CITATION: Ouanounou v. Humber River Hospital et al, 2017 ONSC 6511
COURT FILE NO.: CV-17-58553
DATE: 2018/11/09

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: SHALOM OUANOUNOU, BY HIS SUBSTITUTE DECISION-MAKER AND LITIGATION GUARDIAN, MAXIME OUANOUNOU

AND:

HUMBER RIVER HOSPITAL, ALI GHAFOURI, GARRET PULLE, SANJAY MANOCHA, DR. DAVID GIDDONS, CORONER and OFFICE OF THE CHIEF CORONER

AND:

B'NAI BRITH OF CANADA LEAGUE FOR HUMAN RIGHTS, VAAD HARABONIM OF TORONTO, CENTRE FOR ISRAEL AND JEWISH AFFAIRS, THE EUTHANASIA PREVENTION COALITION AND EUTHANASIA PREVENTION COALITION – BRITISH COLUMBIA

BEFORE: Hainey J.

COUNSEL: *Hugh Scher and Mark Handelman* for the Applicant, Shalom Ouanounou, by his Substitute Decision-Maker and Litigation Guardian, Maxime Ouanounou

Erica J. Baron and Christine Wadsworth for the Respondents, Ali Ghafouri, Garret Pulle and Sanjay Manocha

Daphne Jarvis and Ewa Krajewska for the Respondent, Humber River Hospital

Charles Wagner, Brendan Donovan and Rachael Kwan for the Intervenors, B'nai Brith of Canada League for Human Rights, Vaad Harabonim and Jewish Affairs

John Campion and Stephanie Clark for the Intervenors, The Euthanasia Prevention Coalition and Euthanasia Prevention Coalition-British Columbia

HEARD: November 1, 2017; December 19, 2017; February 12 and 13, 2018

ENDORSEMENT

BACKGROUND

[1] This is a tragic case. Shalom Ouanounou was a devout Orthodox Jew. On September 27, 2017, Shalom experienced an asthma attack at home. He was transported by ambulance to

Humber River Hospital where he was intubated and placed on ventilator life support. On September 30, 2017, Shalom was determined to have met the guidelines for death by neurologic criteria ("brain death") by Dr. Ali Ghafouri and Dr. Garret Pulle, both critical care physicians at the hospital. Shalom's death was subsequently certified by the coroner, Dr. David Giddons, who issued a death certificate dated September 30, 2017 (the "first death certificate").

[2] Following Shalom's brain death his family had discussions with the staff at Humber River Hospital. They explained that in accordance with Shalom's and their religious beliefs, Shalom was not considered to be dead under Jewish law until he stopped breathing and his heart stopped beating. Neither had occurred because he was on ventilator life support.

[3] Shalom's family requested that the hospital continue ventilator life support for Shalom. After extensive consultation between hospital staff and Shalom's family, Dr. Sanjay Manocha, the medical director of the Intensive Care Unit, advised Shalom's family in a letter dated October 26, 2017, that the hospital intended to remove Shalom's ventilator life support on November 2, 2017.

[4] As a result, Maxime Ouanounou, Shalom's father and his substitute decision-maker and litigation guardian (the "applicant"), commenced this application seeking, among other things, an injunction to prevent the hospital from withdrawing his ventilator life support.

[5] In the notice of application filed October 31, 2017, it was argued that Jewish law only recognizes death as the cessation of breathing and heartbeat. According to Shalom's religious beliefs, a declaration of death by neurologic criteria does not constitute death. In the notice of application, the applicant sought the following relief:

> (a) an Order for an Interlocutory Injunction … restraining the Respondents from withdrawing life support measures including mechanical ventilation, food and fluids, from Shalom Ouanounou … who is a patient in the intensive care unit of Humber River Hospital, pending a determination on the main Application or until a decision is rendered by the Consent and Capacity Board pursuant to the *Health Care Consent Act, 1996*;[1]
>
> (b) an Order to rescind the death certificate of Shalom, improperly issued by the Respondent Coroner based on a medical determination of death wrongly made by the Respondents without consideration of or legal accommodation of Shalom's individual religious beliefs;
>
> (c) an Order requiring the Respondents to facilitate the orderly transfer of Shalom either to another health care facility or to his home, and providing for ongoing mechanical ventilation and life support measures to be maintained;

---

[1] S.O. 1996, c. 2, Sch. A.

(d) an Order that Shalom is not dead because he is alive according to Jewish law;

(e) an Order that the Consent and Capacity Board shall have jurisdiction to adjudicate and determine all disputes arising from treatment of the Applicant and others who have been certified as brain dead but who challenge that determination and claim to be alive based upon their own religious beliefs or related considerations, whether or not a death certificate has been issued; and

(f) an Order that doctors shall be required to apply before the Consent and Capacity Board in respect of this or any such dispute of this nature per the Supreme Court of Canada's ruling in *Cuthbertson v. Rasouli*.[2]

[6] On November 1, 2017, I granted an interlocutory injunction, which was not opposed by the respondents, requiring that life support measures be maintained for Shalom up to and until this application was heard. Written materials on the application were filed by all parties during the first week of February 2018. Oral arguments were heard on February 12-13, 2018.

[7] In the applicant's factum, the nature of the relief sought was less than what had been sought in the original notice of application. At the hearing of the application, the applicant and the intervenors sought the following:

(a) an order to rescind the death certificate of Shalom, improperly issued by the respondent coroner based on a medical determination of death wrongly made by the respondents without consideration of or legal accommodation of Shalom's individual religious beliefs, and made in a manner contrary to Shalom's specific beliefs; and

(b) an order that the Consent and Capacity Board shall have jurisdiction to adjudicate and determine all disputes arising from treatment of the applicant and others who have been identified as brain dead but who challenge that determination.

[8] On March 8, 2018, Shalom experienced irreversible cardiac and respiratory failure. This was recognized as death under Jewish law. On the same date, I conducted an emergency telephone conference with all of the parties to facilitate Shalom's funeral arrangements. His family objected to his burial on the strength of the first death certificate, which indicated that his death had occurred on September 30, 2017, based upon neurologic criteria. His family advised that they had located a Jewish doctor who was prepared to issue a death certificate confirming that Shalom's death had occurred from the cessation of his breathing and heartbeat on March 8, 2018 (the "second death certificate"). I suggested that Shalom's family arrange for his burial on the strength of the second death certificate. None of the respondents objected to this and Shalom was buried on the strength of the second death certificate in accordance with Jewish law.

---

[2] 2013 SCC 53, [2013] 3 S.C.R. 341.

[9] Following Shalom's burial, I asked all parties to provide me with written submissions with respect to the issue of whether the application was now moot because of Shalom's death, which was recognized by Jewish law and Shalom's religious beliefs.

[10] I received written submissions from the all of the parties in May 2018 and again in August 2018.

[11] On June 26, 2018, L. Shaw J. released her Reasons for Decision in the case of *McKitty v. Hayani*.[3] In the overview of her thorough decision she described the relief being sought as follows at paras. 1 and 2:

> **Overview**
>
> [1] This court is being asked to determine if Ms. Taquisha McKitty, a 27 year old woman who was declared dead by neurologic criteria on September 20, 2017, is in fact dead. This is a question of profound importance to Ms. McKitty's family who believe that she is alive and request an order that she be maintained on mechanical ventilation until such time as her heart stops beating. The applicant also asserts that Ms. McKitty's religious belief is that she is alive so long as her heart is beating and that belief ought to be protected in accordance with s. 2(a) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 ("the *Charter*").
>
> [2] The issues in dispute are also of significant importance to the respondent as the applicant is challenging the criteria for the determination of brain death that are used by physicians in all hospitals in Ontario and throughout Canada on a daily basis.

[12] Justice Shaw concluded as follows at para. 132 of her Reasons for Decision:

> [132] According to the jurisprudence and legislation in Ontario and throughout Canada, it falls to the medical profession to establish the medical guidelines or practice to determine death. The CMAJ Guidelines are used in all hospitals in Ontario and throughout Canada and have been endorsed by numerous medical associations across Canada. Dr. Baker's evidence is that Canada is considered a leader internationally for having a standard set of guidelines that are applied throughout the country. The CMAJ Guidelines were the result of a consultation process that resulted in a standardized practice used to determine if brain death has occurred. There is no evidentiary basis for this court to find that the CMAJ Guidelines are not the appropriate medical practice by which death by neurologic

[3] 2018 ONSC 4015 [*McKitty*].

> criteria is to be determined by physicians in Ontario. Physiological and biological functioning of a body are not criteria to consider in the determination of brain death. That does not result in medical guidelines that are arbitrary or overbroad in their application.
>
> I find, therefore, that at common law, death includes brain death and brain death is to be determined based on medical criteria as set out in the CMAJ Guidelines. It is important that the law keeps up with technological and medical advancements which, in turn, is consistent with permitting the medical community to establish the practice or guidelines to determine brain death.

[13] Justice Shaw further concluded at para. 207 that because Ms. McKitty was brain dead "she is not a person and it would be incorrect to interpret the provisions of the *Charter* as conferring legal personhood upon" her.

[14] Justice Shaw also concluded that the Consent and Capacity Board did not have jurisdiction to consider Ms. McKitty's treatment at paras. 282 and 283 as follows:

> [282] I have found that physiological functioning of a body, maintained through artificial means, is not a criterion to consider for the purpose of determining brain death. I have also found that the legal definition of death includes brain death and that the criteria used to determine brain death are as set out in the CMAJ Guidelines. I have also found that Ms. McKitty meets these criteria for brain death.
>
> [283] It flows from these findings that Ms. McKitty would not be a person for whom any dispute regarding treatment can be heard by the CCB. Having been declared brain dead, she is not an incapable person for whom consent must be obtained from a substitute decision-maker to provide consent to treatment.

[15] Justice Shaw's decision was appealed by Ms. McKitty to the Court of Appeal for Ontario on July 26, 2018. Her appeal has not yet been heard by the court.

ISSUE

[16] In view of Shalom's death on March 8, 2018, which was recognized by Jewish law, Justice Shaw's decision, and the appeal of her decision to the Court of Appeal for Ontario, is this application now moot?

POSITIONS OF THE PARTIES

[17] All of the parties submit that the application is not moot because there is still a live issue between the parties. They further submit that if I determine that it is moot, I should exercise my discretion and render a decision on the application.

ANALYSIS

[18] Generally, a court will not hear a case that does not resolve an actual controversy or a dispute that affects the actual rights of the parties. The leading case on the doctrine of mootness is *Borowski v. Canada (Attorney General)*.[4] In addressing the principles of law surrounding the issue of mootness, Sopinka J. stated the following at paras. 15-16:

> [15] The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> [16] The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[19] More recently, the Court of Appeal for Ontario revisited the doctrine of mootness in *Tamil Co-Operative Homes Inc. v. Arulappah*.[5] Doherty J.A. summarized the approach a court should take when deciding whether an issue is moot at para. 13:

> [13] Courts exist to resolve real disputes between parties and not to provide opinions in response to hypothetical or academic problems. Courts will, however, on occasion address the merits of an appeal even where the dispute giving rise to

[4] [1989] 1 S.C.R. 342 [*Borowski*].
[5] (2000), 49 O.R. (3d) 566 [*Tamil Co-Operative*].

> the appeal has dissolved. Where a question of mootness is raised, the court must first decide whether the appeal is moot. If the appeal is moot, the court must then decide whether it should nonetheless hear the merits of the appeal. The discretion to hear a moot appeal is intended to address those exceptional cases where the circumstances are such that the general rule against hearing appeals where there is no live controversy between the parties should not be followed.

[20] The following two-part test is to be applied by the court in deciding whether a dispute is moot and, if so, whether the court should exercise its discretion to decide a moot dispute:

(1) The court first determines whether the required tangible and concrete dispute has disappeared and the issues have become academic.

(2) If the response to the first question is affirmative, the court must then decide whether it should exercise its discretion to hear the case.

[21] In determining the second part of test, the court should consider the following three factors:

(1) Whether an adversarial relationship still exists between the parties;

(2) Whether special circumstances exist in the case to justify the expenditure of scarce judicial resources; and

(3) Whether there is a need for the court to be sensitive to its role as the adjudicative branch in our political framework.

[22] The Court of Appeal for Ontario in *Jane Doe v. Canada (Attorney General)*,[6] after identifying these three factors, noted the following at para. 28:

> [a]ny one, or a combination of these factors, may supercede the absence of another to support a court's decision to hear or refuse to hear a case that is moot…

[23] I will now assess each part of the test to determine if this application is moot and, if so, whether I should exercise my jurisdiction to decide it.

HAS THE DISPUTE DISAPPEARED AND RENDERED THE ISSUES ACADEMIC?

[24] At para. 35 of his factum dated February 1, 2018, the applicant states as follows:

> The Respondent's argument regarding application of the *Charter* depends exclusively upon a predetermination in their favour of the ultimate legal issue to

[6] (2005), 75 O.R. (3d) 725.

> be determined by the Court on this application, which is whether Shalom is legally alive or dead; and whether or not the NDD criteria and the legal process to determine and certify his death in Ontario are ultimately Constitutional and respectful of Shalom's *Charter* and Human Rights, wishes, beliefs and the values that underlie them.

[25] The relief sought by the applicant with respect to this "ultimate legal issue" is an order rescinding the first death certificate and an order that the Consent and Capacity Board has jurisdiction to adjudicate and determine all disputes arising from Shalom's treatment and others who have been identified as brain dead but who challenge that determination.

[26] These issues are now academic. Shalom's death is now undisputed and there is no need for the Consent and Capacity Board to consider his treatment. Further, a decision addressing the jurisdiction of the Consent and Capacity Board for others would constitute a hypothetical exercise of considering what might happen in the future.

[27] Justice Shaw has decided these same issues. Her decision will be reviewed by the Court of Appeal for Ontario, which will have the final say on these issues subject to an appeal to the Supreme Court of Canada.

[28] The parties submit that a "live controversy" remains as there are currently two separate death certificates. They argue that I should decide which death certificate is valid. The issuance of a second death certificate occurred at the request of the applicant for the purpose of Shalom's burial. He was buried on the strength of the second death certificate in accordance with his religious beliefs. No party has advanced any argument about what, if anything, turns on the fact that there are two different death certificates. There is no evidence of a collateral estate issue, any damage claim, or any dispute that would require the court to rescind the first death certificate. In other words, there is no live controversy regarding the two death certificates.

[29] For these reasons I have concluded that the disputes raised in this application have disappeared and become academic. The first part of the mootness test has therefore been satisfied.

SHOULD THE COURT EXERCISE ITS DISCRETION TO DECIDE THIS MOOT CASE?

Does an adversarial relationship still exist between the parties?

[30] For the same reasons that I have concluded that the application is moot, I have also concluded that an adversarial relationship does not exist between the applicant and the respondents. There is no live issue between them so there cannot be an adversarial relationship.

[31] In addressing the adversarial relationship part of the test, the applicant submits that the matter has already been comprehensively argued, and all that remains is the court's decision. Further, the applicant argues that the presence of intervenors with a stake in the outcome provides the necessary adversarial context that justifies the court's exercise of its discretion to

decide this case. In support of this assertion, the applicant relies upon the following statement of Sopinka J. in *Borowski* at para. 33:

> [33] In Canada, the cases of *Law Society of Upper Canada v. Skapinker*, supra, and *R. v. Mercure*, supra, illustrate the workings of this principle. In those cases, the presence of interveners who had a stake in the outcome supplied the necessary adversarial context to enable the Court to hear the cases.

[32] The circumstances in those two cases are quite different from the circumstances in this application. In both cases the intervenors essentially became the applicants because of the original applicant's inability to prosecute the appeal. In the case of *Law Society of Upper Canada v. Skapinker*,[7] the Ontario Legislature, relying upon s. 28(c) of the *Law Society Act* as it then was, required all members of the Ontario bar to be citizens of Canada. The issue before the court was whether the former s. 28(c) of the *Law Society Act* was inconsistent with the *Charter*. The proceedings were commenced by Mr. Skapinker. By the time the appeal reached the Supreme Court of Canada, Mr. Skapinker had become a Canadian citizen so the appeal was moot with respect to him. However, Mr. Richardson, who was not a Canadian citizen, and who had been added as an intervenor by the court at first instance, was permitted to continue the appeal as though he was the party who had initiated the proceedings.

[33] In the case of *R. v. Mercure*,[8] the accused, Father Mercure, was granted leave to appeal to the Supreme Court of Canada but died before the appeal could be heard. The appeal involved an analysis of whether a French-speaking person accused of a provincial quasi-criminal offence under a Saskatchewan statute had the right to a trial in the French language, whether the Saskatchewan statutes had to be published in both English and French, and whether such rights were constitutionally entrenched. There were a number of intervenors, including the Province of Alberta, which was in a similar situation to Saskatchewan, the Federation des francophones hors Quebec, the Association canadienne-francaise de l'Alberta and the Association Culturelle franco-canadienne de la Saskatchewan. The court authorized the intervenor associations who had a direct interest in these public policy issues to continue the appeal as principal parties.

[34] In both cases, the mere presence of the intervenors was not the deciding factor. The intervenors, who had a direct interest in the issues, continued as principal parties to the respective appeals. That is not the case in this application. The intervenors have not and could not replace the applicant as the principal parties to this application.

[35] For the reasons outlined above I have concluded that an adversarial relationship does not exist between the parties.

---

[7] [1984] 1 S.C.R. 357.
[8] [1988] 1 S.C.R. 234.

Do special circumstances exist to justify the expenditure of scarce judicial resources?

[36] The principles governing the determination of this issue were addressed in *Borowski.* Sopinka J. explained these principles at paras. 34 - 36 in part as follows:

> [34] … The concern for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.
>
> [35] The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action …
>
> [36] Similarly an expenditure of judicial resources is partially answered in cases which although moot are of a recurring nature but brief duration.

[37] As noted above, the applicant describes the ultimate issue to be determined on this application as whether Shalom "is legally alive or dead" and seeks the following remedies:

> (a) an order rescinding the first death certificate because it is contrary to the *Charte*r; and
>
> (b) an order that the Consent and Capacity Board has jurisdiction to adjudicate all disputes relating to Shalom's and others' treatment.

[38] Justice Shaw carefully considered and determined these issues in her decision in *McKitty*.

[39] She concluded at para. 132 that "at common law, death includes brain death and brain death is to be determined based on medical criteria as set out in the CMAJ Guidelines." Applying Justice Shaw's decision, Shalom was legally dead on September 30, 2017.

[40] She also concluded at para. 207 that the *Charter* does not apply to someone who has been declared brain dead. Applying her decision, the first death certificate does not violate Shalom's *Charter* rights.

[41] Justice Shaw also concluded that the Consent and Capacity Board does not have jurisdiction with respect to the treatment of persons declared to be brain dead.

[42] The issues that I must determine on this application have already been determined by Justice Shaw. The Court of Appeal for Ontario will review her decision and finally determine these issues subject to an appeal to the Supreme Court of Canada. My decision on this application will add nothing to the jurisprudence concerning these issues. For these reasons, I have concluded that special circumstances do not exist that would justify further expenditure of judicial resources on this application.

> *Is there a need for the court to be sensitive to its role as the adjudicative branch in our political framework?*

[43] In *Borowski,* Sopinka J. addressed this issue as follows at para. 40:

> [40] The third underlying rationale of the mootness doctrine is the need for the Court to demonstrate a measure of awareness of its proper law-making function. The Court must be sensitive to its role as the adjudicative branch in our political framework. Pronouncing judgments in the absence of a dispute affecting the rights of the parties may be viewed as intruding into the role of the legislative branch.

[44] Applying the same rationale to this application, pronouncing judgments on moot issues that have already been decided at first instance and are under appeal would not, in my view, demonstrate a proper awareness of my law-making function as it is arguable that these issues should be dealt with by the legislative branch.

CONCLUSION

[45] For all of these reasons I have concluded that this application is moot and I should not exercise my discretion to decide the issues raised by the applicant.

[46] In the unique circumstances of this cases there should be no order as to costs.

[47] I thank all counsel for their helpful submissions.

HAINEY J.

Date: November 9, 2018