

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: D.C. v. Children's Aid Society of Cape Breton, 2008 NSSC 196

Date: 20080709

Docket: SN 206119

Registry: Sydney

Between:

D. C.

Plaintiff

v.

Children's Aid Society of Cape Breton Victoria,
a body corporate

Defendant

Judge: The Honourable Justice C. Richard Coughlan

Heard: June 3, 2008, in Sydney, Nova Scotia

Decision: June 3, 2008 (Orally)

**Release of
Written Decision:** July 9, 2008

Counsel: D. C., plaintiff, self-represented
Christopher Conohan, for the defendant

Coughlan, J.: (Orally)

[1] D. C. commenced action against the Children's Aid Society of Cape Breton Victoria on August 25, 2003 for damages arising out of the apprehension by the Society of L.K.C., a newborn child, born to L. A.. Mr. C. is the father of the child. He bases his claim on negligence, malicious prosecution, abuse of position, abuse of process, breach of fiduciary duty and defamation of character. The Society filed a defence September 5, 2003. Mr. C. filed a list of documents March 16, 2004. The Society filed a list of documents January 4, 2005.

[2] Medical information concerning Mr. C. was requested by the Society in 2005. In July, 2007, the Society received certain releases for information from Mr. C..

[3] On August 21, 2007, Mr. C. requested disclosure from the Society. Mr. C. filed a notice of trial September 18, 2007. A conference was held before the Honourable Justice Simon J. MacDonald in October, 2007. Subsequent to the conference with Justice MacDonald, additional disclosure was made by the Society.

[4] By letter dated March 13, 2008, counsel for the Society informed Mr. C. the Society would be making application to strike his statement of claim. By application dated March 19, 2008, Mr. C. applied to amend his statement of claim.

[5] On April 6th, 2008, the Society applied for an order pursuant to Civil Procedure Rule 14.25 to strike out Mr. C.'s statement of claim. For the purpose of considering the application to strike, I assume Mr. C.'s application to amend has been granted and I will consider the statement of claim as Mr. C. applies to amend it.

[6] Civil Procedure Rule 14.25 provides:

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;
- (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
- (d) it is otherwise an abuse of the process of the court;

and may order the proceeding to be stayed or dismissed or a judgment to be entered accordingly.

2. Unless the court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under paragraph 1(a).

[7] The test for striking out a statement of claim was set out by MacKeigan, C.J.N.S. in giving the Appeal Division's judgment in *Teale v United Church of Canada at Woodlawn, Nova Scotia, Trustees of* (1979), 34 N.S.R. (2d) 313 at p. 315:

Whether a statement of claim discloses a cause of action is ordinarily to be determined solely by pursuing its contents and any relevant statutes. Affidavit evidence may be admitted at the discretion of the chambers Judge but should not relate to proof or disproof of the facts alleged in the claim. On an application to dismiss it is assumed that the facts alleged in the statement of claim can be proved. The question is whether a claim in law is shown, assuming the facts to be true.

[8] This being an application to strike out the statement of claim, the facts as pleaded are assumed to be true.

[9] In *Hunt v. Carey Canada Inc.* [1992], S.C.R. 959, the Court set out the test for an application to strike as whether it is "plain and obvious" the plaintiff's statement of claim discloses no reasonable claim. Therefore, the statement of claim is struck out only if it is plain and obvious the action cannot succeed.

[10] The Society is governed by the provisions of the *Children and Family Services Act*, S.N.S. 1990, c. 5. The purpose of the *Act* is set out in s. 2 of the *Act* as follows:

2 (1) The purpose of this Act is to protect children from harm, promote the integrity of the family and assure the best interests of children.

(2) In all proceedings and matters pursuant to this Act, the paramount consideration is the best interest of the child.

[11] The Society is an agency as defined in the *Act*. Section 9 of the *Act* sets out the functions of an agency as follows:

- 9 The functions of an agency are to:
- (a) protect children from harm;
 - (b) work with other community and social services to prevent, alleviate and remedy the personal, social and economic conditions that might place children and families at risk;
 - (c) provide guidance, counselling and other services to families for the prevention of circumstances that might require intervention by an agency;
 - (d) investigate allegations or evidence that children may be in need of protective services;
 - (e) develop and provide services to families to promote the integrity of families, before and after intervention pursuant to this Act;
 - (f) supervise children assigned to its supervision pursuant to this Act;
 - (g) provide care for children in its care or care and custody pursuant to this Act;
 - (h) provide adoption services and place children for adoption pursuant to this Act;
 - (i) provide services that respect and preserve the cultural, racial and linguistic heritage of children and their families;
 - (j) take reasonable measures to make known in the community the service the agency provides; and
 - (k) perform any other duties given to the agency by this Act or the regulations.

[12] Mr. C. claims against the Society in negligence. In *D.(B.) v. Children's Aid Society of Halton (Region)*, [2007] S.C.C. 38, the Supreme Court of Canada found there is no duty of care to a family of a child in care. The Society, not having a duty of care to Mr. C., his claim in negligence cannot succeed.

[13] Mr. C. claims for breach of fiduciary duty. In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, LaForest, J., in describing a fiduciary duty, stated:

However, as Professor Finn puts it, the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests"; ...

[14] The Society does not stand in a fiduciary relationship with Mr. C.. The Society's duty is the protection of the child. Mr. C. has no cause of action against the Society for breach of fiduciary duty.

[15] Mr. C. claims against the Society for defamation. In an action for defamation, a plaintiff must set out fully and precisely the defamatory words the defendant is alleged to have published and specify how, when, where and to whom they were published. In this proceeding, the statement of claim does not specify any defamatory statements, whether the statements were written or oral, or anything about to whom, when or where any defamatory statement was made. There is nothing in the statement of claim to support an action for defamation.

[16] Mr. C. claims damages for malicious prosecution. In giving his judgment in *Nelles v. Ontario* (1989), 60 D.L.R. (4th) 609 S.C.C. at p. 639, Lamer, J., as he then was, set out the elements necessary for an action for malicious prosecution at para. 42, as follows:

There are four necessary elements which must be proved for a plaintiff to succeed in an action for malicious prosecution:

- a) the proceedings must have been initiated by the defendant;
- b) the proceedings must have terminated in favour of the plaintiff;
- c) the absence of reasonable and probable cause;
- d) malice, or a primary purpose other than that of carrying the law into effect.

[17] The statement of claim does not set out any facts alleging proceedings initiated by the defendant now terminated in favour of the plaintiff. There is nothing set out in the statement of claim to support an action for malicious prosecution.

[18] Mr. C. also claims against the Society for abuse of position. It may be he is referring to the tort of misfeasance in a public office. The nature of the tort was described by Iacobucci, J., in giving the Court's judgment in *Odhavji Estate v Woodlouse*, [2003] 3 S.C.R. 263, where at para. 32 he stated:

To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[19] With regard to the first element, deliberate unlawful conduct in the exercise of public functions, the statement of claim alleges the Society employees decided to apprehend the child regardless of their knowledge Mr. C. had no history of protection concerns, had raised a child on his own and had no history of child abuse. The Agency decided a male could not parent the child and one Society employee, who had previously been assaulted by the child's mother, "voted" to have the child placed in the Society's custody.

[20] These allegations, if accepted as proved, as I must assume in an application to strike, do not establish deliberate unlawful conduct in the exercise of the Society's function. Negligence or inadvertence is not enough. There is nothing in the statement of claim to show the Society or its employees intended to injure Mr. C., or that their actions were beyond their legal powers and likely to injure Mr. C..

[21] Mr. C. claims for abuse of process. In *Klan Remedies in Tort*, (2008 Rel), Chapter 1, Abuse of Process, abuse of process is defined at para. 14.1 as follows:

Abuse of process "occurs where a party resorts to the process of the court not principally for the relief which the court can grant but instead to employ the

process of the court coercively to obtain some other, and wrongful, advantage from the other party and this wrongful purpose is reflected in some act or threat in furtherance of the purpose". For the purpose to be improper, it is not sufficient that the purpose is to obtain a benefit or advantage to the detriment of the defendant. The purpose is improper when the judicial process is used as a threat or club to obtain a collateral advantage not involved in the process itself. Thus, the intention to silence a defendant through a libel suit is not, without more, an improper purpose.

[22] The statement of claim does not contain facts which, if proved, could support a claim for abuse of process.

[23] Assuming the facts pleaded as true, it is plain and obvious the statement of claim discloses no reasonable cause of action.

[24] I grant the application and strike the statement of claim.

[25] Costs are awarded to the defendant in the amount of \$750.00 (subsequently reduced to \$500.00 - see letter dated June 4, 2008).

Coughlan, J.