

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** Cooper v. Atlantic Provinces Special Education Authority,  
2008 NSCA 94

**Date:** 20081017

**Docket:** CA 284552

**Registry:** Halifax

**Between:**

Jennifer Ann Cooper and Jane Suttis

Appellants

v.

Atlantic Provinces Special Education Authority

Respondent

**Judges:** Roscoe, Bateman and Cromwell, JJ.A.

**Appeal Heard:** September 17, 2008, in Halifax, Nova Scotia

**Held:** Appeal is dismissed with costs to the respondent in the amount of \$1,000.00 plus disbursements per reasons for judgment of Roscoe, J.A.; Bateman and Cromwell, JJ.A. concurring.

**Counsel:** J. Brian Church, Q.C., for the appellants  
Noella Martin, for the respondent

**Reasons for judgment:**

[1] This is an appeal from an unreported oral decision of Justice Gregory Warner striking out the appellants' statement of claim pursuant to **Civil Procedure Rule** 14.25 because it did not disclose a reasonable cause of action for breach of fiduciary duty. The chambers judge also granted summary judgment to the respondent pursuant to **Rule** 13.01 in respect of the appellants' claim in negligence, but that ruling is not appealed.

Background:

[2] The appellant Jennifer Ann Cooper attended a residential school, the Atlantic Provinces Resource Center for the Hearing Handicapped (APRCHH), in Amherst from 1979 until 1985. She was five years old when she started at the school. The respondent, the Atlantic Provinces Special Education Authority (APSEA), was responsible for the operation of the school during the time that Ms. Cooper was a student there.

[3] In a statement of claim filed in June 2006, Ms. Cooper and her mother, Jane Suttis, allege that while Ms. Cooper attended the school, she was sexually, emotionally and psychologically abused by Wilbur Milbury, an employee of the school. It is alleged that Ms. Suttis made formal complaints to the school and APSEA at the time her daughter was being abused. Paragraphs 18 and 19 of the second amended statement of claim filed in October 2006, set out the facts to support the claims of negligence and breach of fiduciary duty as follows:

18. The Plaintiffs plead that the Defendant was negligent in the operation of the APRCHH as follows:

- (a) that the Defendant failed to have in place proper safeguards to identify the acts of abuse and assault and to stop them;
- (b) that the Defendant failed to provide proper supervision within the APRCHH;
- (c) that the Defendant knew or ought to have known of the abuse and assaults and failed to address the issue;

- (d) that the Defendant failed to properly assess the counsellors and test them for sexual disorders knowing sexual assaults would occur by individuals with sexual disorders and that the Defendant could, to some extent, have alleviated problems by doing this;
- (e) that the Defendant failed to adequately inspect the APRCHH and to make adequate inquiries as to the well being of the residents;
- (f) that the Defendant knew or ought to have known that the assaults perpetrated on the person of the Plaintiff Cooper was foreseeable based on the information which was known, or ought to have been known, by the persons employed at the APRCHH;
- (g) that the Defendant failed to act on information that assaults were occurring at APRCHH;
- (h) such further and other negligence as may appear.

19. The Plaintiff Cooper repeats the foregoing paragraphs and states that the sexual and physical abuse which she sustained at the APRCHH occurred directly as a result of the failure by the Defendant to fulfill its fiduciary obligations to the Plaintiff Cooper to ensure that as a child in the care of the Defendant, the Plaintiff Cooper came to no harm at the hands of the Defendant or its servants or agents.

[4] APSEA filed a defence denying the allegations of negligence and breach of fiduciary duty. It brought an application to strike the claims for breach of fiduciary duty on the basis that the statement of claim did not set out material facts to support the cause of action, and for summary judgment respecting the claims in negligence on the basis that they were out of time.

[5] At the hearing of the applications before Justice Warner, Mr. Bureau, then counsel for the appellants brought a further amended statement of claim to his attention. This third amended statement of claim has not been filed. That statement of claim included a new paragraph which stated:

20. The Plaintiffs, Cooper and Suttis, repeat the foregoing paragraphs and state that APSEA breached its parental-type of fiduciary duty to act loyally in the best interests of the Plaintiffs and not to put its own or others' interests ahead of the Plaintiffs in a manner that abused the Plaintiff's trust.

The decision under appeal:

[6] After reviewing the law regarding breach of fiduciary duty as set out in **K.L.B. v. British Columbia**, [2003] 2 S.C.R. 403, Justice Warner stated:

The duty – the fiduciary duty, the parental fiduciary duty, imposed is to act loyally and not to put one’s own or others’ interests ahead of the child’s interest in a manner that abuses the child’s trust. As an example at paragraph 49 she states: [referring to McLachlin, C.J. in **K.L.B.**]:

The same may be said of the parent who uses the child for his sexual gratification or a parent who, wanting to avoid trouble for herself or her household, turns a blind eye to the abuse of a child by her spouse.

In order for the Plaintiffs in this case to make a claim for breach of fiduciary duty, it is their obligation to plead and eventually show that there is evidence that the Defendant put its own interests ahead of those of, in this case, Ms. Cooper and committed acts that harmed Ms. Cooper in a way that amounted to a betrayal of trust and disloyalty.

[7] The Chambers judge concluded that the pleading did not set out the basis for a claim of breach of fiduciary duty and struck out the statement of claim on that basis.

Issues:

[8] The issues raised on the appeal are:

1. What is the standard of review?
2. Applying that standard of review, did the chambers judge err in striking out the appellants’ claim for breach of fiduciary duty?

Standard of review:

[9] Since the order made by the chambers judge terminated the appellants’ action, the standard of review is not that usually applied to discretionary orders of an interlocutory nature but rather, whether there was an error of law resulting in an injustice: **Canada (Attorney General) v. Foundation Co. of Canada Ltd. et al** (1990), 99 N.S.R. (2d) 327 (C.A.); **Purdy Estate v. Frank**, [1995] N.S.J. No. 243

(C.A.) at 10; **Clarke v. Sherman**, [2002] N.S.J. No. 238 (C.A.) at 10; **Binder v. Royal Bank of Canada**, 2005 NSCA 94 at 21; **Milbury v. Nova Scotia (Attorney General)**, 2007 NSCA 52. Therefore the appropriate standard of review here is whether there was an error of law resulting in an injustice.

The claim for breach of fiduciary duty:

[10] Recently in **National Bank Financial Ltd. v. Potter**, [2007] N.S.J. No. 478 2007 NSCA 113, Justice Cromwell reiterated the test for striking pleadings pursuant to **Rule 14.25**:

15 There is no issue about the applicable legal test governing whether a pleading should be struck as not disclosing a cause of action. It is a high threshold, variously described as requiring a showing that it is "plain and obvious" that the pleading discloses no reasonable claim or that the claim is "absolutely unsustainable" or that it is "certain to fail" because of a "radical defect.": see, e.g. **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959; **Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)**, [1999] N.S.J. No. 258 (Q.L.) (C.A.).

[11] For the purposes of the appeal it is appropriate to consider the third amended statement claim to determine whether it is plain and obvious that it discloses no reasonable cause of action. Although the appellants have not yet applied for leave to amend the statement of claim, the amended claim adding paragraph 20 was apparently considered by the chambers judge. As noted in **Sherman v. Giles** (1994), 137 N.S.R. (2d) 52, at ¶ 11, relying on **Hunt v. Carey**, *supra*, so long as the statement of claim, as it stands or as it may be amended, discloses a reasonable cause of action, it should not be struck out. It should also be noted that even in the third amended statement of claim the defendant is erroneously referred to as "the Crown".

[12] In order to make out a claim for breach of fiduciary duty the appellants had to plead the material facts supporting her claim for breach of fiduciary duty (**Rule 14.04**). Michael Ng in his book *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (Aurora: Canada Law Book, 2007) clearly sets out the constituent elements of a breach of fiduciary duty at page 2-1:

A claim that a defendant has breached a fiduciary duty is a claim that the defendant has contravened reasonable expectations arising from a trust reposed in

the defendant. Such a claim may be broken down into several stages: first, identifying the fiduciary relationship; secondly, identifying the applicable standard of fiduciary conduct and any breaches thereof, excusable or otherwise; and thirdly, establishing the appropriate equitable remedy. As Laskin J. noted in **Canadian Aero Service Ltd. v. O'Malley**: [1973], 40 D.L.R. (3d) 371 (S.C.C.)]

There are four issues that arise for consideration on the facts so far recited. There is, first, the determination of the relationship of O'Malley and Zarzycki to Canaero. Second, there is the duty or duties, if any, owed by them to Canaero by reason of the ascertained relationship. Third, there is the question whether there has been any breach of duty, if any is owing, by reason of the conduct of O'Malley and Zarzycki in acting through Terra to secure the contract for the Guyana project; and, fourth there is the question of liability for breach of duty if established.

[13] In their statement of claim the plaintiffs state that the defendant acted in the role of a parent or guardian of Ms. Cooper while she was a resident at the school which was sufficient to establish a fiduciary relationship. On the appeal the parties accept that **K.L.B. v. British Columbia**, *supra*, sets out the relevant legal principles. In that case, Chief Justice McLachlin explained that a fiduciary duty in the parental context entails the duty to act loyally and to not put one's interest or another's interest ahead of a child's interest. She said:

49. I have said that concern for the best interests of the child informs the parental fiduciary relationship, as La Forest J. noted in **M. (K.) v. M. (H.)**, *supra*, at p. 65. But the duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust. This explains the cases referred to above. The parent who exercises undue influence over the child in economic matters for his own gain has put his own interests ahead of the child's, in a manner that abuses the child's trust in him. The same may be said of the parent who uses a child for his sexual gratification or a parent who, wanting to avoid trouble for herself and her household, turns a blind eye to the abuse of a child by her spouse. The parent need not, as the Court of Appeal suggested in the case at bar, be consciously motivated by a desire for profit or personal advantage; nor does it have to be her own interests, rather than those of a third party, that she puts ahead of the child's. It is rather a question of disloyalty — of putting someone's interests ahead of the child's in a manner that abuses the child's trust. Negligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense.

50. Returning to the facts of this case, there is no evidence that the government put its own interests ahead of those of the children or committed acts

that harmed the children in a way that amounted to betrayal of trust or disloyalty. The worst that can be said of the Superintendent is that he, along with the social workers, failed properly to assess whether the children's needs and problems could be met in the designated foster homes; failed to discuss the limits of acceptable discipline with the foster parents; and failed to conduct frequent visits to the homes given that they were overplaced and had a documented history of risk (trial judgment, at para. 74). The essence of the Superintendent's misconduct was negligence, not disloyalty or breach of trust. There is no suggestion that he was serving anyone's interest but that of the children. His fault was not disloyalty, but failure to take sufficient care. [emphasis added]

[14] From these authorities, it is clear that a statement of claim for breach of fiduciary duty has to set out the material facts to sufficiently identify:

- the nature of the fiduciary relationship,
- the nature of the duty owed by the fiduciary,
- how the duty was breached,
- how the defendant put its own interests ahead of the plaintiff's interests,
- and the appropriate remedy for the breach.

[15] In **M.(K.) v. M.(H.)**, [1992] 3 SCR 6, ¶ 72 - 79, the Supreme Court of Canada determined that a parent owes fiduciary obligations to his child to act in the child's best interests and to refrain from inflicting personal injury upon the child. It appears from the statement of claim in question on this appeal that there are sufficient particulars of APSEA's role as guardian of Ms. Cooper to properly plead a parent-child type of fiduciary relationship.

[16] In listing the particulars of the defendant's negligence in paragraph 18, the statement of claim states that the defendant knew or ought to have known about the abuse and failed to address the issue and that the defendant failed to act on information that assaults were occurring at the school. Paragraph 20 in the third amended statement of claim "repeats the foregoing paragraphs" and states that the defendant breached its "fiduciary duty to act loyally in the best interests of the plaintiffs and not to put its own or others' interests ahead of the plaintiffs ...". This is simply a statement of law of what a fiduciary duty is and a claim that it was breached. It does not provide any particulars or description of what APSEA is alleged to have done or how it put its interests ahead of the plaintiffs' interests.

[17] Two decisions of the Saskatchewan Court of Appeal deal with similar pleadings: **F.P. v. Saskatchewan**, 2004 SKCA 59 (leave to appeal to the Supreme Court of Canada denied: [2004] S.C.C.A. No. 311) and **R.J.G. v. Canada (Attorney General)**, 2004 SKCA 102 (leave to appeal to the Supreme Court of Canada denied:[2004] S.C.C.A. No. 425). In **F. P.** the plaintiffs claimed to have been sexually and physically abused by members of the foster families they had been placed with when they had been wards of the province. The following particulars were pleaded:

17. The assaults, abuse, and resulting injuries sustained by the Plaintiff were caused by the negligence, breach of trust, and breach of fiduciary duty of the Government, and the servants, agents, and employees of the Government, the particulars of which include but are not limited to the following:
  - (a) permitting unqualified individuals to hire servants, agents, and employees of the Government to administer, operate, supervise and oversee foster homes and the care of apprehended children.
  - (b) failure to have a policy or guideline in place with respect to hiring people to serve as foster parents;
  - (c) failure to protect the Plaintiff from physical, mental, and sexual abuse by K.H., W.H., B.H., and L.H., and the foster family in North Battleford when they should have been alerted by their conduct.
  - (d) employing incompetent servants, agents, and employees to work in, supervise, and monitor the foster homes, when the Government knew or ought to have known that doing so would result in grievous physical, psychological, and emotional harm to the Plaintiff;
  - (e) failure in general to take proper and reasonable steps to prevent injury to the Plaintiff's physical health and mental well-being while the Plaintiff was in the care of Social Services and living in the foster homes;
  - (f) failing to know and observe of K.H., W.H., B.H., and L.H., and the foster family in North Battleford that which was apparent and obvious if any regular and appropriate level of inspection and inquiry had been conducted and any appropriate level of contact with the Plaintiff had been part of the oversight and supervision by the government or if any appropriate level of inquiry in the community had been undertaken by the government about the



individuals who were subjecting the Plaintiff to physical, mental, and sexual abuse; and

- (g) having occupied a position analogous to that of a parent, failing to establish and maintain systems to protect the Plaintiff as a good parent should.

...

24. The Government and its servants or agents conducted themselves with brutal and callous disregard and complete lack of care for the Plaintiff and the rights of the Plaintiff. The Government and its servants or agents knew or ought to have known, and/or should have been, conscious of the probable consequences of their actions and the damages such actions would cause the Plaintiff. The Plaintiff is entitled to aggravated, punitive, and exemplary damages from the Government.

[18] Relying on **K.L.B. v. British Columbia**, the court found that the pleadings did not lay a foundation for breach of fiduciary duty because:

... There is no allegation in the appellants' pleadings that the Government acted in its own self-interest and against the interests of either of the appellants. Although there is a passing reference to breach of fiduciary duty, no material facts are pleaded in support of any such claims.

[19] Similarly in **R.J.G.**, the plaintiff claimed to have been abused while attending a residential school operated by the Government of Canada. Despite explicit claims that the plaintiff was a dependent child, under the control of the Government, who was vulnerable to the actions of the Government with respect to all decisions and actions regarding his care and education, and the Government had a fiduciary duty to act honestly, morally, in good faith, and in the best interests of the plaintiff, which duty was breached as a result of the abuse inflicted, the failure to provide a proper education, and the severance of his cultural heritage the court found:

28 Applying these same principles to the issues in this appeal, we find that the pleadings do not lay a foundation for breach of fiduciary duty. There is no allegation in the respondent's pleadings that the Government acted in its own self-interest and against the interest of the respondent. Although there is a passing reference to breach of fiduciary duty, no material facts are pleaded in support of such claim. The essence of the alleged misconduct on the part of the Government's employees is negligence, "not disloyalty or breach of trust".

29 Given our conclusion with respect to this issue, the claim for breach of fiduciary duty must be struck.

[20] An example of a statement of claim that sets out particulars of how the defendant put its own interests ahead of the plaintiff's can be seen in **Milbury v. Nova Scotia (Attorney General)**, 2007 NSCA 52, where the following was pleaded:

[32] ...

39. The Plaintiff states that the NSHCC breached its parental-type fiduciary duty to act loyally in the best interests of the Plaintiff and not to put its own or others' interests ahead of the Plaintiff in a manner that abused the Plaintiff's trust. The breaches of its fiduciary duty include that it:

(a) structured its operations so that they exploited the resident children as a source of free labour rather than functioning as a facility dedicated to the proper care, protection and education of neglected children;

(b) sold substantial portions of the food produced at the home with the aid of free child labour while at the same time depriving the resident children of adequate food and nourishment;

(c) allowed its staff to consume substantial portions of the food produced at the home with the aid of free child labour while at the same time depriving the resident children of adequate food and nourishment;

(d) by operating the home like an exploitive plantation, created or materially contributed to an atmosphere of tolerance and encouragement of excessive mental and physical abuse such that the repugnant practices pervaded the home and the relationships between the residents of the home as well as between the agents, employees, servants and residents of the home.

[21] In this case, the third amended statement of claim does not lay a foundation for the breach of fiduciary duty because no material facts are pleaded to support a claim that APSEA acted in its own self interest and against the interests of the plaintiffs. There is no statement of how APSEA's interests were promoted by

allowing Ms. Cooper to be harmed. It is therefore plain and obvious that the statement of claim discloses no reasonable cause of action. At the hearing before the chambers judge counsel for the plaintiffs was unable to point to any fact in the affidavits filed that might, if a further amendment to the statement of claim were allowed, support a claim for a breach of fiduciary duty. Furthermore, at the hearing of the appeal, the appellants' counsel was unable to advise the panel of how the statement of claim might be further amended to provide the missing particulars.

[22] In conclusion, the chambers decision discloses no error of law and the appellants have not shown that any patent injustice results from the order striking out the statement of claim. The appeal should be dismissed with costs to the respondent in the amount of \$1,000.00 plus disbursements.

Roscoe, J.A.

Concurred in:

Bateman, J.A.

Cromwell, J.A.