

CANADA / JUDGMENT

Stutt v. Hung

2023 BCSC 1085

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1085 Stutt v. Hung

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stutt v. Hung,

2023 BCSC 1085

Date: 20230623

Docket: S205858

Registry: Vancouver

Between:

Kerri Ann Stutt

Plaintiff

And

Dr. Violet Wai Tak Hung, Dr. Patrick Qin Hua Chen, Vancouver Coastal Health Authority operating a public hospital under the name of Richmond General Hospital, John Doe #1, John Doe #2, and Jane Does #1 - #5

Defendants

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiff:

J.M. Rice, K.C.

J.R. Kendall

Counsel for the Application Respondent, Dr. Richard Kam-Lai Chan:

R.J. Bailey

No other appearances

Place and Date of Hearing:

Vancouver, B.C.

May 15, 2023

Place and Date of Judgment:

Vancouver, B.C.

June 23, 2023

Introduction

- [1] The plaintiff applies to add Dr. Richard Kam-Lai Chan as a defendant to this action and seeks leave to file a revised amended notice of civil claim ("Revised ANOCC").
- [2] The balance of the relief that the plaintiff sought in her application was adjourned generally due to time limitations and will be scheduled for another day.

Background

- [3] This action involves a medical negligence claim.
- [4] Ms. Stutt attended Richmond General Hospital ("RGH") on two separate occasions between March 31 and April 5, 2019. She alleges that the care she received from several physicians and others fell below the relevant professional standards. Ms. Stutt alleges that a spinal epidural abscess she was experiencing was misdiagnosed and mistreated, causing her to suffer a severe spinal cord injury and leaving her a wheelchair-bound paraplegic. Her condition involves several disabilities and impairments, including loss of bowel and bladder function and serially recurring bladder infections. She requires a catheter and daily assistance with her self-care, toileting and bathing. She says her condition is permanent.
- [5] Ms. Stutt was 42 years of age at the time of the incident. She is currently 45 years old. She previously worked as a merchandiser but has not been able to work since these events.
- [6] Her two attendances at the RGH ER were as follows:
 - a) The first began on March 31, 2019 at 2127 hours and ended when she was discharged on April 1 at 1115 hours (the "First Attendance").
 - b) The second began on April 4, 2019 at 1922 hours and ended when she was transferred to Vancouver General Hospital ("VGH") on April 5, 2019 at 1330 hours (the "Second Attendance").

- [7] At VGH she received emergency surgery, involving a T5-T7 laminectomy and decompression.

The First Attendance

- [8] Ms. Stutt presented at the RGH ER on March 31, 2019, complaining of severe pain to her posterior flank and back, radiating to her neck and the left side of her abdomen. She described feeling urinary urgency and complained it was difficult to breathe.
- [9] During triage at 2143 hours, a nurse designated Ms. Stutt as "Level 2" on the Canadian Triage and Acuity Scale ("CTAS"). Counsel indicated this means the patient should be seen by a physician within 15 minutes. She was seen by the proposed new defendant, Dr. Richard Chan, on April 1 at 0025 hours.
- [10] Lab tests were ordered and reviewed by Dr. Chan during his initial assessment. These apparently indicated Ms. Stutt had an elevated white blood count. Several pain medications were administered, however, despite those, Dr. Chan's notes indicate Ms. Stutt's pain was exacerbated with movement and remained severe. He recommended further observation and treatment. He indicated his impression was left-sided back pain, query musculoskeletal pain.
- [11] Ms. Stutt continued to experience pain and required additional pain medication. Notes indicate she was able to ambulate during the night but she advised the nurse that her pain was worse with standing.
- [12] At about 0700 hours, Dr. Chan handed over care of Ms. Stutt to the defendant Dr. Patrick Chen. Dr. Chen ordered an x-ray of her chest, which was reported as normal. When he reassessed her at 0747 hours, she continued to complain of severe flank and left upper back pain. He ordered more pain medication pending receipt of the x-ray results. He discharged Ms. Stutt at 1115 hours with 30 tablets of hydromorphone and instructions to take one to two tablets every four hours as needed.
- [13] Ms. Stutt alleges she was not given a diagnosis during the First Attendance and the only instructions she recalls receiving were to return to the RGH ER if her pain got worse and she would be prioritized.

The Second Attendance

- [14] Ms. Stutt presented at the RGH ER on April 4, 2019 at 1922 hours. She was seen by the triage nurse at 2005 hours. Her chief complaint was noted as "sensory/numbness new". She advised that her legs had been shaking uncontrollably since the morning and she had associated numbness. She was not able to bear weight due to the shakiness. She was noted as diaphoretic and appearing "very anxious and panicky". She was assigned Level 3 on the CTAS, which counsel indicated means urgent and that the patient should be seen by a physician within 30 minutes.

- [15] The plaintiff says while she was waiting to be assessed, she repeatedly complained to ER nursing staff of worsening symptoms, urinary urgency, difficulty voiding and she requested a catheter. She says her legs were twitching uncontrollably. She suggests nursing staff were dismissive of her complaints.
- [16] At 2242 hours Ms. Stutt was assessed by Dr. Hung. She says she mentioned her First Attendance. She indicated she could not feel below her waist or move her legs, there was no history of fall or trauma, she was unable to void and had requested for a catheter to empty her bladder. Notes indicate she had elevated temperature, was diaphoretic and anxious.
- [17] Notes indicate Dr. Hung conducted a neurological exam and noted normal perianal sensation but queried decreased sensation to lower extremities. She described Ms. Stutt's complaints as inconsistent.
- [18] Lab work was ordered. A bladder scan was done at 2345 hours, which revealed 350 ml of urine in the bladder. A catheter was inserted. A nurse noted Ms. Stutt was complaining of numbness from her hips to her feet.
- [19] Notes indicate that at 0059 hours on April 5, Dr. Hung was informed that Ms. Stutt was complaining of muscle spasms and back pain. She ordered Ativan, morphine and Graval. Ms. Stutt has poor recollection of events after she received this medication and believes she was drifting in and out of sleep.
- [20] Notes indicate that at 0130 hours a nurse informed Dr. Hung of lab work results which plaintiff's counsel argues were suggestive of infection. Dr. Hung's differential diagnosis included myelitis, discitis, epidural abscess and cauda equina syndrome. She advised an RGH radiologist that she had ordered an MRI scan for the following morning. She ordered an antibiotic which was administered at 0140 hours.
- [21] Notes indicate Dr. Hung handed over Ms. Stutt's care to Dr. Chan somewhere between 2330 hours on April 4 and 0130 hours on April 5. With regard to the handover, plaintiff's counsel says until Dr. Hung was examined for discovery, he was not certain if this was the same Dr. Chan who had treated Ms. Stutt during the First Attendance. Further, counsel says there are no notes indicating that Dr. Chan had provided any care to Ms. Stutt during the period he was responsible for her care.
- [22] At 0900 hours on April 5, a Dr. Moffat assumed care of Ms. Stutt from Dr. Chan. She noted Ms. Stutt had ongoing mid/lower back pain, numbness had increased and Ms. Stutt reported she had not been able to move her legs since 2330 hours the previous evening. Her temperature had been 37.9 degrees at 2330 hours and her white blood count and CRP had been elevated. She had no sensation below the T5 level and no reflexes. Dr. Moffat's assessment was progressive paralysis at the T5 level.
- [23] Dr. Moffat contacted Dr. Fisher at VGH Spine Unit to discuss transferring Ms. Stutt there. She was informed that it would be quicker for Ms. Stutt to get an MRI scan at RGH than at VGH.

- [24] An MRI scan was performed at RGH at about 1145 hours. It showed a left side posterolateral epidural abscess at the T5-T7 level. The spinal cord was noted to be displaced and narrowed by the abscess, resulting in some spinal cord signal abnormality.
- [25] At 1245 hours Dr. Moffat became aware of the MRI findings. She continued Ms. Stutt's medication and added an additional intravenous antibiotic. By 1330 hours Ms. Stutt was being transferred to VGH.
- [26] A VGH ER triage nurse assessed Ms. Stutt at 1357 hours. The Spine service saw her at 1440 hours. Surgery was performed at 1655 hours, namely a laminectomy on her thoracic spine for decompression of the abscess.

Conduct of the Litigation

- [27] Plaintiff's counsel says prior to starting this action, they requested the plaintiff's complete RGH chart for the First and Second Attendances. On July 17, 2019, they received 49 pages from RGH Records Management. On January 30, 2020, an additional 21 pages were produced.
- [28] On June 3, 2020, the notice of civil claim was filed.
- [29] On August 7, 2020, the notice of civil claim was served on Drs. Hung and Chen. On August 31, 2020, they filed a common response to civil claim. They are both represented by Mr. Samtani of Harper Grey LLP.
- [30] On August 24, 2020, the defendant Vancouver Coastal Health Authority ("VCHA") filed its response to civil claim.
- [31] Counsel for Ms. Stutt notes that each of the defendants denies the allegations of negligence made against them. None of them plead, either alternatively or at all, that Ms. Stutt's injuries were caused by the conduct of another physician, negligent or otherwise.
- [32] The trial of the action is set for April 15, 2024, for 20 days.
- [33] The 84-day deadline for service of expert reports pursuant to R. 11-6(3) of the Supreme Court Civil Rules is January 19, 2024.
- [34] The parties have exchanged lists of documents. The plaintiff's are dated November 3, 2020 and January 31, 2023. Drs. Chen and Hung's list was provided on December 18, 2020. VCHA's was provided on December 8, 2020 (including a more legible copy of the RGH ER chart) and February 16, 2023.
- [35] The plaintiff examined a representative of VCHA for discovery on February 21, 2023 and Drs. Chen and Hung on February 22 and 23, 2023 respectively.

- [36] On February 28, 2023, plaintiff's counsel advised defendants' counsel they would be amending the pleadings after identifying three nurses and Dr. Chan as defendants who had previously identified in the notice of civil claim as four of the seven named Jane/John Does.
- [37] On March 21, 2023, Mr. Samtani advised plaintiff's counsel that he did not have instructions to act for Dr. Chan. The plaintiff subsequently took steps to try to serve the first amended notice of civil claim on Dr. Chan along with a request that he consent to it being filed. Efforts to serve Dr. Chan were initially not successful. Eventually service of a sort was managed after plaintiff's counsel sent materials via the registered and records office address for Dr. Chan's medical corporation and the Canadian Medical Protective Association ("CMPA").
- [38] On April 13, 2023, Mr. Fishman advised plaintiff's counsel that he had been retained to act for Dr. Chan, but did not have instructions to consent to the plaintiff filing the proposed amended version of the notice of civil claim.
- [39] On April 25, 2023, plaintiff's counsel filed this application, returnable May 15, 2023.

Applicable Law - Adding A New Defendant

- [40] Rules 6-2(7)(b) and (c) address addition of new parties:

Adding, removing or substituting parties by order

- (7) At any stage of a proceeding, the court, on application by any person, may, subject to subrules (9) and (10),
- (a)
- (b) order that a person be added or substituted as a party if
- (i) that person ought to have been joined as a party, or
- (ii) that person's participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated on, and
- (c) order that a person be added as a party if there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with
- (i) any relief claimed in the proceeding, or
- (ii) the subject matter of the proceeding

that, in the opinion of the court, it would be just and convenient to determine as between the person and that party.

- [41] In *Madadi v. Nichols*, 2021 BCCA 10 at paras. 21-25, the court of appeal summarized the approach to these two sub-rules as follows:

- [21] Rule 6-2(7)(b) has been interpreted narrowly, as being concerned with remedying defects in the proceedings. A plaintiff applicant must establish either that the proposed defendant "ought to have been joined as a party" or that their "participation in the proceeding is necessary": *Letvad v. Fenwick*, 2000 BCCA 630 at paras. 16-17; *Alexis v. Duncan*, 2015 BCCA 135 at para. 15; and *Byrd v. Cariboo (Regional District)*, 2016 BCCA 69 at para. 36.
- [22] Rule 6-2(7)(c) is broader and therefore more commonly relied upon. A plaintiff applicant must establish that there is a question or issue between the plaintiff and the proposed defendant that relates to or is connected with the relief, remedy, or subject matter of the proceeding. This threshold is low. It is generally expressed as establishing a real issue between the parties that is not frivolous, or that the plaintiff has a possible cause of action against the proposed defendant: *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 at para. 45 [Neilson Architects]; *Strata Plan LMS 1816 v. Acastina Investments Ltd.*, 2004 BCCA 578 [Acastina]; and *MacMillan Bloedel Ltd. v. Binstead et al.* (1981), 58 B.C.L.R. 173 (C.A.) [Binstead]. I would define a frivolous issue as an issue that does not go to establishing the cause of action, does not advance a claim known to law, or serves no useful purpose and would be a waste of the court's time and public resources. This is similar to the considerations for determining whether a claim should be struck as "unnecessary, scandalous, frivolous or vexatious" under Rule 9-5(1)(b): see, for example, *Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 at paras. 65, citing in *Willow v. Chong*, 2013 BCSC 1083 at para. 20.
- [23] This threshold requirement is usually met solely on the basis of the proposed pleadings, but the parties may provide affidavit evidence addressing it. If evidence is provided, the court is limited to examining it only to the extent necessary to determine if the required issue between the parties exists; it is not to weigh the evidence and assess whether the plaintiff could prove the allegations: *Neilson Architects* at para. 45, citing *Acastina* and *Binstead*. Whether or not evidence is provided, it is necessary for the court to examine the pleadings in order to determine whether the plaintiff has a possible cause of action against the proposed defendants. The pleadings must set out material facts sufficient to establish a real and not frivolous issue between the plaintiff and the proposed defendants: *Neilson Architects* at paras. 60, 62, and 75.
- [24] If this requirement is met, the court must next determine whether it would be just and convenient to decide the issue between the parties in the proceeding. It is in relation to this issue that evidence is more commonly provided. This is a discretionary decision, which discretion must be exercised judicially, and in accordance with the evidence adduced and the guidelines established in the authorities. In *Letvad*, this court adopted a list of factors to be considered from *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 19 B.C.L.R. (3d) 282 (C.A.), a decision that addressed the amendment of pleadings after the expiry of a limitation period. These factors include the extent of the delay, the reasons and any explanation for the delay, the expiry of a limitation period, the degree of prejudice caused by the delay, and the extent of the connection, if any, between the existing claims

and the proposed new cause of action: Teal Cedar at para. 67; Letvad at para. 29; see also Chouinard v. O'Connor, 2011 BCCA 161 at para. 21. In the context of adding parties, the last Letvad factor may be more accurately described as the extent of the connection, if any, between the existing claim and the parties to be added.

[25] The existence of a limitation defence is an important factor, as such a defence is extinguished if the proposed defendant is added: Limitation Act, R.S.B.C. 1996, c. 266, s. 4(1)(d), repealed and replaced with Limitation Act, S.B.C. 2012, c. 13, s. 22(1)(d); and Anonson v. North Vancouver (City), 2017 BCCA 205 at para. 13. However, this is not determinative. In Neilson Architects, this court adopted the following approach to considering a limitation defence (at para. 47):

If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in Letvad.

[42] Meade v. Armstrong (City), 2011 BCSC 1591 at para. 16 provides a summary of general principles for interpretation of Rules 6-2(7)(b) and (c):

- 1) A party should be added where that party's participation is necessary for the proper determination of the case ;
- 2) The discretion to add parties should be generously exercised so as to enable effective adjudication upon all matters ;
- 3) In exercising the discretion to add a party, the court should not concern itself as to whether the action will be successful other than to be satisfied that there may exist an issue or question between the applicant and the party being joined ;
- 4) Evidence is not required in support of a joinder application. The pleadings may be sufficient to establish that there is a question to be tried between the parties ;
- 5) Where an applicant relies on pleadings alone, the facts alleged, which if assumed to be true, must disclose a cause of action ;
- 6) Unless there is prejudice, amendments should be granted liberally to enable the issues to be tried .

[Citations omitted.]

[43] Section 22(1)(d) of the Limitation Act, S.B.C. 2012, c. 13 contemplates that new parties can be added or substituted as parties after expiry of the relevant limitation period:

22 (1) If a court proceeding has been commenced in relation to a claim within the basic limitation period and ultimate limitation period applicable to the claim and there is another claim (the "related claim") relating to or connected with the first mentioned claim, the following may, in the court proceeding, be done with respect to the related claim even though a limitation period applicable to either or both of the claims has expired:

(d) new parties may be added or substituted as plaintiffs or defendants.

[44] Factors the court considers when deciding whether to add a party after expiry of a limitation period are summarized in *Letvad v. Fenwick*, 2000 BCCA 630 at para. 29 and include:

- a) the extent of the delay;
- b) the reasons for the delay;
- c) any explanation put forward to account for the delay;
- d) the degree of prejudice caused by delay; and
- e) the extent of the connection, if any, between the existing claims and the proposed new cause of action.

[45] In *Chouinard v. O'Connor*, 2011 BCCA 161 at para. 21, the court of appeal noted this list is not exhaustive and the overriding concern is whether the proposed amendment would be "just and convenient". The decision is ultimately discretionary.

[46] When assessing passage of time after expiry of a limitation period, it is the time after expiry of the limitation period plus one year for serving the notice of civil claim that is relevant. See *Amezcuca v. Taylor*, 2010 BCCA 128 at para. 42 and *McIntosh v. Nilsson Bros. Inc.*, 2005 BCCA 297 at para. 8.

[47] In *The Owners, Strata Plan No. VIS3578 v. John A. Neilson Architects Inc.*, 2010 BCCA 329 ["Strata Plan VIS3578"] at paras. 47-48, the court of appeal sets out the proper approach to considering a possible limitation defence:

[47] The existence of a limitation defence is a relevant, but not determinative, factor in deciding whether to permit joinder, since the effect of s. 4(1)(d) of the Limitation Act is to extinguish such a defence if the proposed defendant is added. In *Brito (Guardian ad litem of) v. Wooley* (1997), 15 C.P.C. (4th) 255, [1997] B.C.J. No. 2487, Joyce J. set out a three step approach to considering a possible limitation defence, which was adopted by this Court in *Strata Plan LMS 1725 v. Star Masonry Ltd.*, 2007 BCCA 611, 73 B.C.L.R. (4th) 154 at para. 12. I summarize it as follows:

1. If it is clear there is no accrued limitation defence, the only question is whether it will be more convenient to have one or two actions since the plaintiff will be able to commence a new action against the proposed defendant if it is unsuccessful in the joinder application.

2. If it is clear there is an accrued limitation defence, the question is whether it will nevertheless be just and convenient to add the party, notwithstanding it will lose that defence. The answer to that question will emerge from consideration of the factors set out in *Letvad*.
 3. If the parties disagree as to whether there is an accrued limitation defence, and a court cannot determine this issue on the joinder application, the court should proceed by assuming that there is a limitation defence, and consider whether it is just and convenient to add the party, even though the result will be the elimination of that defence. If that question is answered affirmatively, an order for joinder should be made, and it becomes unnecessary to deal with the limitation issue since it will be extinguished by s. 4(1)(d) of the Limitation Act.
- [48] There is also a fourth option, an alternative to the third step, set out by Lambert J.A. in *Lui v. West Granville Manor Ltd.*, [1987] 4 W.W.R. 49, 11 B.C.L.R. (2d) 273 at 303 (C.A.) [Lui No. 2]. He suggested that when the limitation issue could not be determined on the joinder application, and the applicant had not established that considerations of justice and convenience justified extinction of the limitation defence under s. 4(1) of the Limitation Act, judicial discretion could be exercised to permit joinder on terms that the limitation defence would be preserved and determined at trial. That approach was considered and adopted in *Strata Plan No. VR 2000 v. Shaw*, [1998] B.C.J. No. 1086 (S.C.) [Shaw] and *Stone Venepal (Celgar) Pulp Inc. v. IMO Industries (Canada) Inc.*, 2008 BCCA 317, 83 B.C.L.R. (4th) 138.

Position of the Plaintiff

- [48] The plaintiff says it was always her intention that all potentially liable parties be named as defendants. She chose not to take an unduly broad scatter-gun approach by suing every doctor and nurse involved in Ms. Stutt's care during the relevant period. When the notice of civil claim was filed, care was taken to make judgment calls regarding who to name as a defendant based on what was evident in the available medical records.
- [49] Counsel says it was not clear which, if any, notes were taken by Dr. Chan as opposed to Dr. Chen during the First Attendance and which by Dr. Hung and Dr. Chan during the Second Attendance. It was not until the examination of Dr. Hung on February 23, 2023 that plaintiff's counsel appreciated that all physician notes during the Second Attendance had been completed by Dr. Hung or Dr. Moffat only.
- [50] A letter from VCHA dated March 31, 2023 confirmed that the plaintiff had received all charting and medical records from the RGH ER during the relevant treatment periods. It then became apparent that Dr. Chan had not made any notes during the portion of the Second Attendance that he was responsible for Ms. Stutt's care.

[51] Counsel argues that doctors have a positive obligation to take notes when they care for patients. Where the required charting was not completed, the court can draw an adverse inference that no care was provided, citing *Medina v. Wong*, 2018 BCSC 292 at paras. 105-106.

[52] Following discoveries, on April 11, 2023, plaintiff's counsel received production of an email between Dr. Hung and Dr. Chan in which Dr. Hung referenced a conversation she had had with Dr. Chan around the time of handover of Ms. Stutt's care:

"Weren't we saying that night that its always the people that seem just a bit off that are the ones we need to be most careful with?"

[53] Also included were text messages between Drs. Hung and Moffat in which Dr. Moffat commented regarding Ms. Stutt's status when she received handover of Ms. Stutt's care from Dr. Chan:

"Saw her around 8:30 when Richard signed her out to me. She had clinically complete T5 down motor and sensory loss by that time, so unfortunately things obviously changed overnight. I called Spine before the MRI and he said it would now still be faster to get the MRI at Richmond. Then I pushed radiology. MRI showed epidural abscess at T5 to T7. She was heading down to VGH by 1300. Hope she does OK.

[54] Counsel says these crucial facts were not discoverable until they received the text message, as there were no physician notes from Dr. Chan after he assumed responsibility for Ms. Stutt's care from Dr. Hung.

[55] Counsel argues there is a relatively low threshold for adding parties under sub-rule (c), namely a question or issue relating to or connected with any relief claimed in the proceeding or the subject matter of the proceeding. In this case the question or issue is whether the conduct of one or more medical professionals who cared for Ms. Stutt while she was at RGH falls below the applicable standard of care and are any such departures from the standard of care a "but for" cause of her permanent paralysis?

[56] Counsel argues Dr. Chan has likely been aware of the claim from the time Ms. Stutt served the notice of civil claim on RGH, Dr. Hung and Dr. Chen, given that they all work together.

[57] Counsel says there is no credible prejudice to Dr. Chan in terms of his ability to mount an adequate defence to the proposed claim. There is adequate time for him to instruct counsel, attend discoveries, make demands of the plaintiff and adequately prepare for trial. Counsel suggests the defences of all defendant physicians have a common controlling and instructing mind regarding the defence of the case, namely CMPA. All deny liability and make the usual defences regarding contributory negligence or non-tortious intervening events. Considering the responses to civil claim filed thus far, all defendants have an identical interest regarding liability, causation, prognosis and quantum of damages such that they will not be able to obtain individual, overlapping or duplicative expert opinion or conduct duplicative examinations for discovery regarding matters of common or aligned interest.

[58] The plaintiff says it is just and convenient to add Dr. Chan as a defendant. He was involved in the plaintiff's care during the First and Second Attendances.

Position of Proposed Defendant, Dr. Chan

[59] Dr. Chan says the application was filed well past the limitation date and that it is not just and convenient for him to be added as a defendant in the action.

[60] The limitation period started running on April 5, 2019. It normally would have expired on April 5, 2021. Due to the COVID-19 pandemic and Ministerial Order No. M086 pursuant to the Emergency Program Act, R.S.B.C. 1996, c. 111, s. 10, the limitation date was extended by one year, thus it expired April 5, 2022.

[61] With respect to the First Attendance, counsel argues that Dr. Chan's involvement in Ms. Stutt's care was clearly evident. His name appears on numerous documents in the RGH chart. Some handwriting is not clear, but there is a transcribed consultation note that he dictated on April 1, 2019 which identifies him, sets out his assessment of Ms. Stutt and his plan on handover to Dr. Chen. Counsel also notes that proposed amendments to the notice of civil claim include allegations Dr. Chan was negligent during the First Attendance. There is no reason those allegations could not have been raised much earlier.

[62] With regard to the Second Attendance, counsel says Dr. Chan's name appears on one page in the records initially produced to plaintiff's counsel. In the "Orders" column there is a handwritten note, apparently written by Dr. Hung, which I am told says "Handover, Dr. R. Chan". Counsel argues this was enough for plaintiff's counsel to recognize Dr. Chan's involvement during the Second Attendance, even if the extent of his involvement was not apparent. Counsel also notes that the discovery of Dr. Hung took place on February 23, 2023, at which time she testified regarding Dr. Chan's involvement. The present application was not filed until two months later, and no explanation has been offered for this delay.

[63] Counsel acknowledges that the copy of the RGH chart that plaintiff's counsel initially received was admittedly not very clear, but plaintiff's counsel received a much clearer copy on January 30, 2020. This is two years and four months prior to expiry of the extended limitation date.

Analysis

[64] The plaintiff applies under Rules 6-2(7)(b) and (c).

Rule 6-2(7)(b)

- [65] Sub-rule (b) is interpreted narrowly and focuses on remedying defects in the proceedings. The plaintiff has to establish either that the proposed defendant "ought to have been joined as a party" or that their "participation in the proceeding is necessary". I am not persuaded that the proposed addition of Dr. Chan can be characterized as falling under either of those categories.

Rule 6-2(7)(c)

- [66] Sub-rule (c) is broader and considers whether there may exist, between the person and any party to the proceeding, a question or issue relating to or connected with any relief claimed in or the subject matter of the proceeding. If so, I am to consider whether it would be just and convenient to determine those issues as between the person and that party.
- [67] The evidence tendered does establish that Dr. Chan was involved in and/or responsible for Ms. Stutt's care during significant portions of both the First and Second Attendances. His role and responsibilities are interrelated with and abut those of Dr. Chen during the First Attendance and Drs. Hung and Moffat during the Second Attendance. The proposed claim against him arises out of the same two assessments as the existing defendants. The proposed claim against Dr. Chan involves real issues which are not frivolous. I am satisfied that Ms. Stutt has pled a possible cause of action against Dr. Chan in the Revised ANOCC. He did not take issue with the adequacy of the amendments relating to him.
- [68] I am also satisfied that it would be just and convenient to decide the plaintiff's issues with Dr. Chan with the issues the plaintiff has as against the existing defendants. The claims all arise from Ms. Stutt's two attendances at RGH. They all arise from the same course of care she received during each of those assessments. It appears there will be many common issues and witnesses. It appears at least some of Dr. Chan's interests in terms of defending the plaintiff's claims are likely to have areas in common with positions that have been taken by Drs. Hung and Chen. The trial date is still sufficiently distant to allow Dr. Chan's counsel a reasonable opportunity to conduct discoveries, develop any desired expert evidence and prepare for trial.

Has the Limitation Period Expired?

- [69] It appears the limitation period with regard to Dr. Chan's involvement in the First Attendance has expired. Plaintiff's counsel argued that they were taking a selective approach to naming defendants which was based on an assessment of the available RGH chart. It is perhaps understandable that his role during the First Attendance might be perceived as potentially giving rise to a lesser prospect of liability given that it spanned the initial 6.5 hours of care. The plaintiff was, or ought to have been, aware of his involvement in Ms. Stutt's care by the time the RGH chart was produced.

- [70] I accept that Dr. Chan's role during the Second Attendance is more concerning and more difficult to discern from the RGH chart. His name, written in cursive handwriting which is, in my view, a challenge to make out, appears in just one location, on just one page. One of the key concerns that plaintiff's counsel raises is the absence of records during the 7.5 - 9.5 hours that Dr. Chan was the physician responsible for Ms. Stutt's care. It is understandable in the circumstances that plaintiff's counsel did not detect his involvement in and appreciate the significance of his acts or omissions during what appears to be a crucial period of Ms. Stutt's stay at RGH. If the limitation analysis was based solely on Dr. Chan's role in the Second Attendance, I would be inclined to the view that his apparent role was not reasonably discoverable until Dr. Hung's discovery.
- [71] The Revised ANOCC proposed by the plaintiff includes allegations relating to both the First Attendance and the Second Attendance. Arguably, allegations relating to the former could have been raised earlier, but it is understandable that viewed in isolation they make for a less compelling basis for pursuing a claim against Dr. Chan. When viewed in combination with the allegations arising from his late-discovered role during the Second Attendance, the rationale for pursuing a claim against him appears much more substantial.
- [72] As it is arguable whether the relevant limitation period has expired, I will proceed to consider the factors set out in Letvad.

Extent of the Delay

- [73] Passage of time after expiry of a limitation period is the time after expiry of the limitation period plus one year for serving the notice of civil claim. In this case, assuming the limitation period relating to Dr. Chan's involvement in the First Attendance began on April 5, 2019, the limitation period plus one additional day due to Ministerial Order No. M086, results in the limitation period expiring April 5, 2022. A further year is added for serving the notice of civil claim, taking this to April 5, 2023. The post-limitation period delay is about 50 days.
- [74] Dr. Chan's counsel argues that delay relating to the First Attendance be measured from when plaintiff's counsel received the RGH chart, namely July 17, 2019. Dr. Chan's involvement was apparent from those. Delay is thus almost four years.
- [75] I accept that it was the revelation of Dr. Chan's role and lack of records regarding care he provided during the Second Attendance which triggered Ms. Stutt's realization that Dr. Chan ought to be added as a defendant. I do not agree that Dr. Hung's brief handwritten note regarding passing Ms. Stutt's care to Dr. R. Chan was sufficient to put her or her counsel on notice of the extent and nature of his role. The realization came from Dr. Hung's examination for discovery on February 23, 2023. At this point, counsel had adequate information to determine that there was a reasonable basis for adding Dr. Chan as a defendant. The delay is thus about two months.

Reasons for the Delay / Explanation Put Forward to Account for the Delay

- [76] As noted, I have accepted that the critical delay for purposes of this application is delay from when plaintiff's counsel learned of Dr. Chan's role during the Second Attendance.
- [77] Plaintiff's counsel argued it was only when they received the March 31, 2023 letter from VCHA which confirmed they had received all RGH charting and medical records that it became apparent that Dr. Chan had not made any notes of care provided to Ms. Stutt during the Second Attendance. Counsel also points to the text message produced on April 11, 2023 which indicates Ms. Stutt's condition appeared to have worsened overnight.
- [78] While those two items added information, I do not agree they were essential for plaintiff's counsel to appreciate the possible claim against Dr. Chan. The key revelation came from the discovery of Dr. Hung. That delay in bringing the application was roughly two months. This delay, while not ideal, is also not excessive in the circumstances.

Degree of Prejudice Caused by Delay

- [79] The only prejudice Dr. Chan complains of is the loss of an accrued limitation period. This is relevant but is not determinative. There was no evidence tendered indicating Dr. Chan has suffered actual prejudice in terms of his ability to defend Ms. Stutt's proposed claim against him. Relevant RGH records relating to the First and Second Attendances have been preserved and produced. There is no evidence indicating that key witnesses having died, lost contact or lost their memory.

Extent of Connection, if any, Between Existing Claims and Proposed New Cause of Action

- [80] There is a close connection between the existing claims and the proposed claims against Dr. Chan.

Conclusion

- [81] For the foregoing reasons, I conclude it would be just and convenient to add Dr. Chan as a defendant to this action. I exercise my discretion to grant Ms. Stutt's application to add him as a defendant despite the loss of an accrued limitation defence.
- [82] The plaintiff also seeks leave to file the Revised ANOCC attached as Appendix "A" to her application. Dr. Chan did not raise any specific objections to the draft pleading in his application response or in oral argument. Leave is granted.
- [83] With regard to costs, Ms. Stutt has been successful on her application. She is entitled to costs from Dr. Chan.

"Master Bilawich"

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