

# Court of Queen's Bench of Alberta

**Citation: Smorag v. Nadeau, 2008 ABQB 714**

**Date: 20081120**  
**Docket: 030303902**  
**Registry: Edmonton**

Between:

**Margaret Smorag**

Plaintiff

- and -

**Herve Nadeau, Trustee of the Estate of Angele Alice Nadeau, Yvonne Nadeau, Guardian of  
the Estate of Angele Alice Nadeau, Herve Nadeau and Yvonne Nadeau**

Defendants

And Between:

**Herve Nadeau, Trustee of the Estate of Angele Alice Nadeau, Yvonne Nadeau, Guardian of  
the Estate of Angele Alice Nadeau, Herve Nadeau and Yvonne Nadeau**

Plaintiffs by Counterclaim  
(Defendants)

- and -

**Margaret Smorag, Dr. Celili R. Lavoie, Alex Smyl, Dr. Guy Lamoureux, Doreen Ralbton,  
Bonnyville Medical Clinic Ltd. And Bonnyville Health Centre**

Defendants by Counterclaim

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**Reasons for Decision  
of the  
Honourable Madam Justice J.M. Ross**

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[1] The Defendant Yvonne Nadeau is the Guardian of Angele Alice Nadeau, a Dependent Adult pursuant to the *Dependent Adults Act*, RSA 2000, c. D-11. She was sued by the Plaintiff following an alleged assault of the Plaintiff by the Dependent Adult, and she now brings this application under R. 159 of the Alberta Rules of Court to dismiss the claim. The Plaintiff alleges that the Guardian was negligent in refusing to accept medical advice regarding the Dependent Adult's medication, and that as a result the Dependent Adult assaulted the Plaintiff causing injury. The Dependent Adult asserts that s. 10(5) of the *Dependent Adults Act* bars the action.

## **Facts**

[2] The affidavits filed in the application recite lengthy facts, but for the purposes of this decision only a few basic facts are relevant and necessary.

[3] The Dependent Adult lived in the Bonnyville Extended Care facility, the medical facility where the Plaintiff was employed. I note that the Workers Compensation Board is prosecuting this action on the Plaintiff's behalf as a subrogated claim, since the injury occurred in the course of her employment.

[4] The Plaintiff alleges that the Guardian negligently withheld consent to an increase in the Dependant Adult's medication requested by the Extended Care facility, although she had been warned on numerous occasions that the increased medication was necessary to control the Dependant Adult's disruptive and potentially violent behavior. On September 11, 2001, the Dependent Adult was assisted to the toilet by the Plaintiff, and while the Plaintiff helped her back into her clothes, the Dependent Adult allegedly pushed her, causing her to fall backward onto, or over, the wheelchair, where she struck her head and lost consciousness.

[5] I note also that the Dependent Adult has since died.

## **Is the Plaintiff sued in her personal capacity?**

[6] Some time in both written and oral argument was spent on the issue of whether the Defendant was sued by the Plaintiff in her personal capacity or in her capacity as the Guardian. The Statement of Claim names both "Yvonne Nadeau, Guardian of the Estate of Angele Alice Nadeau" and "Yvonne Nadeau" (it does not name Angele Alice Nadeau, although it names the trustee of her estate).

[7] To my mind, this argument misses the basic premise regarding capacity. 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.

[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:

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. Section 6 only mentions "capacity" as an alternative to an addition or substitution of a party, and plainly envisages something tantamount to, or very similar to, such a change of party.

[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.

### **Summary of Submissions**

[10] The Defendant argues that the allegations can only stand as against the Guardian, and not in her personal capacity since her actions were related to her role as Guardian. Further, she asserts that the action against her is barred by s. 10(5) of the *Dependent Adults Act*, which 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.

[11] Moreover, the Defendant argues that before negligence can be found against her, the Plaintiff must demonstrate that she owed the Plaintiff a duty of care.

[12] The Plaintiff argues in response that this section is not a statutory bar limiting actions against Guardians of Dependent Adults, but merely an assertion that when the Guardian decides, acts or consents on behalf of the Dependent Adult, those decisions, actions or consents cannot be challenged on the basis that they were not made by the Dependent Adult, either by the Dependent Adult or by persons seeking to set aside those decisions or actions.

[13] The Plaintiff asserts that the Guardian owed her a duty of care that was breached when she did not take the medical advice given her in regard to treatment of the Dependent Adult, and chose, instead to pursue a course of treatment for the Dependent Adult that she knew, or ought to have known, could cause injury to the staff who worked with the Dependent Adult. The Plaintiff concedes that there is no existing authority that a Guardian owes a duty of care to third parties who could conceivably be injured by the Dependent Adult, but asserts that the cases dealing with the liability of persons in authority over children who commit tortious acts is analogous. Those cases hold that a duty of care will be imposed where:

1. The parent knew the child had a propensity to commit the act complained of;
2. The parent could have reasonably anticipated that the child might commit the act; and
3. There was some reasonable step the parent could have taken to prevent the particular act.

[14] The Plaintiff cites: *Eichmanis (Litigation Guardian of) v. Prystay (Children's Lawyer for)* (2004), 185 O.A.C. 97; 129 A.C.W.S. (3d) 1246 (CA), leave to appeal dismissed [2004] S.C.C.A. No. 251; *Robertson v. Adigbite*, 2000 BCSC 1189; *495862 B.C. Ltd. V. C.D.Y.*, 2003 BCSC 1160; *Trevison v. Springman*, 16 B.C.L.R. (3d) 138; 28 C.C.L.T. (2d) 292 (BCSC), aff'd [1997] B.C.J. No. 2557 (CA); *J.G. v. Strathcona (County)*, 2004 ABQB 378.

[15] The Supreme Court of Canada set out the analysis to pursue in determining 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. The first step in that analysis is to determine whether there is an analogous group of cases in which a duty of care has been imposed. However, neither party dealt with the next steps in the analysis if I were to find that the cited cases were not analogous. I therefore asked the parties for further submissions on the applicability of the decisions in *Cooper* and *Anns*.

[16] In response to my request, the Plaintiff discussed whether there were policy reasons which would militate against the existence of a duty of care, asserting that since the action is premised on negligence, the Courts would not find liability where the Guardian reasonably controlled and supervised the Dependent Adult's actions. Further, the Plaintiff submits that if the same test applied to establishing a duty of care in relation to parents and other authority figures for the actions of children under their supervision and control were applied here, any policy concerns would be addressed. The Plaintiff also argues that the imposition of a duty of care in the circumstances set out in the cases regarding adult liability for children is good policy that would encourage guardians who have care and control of Dependent Adults to make decisions in the best interests of both the Dependent Adult and the general public.

[17] The Defendant cites the decision of the NWT Court of Appeal in *Fallowka v. Royal Oak Ventures Inc.*, 2008 NWTCA 4, [2008] 7 W.W.R. 411, which dealt with the question of whether one defendant can be responsible for the tort of another. The Defendant further submits that the action here does not fall within, nor is it analogous to, a category of cases where a duty of care was previously recognized. Further, the Defendant submits that there is no proximity between the Plaintiff and the Guardian. The Guardian's responsibilities are limited to those set out in the *Dependent Adults Act* and the order that appointed her to be the Guardian. No duty of care to the general public is imposed by statute. Further, the Defendant argues that the provision of s. 10(5) is a public policy statement intended to limit liability by deeming any action and decision by the Guardian to be the action or decision of the Dependent Adult.

[18] In regards to Yvonne Nadeau's liability in her personal capacity, the Defendant notes that proximity relates to whether the circumstances of the relationship between the plaintiff and the defendant dictate that the defendant is under an obligation to be mindful of the plaintiff's

interests. In these circumstances, the Defendant suggests that imposing a duty on Nadeau in her personal capacity would “create the specter of unlimited liability to an unlimited class,” a policy consideration negating a duty of care in *Cooper*, at para. 33.

## Analysis

### The Test For Summary Judgment

[19] In *Murphy Oil v Predator Corporation.*, 2006 ABCA 69 (at para. 25) the Court of Appeal set out the two stage approach to determine whether summary judgment should be granted:

In the first, the moving party must adduce evidence to show that there is no genuine issue for trial. Once the moving party has met that burden, the responding party may adduce evidence to persuade the court that there remains a genuine issue to be tried. It may choose to adduce no evidence, but then bears the risk that the judge will decide that the evidence adduced by the moving party has established that there is no genuine issue to be tried.

[20] The test is strict:

It must be plain and obvious that the action cannot succeed before summary judgment will be granted. There must no reasonable prospect of success: *Boudreault v. Barrett* (1998), 219 A.R. 67, 1998 ABCA 232; *Huet v. Lynch* (2000), 255 A.R. 359, 2000 ABCA 97 at para. 20. If there is a genuine question of fact or the action involves an unresolved or difficult question of law which is fact sensitive, summary judgment will be refused: *Spurrell (Next Friend of) v. Bradford*, [2004] A.J. No. 1049, 2004 ABCA 288, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 77; *Western Irrigation District v. Mertz*, [1997] A.J. No. 1105 at para. 2 (C.A.); *Franche v. Craig*, [1998] A.J. No. 27, 1998 ABCA 3 at para. 9.

*Precision Forest Industries Ltd. v. Cox*, 2006 ABQB 175 at para. 19

[21] There is a heavy burden on the Defendant:

A defendant's burden in an action for summary dismissal under R. 159 has been variously expressed as having to establish that it is "plain and obvious that the action cannot succeed" (*Boudreault v. Barrett* (1998), 68 Alta. L.R. (3d) 83 (C.A.) at para. 9); that "there is no merit to the claim, that is, it does not raise a genuine issue for trial" (*Allied-Signal Inc. v. Dome Petroleum Ltd.* (1991), 81 Alta. L.R. (2d) 307 (Q.B.) at 319); or that it is "manifestly clear or beyond a reasonable doubt that there is not a triable issue" (*Mellon (Next Friend of) v. Gore Mutual Insurance Co.*, [1995] A.J. No. 855 (C.A.) at para. 3). Merely showing that the defendant has a strong likelihood of success at trial is not sufficient (*Allied-Signal Inc.*, *supra*). Therefore, the Court's task in this application is to determine whether, on the pleadings and evidence, there is a genuine

issue for trial. It is not to make conclusive findings on those issues: *Western Canadian Place Ltd. v. Con-Force Products Ltd.*, [1997] A.J. No. 1299 (Q.B.) at para. 50.

*Pelechytik v. Snow Valley Ski Club*, 2005 ABQB 532 at para. 9

[22] The Plaintiff submits that there are a number of factual determinations that require trial:

1. Whether the Guardian altered the Dependent Adult's treatment and medication?
2. Whether the Guardian disallowed the Extended Care facility to properly medicate the Dependent Adult?
3. Whether an increase in the medication would have quieted the Dependent Adult's aggressive behaviour?
4. Whether the medication change would have prevented the assault?

[23] While I agree that these questions require trial to answer, a prerequisite is whether the claim raises a cause of action at all, that is does the Defendant owe a duty of care to the Plaintiff? If there is no duty of care, and therefore no cause of action, the Defendant's application for summary judgment will succeed. The only facts necessary to determine this issue are undisputed, including the fact that the only actions of Defendant complained of are those undertaken in her role as Guardian.

#### **Is S. 10(5) a statutory bar to this action?**

[24] I do not accept the Defendant's argument that s. 10(5) bars this claim.

[25] The Court of Appeal has indicated that the modern rule of statutory is to be applied as described by Ruth Sullivan in her text *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ont.: Butterworths Canada Ltd., 2002) at 1:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

*R. v. Dudley*, 2008 ABCA 73, at para. 32

[26] Section 10 falls within Section 2 of the Act, which deals with Guardianship orders and their effect. Section 10(1) provides that the Court should only grant a guardian the powers necessary to make or assist a dependent adult in making reasonable judgments about the person of the dependent adult, (2) deals with the effect of an existing personal directive, (3) sets out the possible powers and authority that may be granted to a guardian, and (4) gives the Court the discretion to make its order subject to conditions or restrictions.

[27] In this context ss. (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.

[28] It would take more express statutory language to limit or exclude a person's cause of action. 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 :

**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.

[29] Similar provisions can be found in s. 14 of the *Court of Queen's Bench Act* (no action may be brought against a master in chambers for actions done in the execution of his duty), s. 15 of the *Criminal Notoriety Act*, s.93 of the *Electric Utilities Act*, s.6(2) of the *Family Support for Children with Disabilities Act*, s.52(4) of the *Personal Property Security Act*, and s.9.51(1) and s. 68 of the *Provincial Court Act*.

[30] I agree with the Plaintiff 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. This interpretation is consistent with the context of the statutory scheme.

**Is there an analogy between this case and those dealing with the duty of care of parents and others for the actions of children?**

The Plaintiff argues that the Guardian here is in an analogous position to those persons supervising children.

[31] The cases cited by the Plaintiff include:  
[32]

***Robertson v. Adigibite***

In this case mentally disabled adult who was resident in an adult group home was alleged to have attacked a shopper while out on a supervised "field trip" to a store. The parties agreed to the proposition that a "person who exercises care and control of another person may owe a duty of care to a 3rd person." The Court found that there was no duty of care because it was not foreseeable that the resident would act aggressively based on his earlier behaviour.

***495862 B.C. Ltd v. C.D.Y.***

The Director under the *Child and Family and Community Services Act* was found not to be liable for the actions of a ward of the state who set fire to a building, although the Court held that the

Director and the Crown stood in the same legal position as natural parents. The child had been transferred from a group home to a variety of foster homes, and often ran away to his grandmother's. At the time of the fire, the Director had arranged for a placement with another foster family, but that had not yet occurred and he was living with his grandmother. The Court held that it was not foreseeable that the child would set fires maliciously, although he had set some minor fires earlier. Therefore the Court dismissed the action against the Director. Although the question was moot, the Court went on to conclude that the defendants owed a duty of care to the plaintiff based on the rationale in *MacAlpine v. H.(T.)* (1991), 82 D.L.R. (4th) 609 (BCCA).

[33] There, in a similar situation, the Court of Appeal concluded that there was sufficient proximity between the Plaintiff and the Superintendent to warrant the imposition of a duty of care if the Superintendent was negligent in placing a child with a foster family, noting:

In placing a troubled child in a home in the community the Superintendent must weigh not only the interests of the child, which is his primary obligation under the statute, but must also take into account the public interest concerns of protecting the placement parents, neighbours and their property. (at p. 614)

[34] Again although the permanent ward had a troubled history of theft and break and entry, the Court held that there was no reason to believe that he would engage in the destructive behaviour that formed the basis of the action.

[35] These two cases establish that the Crown may owe a duty of care to third persons for its decisions on how, where and when to place its wards in care.

***Trevison v. Spring***, [1996] 4 W.W.R. 760

The defendants' adopted son set fire to the plaintiffs' home. The plaintiffs left their house key with the defendant mother to watch over their house while they were gone. The son guessed that his mother had the key and stole it. He then snuck out of the house while the family was asleep and broke into the plaintiffs' house, stealing a variety items. When questioned by his parents about excess mileage on the family truck and keys found in his pockets, he decided to cover up any evidence of the break-in, sneaking back into the house and setting fire to it. The Court found that the parents had adequately supervised their son. Although they knew he had a propensity for theft and for breaking into premises, it was not foreseeable that he would set the house on fire.

[36] The Court set out the test for finding parental liability for a child's actions:

1. That the child had a propensity for the tortious act;
2. That the parent knew of the propensity;
3. That the parent could have reasonably anticipated that the child might commit the tortious act, and
4. That there was a reasonable step the parent could have taken to prevent the tortious act.

[37] These criteria were referred to by Binder J. in *J.G. (Dependent Adult) v. Strathcona (County)*, 2004 ABQB 378.

[38] In each of these cases, the Defendant parent or adult in the role of parent had direct ongoing control and supervision of the child (or disabled adult in *Robertson*). In *Robertson* and *Trevison* the adult had the immediate supervision of the child or disabled adult. In *495862 B.C. Lt.d* and *MacAlpine* the representative of the Crown had the authority to determine who would have day to day supervision of the child.

[39] I do not accept that the Guardian's position here is analogous. In each of the above cases, the child in question was under the direct supervision of the defendants in question, or the defendants had the authority to determine who would have day to day supervision. Here, the Dependent Adult was living in the Extended Care facility, under the direct supervision of its staff. The Guardian's authority was limited by the terms of the order and by the fact that the day to day supervision of the Dependent Adult was left to the Extended Care facility. She had no control over day to day decisions, such as who would care for the Dependent Adult, how she would be cared for, or what steps would be taken to supervise and treat her.

[40] If the Dependent Adult lived with the Guardian, then the situation would be more analogous. But in my opinion without the Guardian exercising the day to day direct care and control of the Dependent Adult, the situations are not analogous.

### **Does the Guardian owe a duty of care to the Plaintiff?**

#### **The Anns analysis**

[41] The Supreme Court of Canada has said that when assessing whether a duty of care should be imposed, the analysis described in *Anns* should be applied: *Cooper*, at 550.

There are two stages to the *Anns* analysis. In *Holtslag v. Alberta*, 2006 ABCA 51, leave

[42] to appeal denied [2006] SCCA No. 142, the Court of Appeal noted that the first stage of the *Anns* test involves two questions (at para. 11):

- (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and
- (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? (*Cooper*, at 551)

[43] The second stage of the analysis also involves consideration of policy:

At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. (*Cooper*, at 551)

[44] However, the Supreme Court notes that this second policy analysis is not duplicative since different types of policy considerations are involved at the two stages; the first is whether there are policy considerations in regard to this Plaintiff and Defendant that would negate imposing a duty of care here, and the second is a broader policy consideration outside of these two parties that "relate[s] to matters external to the relationship between the parties, namely the effect of recognizing a duty of care on other legal obligations, the legal system, and society generally." (*Royal Oak* at para. 57).

[45] In *Royal Oak*, the Court proposed summarised a more detailed formulation of the test (at para. 48):

Recognizing a duty of care in tort requires that the plaintiff establish each of the following:

- (i) that the harm complained of is a reasonably foreseeable consequence of the alleged breach;
- (ii) that there is sufficient proximity between the parties that it would not be unjust or unfair to impose a duty of care on the defendants:
  - (a) "Proximity" describes the type of relationship in which a duty of care to guard against foreseeable harm may rightly be imposed.
  - (b) In performing the analysis the court looks at categories of relationships that have previously been recognized as creating a duty in tort, and analogies to them;

and

- (iii) that there exist no policy reasons that would make the imposition of the duty unwise or unfair, so as to negative or otherwise restrict that duty. Since at this stage of the analysis one is generally dealing with a situation outside established categories, policy factors will play an especially important role once they are reached.

### **Foreseeability**

[46] It is arguable that the harm complained of here was reasonably foreseeable, and that if foreseeability were the only factor, a trial would be necessary to determine the issue. However, in *Cooper* the Supreme Court expressly noted that mere foreseeability is not enough (*Cooper*, at para. 42).

## Proximity

[47] The proximity analysis, according to the Supreme Court of Canada in *Cooper* looks at the parties' relationship:

The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. (*Cooper*, at 551)

[48] The starting point for the proximity analysis is whether there are analogous categories of cases in which proximity has previously been identified:

On the first branch of the Anns test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. (*Cooper*, at para. 31)

[49] Are there circumstances in which a duty of care was imposed that are analogous to the situation here? I have found that the cases raised by the Plaintiff are not directly analogous. But are there similar categories?

[50] In *Royal Oak*, (paras. 60-74) the Court analysed the cases in which persons were held responsible for the torts of another; in these cases the alleged ancillary tortfeasor exercised a significant degree of control over the immediate tortfeasor. In contrast, a hospital was found not to be liable for discharging a voluntary psychiatric patient, and owners of motor vehicles were not liable for torts committed by persons who stole their vehicle, even if the owner was negligent in allowing the theft. In these situations, the individuals relieved of liability exercised little or no control over the immediate tortfeasor.

[51] Here, the Guardian had some degree of control over the Dependent Adult, but it was not direct. In my opinion this Guardian does not fall within the categories in which an individual has been found to be responsible for the torts of another.

[52] Failing a finding that there is an analogous category, the plaintiff must show proximity: that the defendant was in a close and direct relationship to him or her such that it is just to impose a duty of care in the circumstances. "The plaintiffs must point to factors arising from the circumstances of the relationship that impose a duty." (*Cooper* at para. 42). Proximity measures the relationship between the parties with respect to the risks that have materialized, and is more than a temporal or physical juxtaposition (*Royal Oak*, at paras. 56 and 57):

Proximity denotes the type of relationships that the law recognizes as giving rise to a duty of care, and accordingly determining whether "proximity" exists between a plaintiff

and the defendant also involves considerations of policy internal to the relationship between the parties. (*Royal Oak*, at para. 57)

[53] The Supreme Court noted that the factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. If there is a governing statute, it will form part of that context, but the Court cautioned, there is no single unifying characteristic (*Cooper*, at para. 35).

[54] The Guardian has an express statutory duty to act in the best interests of the Dependent Adult. In this case, she was granted the authority to authorize and consent to medical treatment. In my view, there are strong policy considerations against imposing a duty of care in the circumstances of these parties. A duty of care could create a conflict between making medical decisions in the best interests of the Dependent Adult and acting in a manner that the Guardian might fear were contrary to the Dependent Adult's interests in order to protect herself from possible liability claims by a third party.

[55] I thus find that there is not a proximate relationship between the Guardian and the Plaintiff that would justify imposing a duty of care in these circumstances.

### **Residual Policy Considerations**

[56] If I am wrong and there is a proximate relationship between the parties, I will move on to consider whether there are residual policy concerns. The Supreme Court in *Cooper* discussed residual policy factors as follows (at para. 37):

These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized?

[57] First, imposing tort liability in these circumstances would impose an additional obligation on a Guardian who has already undertaken to consider the best interests of the Dependent Adult. This additional obligation may conflict both with the Guardian's good faith (though possibly negligent) decisions on the Dependent Adult's best interests and with the Guardian's own interests in avoiding liability. This could well have a chilling effect on whether people would be prepared to act as a Guardian, a negative effect on society generally.

[58] Moreover, there is another approach that could have addressed the alleged problem. Under the *Dependent Adults Act*, interested parties may apply to the Court under s. 23 for a review of the Guardianship order at any time. An interested person includes any "adult person who is concerned for the welfare of the person in respect of whom a guardianship order ... has been obtained. "

(s.1(1)(iii)). Thus, a health care provider may in similar situations seek an order that limits or removes a Guardian's authority to approve medication decisions.

[59] Moreover, there are practical considerations at play here. When a dependent adult is housed in a facility that exercises day to day control and supervision, a guardian does not have control over such things as who is employed to work with the dependent adult, how those interactions are implemented, what measures of physical control are implemented, where and how the dependent adult is transported both within the facility and outside, and what measures of care and discipline are used. It would therefore be unjust to impose the potential for liability on guardians of dependent adults resident in such a facility.

[60] In reaching these conclusions, I have considered and dismissed the Plaintiff's submissions that the test employed to determine whether a duty of care has been breached answers the policy concerns. The Plaintiff submitted that if a guardian acts reasonably in light of knowing a dependent adult's propensity, then there are no policy concerns. With respect, this reverses the analytical process. The test assumes that there is a duty of care; it is tautological to conclude that there are no policy considerations militating against a duty of care by asserting that duty of care as the basis for that finding.

[61] I also reject the the Plaintiff's assertion that imposing a duty of care in these circumstances is good policy since it would encourage guardians to make decisions that are both in the best interests of the Dependent Adult and the general public. This does not deal with the possibility of conflict of interest.

## **Conclusion**

I therefore grant the Defendant's application for summary judgment and dismiss the claim against Yvonne Nadeau personally for her actions as Guardian of Angele Alice Nadeau.

Heard on the 6th day of August, 2008, and written submissions received on September 29th, 2008 and October 2nd, 2008.

**Dated** at the City of Edmonton, Alberta this 20th day of November, 2008.

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**J.M. Ross**  
**J.C.Q.B.A.**

**Appearances:**

Mark Kay  
for the Plaintiff

Gerald A. Smith  
for the Defendant