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The Spectre of Personal Liability for Guardians of Dependant Adults

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Cases Considered:

Smorag v. Nadeau, 2008 ABQB 714

The decision in *Smorag v. Nadeau* is noteworthy because the Workers' Compensation Board (WCB) argued that the defendant was personally liable for a health care decision she made in her role as the guardian of an adult who lacked the mental capacity to make that decision for herself. Madam Justice June Ross appears to have accepted this novel argument. She found that the *Dependant Adults Act*, R.S.A. 2000, c. D-11, under which the defendant had been appointed guardian and granted the power to make health care decisions for the dependant adult, did not protect the defendant from personal liability. Although Justice Ross did, in the end, strike down the lawsuit against the defendant personally, she did so only because she was not prepared to find a duty of care owed by the defendant to an employee of the extended care facility where the dependant adult resided. That part of the decision - an *Anns* analysis - raises some interesting issues in itself. However, I want to focus on the fact that the law suit against the defendant in her personal capacity got as far as the *Anns* analysis. I will also look at whether Bill 24, the new *Adult Guardianship and Trusteeship Act*, S.A. 2008 c. A-4.2 that will replace the *Dependant Adults Act* later this year, removes the spectre of personal liability for guardians.

The reasons Justice Ross thought a person who makes decisions in her role as a guardian for a dependant adult could be sued personally for those decisions are important for a number of reasons. The idea that they might be personal liable will likely have some sort of chilling effect on guardians and potential guardians and their decision making, even though the claim against this defendant personally was dismissed. Equally important in the long run is that her reasons would apply to the stronger protection against liability for guardians that is granted by the new *Adult Guardianship and Trusteeship Act*. The reasons that Justice Ross gave for saying that the indirect protection for guardians in the *Dependant Adults Act* did not stop the defendant from being sued personally would also apply to make the more direct and explicit protection from law suits in the yet-to-be-proclaimed *Adult Guardianship and Trusteeship Act* equally irrelevant.

Smorag v. Nadeau is a personal injury action by an employee of the Bonnyville Extended Care Facility, although it was actually the WCB which was prosecuting the action on behalf of the plaintiff, Margaret Smorag. The injury happened during the course of Ms. Smorag's employment at the Facility and the WCB was pursuing its subrogated claim. (In Alberta, when a worker is

entitled to workers' compensation benefits, the WCB is automatically subrogated to the worker's right of action, meaning that they may bring an action on behalf of the worker and in the name of the worker: see the *Workers' Compensation Act*, R.S.A. 2000, c. W-15, s. 22). The person who allegedly injured Ms. Smorag was not named as a defendant. It was alleged that Angele Alice Nadeau, now deceased, had pushed Ms. Smorag, causing the plaintiff to fall, hit her head and lose consciousness. However, Ms. Nadeau was a dependant adult at the time of the alleged assault. The persons named as defendants were Herve Nadaeau, as himself and as Ms. Nadeau's trustee, and Yvonne Nadeau, as herself and as Ms. Nadeau's guardian. Yvonne Nadeau was being sued on the basis that she was negligent in withholding consent to an increase in the dependant adult's medication. It was alleged that she had been warned on several occasions that increased medication was necessary to control the dependant adult's behaviour, which was characterized as "disruptive and potentially violent."

This decision of Justice Ross is the result of Yvonne Nadeau's application under Rule 159 of the Alberta Rules of Court, Alta. Reg 390/68, to dismiss the plaintiff's claim. The defendant, Yvonne Nadeau, argued that the allegations that she was negligent in withholding consent to the increase in the dependant adult's medication could only be made against her in her role as guardian, and not in her personal capacity. And in her capacity as guardian, the defendant argued that the plaintiff's lawsuit was barred by s. 10(5) of the *Dependent Adults Act*.

Finally, and probably in the alternative, the defendant argued that, before negligence could be found against her personally, the plaintiff had to demonstrate that she owed the plaintiff a duty of care. The defendant lost all of these arguments except this last one. Justice Ross refused to impose a duty of care on the defendant in her personal capacity. Justice Ross' decision ends with the following words (at para. 62): "I therefore . . . dismiss the claim against Yvonne Nadeau personally for her actions as Guardian of Angele Alice Nadeau." Noting that a guardian has an express statutory duty to make health care decisions in the best interests of the dependant adult - section 10(3)(h) of the *Dependant Adults Act* - Justice Ross held (at para. 54) that imposing a duty of care on the guardian towards the plaintiff could create a conflict of interest for the guardian. Instead of making decisions in the best interests of the dependant adult, the guardian might make decisions to protect herself form being sued by the dependant adult's health care providers. Justice Ross also recognized (at para. 57) the broader policy considerations that mitigated against imposing a duty of care on the guardian: "This could well have a chilling effect on whether people would be prepared to act as a Guardian, a negative effect on society generally." Why this talk of imposing duties of care on a guardian are relevant to the defendant being liable is not that clear to me.

Those familiar with the law of torts will recognize that Justice Ross was using the (in)famous *Anns* analysis. The Supreme Court of Canada set out the process to be used to determine whether a novel duty of care should be imposed in *Cooper v. Hobart*, [2001] 3 S.C.R. 537, 2001 SCC 79, adapting the English decision in *Anns v. Merton London Borough Council*, [1978] A.C. 728. As I have already noted, I am not concerned with the *Anns* analysis in this post, and so I will leave it to others to try to make sense of how it is applied in this case and to whom. What I would like to focus on now is Justice Ross's dismissal of the defendant's first two arguments: that she could

only be sued as guardian and not personally, and that, as guardian, she was protected by section 10(5) of the *Dependant Adults Act*. I think these are good arguments. And had these arguments succeeded, the *Anns* analysis would not have been necessary.

Was the defendant sued by the plaintiff in her personal capacity or in her capacity as guardian?

In what capacity was the plaintiff, Yvonne Nadeau, sued? The Statement of Claim named both "Yvonne Nadeau, Guardian of the Estate of Angele Alice Nadeau" and "Yvonne Nadeau." While noting that counsel for the parties had argued about whether the defendant was sued in her personal capacity or in her capacity as guardian, Justice Ross held (at para. 7) that this argument "misses the basic premise regarding capacity." What is the basic premise? I need to quote Justice Ross at some length on this (at paras. 7 to 9) as her point is a difficult one to understand:

> [7] . . . The Statement of Claim alleges that the Defendant was negligent in carrying out her duties vis-a-vis a third party. In that sense, she is sued as the Guardian of the Dependent Adult; the entire basis of the claim against her is premised on her actions as guardian. However, that does not mean she is sued in her capacity as Guardian of the Dependent Adult. She is sued in her personal capacity for decisions she made as Guardian. (emphasis in the original)
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> [8] The Alberta Court of Appeal has discussed the meaning of the "capacity" in which persons are sued in *Crane v. Brentridge Ford Sales Ltd.*, 2008 ABCA 216 at para. 12:
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> > In our view, the word "capacity" refers to whether the named party sues or is sued on its own behalf, or merely as a representative for someone else, such as an executor or next friend. . . .
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> [9] The claim against "Yvonne Nadeau, Guardian of the Estate of Angele Alice Nadeau," is a claim against Yvonne Nadeau as representative of Angele Alice Nadeau for Angele Alice Nadeau's actions, not for her own actions. The claim against Yvonne Nadeau personally is the only claim related to Yvonne Nadeau's alleged negligence.

Let me try to summarize this account of capacity in this lawsuit. First, Yvonne Nadeau was being sued as a representative of Angele Alice Nadeau for Angele Alice Nadeau's alleged assault on the plaintiff; she was wearing her "guardian" hat for the assault claim and, if the claim was proven, the Estate of Angele Alice Nadeau would pay the damages. Second, Yvonne Nadeau was being sued on her own behalf for her allegedly negligent refusal to consent to an increase in Angele Alice Nadeau's medication; she was wearing her plain "Yvonne Nadeau" hat for this negligent decision making claim and, if the claim was proven, Yvonne Nadeau would pay the damages.

If that is an accurate summary, then I don't get it. How can Yvonne Nadeau be personally responsible for a decision she could only make as guardian of Angele Alice Nadeau?

What does Justice Ross mean in paragraph 7 when she concedes that "the entire basis of the claim against [the defendant] is premised on her actions as guardian" but states that does not mean the defendant is sued in her capacity as guardian? Is it possible, logically, to say that the defendant "is sued in her personal capacity for decisions she made as Guardian"? Is the lower case "guardian" different than the upper case "Guardian"? Again, the only reason the defendant could make health care decisions for someone else was because she was appointed by the courts as the guardian of that other person. The defendant could not, in her personal capacity, make such decisions. And the only health care decisions the defendant could make for that other person are, to quote section 10(3)(h) of the *Dependant Adults Act*, those that are "in the best interests of the dependant adult." Yet the WCB did not appear to be alleging that the decision that the defendant made was not in the best interests of the dependant adult. They appeared to be saying that the defendant was negligent in refusing to accept certain medical advice. But it was her decision as a guardian that was allegedly negligent. As Yvonne Nadeau in her personal capacity, what could she say about Angele Alice Nadeau's medication? Nothing. If she was not the guardian, the medical staff at the extended care facility would not need to listen to her on the topic of an increase in medication.

It is to be regretted that the four paragraph discussion of the capacity in which the defendant was sued is not clearer. If the Guardian/guardian differentiation in paragraph 7 was intentional and was meant to distinguish actions made wearing one hat from actions made wearing a different hat, the point should have been made explicitly. It also makes it difficult to understand the *Anns* analysis because Justice Ross keeps referring to the relationship between the "Guardian" and the plaintiff, rather than the relationship between the defendant and the plaintiff or between the plaintiff and Yvonne Nadeau in her personal capacity.

Section 10(5) of the *Dependent Adults Act*

The defendant had argued that section 10(5) of the *Dependent Adults Act* barred the action against her. That subsection provides:

> (5) Any decision made, action taken, consent given or thing done by a guardian with regard to any matter in respect of which the guardian is appointed guardian is deemed for all purposes to have been decided, taken, given or done by the dependent adult as though the dependent adult were an adult capable of giving consent.

Justice Ross notes that section 10 is the section of the *Dependant Adults Act* that sets out the powers that a court can grant a guardian, such as the power under section 10(3)(h) to consent to health care that is in the bets interests of the dependant adult. As such, she holds (at para. 27) that subsection 10(5) "should be read as setting out the extent of the guardian's authority, not as limiting a third party's right to sue the guardian for negligence." She concludes (at para. 30) that

"the proper interpretation of the section is that it constitutes an assertion that a guardian's decision, act or consent on behalf of a dependent adult cannot be challenged on the basis that they were not made by the dependent adult."

Is this limited interpretation of section 10(5) correct? To paraphrase Justice Ross at para. 30 and the sentence just quoted, "the proper interpretation of the section is that it constitutes an assertion that Yvonne Nadeau's refusal to consent to an increase in Angele Alice Nadeau's medication cannot be challenged on the basis that it was not made by Angele Alice Nadeau." How can a third party sue Yvonne Nadeau for negligence in refusing to consent to an increase in Angele Alice Nadeau's medication if that refusal was Angele Alice Nadeau's refusal under section 10(5)?

It is true that the protection afforded a guardian by section 10(5) is an indirect protection. Nevertheless, it should protect a guardian who acts within the scope of her authority under the Act. (And so should Saskatchewan's *Adult Guardianship and Co-decision-making Act*, S.S. 2000, c. A-5.3, section 24(1) which is a very similar provision.) A guardian can only make decisions as a representative of a dependant adult and is protected from personal liability by section 10(5) deeming those decisions to be those of the dependant adult. The consequences of negligent decisions would be paid for by the dependant adult's estate. After all, section 10(5) says the dependant adult is the one who consented or refused consent to the increase in medication.

In other jurisdictions, substituted consent is usually protected if carried out in accordance with the relevant legislation. And that protection for liability is usually effected by deeming the consent to be that of the person lacking capacity. See J. A. Devereux, "Guardianship and Consent", in *Epilepsy: A Question of Ethics*, by Roy G. Beran (Yozmot Heiliger, 2002) 55 at 59.

The only apparent good news in this part of the judgment is that Justice Ross notes (at para. 28):

> Had the Legislature intended to limit the Guardian's liability as to third parties for decisions he or she makes, it could have said so expressly. Such provisions are routinely found in Alberta legislation, using such language as in the *Child, Youth and Family Enhancement Act*, c. C-12:
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> > 3.1(5) No action may be brought against a person who conducts alternative dispute resolution under this section for any act done or omitted to be done with respect to the alternative dispute resolution unless it is proved that the person acted maliciously and without reasonable and probable cause.

The new *Adult Guardianship and Trusteeship Act* contains a liability provision similar to the one quoted by Justice Ross, but worded positively in terms of "good faith" rather than negatively in terms of "maliciously." It is to the question of whether the new Act will protect guardians from personal liability that I want to turn now.

Does the new *Adult Guardianship and Trusteeship Act* protect guardians from personal liability?

The new *Adult Guardianship and Trusteeship Act* is the result of a review that included consultation with over 4,300 Albertans. It is part of the third wave of reform in the areas of adult guardianship and substituted decision making since the early 1970s (see Robert M. Gordon, "The Emergence of Assisted (Supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making" (2000) 23 International Journal of Law and Psychiatry 61). One of the major improvements is the broad range of choices it introduces. Under the current Act, lack of decision-making capacity is a fairly black-and-white matter; either one has capacity or one does not. The new Act recognizes that losing capacity is often a gradual process, or one that affects certain types of decisions, but not all. Instead of guardianship being the only choice, with a guardian making decisions for the adult who lacks capacity, court recognition for supported decision making and co-decision making, as well as for guardianship and trusteeship, will be available. In addition, the new Act will provide for obtaining one-time consent to health care treatment and to health care placement. Those assisting adults lacking capacity are also given more direction as to what to consider when making a decision with or for an adult lacking capacity.

Section 10 of the new *Adult Guardianship and Trusteeship Act* protects those who support others in decision making, section 23 protects co-decision makers, and section 42 protects guardians. All three provisions are essentially worded the same way, so I will focus on section 42, the one that appears to grant a guardian immunity from lawsuits if they have acted in good faith:

> 42 No action lies against a guardian for anything done or omitted to be done in good faith while exercising the authority or carrying out the duties and responsibilities of the guardian in accordance with this Act.

A guardian who acts in good faith may be negligent, but as long as they act in good faith and while carrying out their duties, they cannot be sued - as a guardian. Section 42 provides that "No action lies against a guardian . . .". Would Yvonne Nadeau have been protected by s. 42 of the new *Adult Guardianship and Trusteeship Act* had it applied? Or would the WCB have still been able to sue her personally and have the intended liability protection rendered irrelevant? Given the reasons set out by Justice Ross, I do not see how section 42 would have protected Yvonne Nadeau any better than did section 10(5) of the *Dependant Adults Act*. Once the decision is made that someone is sued in his or her personal capacity for decisions they made as a representative, protection of their decisions as representatives are beside the point.

I could not find any discussion of why the indirect protection of section 10(5) of the *Dependant Adults Act* was replaced by the direct protection of sections 10, 23 and 42 of the new *Adult Guardianship and Trusteeship Act*. I saw nothing about it in the Hansard discussions of Bill 24 as it proceeded through the legislature. There was nothing in the Final Report and Recommendations of the Legislative Review of the *Dependent Adults Act* and the *Personal Directives Act* discussing the need for immunity from lawsuits, nor was it in the

Feedback from the Detailed Questionnaire for Stakeholders, part of the consultation process. However, the legislative review process also included examination of equivalent legislation in other Canadian jurisdictions and internationally. Not all such legislation immunizes family and friends appointed to make health care and other decisions on behalf of adults lacking capacity. Manitoba's does, providing in section 79 of the *Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, that "No proceeding for damages shall be commenced against a substitute decision maker for personal care for anything done or omitted in good faith in connection with his or her powers and duties under this Act."

The 30-year-old *Dependant Adults Act* is supposed to be retired by the end of this year. Its replacement, the new *Adult Guardianship and Trusteeship Act* promises to be better for adults who lack the capacity to make personal or financial decisions and better for their families and friends than the current *Dependant Adults Act* in a number of ways. If, however, it does not do away with the spectre of personal liability for guardians and other substitute decision makers, then the new Act will be off to a bad start. Rather than encouraging family members and friends to participate officially and under the auspices and with the safeguards of legislation, people may be more reluctant to undertake the burden of decision making with and for others, especially others with whom they are not very close. And that would be a shame because the *Adult Guardianship and Trusteeship Act*, the result of a lengthy consultation process, has much promise for a better future in this growing area of law.