precluded. It seems to me that the one action limitation cannot apply sensibly to claims arising from an accident, being the subject matter of the claim.

[20] The legislation must have, in fact, intended that the action arises from the death being the incident and that all persons deriving a claim as a result of that death under the statute are entitled to make their claim provided that, again, only one action can arise in relation to one particular death.

[21] Mr. Kimball has provided a decision of Justice Stewart in ***Rowe* v. *Brown***, 2008 N.S.S.C. 13, in which she quotes Justice Cromwell of our Court of Appeal in ***MacLean* v. *MacDonald***, 2002 N.S.C.A. 30, and I would suggest that in his decision, the references he makes to this statute in paragraphs 25 and 29 of his decision, support the conclusion that I am proposing.

[22] The last words of paragraph 25 say:

> "However, the damages recoverable were based on the loss his or her death caused to the surviving spouse, parent and children."

[23] Paragraph 29, I will read in full:

> "I think it important to note that this fatal injuries legislation does not do away entirely with the common law rule barring wrongful death actions. Rather, it only modifies the rule in specific ways. The claim under the legislation is limited to a defined class of persons. It provides compensation for all of them, but in one action, and the compensation to which they are entitled is primarily for the loss of support they reasonably could have expected to receive **from the deceased had he or she lived**." (Emphasis added)

[24] The application is denied.

THE COURT: You're not looking for costs, Mr. Kimball, out of that, are you?

MR. KIMBALL: I don't think so. I am not sure what the status of the applicant is in these situations in any event. I think it is important to be able to come to the court and get direction on a matter such as this but they are not technically a party yet so it is almost a leave, and that is why I raised it in the brief but not as an impediment to the hearing at all.

THE COURT: Okay.

MR. KIMBALL: So thank you, My Lord.

THE COURT: I hope that will help everybody and not confuse the issue.

J.