

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

**ROSALIND BECHARD AS LITIGATION GUARDIAN OF
MARY ELLEN FOX**

Plaintiff

- and -

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF
ONTARIO**

Defendant

Proceeding under the Class Proceedings Act, 1992

STATEMENT OF DEFENCE

1. The Crown admits that it owned, operated and managed a facility in Chatham Kent, Ontario, for individuals with developmental disabilities which came to be known as Southwestern Regional Centre. The Crown further admits that the Representative Plaintiff in this proceeding, Mary Ellen Fox (nee. Yacks), was at one time a resident at Southwestern Regional Centre.

2. The Crown has no knowledge of the allegations contained in paragraphs 2-4 of the Statement of Claim.

3. The Crown denies all other allegations contained in the Statement of Claim.

Southwestern Regional Centre and the Evolution in Care for Individuals with Developmental Disabilities

4. Like many jurisdictions, Ontario's early history of developmental services was based, in part, on the notion that individuals with developmental disabilities were often best served by segregating them from the rest of the community and caring for them in large institutional settings. It was believed by some that it was beneficial for the individual with the developmental disability to be institutionalized. It was also believed that institutionalization was somewhat beneficial in relieving the strain on families who would otherwise be caring for the individuals and, in some cases, serving to protect society from the individual.

5. In 1961, the Crown opened the Ontario Hospital School for Retarded Children at Cedar Springs, Ontario. Although it was known by a number of names during its operation, this facility ultimately became known as Southwestern Regional Centre ("SRC").

6. At the outset of its operation, SRC was operated on a medical model of care that focused primarily on the physical health of its residents. For the first years of its operation, SRC was operated under the auspices of the Ontario Department of Health.

7. Many of the residents of SRC had what would now be known as developmental disabilities, in some case quite severe. Residents also suffered from mental illness, physical disabilities and other medical and social problems.

8. Some of the residents, however, had no developmental disability at all. Some were sent to SRC by families who could not or would not care for them.

9. Residents of SRC were admitted with the consent of their family or legal guardian, sometimes based on the advice of doctors or other medical experts.

10. In some cases, the individuals admitted were wards of the Crown. However, individuals did not become wards of the Crown simply by virtue of their admission to SRC and many of SRC's residents were not Crown wards. They remained under the legal authority of their families.

11. Many of the residents of SRC were long-term care residents in that, once admitted, they spent the remainder of their lives at SRC.

12. For a variety of reasons, many of the residents of SRC had little if any contact with their families during their time at SRC.

13. Many of the residents of SRC were entirely supported financially by the government throughout their residency at SRC.

14. A multi-disciplinary team would assess each individual who entered SRC and assign a developmental level to each so that appropriate decisions could be made

regarding the appropriate residence at SRC, educational and training programs and other social activities for the individual.

15. Where appropriate, residents of SRC were involved in a variety of educational and training activities including classroom instruction, participation in ward schools and occupational therapy.

16. It was often considered beneficial for residents to work, at SRC and elsewhere, when appropriate. Work was seen as a valuable way to provide training to people and to improve confidence.

17. At SRC, some residents were involved in skills development activities in the facility's beauty parlour, laundry, dining room and on the farm.

18. Residents of SRC were also involved in a variety of other activities for recreation and relaxation including sports and outings in the community. Recreation, leisure, clubs and special events were included to foster a sense of wellbeing and community.

19. The program at SRC was structured and controlled, in an appropriate manner by, SRC staff. Although some residents were given choices and opportunities, some were not considered to be capable of exercising any significant degree of control over their day-to-day lives given the extent of their disability.

20. SRC residents received different types of care depending on and appropriate to their condition and needs. This care included medical, dental, psychiatric and psychological care, as appropriate.

21. Throughout the years of SRC's operation, the Crown ensured that only qualified candidates were selected for employment at the facility.

22. Furthermore, once hired, the Crown ensured that all staff were adequately and appropriately trained and supervised. In the early years, the training program focused on care issues and the medical problems which arose in SRC's resident population. In later years, staff training was expanded to include other areas including individual planning and programming, behavioural programming, appropriate discipline for residents, recognizing signs of abuse and the proper steps to take if abuse is suspected.

23. The policy at all times was that if, at any time, an allegation of mistreatment or abuse of an SRC resident by an SRC staff member was substantiated, the Crown took any and all appropriate steps including dismissing the involved staff member and reporting the alleged mistreatment or abuse to appropriate authorities.

24. SRC was a large facility which included a variety of buildings. In the early decades of SRC's operation, residents of SRC lived and slept in large wards. Washrooms were also communal.

25. In the 1960s, attitudes towards people with developmental disabilities began to change. Academics, families and experts in the area of developmental disabilities came to believe in the principle of normalization – that individuals with developmental disabilities should have available to them patterns and conditions of everyday life which are as close as possible to the norms and patterns of the rest of society. Just as attitudes were changing throughout the world, those working in Ontario with individuals with developmental disabilities – including the Crown - determined that it would be better for the individuals in question to live and work in the community rather than being cared for in large-scale facilities.

26. In the early 1970s, the Crown in Ontario embarked on a process that saw the care provided to persons with developmental disabilities shift from segregated, large-scale institutions operated by the Crown to community based services delivered by local agencies but still funded by the Crown.

27. Because the new approach focused on community and social supports and services as opposed to the original medical model of care, as part of the transition, the Crown transferred responsibility for services for people with a developmental disability from the Ministry of Health to the Ministry of Community and Social Services.

28. Also as part of this evolution, in 1974, the Ontario legislature passed the predecessor to the *Developmental Services Act*. R.S.O. 1990, Chapter D.11 which would govern the operation of SRC until its closure on March 31, 2009.

29. At SRC, the Crown prepared for the eventual closure of the facility by changing some aspects of its operation. For instance, in the 1970s and 1980s, to help residents prepare for their eventual move to new homes in the community, large living units at SRC were divided into smaller units to accommodate smaller groups of people. These units had their own common areas, washrooms and eating areas.

30. Over the many years that it took to transition to a community-based model of care, the Crown carried out a planning process for each resident of SRC to ensure that a placement was developed for them in the community which would adequately meet their needs.

31. Ultimately, SRC was closed in 2008.

32. During the years of SRC's operation, various reports and articles were written about the facility and others like it.

33. The Williston Report referred to at paragraphs 17 through 19 of the Statement of Claim was produced in 1971 and its criticisms of SRC reflect the change in thinking then taking place concerning the appropriate way to care for individuals with developmental disabilities. The Williston Report advocated a move away from the institutional model towards community living. The Crown responded appropriately to this Report at least in

part by moving forward with the expansion of the community-based model for caring for individuals with developmental disabilities.

34. Similarly, the Welch Report focussed on the need to move away from the institutional model of care, a process which had already been commenced by the Ontario Crown. Although the Welch Report clearly advocated for the community based model of care, the Report also notes that institutions (like SRC) “provide[d] [the disabled individual] with a perfectly safe environment and afford[ed] him access to a wide range of treatment and developmental services”.

Mary Ellen Fox

35. Mary Ellen Fox was admitted to SRC under her maiden name of May Ellen Yacks. Her first admission was on March 1, 1971, and she was discharged to her home on April 14, 1971. She was readmitted on May 5, 1971 and was a resident of SRC until she was discharged on November 18, 1988.

Defence to Allegations of Negligence and Breach of Fiduciary Duty

36. The Crown’s establishment, funding, operation, management, administration, supervision and control of SRC was to the benefit of the residents of SRC, particularly having regard to the fact that, in each and every case, the residents’ families could not or would not care for them.

37. The Crown, her employees, agents and servants, acted at all times in the best interests of the residents of SRC.

38. Over the decades of SRC's operation, the best practices in the care of individuals with developmental disabilities, both in Ontario and elsewhere, have changed. Thinking has evolved and more has been learned about individuals with disabilities. As a result, the standard of care for the operation and management of facilities for individuals with developmental disabilities has changed over time. The Crown, her employees, agents and servants, operated and managed SRC in accordance with the standard of care for such facilities at all relevant times.

39. The Crown, her employees, agents and servants provided the highest possible standard of care for the residents of SRC, having regard to all applicable constraints including budgetary constraints.

40. To the extent there may have been inadequacies in the operation and management of SRC, which is expressly denied, these inadequacies were the result of funding decisions. The decisions regarding the funding of SRC, and all institutions like it, were policy decisions. These decisions were made, at the highest levels of government, based on an assessment by the Crown of the competing demands for public resources and the government's responsibility to taxpayers to work within approved budgets.

41. To the extent the Crown owed common law duties of care, which is not admitted, such duties would have obliged the Crown to act as a reasonable person would in the operation and management of SRC. The plaintiff has improperly pleaded the nature of

common law duties of care by alleging, in paragraph 39 of the Statement of Claim, that the Crown owed a duty:

- to ensure that residents would not suffer harm;
- to ensure that physical, emotional and sexual abuse would not occur;
- to protect SRC residents from any person or thing which would endanger or be injurious to the health and well-being of the resident;
- to provide a safe environment and, in particular, one free from physical, sexual and/or psychological assault or harm;
- to set or implement standards of conduct for its employees and SRC residents to ensure that no employee or resident would endanger the health or well-being of any resident or person.

42. Contrary to the assertion in paragraph 41 of the Statement of Claim, most of the residents of SRC were not wards of the Crown. Many of the residents had parents or legal guardians other than the Crown throughout their residency at SRC. The Crown owed no fiduciary duty to the residents at SRC because, *inter alia*, the residents of SRC were not entirely within the power and control of the Crown.

43. The Crown breached no common law, fiduciary or statutory duty in the establishment, funding, operation, management, administration, supervision or control of SRC.

44. Throughout their time at SRC, the residents of SRC received supervision, care, education, training and guidance in accordance with the highest standard of care at the time and appropriate to their needs and abilities.

45. The Crown denies the examples of improper conduct set out in paragraph 37 of the Statement of Claim. Specifically, the Crown denies that:

- (a) there was intermittent or inadequate or no attempt to supervise or program residents' activities;
- (b) residents were not given the appropriate level of education;
- (c) residents were required to perform a number of routine tasks necessary for the operation of the institution, including cooking, laundry, farming, gardening, hair cutting, cleaning toilets, helping other residents to eat their meals, feeding other residents, among other tasks;
- (d) communications between residents and family members were made difficult;
- (e) serious shortage of professional staff, falling far behind, sometimes in the nature of 25%, appropriate industry and professional standards or ratios;
- (f) total lack of personal attention or privacy given the institutional structure, facilities and overcrowding;
- (g) wards and rooms were unnecessarily locked, creating a prison-like environment;
- (h) basic standards of privacy that would allow residents to clothe and cover themselves were disregarded; and
- (i) for their physical labour in and around the institution, residents were either paid nothing at all or were paid minimal and completely unrealistic wages in the range of 3 cents per hour.

46. The Crown denies each of the alleged breaches of fiduciary duty set out in paragraph 49 of the Statement of Claim. Specifically, the Crown denies that:

- (a) the Crown failed to report injuries sustained by residents of SRC;
- (b) the Crown failed to provide adequate medical care for residents;
- (c) the Crown, to its own benefit, exploited the labour of residents to work on the premises without proper, adequate or appropriate compensation to those residents for their labour, and without ensuring a safe working environment, thereby preferring its own interests to those of the Resident Class or its beneficiaries;

- (d) the Crown placed SRC in a remote and isolated location, that was advantageous to the Crown due to cheap land and job creation, but was to the detriment of the residents by making the recruitment of qualified staff and visits by family difficult;
- (e) the Crown failed to report allegations of sexual abuse and, moreover, often punished those residents who came forward with such claims;
- (f) the Crown failed to properly screen applicants for positions which they were hired for at SRC;
- (g) the Crown hired caregivers and others to work at SRC who were not qualified to reach or to meet the needs of individuals under their care and supervision;
- (h) the Crown failed to properly supervise the administration and activities of SRC;
- (i) the Crown, to its own benefit, failed to provide adequate financial resources or support to properly maintain the SRC facilities or to care and provide for its residents;
- (j) the Crown failed to respond adequately, or at all, to complaints or recommendations which were made concerning SRC, both with respect to its condition and the treatment of residents;
- (k) the Crown created, permitted and fostered an atmosphere of fear and intimidation;
- (l) the Crown failed to safeguard the physical and emotional needs of the Resident Class;
- (m) the Crown permitted unhealthy and inappropriate punishments to be perpetrated against the Resident Class; and
- (n) the Crown permitted an atmosphere that threatened the Resident Class with severe physical punishments, including violence.

47. The Crown also denies that residents were improperly exposed to the use of electric shocks and confined to small, windowless rooms on a regular basis as a form of discipline.

48. The Crown denies that any resident at SRC was abused, mistreated or neglected by the Crown's employees, representatives or agents during the time of their placement at SRC and the Crown holds the plaintiff to the strict proof of this allegation.

49. If abuse, mistreatment or neglect did occur, which the Crown expressly denies, the Crown specifically denies that it had or should have had any knowledge or information concerning the allegations of abuse, mistreatment and neglect in the Statement of Claim. If the abuse, mistreatment and assault occurred, which is expressly denied, the Crown was not made aware of these allegations at the relevant time. The Crown denies that any of the abuse alleged by the plaintiff was known or foreseeable by this defendant. The Crown puts the plaintiff to the strict proof of these allegations.

50. If any resident at SRC was abused, mistreated or neglected, which is not admitted but expressly denied, such conduct was not carried out as part of the authorized duties of its employees, representatives or agents. If such conduct was carried out upon the Representative Plaintiff or any other resident of SRC, then such conduct was in no way authorized, condoned or permitted by the Crown nor was it carried out with the knowledge of the Crown. With respect to the allegations of abuse, mistreatment and neglect, which are expressly denied, the Crown is not, in any way, vicariously liable for any such alleged acts.

51. The Crown monitored and supervised the care for the residents of SRC at any and all relevant times. If the residents of SRC suffered any form of abuse, mistreatment,

assault or neglect, which is not admitted but denied, there was an ongoing opportunity to report such alleged abuse so that it could be investigated in a timely fashion. The Crown ensured that SRC had in place all appropriate safeguards to ensure that abuse was prevented and that, if it did occur, it could be reported and appropriately addressed.

52. The Crown responded appropriately and in accordance with the standard of care to any and all information it received regarding allegations of abuse or mistreatment.

53. The Crown responded appropriately and in accordance with the standard of care to any and all reports, article and studies and any other information received by it concerning the management and operation of SRC.

54. The Crown denies that it failed to adequately monitor, train or supervise its staff.

55. No individuals were forced by the Crown to reside at SRC.

56. The Crown, her employees, agents and servants, managed the lives of SRC residents only as appropriate to ensure that the residents were safe and well cared for.

57. The plaintiff cannot assert a claim against the Crown for inadequate funding of SRC. Such a claim is not recognized at law.

58. The plaintiff cannot assert a claim for breach of statutory duty. Such a claim is not recognized at law.

59. The Crown is immune to any claims in tort prior to September 1, 1963 when the *Proceedings Against the Crown Act* R.S.O. 1990, Chapter P.27 was first enacted. No claim in tort can be asserted for any actions or events which predate the passage of this act.

60. Any and all claims brought by the plaintiff are statute-barred by virtue of the *Limitations Act, 2002* S.O. 2002, Chapter 24 Schedule B and any and all predecessor legislation.

61. The Crown states that, due to the many years that have elapsed since the alleged events occurred, the documentary and evidentiary record is incomplete and cannot be reconstructed. The lengthy passage of time has also resulted in the death or unavailability of many potential witnesses and recollection difficulties for any witnesses that can still be found. Accordingly, the Crown has suffered severe prejudice in its ability to fully defend this action in that it has insufficient information or knowledge either to confirm or deny the plaintiff's allegations. The Crown relies upon the doctrine of *laches* and states that the plaintiff is estopped from bringing this action as against the Crown.

62. The Crown denies that the residents of SRC suffered any loss or damages as alleged.

63. In the alternative, if the residents of SRC have suffered any loss or damages, such loss or damages were as a result of acts or omissions not within the power or control of the Crown. Any such loss or damages resulted from pre-existing physical, emotional or psychological problems which were not caused or contributed to by the Crown.

64. In the further alternative, any such loss or damages were caused by matters arising subsequent to the plaintiff's stay at SRC and were unrelated to any conduct of the Crown.

65. If the residents of SRC have suffered any loss or damages as alleged or otherwise, which is not admitted but denied, such alleged loss and damages are excessive and too remote and the plaintiff is put to the strict proof thereof.

66. The plaintiff has failed to mitigate their alleged loss or damages.

67. The Crown states that nothing in its conduct warrants the awarding of punitive or exemplary damages.

68. The Crown pleads and relies upon the *Negligence Act*, R.S.O. 1990, c. N. and the *Developmental Services Act* R.S.O. 1990, Chapter D.11.

69. The Crown asks that this action be dismissed with costs.

October 31, 2011

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**BECHARD et al.
Plaintiff**

-and-

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Defendants**

**ONTARIO
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STATEMENT OF DEFENCE

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