SUPREME COURT OF NOVA SCOTIA

Citation: Barton v. Nova Scotia (Attorney General) 2012 NSSC 405

Date: 20121120
Docket: Hfx.No. 396602
Registry: Halifax

Between:

Gerald Gaston Barton

Plaintiff

v.

The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia and the Attorney General of Canada

Defendants

DECISION

Judge: The Honourable Justice Kevin Coady

Heard: November 1, 2012, in Halifax, Nova Scotia

Decision: November 20, 2012

Counsel: Dale Dunlop, for the plaintiff
Jessica Harris, for the Attorney General of Canada
Darlene Willcott for the Attorney General of Nova Scotia

By the Court:

INTERLOCUTORY RULING

[1] The Attorney Generals of Canada and Nova Scotia have filed motions for summary judgment on the pleadings. These defendants seek an order setting aside Mr. Barton's Amended Statement of Claim on the grounds that it fails to plead a reasonable cause of action. It is their view that this action is unsustainable.

[2] These motions arise from a tragic and somewhat unique set of circumstances. In 1970 a young woman became pregnant. She was 14 years old and living with her parents in a small rural community near Digby. Under pressure from her family she went to the RCMP and accused Mr. Barton of having sexual intercourse with her which resulted in her pregnancy.

[3] The RCMP arrested and charged Mr. Barton with having sexual intercourse with a female between the ages of fourteen and sixteen years of age contrary to Section 138(2) of the 1954 **Criminal Code of Canada**. Mr. Barton was convicted of this charge and given one year of probation. Mr. Barton was 19 years old at the

time. No records of a court proceeding or an RCMP investigation are known to exist.

[4] Mr. Barton's pleadings state that he was convicted without a trial or guilty plea. He alleges that the then crown prosecutor was a friend of the complainant's father. Given the lack of any record, it is difficult, if not impossible, to know what happened. It appears that Mr. Barton was not provided with legal counsel or any kind of support.

[5] In 2008 the RCMP began a criminal investigation involving the complainant's brother. They took a statement from the complainant in which she advised that her brother had repeatedly sexually assaulted her when she was between the ages of nine and thirteen years of age. During this interview she stated as follows:

> •That in 1969 she gave birth to a child who was conceived by her brother's sexual contact.
>
> •That her 1970 accusation against Mr. Barton was a lie.
>
> •That she was pressured by her father to explain her pregnancy.

> •That her father was not willing to accept that her brother sexually assaulted her and caused her pregnancy.

[6] The RCMP obtained DNA samples from all involved and testing overwhelming eliminated Mr. Barton as the father of the child born to the complainant. These tests also overwhelmingly indicated that the complainant's brother was the father of the child. On the basis of the above Mr. Barton appealed his conviction.

[7] In 2011 the Nova Scotia Court of Appeal allowed Mr. Barton's appeal and acquitted him of the 1970 charge. In doing so the court concluded that a miscarriage of justice had occurred. In 2012 Mr. Barton started this action.

[8] The law respecting summary judgment on the pleadings is settled. *Civil Procedure Rule* 13.03 provides that a Statement of Claim must be set aside if it fails to disclose a cause of action or if the claim is clearly unsustainable when the pleading is read on its own.

In *Cape Breton (Regional Municipality) v. Nova Scotia (Attorney General)* 2009 NSCA 44 the court confirmed that in order to strike under *Rule* 13.03, the action must appear to be either certain to fail or absolutely unsustainable.

[9] There is a heavy burden on the applicants in any summary judgment application. The remedy is drastic in that it denies a litigant their day in court. The above referenced case spoke about the burden at paragraph 17:

> Rule 14.25 offers a drastic remedy. It provides for an action to be dismissed summarily, thus denying litigants their "day in court". Understandably, therefore, any defendant seeking such relief bears a heavy burden. The Chambers judge would have to consider this claim at its highest, by assuming all allegations to be true without the need to call any evidence. Then even with this assumption, it must still remain "plain and obvious" that the pleadings disclose no reasonable cause of action.

[10] In *Ameron International Corporation v. Sable Offshore Energy Inc*., 2007 NSCA 70 the same court stated at paragraphs 12 and 13:

> When a statement of claim reveals a difficult and important point of law, it is generally desirable to allow the case to proceed to trial so that the common law will continue to evolve to meet the legal challenges that arise in our modern industrial society ...

> The burden on a party seeking to strike a claim is very high. The Supreme Court of Canada has used the term "plain and obvious" that the claim cannot succeed; The House of Lords has described the standard as "unarguable" or "obvious and almost incontestibly bad" ...
>
> The burden is not on the plaintiff to show that the pleaded cause of action exists or will be accepted in the future; the burden is on the defendant to convince the court that the claim is certain to fail.

[11] Mr. Barton's action is directed at the investigation by the RCMP and the prosecution by a provincial Crown Attorney. The federal defendant relies on *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 for the principle that the actions of police are only actionable if they are motivated by malice. The provincial defendant relies on *Nelles v. Ontario*, [1989] 2 S.C.R. 170 for the principle that crown prosecutors are immune from civil liability except in rare cases where malice can be shown. The present defendants submit that the pleadings do not allege malice and, as such, they do not disclose a sustainable action and are certain to fail.

[12] Mr. Barton's response is twofold. One, he argues that his notice pleads sufficient facts to sustain the action against both defendants. Two, he argues that if they are insufficient he is permitted to amend his Notice of Action.

[13] Mr. Barton's counsel acknowledges that he was being "judicious" when drafting his pleadings. He was optimistic that the defendants would be more receptive to settlement than would be the case if he pleaded malice. He submitted that he has grounds to plead malice should he be allowed to amend.

[14] The law of summary judgment on the pleadings is well settled. The law on police and prosecution liability is well settled. I conclude that Mr. Barton's pleading is insufficient on the issue of malice. The question is whether he be permitted to amend at this juncture.

[15] In *Innocente v. Canada (Attorney General)* 2010 NSSC 111 Justice LeBlanc, in the face of a summary judgment application, allowed Mr. Innocente to amend. He stated at paragraphs 63 and 64:

> 63 It is my view that the court has a duty to allow Mr. Innocente to amend the Statement of Claim in order to reflect that his claim for damages is based on the improper withholding of his property, as set out in his letter of September 8, 2009 and a letter from Mr. Thompson of January 5, 2010. It is evident that Mr. Innocente wishes to make a claim for compensation for damages caused by the restraint of his property, where the charges upon which the restraint are based were withdrawn, abandoned or dismissed.

> 64 As a result, I am dismissing the Statement of Claim without prejudice to Mr. Innocente's right to file an Amended Statement of Claim.

[16] Justice LeBlanc relied on *Civil Procedure Rule* 13.03(4). He also relied on *Stacy v. Consolidated Foods Corp. Of Canada* (1986), 76 N.S.R. (2d) 182 for the principle that amendments to pleadings should not be refused unless the applicant was acting in bad faith or serious prejudice would occur to the respondent.

[17] Mr. Innocente did amend his pleadings and the Attorney General of Canada brought a second application for summary judgment on the pleadings. After hearing that application (2011 NSSC 184) I concluded that the amended claim was "clearly unsustainable" and I dismissed the action. Mr. Innocente appealed.

[18] Fichaud J.A. stated at paragraph 40 of 2012 NSCA 36:

> I would dismiss Mr. Innocente's ground of appeal that challenges the summary judgment which dismissed his claims as pleaded in the existing amended Statement of Claim.

[19] Mr. Innocente argued for a further opportunity to amend respecting damage to his personal property. Justice Fichaud stated at paragraph 56:

> In these circumstances, to deny the requested amendment would be a patent injustice.

Justice Fichaud then exercised his discretion and allowed Mr. Innocente to further amend.

[20] In light of these authorities and given the unique nature of Mr. Barton's claim, I will allow him to further amend his Statement of Claim. He shall do so within 30 days of this decision. The respondents will then assess the amended claim and may make another application if those pleadings fail to disclose a sustainable action.

[21] I am not ordering costs on this application.

J.