IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Finck v. Hartlieb, 2006 NSSC 3

Date: 20060117
Docket: SH 238288
Registry: Halifax

Between:

Lawrence Ross Finck and Carline Antonia Vandenelsen

Plaintiffs

v.

Rhonda Hartlieb, Giselle Tiche, Christine Coade, Barbara McPherson, Gale Cromwell, David Barenberg, Alfred Mamo, Dawn Edgar, Elizabeth Whelton, David Aston, Grant Campbell, Janis Searle & Craig Merkley

Defendants

DECISION
(Chambers Application)

Judge: The Honourable Justice Hilroy S. Nathanson

Heard: November 22 and 25, 2005 and January 4, 2006, in Halifax, Nova Scotia

Counsel: Lawrence Ross Finck and Carline Antonia Vandenelsen, in person
Scott C. Norton, Q.C., for the defendants David Barenberg and Alfred Mamo
Robert L. Barnes, Q.C., for the defendant Elizabeth Whelton
Michael J. Wood, Q.C., for the defendants Christine Coade, Barbara McPherson, and Gale Cromwell
Thomas P. Donovan, Q.C., for the defendant Dawn Edgar
Charles J. Ford, Esq., for the defendants Rhonda Hartlieb and Gisele Piche
Jennifer Ross, Esq., for the defendants Craig Merkley and Janis Searle

Nathanson, J.:

[1] The several defendants apply in Chambers for an order pursuant to **Civil Procedure Rule 14.25(1)** to strike the Statement of Claim or, alternatively, pursuant to **C.P. Rule 13.01** for summary judgment.

[2] **C.P. Rule 14.25(1) and (2)** provide as follows:

> 14.25 (1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
>
> (b) it is false, scandalous, frivolous or vexatious;
>
> ... (d) it is otherwise an abuse of the process of the court;...
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.
>
> (2) Unless the court otherwise orders, no evidence shall be admissable by affidavit or otherwise on an application under paragraph (1)(a).

[3] The test to be applied in deciding whether a statement of claim discloses a reasonable cause of action is set out in **Vladi Private Islands Ltd. v. Haase et al.** (1990), 96 N.S.R. (2d) 323 (S.C.A.D.) at p.325:

> ...a judge must proceed on the assumption that the facts contained in the Statement of Claim are true and, assuming those facts to be true, consider whether a claim is made out. An order to strike out a Statement of Claim will not be granted unless on the facts as pleaded the action is "obviously unsustainable."

[4] The Supreme Court of Canada authoritatively stated the test in different words, but to similar effect, in **Hunt v. Carey Canada Inc.**, [1990] 2 S.C.R. 959 at p. 980:

> ...assuming that the facts as stated in the Statement of Claim can be proved, is it "plain and obvious" that the Plaintiff's Statement of Claim discloses no reasonable cause of action?....Neither the length or complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the Plaintiff from proceeding with his or her case. Only if the action is

> certain to fail because it contains a radical defect...should the relevant portions of the plaintiff's Statement of Claim be struck out....

[5] Plaintiff Finck cited a number of additional cases on the same point of law. However, their *ratio decidendi* are similar to those in **Vladi** and **Hunt**. Since I consider **Vladi** and **Hunt** to be the leading cases in this area of the law, there is no need to deal with the other cases cited by plaintiff Finck.

[6] In the case of **Re Lang Michener Lash Johnston et al. v. Favian et al.** (1987) 37 D.L.R. (4th) 685, (Ont. H.C.J.) Henry, J. set out a list of principles taken from other case authorities in determining whether a pleading is frivolous or vexatious or an abuse of process. These include:

> (b) Where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) Vexatious actions include those brought for improper purpose, including the harassment and oppression of the other parties by multifarious proceedings brought for the purpose other than the assertion of legitimate rights;
>
> (d) It is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;....

[7] These principles were cited and applied in **Re MacCulloch (Bankrupt)** (1992), 115 N.S.R. (2d) 131 (S.C.T.D.), and **Credit Union Atlantic Ltd. v. Herbert** (1998), 172 N.S.R. (2d) 147(S.C.).

[8] I propose to proceed in this decision in the following manner: I will first consider whether a defendant has established that the Statement of Claim discloses no reasonable cause of action under **C.P. Rule 14.25 (1)(a)**; only if it has not done so, will I move on to consider whether, pursuant to **C.P. Rule 14.25 (1)(b)**, the Statement of Claim is false, scandalous, frivolous or vexatious; only if it is not, will I then move on to consider whether, pursuant to **C.P. Rule 14.25 (1)(d)**, the Statement of Claim is an abuse of the process of the court; only if the conclusion on that point is in the negative will I move on to consider the matter of summary judgment.

PROCEDURAL BACKGROUND

[9] The plaintiffs issued a Statement of Claim on January 10, 2005, against 15 named defendants. The Statement of Claim contains 368 paragraphs. It claims general, special, aggravated and punitive damages for actions alleged to constitute unspecified actionable torts.

[10] The Statement of Claim reviews the history of the Plaintiffs' individual and combined dealings with the child welfare authorities, lawyers, judiciary, and criminal justice system in Ontario and Nova Scotia over the last decade. It is a vast and prolix document. It does not focus on any particular acts of wrongdoing but, rather, is replete with speculation, vague references to unspecified illegal conduct, and unsubstantiated conspiracy theories. The plaintiffs vaguely allege wrongful conduct by government authorities over and above the named defendants. They refer to a broad-based conspiracy running throughout the justice system, the child welfare system and, indeed, government generally. None of these allegations are supported by a factual matrix which could result in findings of wrongdoing.

[11] It is apparent that, over the course of the last decade, the plaintiffs have been engaged, separately or together, in numerous judicial proceedings involving issues of custody and access relative to their children. They have not been satisfied with the result of these proceedings. They attack the conduct of the judiciary, judicial officers, child welfare authorities and the parties to these proceedings. There are no cogent allegations linking these parties or their activities in a manner such that would give rise to a legal right to relief.

[12] The statement of claim is extremely long and convoluted, and is filled with various rambling allegations against all the defendants. Few, if any, particulars are set out, contrary to the requirement of **C.P. Rule 14.12(1)**. Much of the contents is in the nature of evidence, rather than material facts in support of the plaintiffs' allegations, contrary to the requirement of **C.P. Rule 14.04**.

[13] On February 11, 2005, Justice John D. Murphy ordered that, as against two defendants, Justice Robert Wright and Associate Chief Justice Deborah K. Smith, certain paragraphs and parts of paragraphs of the Statement of Claim be struck out pursuant to **C.P. Rule 14.25(1)** on the basis that the pleadings disclosed no reasonable cause of action, as follows: 180 and 185, in their entirety; 196, remove the words "and

Smith"; 199, 201, 202, 206, 207, in their entirety; 250, remove the sentence "The plaintiffs state defendant Smith proceeded in their absence knowing the plaintiffs were delivered to another court on criminal matters stemming from her previous order(s)."; 251, remove the sentence "The plaintiffs state the defendant Smith did not sufficiently inquire as regards family placement and or consider family placement as an alternative against the detrimental effects keeping the infant child in state care."; 252 and 253, in their entirety; 254, remove the balance of the paragraph following the first sentence; 256, remove the word "Smith"; 280, remove the sentence "The plaintiffs aver defendant Smith lost her jurisdiction by her continued reckless judicial renderings and failure to respect and or maintain a level of decency and fairness."; 295, delete the words "and Smith"; 296 and 297, in their entirety; 298, remove the sentence "They state defendant Smith did not or would not take control of her courtroom and would not or did not adjudicate according to governing and or applicable laws."; 301, remove the words "defendants Smith and" and replace with "defendant"; 302, 303, 304, 306, 307 and 308, in their entirety; 315, remove the words "and Smith"; 321, 322, 323, 324, 325, 326, 327 and 328, in their entirety; 340, 343, and 345, remove the words "Smith" and "Wright" in each; and 363, remove the word "Smith".

[14] On October 17, 2005, Justice Arthur W.D. Pickup ordered the pleadings struck, pursuant to **C.P. Rule 14.25(1)**, as against two defendants, Justice David Aston and Justice Grant Campbell, of the Superior Court of Ontario, on the ground that they were obviously unsustainable on the basis of judicial immunity and absolute privilege.

[15] That leaves the plaintiffs' claims against 11 defendants to be considered in the present application. In doing so, for the purpose of ascertaining whether any pleading discloses a reasonable cause of action, I assume that the allegations set out in the statement of claim are true.

CLAIMS AGAINST HARTLIEB AND PICHE

[16] The defendants Rhonda Hartlieb and Gisele Piche (erroneously referred to throughout the Statement of Claim as Giselle Tiche) are employed by the Huron-Perth Children's Aid Society, in Ontario, which operated a satellite office in Stratford known as the Stratford Children's Aid Society. Although neither of the Societies is a party to the proceeding, the Statement of Claim contains a number of references to the conduct of the Children's Aid Society of Stratford, which is described in the body of the Statement of Claim as a defendant. For ease of reference, Hartlieb, Piche and

the Children's Aid Society of Stratford will be referred to as the "CAS Stratford defendants".

[17] The CAS Stratford defendants request that the following paragraphs of the Statement of Claim be struck out: 4, 5, 6, 32, 111, 112, 113, 116, 117, 119, 120, 121, 122, 128, 129, 132, 146, 149, 153, 158, 165, 166, 175, 194, 195, 196, 197, 200, 226, 342, 344 and 347. They also request that their names be removed from the style of the cause.

[18] The CAS Stratford defendants are alleged, in summary, to have received reports; conducted some investigations; compiled reports, some of which are described as "negating all child welfare concerns" and containing unspecified misleading information; not returned all phone or letter messages from the plaintiffs; not conducted an investigation sought by the plaintiffs; attempted to "herd" the plaintiffs into a family assessment; not scheduled a meeting sought by the plaintiffs; sent a Canada-Wide Apprehension Alert to CAS Halifax alleging the plaintiffs require mental assessments; and breached unspecified laws.

[19] In addition to these allegations specifically identifying the Stratford CAS defendants, there are a number of global allegations against all defendants. The plaintiffs allege "a pattern of unnecessary, substantial and aggravated involvement of... government agents/authorities" (para. 203). They suggest that this pattern supports a goal of sustaining a "government child welfare business" by confusing and diverting issues. They allege that this operates to the financial benefit of government and lawyers (para. 204). They claim that the defendants collectively attempted to "herd the plaintiffs into a physical, emotional and psychological corner of despair" (para. 335). They assert that their "rights to liberty, security, beliefs and privacy protecting physical and psychological integrity and familial rites of passage were severely interfered with by the actions of the defendants" (para. 338).

[20] The plaintiffs allege that "a person using ordinary care and skill" would not have severed their contacts with their children (para. 344). The plaintiff Vandenelsen alleges an "assault" on her "rites of passage of motherhood" and an ongoing violation of her "maternal instincts and abilities" (para. 352). The plaintiffs claim damages in the form of pain and suffering, interference with family relations, diminished health, mental distress, etc.

[21] The claim is not set out clearly. Neither the legal nature of the alleged wrongs, nor their causal link to damages, are set forth. Since the plaintiffs are unrepresented, it is considered appropriate to take a generous view of the pleadings and to evaluate the Statement of Claim with respect to three torts which I consider to be appropriate: negligence, public misfeasance, and civil conspiracy.

[22] In order to establish a reasonable cause of action in negligence, there must be facts capable of supporting a finding of breach of duty of care owed to the plaintiffs. The plaintiffs allege that the CAS Stratford defendants received reports and conducted investigations, but no specific facts are alleged which could support a finding that these defendants were negligent in their conduct of investigations. The plaintiffs allege that the CAS Stratford defendants did not respond to each and every phone call from the plaintiffs, and did not acquiesce in each and every request for a meeting or investigation, but no facts are alleged which would tend to show that this amounted to a dereliction of any duty of care owed to the plaintiffs. These bald assertions cannot sustain a reasonable cause of action in negligence.

[23] There are two essential elements to the tort of public misfeasance (**Odhavji Estate** v. **Woodhouse** (2003), Carswell Ont. 4851 at para. 23): (1) deliberate and unlawful conduct in one's capacity as a public officer; and (2) awareness by the public officer that such conduct was unlawful and likely to harm the plaintiff. The allegations contain a number of assertions that the Children's Aid Society of Stratford is an "abusive child welfare agency", but no facts are alleged to support that assertion. The plaintiffs also allege that the CAS Stratford defendants participated in the fabrication of a Canada-Wide Alert, but there is no allegation as to what, if any, information in that document was fabricated. None of the allegations are capable of supporting a finding that there was deliberate and unlawful conduct. As such, the Statement of Claim does not set out the basis for a reasonable cause of action in public misfeasance as against the CAS Stratford defendants.

[24] The various assertions in the Statement of Claim that the defendants are engaging in a pattern of behaviour designed to further their interests might be taken as an assertion of a claim of civil conspiracy. This has been defined by Willes, J. in **Mulcahy** v. **R.** (1868), L.R. 3 H.L. 306 at 317 as an agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. The Statement of Claim does not contain any specifics as to an agreement to conspire, nor as to what objects were served or might be served by such conspiracy. Furthermore, the Statement of Claim does not allege any unlawful acts or lawful acts done by unlawful means on the

part of the CAS Stratford defendants. Therefore, the Statement of Claim does not establish the basis for a reasonable cause of action in civil conspiracy.

[25] The claim of the plaintiffs is obviously unsustainable. Therefore, it is plain and obvious that the Statement of Claim does not disclose a reasonable cause of action against the CAS Stratford defendants.

CLAIMS AGAINST COADE, McPHERSON AND CROMWELL

[26] These three defendants are employees of the Children's Aid Society of Halifax. Cromwell is a supervisor. They request that the claims against them be struck in their entirety pursuant to **C. P. Rule 14.25(1)(a)** or, in the alternative, pursuant to **C. P. Rule 14.25(1)(b) and (d)**.

[27] The paragraphs specified by these three defendants are: 12; 163; 169, last two sentences to be deleted; 170 and 171; 173, last sentence to be deleted; 175; 188; 190, last two sentences to be deleted; 191, the portion saying, "given the immeasurable and unrelenting stresses and abuses by the defendants and the 'system' overall" to be deleted from the last sentence; 195, the words "Coade, and CAS Halifax" to be deleted from the first sentence; 196, last sentence to be deleted; 197, items (d), (e) and (f); 198; 200, portion saying, "that defendant CAS Halifax had no evidence indicating otherwise" to be deleted; 203; 204 and 205; 224, references to "Cromwell, CAS Halifax" to be deleted from the first sentence; second sentence to be deleted in its entirety; 225, everything after the first sentence to be deleted; 226, last sentence to be deleted; 233, portion saying, "CAS Halifax, Cromwell, and McPherson who then gave her to other agents unknown" to be deleted; 237, last sentence to be deleted; 240 and 241; 251, first sentence to be deleted; 254, first sentence to be deleted; 255 and 256 and 257; 277, first two sentences to be deleted; 295, portion of first sentence saying "McPherson, Cromwell, CAS Halifax" to be deleted; second sentence to be deleted; 298; 315, reference to "McPherson, CAS Halifax" to be deleted; 338; 342, portion saying "CAS Halifax, Coade, McPherson, Cromwell" to be deleted; 347, references to "Coade, McPherson" "Cromwell" and "and CAS Halifax" to be deleted; 352; and 356 and 357.

[28] The relevant allegations in the Statement of Claim can be categorized as falling into several groups, namely: negligence, breach of statutory duty, criminal conduct (including providing false evidence), harassment, deceit and conspiracy. Some of such allegations do not raise a cause of action, while others refer to actions taken by

these defendants in accordance with their mandate under the *Children and Family Services Act*, S.N.S. 1990, c. 5, as amended.

[29] Paras. 225, 233, 237, 254 and 257 can be grouped together as alleging negligence. These allegations do not include statements of the material facts necessary to set out a duty of care or breach of a standard of care by these defendants, or do not disclose a duty of care owed by these defendants to the plaintiffs.

[30] Certain specific allegations against one or more of these three defendants can be grouped together: paras. 163, 169, 170, 171, 224, 225, 277 and 347. Some of these allegations refer to breaches of their duties under the *Children and Family Services Act* or attempts to "undermine the philosophy and spirit" of that *Act*. These seem to be allegations of breach of statutory authority. However, the Supreme Court of Canada in the case of **Canada** v. **Saskatchewan Wheat Pool**, [1983] 1 S.C.R. 205 held that there is no tort of breach of statutory authority. In any event, the statutory duties of a Children's Aid Society, and its employees, are set out in s. 9 of the *Children and Family Services Act*: to protect, investigate, supervise and provide care. The Statement of Claim does not set out material facts in support of an allegation that these defendants breached their statutory duties, and does not contain a plea of the existence of a duty of care or a breach of a standard of care with respect to statutory obligations. Moreover, s. 34 of the *Act* permits agency workers to enlist the help of peace officers to effect search and seizure; thus, the allegation in para. 225 indicates that the defendants acted in conformity with statutory duty rather than in breach of it.

[31] The plaintiffs allege criminal conduct, including swearing false evidence, in paras. 175, 196 and 197. Coade is said to have sworn an affidavit containing false or misleading statements; Coade and Cromwell are alleged to have been involved in unspecified criminal conduct; and Coade is alleged to have misdated an intake report. The allegation of a false affidavit in para. 175 does not support a civil cause of action, even if it were proved to be true: **L.M.K.** v. **Ontario (Ministry of Community & Social Services)**, [1996] O.J. No. 812 (Ont. Gen. Div.) at paras. 83 and 84. All of the allegations of criminal conduct are unspecified and, in any event, cannot give rise to a civil cause of action.

[32] Certain allegations, more specifically paras. 198 and 255, may be allegations of harassment or of intimidation. If harassment, there is no such tort known to law. If intimidation, the Statement of Claim does not set out material facts in support of the requisite elements of the tort. Moreover, the allegations appear to relate to third

parties rather than to the plaintiffs, so that there can be no cause of action against these defendants.

[33] The plaintiffs allege that the defendants MacPherson and Cromwell were deceitful in giving advice to extended family members. See paras. 240-241. The tort of deceit requires the existence of a false representation: Klar, Remedies in Tort, 2005, p. 5-11. Here, the statements made were consistent with provisions of the *Children and Family Services Act* and, therefore, could not be fraudulent. There are no material facts pleaded in support of the claim for deceit.

[34] Paras. 190, 204 and 205 can be grouped together as alleging conspiracy. But the plaintiffs have not claimed that the conspiratorial acts of the defendants concerning the "child welfare business" or the coverup of the I.W.K. Assessors alleged history of child abuse were intended to injure either of them. Instead, the allegations relate to harm occasioned to the child, M.F.. But the child is not a plaintiff. And the Statement of Claim does not contain any particulars of any monetary loss occasioned by the plaintiffs. Therefore, the elements of this cause of action are impossible to be made out.

[35] The plaintiffs allege miscellaneous wrongdoing in paras. 188, 204, 256, 295, 315, 352 and 357: misappropriation of documentation such as birth certificates; lack of awareness of another's plight; vague assertions of moral, criminal, ethical and legal wrongdoing; assault on a person's rites of passage or rites of motherhood; and political persecution. None of the facts alleged constitute torts known to law. Allegations of material facts are completely absent. Therefore, no cause of action is disclosed.

[36] The claims against these three defendants are obviously unsustainable and are certain to fail. It is plain and obvious that they disclose no reasonable cause of action pursuant to **C. P. Rule 14.25 (1)(a)**.

CLAIM AGAINST MAMO AND BARENBERG

[37] These two defendants are members of the Law Society of Upper Canada, practicing law in London and Stratford, Ontario, respectively. They have applied to this Court to strike certain paragraphs of the Statement of Claim on three alternative and cumulative grounds, as follows: (1) pursuant to C.P. Rule 14.25(1)(a); (2) pursuant to **C.P. Rule 14.25(1)(b)** and/or **(d)**; and (3) pursuant to **C.P. Rule 13.01**.

[38] The paragraphs and parts of paragraphs specified by these two defendants are as follows: 4 and 5 in their entirety; 25 by removing the word "defendant" from immediately in front of the word "Barenberg" throughout the paragraph; 26 by removing the word "defendant" from immediately in front of the word "Barenberg" throughout the paragraph; 28 by removing the word "defendant" from immediately in front of the word "Barenberg" throughout the paragraph; 41 in its entirety; 44 by removing the word "defendant" from immediately in front of the word "Barenberg"; 48 by removing the word "defendant" from immediately in front of the word "Barenberg"; 53 in its entirety; 55 by removing the word "Barenberg" from the first line; 99 by removing the word "defendant" immediately in front of the word "Barenberg"; 106 by removing the first sentence and removing the remainder of the paragraph following after the words "plaintiff's mother's schedule"; 107 in its entirety; 108 in its entirety; 109 in its entirety; 115 by removing the word "defendant" from immediately in front of the word "Barenberg"; 135 by removing the word "defendant" from immediately in front of the word "Mamo"; 138 by removing the word "defendant" from immediately in front of the word "Mamo"; 143 in its entirety; 173 by removing the word "Mamo"; 353 in its entirety; and 355 by removing the words "Barenberg: and "Mamo."

[39] The paragraphs and parts of paragraphs of the Statement of Claim specified by these defendants contain allegations which assert various acts of wrongdoing arising from their legal representation of one Merkley who was a defendant in one or more actions before the Ontario Superior Court of Justice. There is no allegation of any contractual or other relationship between the plaintiffs and either of these two defendants in the present case.

[40] The Statement of Claim does not identify any specific breach of any legal duty giving rise to a cause of action. Even if it did, the authorities are clear that lawyers for one party do not owe a duty of care to the other party: **Rent** v. **Gillis et al.**(1991), 108 N.S.R. (2d) 389 (S.C.T.D.,) ; **Michaud** v. **Jackson** (2003), 262 N.B.R. (2d) 344 (Q.B.); and **Niro** v. **Niro** , [2004] O.J. No. 342. Therefore, such a claim could have no chance of success. Even if the plaintiffs had grounds to complain about the ethical conduct of the applicants (which they do not), that would not provide the basis for an action in damages. If the plaintiffs' allegations had any merit, they might have formed the basis for an appeal of one or more of actions extant in Ontario, but they do not form the basis for a claim of civil liability against these two defendants.

[41] The action is obviously unsustainable against these two defendants. It is bound to fail. It is plain and obvious that the paragraphs and parts of paragraphs specified by these two defendants disclose no reasonable cause of action.

CLAIM AGAINST EDGAR

[42] This defendant was the physician for the plaintiff, Carline Vandenelsen, from December 8, 2003, to January 9, 2004, and was the physician responsible for her infant following birth on December 23, 2003. She asks this Court to strike out certain paragraphs of the Statement of Claim because they disclose no reasonable cause of action, as follows: 15; 162; 163; 164; 167; 169; 170; 171; 172; 177; 185; 197(d); 197(e); 197(f); 237; and 339.

[43] The Statement of Claim alleges, *inter alia*, that Dr. Edgar contacted the Children's Aid Society, was contacted by the Society, and was ordered by Associate Chief Justice Deborah K. Smith to produce the plaintiff mother's medical file, which she did. Then, in para. 339, the plaintiffs claim:

> The Plaintiffs claim Defendant Edgar breached a fiduciary duty to the Plaintiffs and their infant child when not fully disclosing to the Plaintiffs her knowledge of and/or involvement with the Defendants Coade and CAS Halifax causing aggravated stress and fear. They claim she further breached duties by failing, refusing and/or declining to give a proper medical report that would otherwise or should have otherwise resulted in a dismissal of Family Court proceedings, which did and continues to put the Plaintiffs' infant's life in jeopardy. [emphasis added]

[44] Reporting by a medical practitioner to a Children's Aid Society is a professional obligation by virtue of ss. 23 and 24 of the *Children and Family Services Act*. The *Act* protects the duty to report by restricting the right of civil action. The only exception is a report made falsely and maliciously. Proof of malice requires proof of an intentional wrongful act without just cause or excuse, with intent to inflict injury. There are no material facts pleaded in the Statement of Claim which raise, let alone support, such an allegation. Furthermore, it is noted that the Statement of Claim does not advance a claim that Dr. Edgar made a false and malicious report. In such case, no cause of action is revealed.

[45] The second breach alleged is that Dr. Edgar failed to give a proper medical report. Dr. Edgar produced medical records in compliance with a court order. No cause of action is disclosed by doing so.

[46] The claim against this defendant is obviously unsustainable and certain to fail. It is plain and obvious that the paragraphs of the Statement of Claim specified by this defendant disclose no reasonable cause of action.

CLAIM AGAINST WHELTON

[47] This defendant is a barrister of the Supreme Court of Nova Scotia who represents the Children's Aid Society of Halifax in respect of supervisory and custody arrangements concerning the plaintiffs' infant child, M.F.. She has never acted for either of the plaintiffs in any proceeding, and has been adverse in interest to them in all events giving rise to the present action. She has applied to this Court pursuant to **C.P. Rule 14.25(1)(a), (b) and (d)**, and pursuant to the inherent jurisdiction of this Court.

[48] She requests that all references to, and allegations against, her in the following paragraphs of the Statement of Claim be struck out: 173, 174, 175, 176, 179, 180, 183, 191, 197, 198, 204, 205, 206, 224, 225, 226, 237, 246, 251, 253, 254, 256, 257, 271, 277, 280, 282, 295, 297, 315, 317, 335, 352, 355 and 357.

[49] Some of these paragraphs set out allegations that Ms. Whelton erred or misconducted herself during her representation of the Children's Aid Society of Halifax and her retainer to pursue a supervision and access order with respect to the child, M.F.. Other paragraphs allege negligence in causing the death of the plaintiff Finck's mother, and failure to report factual circumstances to the Court which, it is asserted, would have changed the outcome of a court hearing. A number of allegations allege that Ms. Whelton failed to take certain steps, none of which constitutes a cause of action known to law.

[50] The allegations of misconduct while representing the Children's Aid Society of Halifax are obviously unsustainable in that there can be no cause of action at law against an opposing lawyer with respect to that lawyer's representation of a client: **Rent** v. **Gillis et al.**, *supra*; **Michaud** v. **Jackson**, *supra;* and **Niro** v. **Niro**, *supra.*

[51] The other allegations against Ms. Whelton disclose no cause of action

[52] It is plain and obvious that the paragraphs and parts of paragraphs specified by this defendant disclose no reasonable cause of action.

[53] This defendant also seeks an order directing that these plaintiffs may not commence any action as against her or other members of the Nova Scotia Barristers' Society representing the Children's Aid Society of Halifax without leave of the court. She seeks this order so as to protect herself and other opposing counsel from any further baseless, frivolous or vexatious claims by these plaintiffs. This request of this defendant will be granted.

CLAIM OF MERKLEY AND SEARLE

[54] The defendant Merkley is the former husband of the plaintiff Vandenelsen. The defendant Searle is Merkley's wife. They live in Stratford, Ontario.

[55] The Statement of Claim refers to court applications and subsequent orders relating to past custody and access applications involving Vandenelsen and Merkley. Merkley has sole custody of the children of their former union, and Vandenelsen has no right of access. These two defendants submit that the various allegations against them contained in the Statement of Claim disclose no cause of action on the basis that they are statute-barred, are not properly particularized, cannot give rise to a known cause of action at law, or are precluded by operation of law. These two defendants submit that the plaintiffs' claim is replete with radical defects or is absolutely unsustainable.

[56] When a court considers an application to strike under **C.P. Rule 14.25 (1)(a)**, it is required by the provisions of **C.P. Rule 14.25 (2)** to accept the allegations in the Statement of Claim at face value in order to determine whether the claim, as pleaded, gives rise to a cause of action at law. The veracity of any allegations is not a factor for the Court to consider; the Court is not looking at the merits of the claim but, rather, only at whether the claim could disclose a cause of action.

[57] It is submitted that some of the paragraphs in the Statement of Claim, such as paras. 19-28, can disclose no cause of action as they are out of time, that is, are barred by the operation of limitation periods. In addition, they do not disclose claims which give rise to causes of action known to law. Para. 19 alleges misrepresentation concerning Merkley's presumed infertility, but negligence and related torts such as

negligent misrepresentation have a six year limitation period under section 2(e) of the *Limitation of Actions Act*, R.S.N.S. 1989, c. 258 so that the right to make a claim for negligent misrepresentation on October 15, 1998, would have expired in October, 1994. In such case, the claim cannot succeed: **Smith** v. **McGillivary** (2000), 191 N.S.R. (2d) 141 (S.C.). Para. 20 appears to constitute an allegation of conversion or detinue with respect to Merkley's retention of file materials; since the limitation period for such torts is six years, any claim for conversion would be statute-barred well before January, 2005, when the Statement of Claim was issued. Paragraph 22 alleges facts which might be construed as assault or battery; however, they are not allegations against any of the named defendants, there are insufficient particulars to disclose any cause of action against Merkley because illness arising from *in vitro* fertilization attempts is not a known tort. Paras. 25 and 350 contain allegations of false evidence or perjury, which cannot give rise to a cause of action in law: **L.M.K.** v. **Ontario (Ministry of Community & Social Services)**, [1996] O.J. No. 812 (Ont. Gen. Div.) at para. 83. In any event, the limitation period for any misrepresentation by Merkley has long since expired. Para. 28 contains an allegation that Merkley obtained a court order by surreptitious means; this does not give rise to a right of civil action.

[58] The allegations in para. 29 do not contain material facts or sufficient particulars to identify a cause of action. Vandenelsen does not allege how she lost money to Merkley and Searle, the time period during which the money was lost, or the amount of money.

[59] Para. 30 alleges adultery. There is no civil cause of action for adultery.

[60] Para. 40 alleges that Merkley and Searle defamed and slandered Vandenelsen. However, she has not set out what particular words used by Merkley and Searle comprise the alleged defamation. This is always a fatal legal defect in claims for defamation. A similar problem arises with respect to the claim for defamation set out in para. 51.

[61] Para. 53 appears to contain an allegation of injurious falsehood against Searle. Such a claim requires that the plaintiff show disparagement of property by a third party which affects the disposibility of the property (Klar, Remedies in Tort, 2005, p. 9-5), and that the disparagement or representation was made maliciously. However, the claim here lacks specifics and particulars, and does not allege malice.

[62] Para. 54 is simply a recitation of the fact that Merkley brought a cross-appeal against Vandenelsen in court. That is something which every litigant is entitled to do.

[63] Para. 165 states that Merkley contacted the Children's Aid Society of Stratford to report that Vandenelsen had given birth in Halifax. There is no mention whether he expressed any concerns relating to the welfare of the child. The paragraph does not allege that Merkley reported anything falsely or maliciously. Merely reporting a stated fact or allegations to a government authority is not actionable.

[64] In summary, the allegations contained in paras. 19-30, 40, 51, 53, 54 and 350 are obviously unsustainable and are certain to fail. It is plain and obvious that they disclose no cause of action against either of these two defendants or disclose radical defect.

SUBMISSIONS OF PLAINTIFFS

[65] The plaintiffs did not submit a pre-hearing brief, but plaintiff Finck, on behalf of himself and plaintiff Vandenelsen, made a lengthy and extensive oral presentation at the hearing of the application. During that presentation, he spent most of the time on the merits of the case, that is, elaborating on the factual allegations in the Statement of Claim and also supposed facts not appearing anywhere in that pleading. He did so despite acknowledging that the Court was limited to considering the allegations set out in the Statement of Claim, which facts the Court was bound to assume to be true. He did not seem to appreciate that this is a procedural application.

[66] During the course of his submission, he cited a number of cases. One is **K.L.B.** v. **British Columbia**, [2003] 2 S.C.R. 403. The issue summary of the headnote in the case report is as follows:

> Torts — Liability — Intentional torts — Abuse of children by foster parents — Whether government can be held liable for harm children suffered in foster care — Whether government negligent — Whether government vicariously liable for torts of foster parents — Whether government liable for breach of non-delegable duty — Whether government liable for breach of fiduciary duty.

Clearly, this case has nothing whatsoever to do with the issues in this application, although it may have some connection with the merits of the case, that is, a crusade

of the plaintiffs to regain custody of their children whom governmental authorities apparently directed into foster care.

[67] Plaintiff Finck appears to be seeking some vague and generalized form of equity or fundamental fairness, which doubtless he would define as achieving the remedies which he seeks. He informed the Court that he would be taking the present application, as well as other pending actions and appeals, all the way to the Supreme Court of Canada and also to the World Criminal Court. At one point in his oral submission, he asked this Court to refer the matter to the Minister of Justice of Nova Scotia to authorize an inquiry pursuant to the *Judicature Act*; but, when asked to cite authority for his submission, he was unable to do so.

[68] He submitted that this application is a cross-jurisdiction case, apparently referring to the fact that some of the allegations set out in the Statement of Claim concern events which occurred in Ontario while others occurred in Nova Scotia. He submitted that this Court has the power under the *Judicature Act* to send the case to "the powers that be".

[69] Plaintiff Finck also submitted that the present application was incomplete and premature. I believe he wanted time to amend the Statement of Claim, as he requested on two occasions. On the first occasion, he wanted two named physicians to be added as co-defendants, and on the second occasion he named four additional present and former penitentiary officials to be added. Except for their names and occupations, he gave little further information and no reason for their addition at this late date. He implied that they were not participants in the events alleged in the Statement of Claim; rather, they were preventing the plaintiffs from preparing proper documents for Court while he was on remand. He was asked to file a Notice of Application and Affidavit setting out the facts upon which he wished to rely. Unless and until he does so, it is impossible to understand and rule upon his submissions. No documentation has been received to the date of this decision.

DISPOSITION

[70] In summary, assuming as we must that the facts as stated in the Statement of Claim can be proved and are true, it is plain and obvious that the paragraphs in the Statement of Claim which relate to each of the several defendants disclose no

reasonable cause of action or contain a radical defect. The action as pleaded is obviously unsustainable. If the action continues, it is certain to fail.

[71] Therefore, the application of each of the several defendants is granted. Paragraphs or parts of paragraphs of the Statement of Claim relating to them respectively will be struck out in accordance with their respective requests.

[72] While I have not considered the matter at length, it is probable from the foregoing discussion that the allegations in the Statement of Claim are also frivolous, vexatious and an abuse of process.

[73] Any incidental matters which may arise from this award, not dealt with in this Decision, may be addressed at the time an Order for Judgment is taken out.

[74] The several defendants will have their costs of this application in such amounts as may be agreed upon or, in default therefore, to be taxed. Any of the parties may speak to this matter at the time an Order is taken out.

J.