CITATION: Harris v. Ontario, 2016 ONSC 4641
COURT FILE NO.: CV-13-19804
DATE: 20160802

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Kari Harris, Mark Dew and Riley Carver Dew, by her Litigation Guardian, Kari Harris Plaintiffs	Andrew C. Murray, for the Plaintiffs
– and –	
Her Majesty the Queen in Right of Ontario, as represented by the Ministry of Community Safety & Correctional Services, Windsor Jail Superintendent Vic Villeneuve, Joe Doe, John Doe, Jeff Doe, and Jane Doe Defendants	Ann Christian-Brown, for the Defendant, Her Majesty the Queen in Right of Ontario
	HEARD: April 18, 2016

RULING ON MOTION

HEBNER J.:

[1] The plaintiffs are all surviving next of kin of Jonathan Dew, who was born March 26, 1986. Jonathan Dew died on September 21, 2012, following a brief period of incarceration at the Windsor Jail. The plaintiffs issued their statement of claim against the defendants on April 3, 2013, claiming that the defendants are responsible for the death of Jonathan Dew. The plaintiffs have claimed damages pursuant to s. 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, in the sum of $300,000, special damages in the sum of $50,000 and punitive, aggravated and exemplary damages in the sum of $1 million.

[2] The plaintiffs have brought a motion under rule 21.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, requesting the determination before trial of the following question of law:

> Are claims for recovery of legal expenses incurred in connection with the inquest conducted into the death of Jonathan Dew potentially recoverable in law as against the defendants, pursuant to section 61(1) of the *Family Law Act*, R.S.O. 1990, c. F.3, or are such expenses excluded claims which are not potentially recoverable at law?

Background

[3] The plaintiffs are Jonathan Dew's mother, father and daughter. The following facts are alleged in the statement of claim:

1. On Sunday, September 9, 2012, an otherwise healthy Jonathan Dew was stopped by Windsor police while riding his bicycle for the offence of breach of probation. He was taken into police custody, where his health was observed to be fine, and transferred later that day to the Windsor jail.

2. Three days later, at approximately 3:20 p.m. on September 12, 2012, Kari Harris (Jonathan's mother) was contacted by a nurse at the Windsor jail with the advice that Jonathan Dew had been "very sick for 3 days now" as he was unable to eat or drink and had been experiencing severe vomiting and diarrhea. He was in the process of being transferred to the Hotel Dieu Grace Hospital in Windsor, ON for medical treatment.

3. Jonathan Dew was admitted to Hotel Dieu Grace Hospital, became unresponsive and lost consciousness. He was transferred to University Hospital in London, where he died on September 21, 2012.

4. By the time of Jonathan's death at University Hospital he had been released from police custody.

[4] An inquest took place in January of 2014 in Windsor, Ontario. The plaintiffs were represented at, and took part in, the inquest. They incurred significant legal fees as a result. On January 24, 2014, the coroner's jury released 19 recommendations. The plaintiffs brought this motion for the determination of the question of law set out herein as they seek to recover, from the defendants, the legal expenses they incurred as a result of their participation at the inquest.

Analysis

[5] This motion presents the following issues:

1. Is this a proper case for invoking rule 21.01 (1)(a)?

2. Are legal expenses incurred in connection with a family's participation in an inquest potentially recoverable in a civil proceeding under section 61(1) of the *Family Law Act*?

3. Do the provisions of the *Coroners Act*, R.S.O. 1990, c. C.37 and *The Chief Coroner's Rules of Procedure for Inquests* (effective July 1, 2014, revised January 2015) pursuant to s. 50.1 of the *Coroner's Act*, R.S.O. 1990, C.37 [*Rules*"] thereunder provide a complete code for the recovery of costs such that a claim for costs is not available under the *Family Law Act*?

Rule 21.01(1)(a)

The Pleading

[6] Rule 21.01(1)(a) states:

> 21.01(1) A party may move before a judge,
>
> > (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
> >
> > (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
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> and the judge may make an order or grant judgment accordingly.

[7] Ms. Christian-Brown for the defendants submits that the question of law for determination must be raised by the pleadings and, as the statement of claim does not contain a specific claim for costs associated with the plaintiffs' participation in the inquest, the motion cannot proceed. Mr. Murray for the plaintiffs points out that in the statement of claim issued April 3, 2013 the plaintiffs claim "special damages (estimated) $50,000". Mr. Murray submits that the special damages claimed consist of the OHIP subrogated claim and the legal fees incurred by the plaintiffs in connection with their participation in the inquest. He points out that rule 25.06 (9)(b) requires that where damages are claimed in a pleading:

> [T]he amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial.

[8] Mr. Murray points out that the letter requesting standing for the plaintiffs at the inquest, the legal bills and time dockets have all been provided to the defendants.

[9] I agree with Mr. Murray on this point. Given that the inquest took place nine months after the statement of claim was issued, the statement of claim could not possibly have

specified the legal fees incurred as a result of the plaintiffs' participation in the inquest. The special damages claimed in the statement of claim are noted to be "estimated".

Further, the statement of claim is sufficiently broad to include the legal fees in para. 19 as follows:

> The plaintiffs claim damages pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3, as amended for the loss of guidance, care and companionship, services rendered and to be rendered, and for expenses incurred and it to be incurred for the benefit of Jonathan Dew, and for travelling, nursing, housekeeping expense, and other services arising from the injuries pleaded herein and sustained by Jonathan Dew.

[10] I find that the fact that the pleading does not specifically claim legal expenses incurred by the plaintiffs as a result of their participation in the inquest into the death of Jonathan Dew is not a bar to this motion. However, now that the expense is known, it is appropriate that it be specifically pleaded and leave is hereby granted to the plaintiffs to amend their pleading accordingly.

The Plain and Obvious test

[11] Ms. Christian-Brown submits that the jurisprudence is not fully settled and therefore a Rule 21 motion is not the proper means to determine the issue. In support of this submission, Ms. Christian-Brown relies on the Court of Appeal decision in *R.D. Belanger & Associates Ltd. v. Stadium Corp. of* Ontario *Ltd.* (1991), 5 O.R. (3d) 778, [1991] O.J. No. 1962. In that case, the Court of Appeal found that the motions judge ought not to have dismissed the action in question under rule 21.01(1)(b) as it was not "plain and obvious" that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown". In that case, the court dealt with the proper use of rule 21.01(1)(b) as opposed to rule 21.01(1)(a). I, therefore, distinguish the case on that point.

[12] In the case of *Fosker v. Thorpe*, [2004] O.T.C. 883, 2004 CarswellOnt 4150, Quinn J. dealt with a motion brought by the defendant under rule 21.01(1)(a). The question was whether the plaintiff's motor vehicle was an uninsured motor vehicle. Plaintiff's counsel made a similar argument before Quinn J. The plaintiff's submission was that novel questions of law which are not fully settled in the jurisprudence ought not to be determined using this method. On that point, Quinn J. stated the following:

> There are no material facts in dispute on this motion. Indeed, I asked Ms. Tummillo what additional facts might come out at trial that could affect the issue of whether the Ford is an uninsured automobile. She was unable to suggest any. In my view, where all of the material facts are known and not in dispute, the above criteria from *Saygili* and other similar cases are of little assistance when it

> comes to deciding questions of law. Thus: (1) there is no reason to shy away from resolving a novel question of law at this stage of the
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> proceedings — there being no further facts that might arise bearing upon the matter, a motions judge is as equipped to decide a novel issue as the trial judge; (2) the question of law need not be "crystal clear" — it may be decided, as it would at trial, on a balance of probabilities; and, (3) similarly, there is no requirement for the question of law to be "plain, obvious and beyond doubt" — such a burden of proof is too high.

[13] In this case, in its statement of defence the defendants admit that Jonathan Dew was admitted to the Windsor jail; that Jonathan Dew was assessed by a nurse and a medical protocol was instituted; that Jonathan Dew was taken by Windsor jail staff to the hospital on September 12, 2012. Further, there is no question that Jonathan Dew died at University Hospital on September 21, 2012; that an inquest took place in January 2014 and that the plaintiffs were given status to participate in the inquest. It seems to me that the facts relevant to the question posed by the plaintiffs are not in dispute. Accordingly, there is no reason to shy away from resolving the question of law posed at this stage of the proceedings.

[14] I further find that the determination of the question posed by the plaintiffs may substantially shorten the trial and/or result in a substantial saving of costs, depending on the answer to the question. If the answer is in the negative, the trial judge will not be required to hear evidence on the issue of whether the legal fees are recoverable in this particular case and the quantum thereof. If the answer is a positive one, then the parties may proceed to call that evidence knowing that it is necessary for a determination of the issue.

[15] As a result of the foregoing, I find that this is a proper case for invoking rule 21(1)(a) so as to provide an answer to the question posed by the plaintiffs.

Are legal expenses incurred in connection with a family's participation in an inquest potentially recoverable in a civil proceeding under section 61(1) of the *Family Law Act*?

[16] Sections 61(1) and (2) of the Family *Law Act* read as follows:

> 61(1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an

> action for the purpose in a court of competent jurisdiction. R.S.O. 1990, c. F.3, s. 61 (1); 1999, c. 6, s. 25 (25); 2005, c. 5, s. 27 (28).
>
> Damages in case of injury
>
> (2) The damages recoverable in a claim under subsection (1) may include,
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> (a) actual expenses reasonably incurred for the benefit of the person injured or killed;
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> (b) actual funeral expenses reasonably incurred;
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> (c) a reasonable allowance for travel expenses actually incurred in visiting the person during his or her treatment or recovery;
>
> (d) where, as a result of the injury, the claimant provides nursing, housekeeping or other services for the person, a reasonable allowance for loss of income or the value of the services; and
>
> (e) an amount to compensate for the loss of guidance, care and companionship that the claimant might reasonably have expected to receive from the person if the injury or death had not occurred. R.S.O. 1990, c. F.3, s. 61 (2).

[17] The leading case on point is *Macartney v. Islic* (2000), 46 O.R. (3d) 641, [2000] O.J. No. 30 (C.A.). In that case, the plaintiffs' 19-year-old son was killed in a motor vehicle accident near their home. The plaintiffs sued for damages for nervous shock and loss of income resulting from their son's death. On a motion under Rule 21 before the Ontario Court (General Division), Yates J. decided that the plaintiffs could proceed to trial on both claims. The defendant appealed the decision to the Court of Appeal.

[18] The Court of Appeal concluded that the plaintiffs' claim for loss of income resulting from their son's death was a claim that could be pursued under s. 61 (1) of the *Family Law Act*. At para. 40, Laskin J.A. stated, "in my opinion, Mr. and Mrs. Macartney need not prove that their loss of income was caused by nervous shock to succeed in their claim under section 61(1). They need only prove that their income loss is a pecuniary loss resulting from Jeremy's death". In coming to that conclusion, Laskin J.A. (Morden J.A. concurring) made the following points:

1. The ordinary meaning of the words in section 61(1) would permit recovery for the income loss claimed by the plaintiffs as the loss is a pecuniary one. Nothing in the wording of section 61(1) restricts recovery for pecuniary loss to the pecuniary benefits that the parents would have received from their son had he not been killed.

2. A basic principle of statutory interpretation is that the ordinary meaning of a legislative provision should prevail absent a good reason to reject it.

3. Even where the ordinary meaning of a legislative text appears to be clear, the court must consider the purpose and scheme of the legislation and the consequences of adopting this meaning. A court must take into account all relevant indicators of legislative meaning.

4. In light of these additional considerations, the court may adopt an interpretation in which the ordinary meaning is modified or rejected. That interpretation, however, must be plausible; that is, it must be one the words are reasonably capable of bearing.

5. The preamble of the *Family Law Act* recognizes the *Act*'s important purpose of strengthening family relations. Moreover, the scheme of the *Act* as a whole reflected the Legislature's intention to provide much greater protection to family members, in the case of family breakup or family loss, than previously available. Accordingly, restricting the scope of pecuniary loss is inconsistent with the purpose of the *Act*.

6. There are 3 specific reasons why section 61(2) does not restrict the scope of pecuniary loss in section 61(1). They are:

    a) The general category of "pecuniary loss" in subsection (1) precedes the list of specific kinds of awards in section 61(2). The inference is that the legislature did not intend to restrict the general category.

    b) The specific examples in section 61(2) are introduced by the words "may include". The result is that the list of examples is not intended to be exhaustive.

    c) The general category of "pecuniary loss" is not restricted by the inclusion of specific examples.

[19] Thus, section 61(2) "does not provide a reason to depart from the ordinary meaning of section 61(1) or to restrict its scope": see Macartney, at para. 59.In applying the analysis in the *Macartney* case to the case at hand, the question to be posed is whether the legal fees incurred by the plaintiffs is a pecuniary loss resulting from Jonathan's death. I find that it is. In making the finding, I apply the "but for" test, namely "but for Jonathan's death, would the plaintiffs have incurred the legal expenses?" The obvious answer is no.

[20] There are two cases that have dealt with the issue, both of which I do not find helpful. The first is *Jinks v. Cardwell* (1987), 3 A.C.W.S. (3d) 357, 1987 CarswellOnt 758 (Ont. Supreme Ct.). In that case, the late Mr. Jinks, who suffered from mental illness, drowned in a bathtub in the defendant psychiatric hospital. The plaintiff, Mr. Jinks' widow, was

falsely informed that her husband had committed suicide. In her claim, she included a request for $10,000. This amount was to cover fees she incurred for legal counsel before the coroner's inquest, where her husband's name was cleared. The verdict was that the death was "accidental drowning due to reaction to medication". The trial judge found that Mrs. Jinks had a valid motive for retaining counsel. However, McRae J. found "the legal fees are too remote and are not recoverable". The defendant hospital appealed the decision on other grounds and the Court of Appeal did not address the issue.

[21] The second case is *Carpenter v. Beck* (1997), 145 D.L.R. (4th) 574, 69 A.C.W.S. (3d) 845 (Man C.A.). In that case, Amber Vasas was killed as a result of an accident involving a garbage truck. The plaintiffs, her parents, sought to cover the legal costs of representation by counsel at the inquest into her death. The motions judge held that the costs were not recoverable. The Manitoba Court of Appeal dismissed the appeal, finding that there was no "causal connection between the defendant's negligence and the costs incurred by the plaintiffs in being legally represented at the inquest": see *Carpenter*, at para. 3 The Court of Appeal also found that "it is simply not reasonable to require a wrongdoer to pay as damages the costs voluntarily undertaken by a victim's next of kin for legal representation at an inquest".

[22] Both of these cases were decided before the Ontario Court of Appeal decision in *Macartney v. Warner*. The *Jinks v. Cardwell* case did not include an analysis under s. 61(1) of the *Family Law Act*. The *Carpenter v. Beck* case obviously did not apply the Ontario legislation, nor did it provide an analysis under any similar legislation in Manitoba. Both of these cases must be superseded by the *Macartney v. Warner* analysis, which is the analysis to apply in this case.

Do the provisions of the *Coroners Act* and *Rules* thereunder provide a complete code for the recovery of costs such that a claim for costs is not available under the *Family Law Act*?

[23] The inquest into Jonathan Dew's death was a discretionary inquest brought under s. 20 of the *Coroners Act*. The inquest was not required under sections 10 (4.3) or (4.5) because Jonathan Dew was no longer in custody by the time he died at University Hospital in London.

[24] Counsel for the defendants submits that there is no requirement, statutory or otherwise, for families to participate in inquests. Counsel for the defendants further submits that the *Coroners Act* contains specific provisions for the possible recovery of costs of retaining legal representation at inquests. Accordingly, it would be contrary to the legislative provisions and intention of the *Coroners Act* to permit recovery in a civil action of costs incurred.

[25] Section 41(1) of the *Coroners Act* provides that, "on the application of any person before or during an inquest, the coroner shall designate the person as a person with standing at the inquest if the coroner finds that the person is substantially and directly interested in the inquest." According to section 41(2), a person with standing at an inquest may be represented, may call witnesses, may cross-examine witnesses and may present

arguments and make submissions. Costs of representation are dealt with in s. 41(3) and (4) as follows:

> (3) If the coroner in an inquest into the death of a victim as defined in the *Victims' Bill of Rights, 1995* designates a spouse, same-sex partner or parent of the victim as a person with standing at the inquest, the person may apply to the Minister to have the costs that the person incurs for representation by legal counsel in connection with the inquest paid out of the victims justice fund account continued under subsection 5 (1) of the *Victims' Bill of Rights, 1995*.
>
> (4) Subject to the approval of Management Board of Cabinet, payment of the costs described in subsection (3) may be made out of the victims' justice fund account.

[26] Under s. 50.1 of the *Coroners* Act, "the chief coroner may make additional rules of procedure for inquests". Counsel for the defendants points to rules 2.3(1) and 2.6 of the *Rules*, which provide as follows:

> 2.3(1) It is the duty of all parties to consider their need for representation and interpretation and to retain a representative or interpreter as required at the earliest opportunity, and to take timely measures to obtain any necessary funding.
>
> 2.6 Parties are responsible for any and all costs of their participation in the inquest, including but not limited to representation, travel, accommodation and fees and expenses for interpreters and witnesses caused by the party.

[27] It is stated in the commentary under rule 2.6 that "no party shall make a motion, and the coroner shall make no rulings, regarding reimbursement of a party's costs".

[28] Counsel for the defendants submits that the *Coroners Act* ought to be seen as a complete code dealing with costs incurred at an inquest. She suggests that the scheme and provisions for costs as set out in the *Coroners Act* and the *Rules* are inconsistent with a claim for such costs under s. 61(1) of the *Family Law Act*. She submits that the scheme under the *Coroners Act*, as it is more specific, ought to apply so as to oust the ability to bring a claim for the recovery of such costs under s. 61(1) of the *Family Law Act*. I do not accept these submissions for the following reasons:

1. The fact that the inquest was a discretionary one rather than a mandatory one is not relevant to the issue of the recovery of costs. Similarly, the fact that Jonathan's parents were not required to take part in the inquest is not relevant to the issue of the recovery of costs. It seems to me that the parents of a person whose death is the subject of an inquest are obvious interested parties whose involvement ought to be encouraged.

2. Sections 41(3) and (4) do not apply unless the deceased is the victim of a crime. Accordingly, those sections do not apply in cases such as the one at hand. As a result, in this case there is no conflict between the provisions of the *Coroners Act* and the provisions of the *Family Law Act*.

3. In my view, the purpose of the provisions of the *Coroners Act* and *Rules*, as referred to above, is to provide that parties to an inquest cannot look to the public purse for reimbursement of their costs except for the specific provision dealing with victims of crime. They were not meant to address the issue of recovery of such costs from an alleged tortfeasor. To put it another way, there is nothing in the *Coroners Act* and *Rules* that precludes a deceased's family from claiming such costs in a civil action against an alleged tortfeasor.

Disposition

[29] For the reasons set out above, I answer the question posed by the plaintiffs in the affirmative. I find that claims for recovery of legal expenses incurred in connection with the inquest conducted into the death of Jonathan Dew are potentially recoverable in law as against the defendants, pursuant to s. 61(1) of the *Family Law Act*.

[30] I make no determination on any other issue, including foreseeability, negligence and quantum. I simply answer the question posed to the court. All remaining issues are best left to the determination of the trial judge.

[31] If the parties cannot agree on costs, they may make written submissions, to include a costs outline, as follows:

a) the plaintiff to provide submissions within 20 days;

b) the defendant to provide submissions within a further 10 days;

c) the plaintiff to provide any reply submissions within a further 5 days.

"original signed and released by Hebner J."

Pamela L. Hebner
Justice

Released: August 2, 2016

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