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Opportunity Lost

By Alice Woolley

Cases Considered:

Hughes (Estate) v. Brady, 2009 ABCA 187

In an earlier post (Conflicting Interests, Conflicting Judgments and the Ethical Obligations of Lawyers and Judges) I commented on Justice Alan Macleod's dismissal in part of Lawrence Hughes' lawsuit against Shane Brady and David Gnam. Mr. Hughes' lawsuit was brought in his capacity as the Administrator ad litem of the estate of his daughter Bethany Hughes, who died of cancer in 2002. Bethany Hughes was a mature minor and had been raised as a Jehovah's Witness. Ms. Hughes sought to resist blood transfusions necessary for the treatment of her cancer. She was unsuccessful in doing so because it was found by Justice Adele Kent that she had been subject to undue influence from those around her, such that she could not make an independent and informed choice about the matter (*B.H. (Next friend of) v. Alberta (Director of Child Welfare)*, 2002 ABQB 371). Mr. Hughes' lawsuit was based on a number of allegations against Mr. Gnam, Mr. Brady, the Watch Tower Bible and Tract Society of Canada and others. Mr. Hughes alleged, inter alia, that Mr. Gnam and Mr. Brady had been in an improper conflict of interest in their representation of Ms. Hughes and that they had violated obligations of confidentiality owed to her.

Macleod J. granted Mr. Gnam and Mr. Brady's application for summary judgment on the conflicts and confidentiality allegations (*Hughes Estate v. Hughes*, [2008] A.J. No. 739 (Q.B.) (Q.L)). In my earlier post I was highly critical of this decision. My main issues were, first, that Macleod J. did not take into account the factual findings made by Kent J. in 2002 about Ms. Hughes' ability to make an informed decision about medical treatment and about the undue influence to which Ms. Hughes was being subjected. Second, Macleod J. did not consider the law on conflicts of interest properly. He emphasized the issue arising from Mr. Gnam and Mr. Brady's personal beliefs as Jehovah's Witnesses; however, the far more significant conflicts issue in fact arose from Mr. Gnam and Mr. Brady's contemporaneous representation of the Watch Tower Society. The fact that Watch Tower had an interest in a specific legal outcome in Ms. Hughes' litigation, which may or may not have been aligned with her interest, created an impossible to overcome violation of their loyalty obligations to her as their client. The primary obligation of lawyers to a client like Ms. Hughes is to ensure that she is able to identify her legal interests freely and without undue influence - that she is able to identify her own ends and then pursue them within what the law permits. Given Mr. Gnam and Mr. Brady's long standing

representation of the Watch Tower Society, there is significant reason to doubt their ability to have done this relative to Ms. Hughes. Third, at various points, particularly on the confidentiality issue, Macleod J. placed weight on a presumption that "members of the Bar will honour their oath of office, in the absence of evidence to the contrary" (at para. 33). The basis for this position is dubious. Members of the Bar should be subject to no particular favour in this respect but should, like other litigants, be required to demonstrate the validity of their position on the balance of probabilities taking into account the totality of the evidence.

On May 25, 2009 the Alberta Court of Appeal (Justices Marina Paperny, Clifton O'Brien and Jack Watson) denied Mr. Hughes' appeal of Macleod J.'s decision, upholding the granting of summary judgment to Mr. Gnam and Mr. Brady on the conflicts and confidentiality issues. The Court held that there was no "extricable error of law nor any palpable and overriding error of fact on the part of the chambers judge in connection with the claims that he dismissed" (para. 13). The Court did not decide "whether the claims of conflict or misrepresentation were arguable on the available evidence" (para. 13); however, it held that there was a sufficient basis for the chambers judge to "conclude that the claim of causation of harm to Bethany resulting from either the legal or medical advice she received… was doomed to fail" (para. 13). It also declined to re-appraise the evidence related to the confidentiality issue. In other words, the Court was satisfied that Macleod J. had a sufficient basis for concluding that Bethany did not suffer any loss even if her lawyers were in a conflict, with the result that the Court did not have to consider whether the advice she received was conflicted.

The Court's decision to narrow its review of Macleod J.'s judgment in this way is disappointing. The numerous legal errors in that decision, and its dubious factual underpinnings, warranted consideration by the Court. Lawyers and future litigants should have been given some positive indication that representation of clients with interests who conflict in this way is improper. The issue here has significance beyond the tragic death of Bethany Hughes. As recently as 2007 Mr. Brady was representing the parents of Vancouver sextuplets who were apprehended by the state to ensure they received medically necessary blood transfusions (Tom Blackwell, "Witness for the family: Debate over role of sextuplet case lawyer" National Post, February 10, 2007). Representation of adults does not raise the same issues as does representation of a minor such as Ms. Hughes, but it does suggest that the contemporaneous representation by Mr. Gnam and Mr. Brady of Watch Tower and of church members was not a one off, and is a matter of ongoing significance and concern.

Moreover, the stakes in a case like this are extraordinarily high. On the one hand, an individual who may well have the capacity to make the decision to risk death rather than violate her religious beliefs loses the strength of an impartial advocate to help her formulate her position and bring it forward. Ironically in this case, if Ms. Hughes had had such an advocate, and had maintained the same position, she might have succeeded in resisting the transfusions. That she was unable to do so was in part a result of Kent J.'s perception that she was not being left to formulate a position on her own. On the other hand, an individual who does not have that capacity remains unprotected from those who have interests and beliefs of their own, and will seek to control and influence her actions. She loses the benefit of legal advice designed to help

her formulate her own position and decide where her legal interests lie. Would her course of treatment have been as stressful and difficult for her had she been able to receive independent counsel and decide that it was in her interests?

With respect to the failure of Macleod J. to even note the prior decision of Kent J., the Court states that the "issue at that time was not identical to that which was before the chambers judge" (para. 6). This may be true in relation to, say, an argument of issue estoppel or res judicata. However, the facts relevant to Kent J.'s determination of Bethany's capacity to make a proper decision on her health ***are*** relevant and significant to the determination of whether her decision to forego a blood transfusion was so freely made as to remove any conflict between her and Mr. Gnam and Mr. Brady's other client, the Watch Tower Society. The Court ignores this problem. It does not even acknowledge that Macleod J. did not reference Kent J.'s judgment, and gives no consideration whatsoever to his otherwise dubious analysis of the conflicts issue.

Moreover, it seems artificial to separate the determination that causation of harm cannot be shown from the determination of the substantive legal issue on conflicts. What is "harm" in a case like this? Does it begin and end with whether or not she received the blood transfusion? This seems a tremendously narrow characterization of harm. Could harm not also include such matters as wasted legal fees, the fact that she was required to receive blood transfusions that may have violated her religious beliefs because her capacity to decide on her own health care was undermined by the actions of those around her, the absence of palliative care she might have received had she not been exploring alternative treatments such as arsenic injections and Vitamin C, and the interruption of her relationship with her father in the last days of her life? And even if the harm could be measured as financially minimal - if, for example, the legal fees she paid were small - what about punitive damages or other judicial remedies? To uphold Macleod J.'s decision that the evidence demonstrated no causation of harm, when the rest of his judgment was so flawed, takes appellate deference to a level it should not go.

At the end of the day, all Mr. Hughes is requesting is a trial, a determination of the full factual and legal issues related to Mr. Gnam and Mr. Brady's representation of Bethany. To deny him that right based on deference to Macleod J.'s highly problematic decision is wrong.