

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Doug Wood by his Litigation Guardian the Public Guardian and Trustee et al.,  
Plaintiffs

**AND:**

Dr. David Mitchell et al., Defendants

**BEFORE:** Master P. Tamara Sugunasiri

**COUNSEL:** Veel, P-E., Counsel for the Drs. Mitchell, Huebel, Farrington, Shainhouse,  
Vasilou, Jyu and Javanmard, Defendants/Moving Parties (“Defendant Doctors”)

McFarlane, B., Counsel for Thomas McQueen in his own capacity and as Estate  
Trustee of Doug Wood/Responding Parties

Bourrassa, A., Counsel for Dr. Dingra

**HEARD:** November 29, 2019

**LONG ENDORSEMENT**

**Overview:**

- [1] This is a medical negligence action arising from medical treatment and care provided to the late Mr. Wood in August and September of 2007. The Plaintiffs commenced the action on August 7, 2009. At that time, they were represented by Thomson Rogers. In 2011 Master Hawkins removed Thomson Rogers as the Plaintiffs’ solicitors. In 2012, Master Haberman appointed the Public Guardian and Trustee as Mr. Wood’s litigation guardian. Later that year, the Plaintiffs moved to add the Defendant Doctors to the action. They alleged that the limitation period did not begin to run until Master Haberman appointed a litigation guardian in February of 2012. This is because Mr. Wood was an incapable person not represented by a litigation guardian under section 7 of the *Limitations Act*.
- [2] Ultimately the Defendant Doctors consented to adding the Defendant Doctors to the action without prejudice to them raising a limitations defence. The Plaintiffs amended the original Claim, the Defendant Doctors defended, and the parties moved on to discoveries. At the Plaintiffs’ discovery, the Defendant Doctors explored the limitations issue. In their view, the communications with counsel prior to issuing the Claim are relevant to the issue of Mr. Wood’s capacity and whether Mr. McQueen was his *de facto* litigation guardian. The Plaintiffs refused to answer questions about their communications with Thomson Rogers (“TR”) and to provide TR’s file.

[3] The sole issue before me is whether the Defendant Doctors are entitled to disclosure of TR's file. The balance of the motion seeking answers to refusals was adjourned on consent pending my determination on this issue. I dismiss this portion of the Defendant Doctors' motion. TR's file is not relevant to the limitations issue. As I have decided this motion based on relevance, I need not decide whether Mr. McQueen has waived his solicitor-client privilege over the file.

**Analysis:**

[4] The parties' dispute arises as a result of section 7 of the *Limitations Act* which states that the limitation period does not start to run where a person is incapable of commencing a proceeding because of his physical, mental or psychological condition and is not represented by a litigation guardian. The section also includes a presumption of capacity unless the contrary is proved.

[5] The Defendant Doctors plead in their defence that the claim against them is out of time because Mr. Wood was capable of commencing a proceeding prior to February of 2012 or was incapable but was represented by a litigation guardian. Mr. McQueen retained Thomson Rogers on November 1, 2007 "to investigate the alleged malpractice and to commence a lawsuit and generally conduct the said matters in all respects." Ultimately, Thomson Rogers commenced an action naming Mr. Wood as a Plaintiff without a litigation guardian. This, the Defendant Doctors argue, was either done negligently or without authority, or Mr. McQueen was Mr. Wood's *de facto* litigation guardian. In any event, the Defendant Doctors assert that the contents of the TR file will shed light on Mr. Wood's capacity and whether Mr. McQueen was his *de facto* litigation guardian prior to February of 2012.

***TR file is irrelevant to issue of Mr. Wood's capacity***

[6] According to subsection 7(2) of the *Limitations Act*, a plaintiff is presumed to have capacity to commence a proceeding. I agree with the Defendant Doctors that the onus is on the Plaintiffs in this action to establish Mr. Wood's incapacity at the time Thomson Rogers commenced the action. The Plaintiffs offer numerous medical reports and Mr. McQueen's evidence as to his brother's condition. As noted by Justice Archibald in *Huang v Pan*, 2016 ONSC 6306 at para. 25, mental capability is decided largely on "recent" medical evidence. In this case, the relevant documents is the medical evidence available prior to February of 2012. If, as the Defendant Doctors argue, there are deficiencies or gaps in the medical evidence, that is to the detriment of the Plaintiffs. They run the risk of failing to prove Mr. Wood's incapacity prior to February of 2012.

[7] What counsel at Thomson Rogers thought was Mr. Wood's capacity can be a factor in the calculus (*Huang* at para. 20). It does not warrant disclosure of TR's entire file. Even if the Defendant Doctors persuaded me that Mr. McQueen has waived privilege over the entire file by revealing some of his communications with counsel and as a result of the solicitor's negligence suit against Thomson Rogers, it is still incumbent on the court to jealously protect solicitor-client privilege unless it is unfair to do so (*Roynat Capital Inc. v Repeatseat Ltd.*, 2015 ONSC 1108 at paras. 64 & 84 (DC)). Given the existing medical

evidence and the reality of the Plaintiffs' burden to prove incapacity, it is not unfair to protect Mr. McQueen's privilege over TR's file. At best Mr. McQueen can search the TR file and advise if there were any capacity assessments of Mr. Wood prior to issuing the Claim. If there were, he should produce it.

***TR's File is irrelevant to the issue of whether Mr. McQueen was de facto litigation guardian***

- [8] The Defendant Doctors argue that the TR file might shed light on whether Mr. McQueen was a *de facto* litigation guardian for Mr. Wood prior to February of 2012 when Master Haberman appointed the PGT. The Ontario Court of Appeal's decision in *Azzeh (Litigation Guardian of) v Legendre*, 2017 ONCA 385 at paras. 29-34 puts this argument to rest. The Court of Appeal establishes that:
- a. A person's "representations" on behalf of an incapable person to his solicitor does not make that person a *de facto* litigation guardian (para. 31); and
  - b. It is only when a person represents himself as a litigation to the defendants or others that he can be considered a litigation guardian despite not filing an affidavit as required by r. 7.02(2) (para. 34).

- [9] Therefore, whatever discussions or representation Mr. McQueen may have made to Thomson Rogers is irrelevant to the question of whether Mr. McQueen was Mr. Wood's *de facto* litigation guardian in February of 2012. In other words, even if Mr. McQueen did represent himself to counsel that he was representing Mr. Wood, that does not make him a *de facto* litigation guardian. The relevant consideration is whether Mr. McQueen represented himself to the any of the defendants as Mr. Wood's litigation guardian.

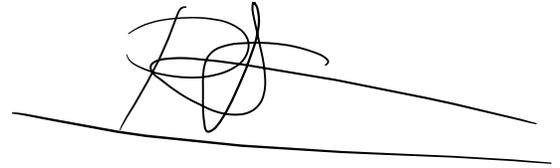
**Disposition:**

- [10] I dismiss the Defendant Doctors' motion to obtain TR's file. I order the Plaintiffs to search the file to determine if there are any medical capacity assessments of Mr. Wood prior to commencing the action or any time before they were removed as solicitors of record.
- [11] The balance of the motion is adjourned *sine die*. If the parties require adjudication on the refusals, they may obtain a mutually convenient date on one my regular motions lists.

**Costs:**

- [12] I strongly urge the parties to agree on costs. If they are unable to do so, the Plaintiffs may deliver their costs outline and three-pages, double-spaced of submissions by February 14, 2020. They may file those materials at the Masters' Administration on the 6<sup>th</sup> floor of 393 University Avenue. The Defendant Doctors may respond within the same parameters by

February 28, 2020. The Plaintiffs may deliver a Reply of no more than two-pages double-spaced by March 6, 2020.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Master Sugunasiri

**Date:** January 29, 2020