SUPREME COURT OF NOVA SCOTIA
Citation: *Layes v. Bowes*, 2019 NSSC 298

Date: 20190930
Docket: Hfx No. 478371
Registry: Halifax

Between:

Kevin Joseph Layes and Carmen Marie Blinn

Plaintiffs

v.

Dr. Matthew Bowes, Dr. Stephen Paul Sturmy, National Medical Services Inc. carrying on business NMS Labs, The Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia

Defendants

Decision

Judge: The Honourable Justice John P. Bodurtha

Heard: December 13, 2018, in Halifax, Nova Scotia

Counsel: Michael Donovan, for the Plaintiffs
Michael Pugsley & Ashley Hemp-Gonsalves, for the Defendants
Sarah Walsh, for the Defendant
Colin Clarke, for the Defendant

Introduction

[1] The Defendants, Dr. Matthew Bowes and the Attorney General of Nova Scotia representing Her Majesty the Queen in Right of the Province of Nova Scotia seek an order striking out 38 paragraphs, or portions of the 38 paragraphs, from the 101 paragraphs of the Plaintiffs' Statement of Claim. Attached as Schedule "A" to this decision is a chart prepared by the Defendants outlining the various paragraphs, or portions of the paragraphs, which the Defendants seek to have struck on the basis that these paragraphs or portions:

> a) Plead evidence, immaterial facts, and are not concise contrary to Nova Scotia Civil Procedure Rule ("CPR") 38; and
>
> b) Are frivolous, vexatious, or otherwise an abuse of the Court's process contrary to CPR 88.

[2] Counsel for the Defendants, Dr. Sturmy and NMS Labs each wrote the Court prior to the hearing indicating that they support the motion of Dr. Bowes and the Attorney General of Nova Scotia. They both indicated that they would not be filing any independent materials but would attend in a watching brief capacity.

[3] The Defendants in their brief withdraw their objection to paragraphs 54, 66 and 76 of the Statement of Claim. The paragraphs that remain in issue are the following: 16-37, 41, 44-45, 49-51, 57-60, 70-71, 76 and 84.

[4] At the hearing, the Defendants withdrew their objection to paragraph 71.

Background

[5] The Plaintiffs have filed a statement claim alleging Dr. Bowes, committed acts of negligence related to or in the course of an autopsy of John James Layes, senior. It is alleged that Dr. Sturmy or someone under his direction altered medical records to conform to Dr. Bowes's autopsy findings. Defendant, NMS Labs is alleged to have prepared a false or inaccurate toxicology report based on instructions from Dr. Bowes. Lastly, the Defendant, AGNS is being sued on the basis it is vicariously liable for the actions of Dr. Bowes and failing to supervise him.

[6] The Plaintiffs raise the following causes of action in their statement of claim:

(a) misfeasance in Public Office;
(b) negligence;
(c) negligent misrepresentation;
(d) deceit/fraud; and,
(e) conspiracy.

The Law regarding pleadings

Rule 38

[7] Civil Procedure Rule ("Rule") 38 reads as follows:

> 38.02 (1) A party must, by the pleading the party files, provide notice to the other party of all claims, defences, or grounds to be raised by the party signing the pleading.
>
> (2) The pleading must be concise, but it must provide information sufficient to accomplish both of the following:
>
> (a) the other party will know the case the party has to meet when preparing for, and participating in, the trial or hearing;
>
> (b) the other party will not be surprised when the party signing the pleading seeks to prove a material fact.
>
> (3) Material facts must be pleaded, but the evidence to prove a material fact must not be pleaded.

[8] Rule 38.02(2) is clear, there is no ambiguity. Pleading evidence to prove a material fact is prohibited under Rule 38.02(3). This is to avoid giving the Court an incomplete picture of the case and because the evidence may be ruled inadmissible at trial (*Fairbanks v. Nova Scotia (Attorney General)*, 190 NSR (2d) 120 at para. 11).

[9] In Williston and Rolls, *The Law of Civil Procedure* (1970) at p. 647 the authors state:

> It is an elementary rule in pleading that when a state of fact is relied on, it is enough to allege it simply without setting forth the subordinate facts which are the means of proving it or the evidence to sustain the allegation. While generally any fact which may be given in evidence may be pleaded, the pleading of a fact which is only relevant insofar as it tends to prove a material allegation is in the nature of pleading evidence and will be struck out.

[10] Rule 38(2) and (3) inform us that pleadings must be concise but provide enough information to the other side of the nature of the proceedings, and when the party signing the pleading seeks to prove a material fact, the other side will not be surprised. The inclusion of evidence ignores the distinction between material facts and evidence.

[11] In *DeYoung et al v Central Regional Health Board*, 2000 NSCA 142, the Nova Scotia Court of Appeal refused to permit a plaintiff to make evidentiary pleadings in a wrongful dismissal action. The Court stated at paras. 2-4:

> [2] The appellants commenced an action for wrongful dismissal against the respondent. Included in the claim was an allegation that the appellants "were treated unfairly and they were the innocent victims of favouritism and punitive actions on the part of the employer."
>
> [3] Included in the application for leave to amend the statement of claim was a request to amend paragraph 5 by adding the following:
>
> > The Plaintiffs say that the character of the Defendant employer as a public body mandates that it treat its employees fairly in the matters of promotion and dismissal. They say further that the employer was aware of serious allegations of unfair practices in the workplace, particularly in relation to Colleen Phillips, the Head Nurse, to the extent that it caused an investigation to be conducted by one John LaRocque in the winter and spring of 1997-1998, which resulted in an extensive unfairness and inequality in the workplace, which eventually culminated in their dismissals. They say the report refers to a workplace situation in which the "A-Team" received benefits and privileges denied to the "B-Team". They say they were members of the "B-Team" which did not enjoy Ms. Phillips' favour. They say further that because they were outspoken in their criticism of workplace practices, they were dismissed.
>
> [4] The amendment to paragraph 5, which the appellants requested, except for the first sentence thereof, does not plead facts on which the appellants rely for their claim in this action. Rather, it pleads evidence, or proof, of certain facts which are alleged by the appellants as part of their claim. As such, the proposed amendment is contrary to Civil Procedure Rule 14.04, and is not permitted.

[12] In *CMT et al. v. Gov't of PEI et al.*, 2016 PESC 4, the Supreme Court of Prince Edward Island, considered the equivalent civil procedure rule and noted at paragraph 14:

> [14] That Rule provides the basis for determining what a proper pleading should and should not contain. A statement of claim (or a statement of defence) should

> not become a rambling narrative of the relationship between the parties but should clearly and concisely recite only essential or material facts necessary to base a claim. Superfluous, irrelevant, extraneous, repetitive, or immaterial statements are not to be tolerated.

[13] The pleading of evidence is prohibited. The rule is meant to restrict the pleading of facts that are subordinate and that merely tend to prove the truth of the substantial facts in issue (see *Rare Charitable Research Reserve v Chaplain* (2009) OJ No 3893 (Ont. S. C.)).

[14] What is patently obvious after hearing the submissions of the parties is the difference between pleading material facts and pleading evidence is a difference in degree and not in kind (see *Toronto (City) v MFP Financial Services Ltd* (2005), OJ No 3214 (Ont. Master)).

[15] The Plaintiff relies on the case of *Robertson v. Jacques Whitford Environment Ltd.*, 2004 BCSC 1424, at para. 20, for the distinction between material facts and evidence but also for a more liberal interpretation of pleading evidence. The Court quotes the following passage from MacLachlin and Taylor's *British Columbia Practice*, 2nd ed.:

> The distinction between material facts and evidence is essentially one of degree. A material fact is a fact that of itself is necessary to establish a legal proposition and without which the cause of action is incomplete. Evidence includes those facts necessary to establish the material facts. It is a safe practice, if in doubt to plead a matter as the risk of having an order go to strike out a portion of one's pleadings as being evidence is remote, and the consequences of such an order are slight (costs), while the consequences of having omitted to plead a material fact might be to have one's pleadings struck out or claim dismissed for failing to state a cause of action or defence.

[16] A similar point was made in *Toronto (City) v. MFP Financial Services Ltd.*, 2005 CarswellOnt 3324, [2005] O.J. No. 3214, [2005] O.T.C. 672, 141 A.C.W.S. (3d) 254, 17 C.P.C. (6th) 338 but the court also discusses how the answer to acceptable pleadings can be found by revisiting first principles such as fairness, judicial economy and the exposition of truth at paras 15-16:

> 15 The distinction between material facts, particulars and evidence is not a bright line and there will be situations in which the level of detail required to provide adequate particulars sets out material facts that might also be regarded as evidence. Furthermore, pleadings motions should not be approached in an overly technical manner. Generally speaking, a party should be at liberty to craft a pleading in the manner it chooses providing the rules of pleading are not violently

> offended and there is no prejudice to the other side. (see *Toronto (City) v. British American Oil Co.* (1948), [1949] O.R. 143 (Ont. C.A.) and *Abdi Jama (Litigation Guardian of) v. McDonald's Restaurants of Canada Ltd.*, [2001] O.J. No. 1068 (Ont. S.C.J.)
>
> 16 The answer to acceptable pleading may often be found by revisiting first principles. Our rules of pleading are intended to define and limit the issues in order to promote fairness, judicial economy and exposition of the truth. This must be done so that the court understands the dispute and the parties have fair notice of the case to be met and the remedies to be sought. Pleadings are important because they are the foundational documents on which the case rests and will shape the scope of relevance for both discovery and trial. It must be remembered however that the question for today is not whether similar fact evidence will be admitted at trial but whether or not the allegations appearing above should be added to the statement of claim.

[17] In *Lytton v. Alberta*, 1999 ABQB 421 the court discusses the gray area between pleading a material fact and pleading evidence and how improper pleadings should be viewed as a mere annoyance at para. 20:

> …In the usual case, however, it is not worth the parties' efforts to fight a battle over what is often a gray area between pleading material fact and pleading evidence. Even if a pleading is obviously evidence it should ordinarily be regarded by the other side as a mere annoyance to be overlooked (or, in some cases, as useful, where it gives an early tip-off of the other side's evidence). …

[18] The Court in *Brisson v. 6342581 Canada Inc., et al.*, 2014 ONSC 1535 (CanLII) took a similar position:

> As has been said by this court in many cases, there is no bright line distinguishing material facts from evidence. As long as references to evidence are kept to a minimum and are for the purpose of providing context or a narrative background to the claim, the court will not strike the pleading.

[19] The Court in *Lytton* (para. 7) also said the court should not interfere with how a party pleads its case, therefore, when striking evidentiary pleadings, the issue is whether the other party is prejudiced by the pleading.

[20] In my opinion, prejudice is an important consideration, but prejudice cannot and should not replace the objectives of Rule 38.02(2) and 38.02(3). Brevity should not succumb to a rambling narrative because of a lack of prejudice to the other side.

[21] In addition to the previous cases mentioned, the Plaintiffs rely on Rule 38.03(3) and 38.02(4) to support its pleading of particulars and points of law. Those Rules read as follows:

> 38.03(3) A pleading must provide full particulars of a claim alleging unconscionable conduct, such as fraud, fraudulent misrepresentation, misappropriation, or malice.
>
> 38.02(4) A party may plead a point of law, if the material facts that make it applicable are also pleaded.

[22] In *Bruce v. Odhams Press Limited*, [1936] 1 K.B. 697 at 712-713 the court discussed the use of particulars and stated:

> Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he has to meet and to enable him to prepare for trial.

[23] In this case, I find the Plaintiffs use of particulars fits squarely with the defendant's position in *Jacobson v. Skurka*, 2015 ONSC 1699:

> 67 Finally, on the matter of the challenge to Mr. Skurka's Statement of Defence and Counterclaim, Mr. Skurka justifies his pleading on the basis that he has just helpfully provided particulars of his serious allegations against Mr. Jacobson. I am sure that Mr. Jacobson, who did not ask for particulars but moved to have the allegations struck out, would have been happier to wait for the affidavit of documents and examination to discovery to obtain disclosure of the evidence upon which Mr. Skurka relies to prove his material facts. But more to the point, Mr. Skurka's unsolicited particularization of his defence abuses the notion of particulars.
>
> 68 In between material facts and evidence, is the concept of "particulars". Particulars are additional details that enhance the material facts, and particulars have a role to play different from just being evidence: *Copland v. Commodore Business Machines Ltd.*, [1985] O.J. No. 2675 (Ont. Master), aff'd (1985), 3 C.P.C. (2d) 77n (Ont. H.C.). Particulars are ordered primarily to clarify a pleading sufficiently to enable the adverse party to frame his or her answer, and their secondary purpose is to prevent surprise at trial: *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122 (Ont. H.C.). Particulars have the effect of providing information that narrows the generality of pleadings: *Mexican Northern Power Co. v. Pearson* (1913), 25 O.W.R. 422 (Ont. H.C.).
>
> 69 In *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369 (B.C. C.A.) at para. 15, the British Columbia Court of Appeal identified six functions for particulars: (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved; (2) to prevent the other side from being taken by surprise at the trial; (3) to enable the other side to know what

> evidence they ought to be prepared with and to prepare for trial; (4) to limit the generality of the pleadings; (5) to limit and decide the issues to be tried, and as to which discovery is required; and (6) to tie the hands of the party so that he or she cannot without leave go into any matters not included.
>
> 70 In my opinion, most if not all of the evidentiary details provided by Mr. Skurka cannot be justified by the purposes of particulars. The evidentiary details are the means by which Mr. Skurka intends to prove his defence that he was not negligent or in breach of fiduciary duty and his allegation that Mr. Jacobson suffered no damages because he is not an innocent man. The above analysis reveals that much of the so-called particulars are just a responsive polemic that will just provoke a further polemic in the Reply and Defence to the Counterclaim.

[24] Pleadings shape the scope of relevance for both discovery and trial. Pleadings are the first stage of the litigation process. They contain an untested version of what potentially may be the evidence. The rules prohibiting the pleading of evidence recognize the purpose of pleadings being to define the issues and the trial to deal with the admissibility of evidence to prove the material facts (see *Rare Charitable Research Reserve v. Chaplin*, 2009 CarswellOnt 5530, [2009] O.J. No. 3893, 180 A.C.W.S. (3d) 411, 52 E.T.R. (3d) 170 at para. 20).

[25] Similarly, the court in *Parker v. Pfizer Canada Inc.*, 2011 ONSC 5169 at para. 38 stated:

> For the case at bar, that pleadings of evidence have been struck from the Amended Statement of Claim would not relieve Mr. Parker from disclosing that evidence relevant to the claim or defence on his examination for discovery, and it does not preclude him from asking questions about the evidence that was struck from his pleading to prove his claim against the Defendant. The point is that a claim or defence is not adjudicated in the pleadings; rather, the pleadings are the framework for the trial and they do not do the work of the trial.

Rule 88

[26] The second Rule the Applicants rely upon to strike portions of the Plaintiffs' statement of claim is Rule 88 which reads:

> Scope of Rule 88
>
> (1) These Rules do not diminish the inherent authority of a judge to control an abuse of the court's processes.
>
> (2) This Rule does not limit the varieties of conduct that may amount to an abuse or the remedies that may be provided in response to an abuse.
>
> (3) This Rule provides procedure for controlling abuse.

> Remedies for abuse
>
> 88.02 (1) A judge who is satisfied that a process of the court is abused may provide a remedy that is likely to control the abuse, including any of the following:
>
> …
>
> (e) an order striking or amending a pleading;

[27] The Defendants place the remaining impugned paragraphs under the general heading of frivolous, vexatious, and otherwise an abuse of the Court's process. Included within that category are paragraphs which they say contain opinion and argument, irrelevant facts, and allegations against non-parties. They submit these types of pleadings are inappropriate and should be struck from the Statement of Claim.

[28] Opinions and argument are not to be contained in a statement of claim. They are matters for counsel to address in their submissions to the court (see *CMT et al.* at para 31).

[29] *CMT et al. v. Gov't of PEI et al.*, 2016 PESC 4 addressed scandalous pleadings:

> 37 …A pleading can be scandalous when it is offensive, irrelevant, or, in addition, as in this case, constitutes a collateral attack asserting a cause of action against a non-party, leaving the non-party no ability to answer to the claim. Taylor J. also addressed this issue in *Ayangma*, supra, where the statement of claim included accusations against non-parties, alleging they engaged in a conspiracy. At para. 50(l) he stated:
>
> > 50 (l) The statement of claim is scandalous at many points (Rule 25.11(b)). It accuses the Human Rights Commission (paragraphs 129, 158) and the French and Eastern School Board (paragraph 129) of conspiracy, and the PEI legal community (paragraphs 127, 128, 182, 234, 251, 254, 276, 290, 291) of malice, abuse of court process, and possibly defamation. These bodies are not parties to the action, and the claim is therefore scandalous in the legal sense, meaning that it is both offensive and irrelevant.

[30] The Applicants rely on *Ayangma v Prince Edward Island*, [2005] PEIJ No 31, 2005 PESCTD 25 to support their position that portions of the Plaintiffs' Statement of Claim are frivolous, vexatious and otherwise abusive of the court's process. In *Ayangma*, the Supreme Court of Prince Edward Island said the following:

[20] In addition to the provisions under the Rules of Civil Procedure, the court has an inherent jurisdiction to strike pleadings which are oppressive, frivolous, vexatious, embarrassing or an abuse of the process of the court (see Reichel v. Magrath (1889), 14 App. Cas. 665 referred to in Casson, Odgers on High Court Pleading and Practice, (1991); R. v. Mills (1983), 3 C.R.R. 63 (Ont. H.C.) at p. 78; R. v. Osborn [1969] 1 O.R. 152 at 155, quoting Haggard v. Pelicier Freres, [1892] A.C. 61 at pp. 67-68).

[21] "Frivolous", "vexatious", "abuse of the process of the court" (not to be confused with the tort of abuse of process), and "embarrassing" are to some extent terms of art in the law. They bear their common usage meanings together with specific meanings attributed to them in the operation of the law.

[22] The terms are sometimes used interchangeably, and their meanings are not closed; they often appear to overlap and are fluid and fact based (see Margem Chartering Co. v. Cosena S.R.L., [1997] 2 F.C. 1001 (Fed. T.D.), (1997) 127 F.T.R. 161 at 169; in ATL Industries Inc. v. Han Eol Ind. Co., [1995], 36 C.P.C. (3d) 288 (Ont. Gen. Div.); Farley J. at p. 314 referring to House of Spring Gardens Ltd. v. Wait, [1990] 3 W.L.R. 347 (C.A.)] at pp. 358-359; McIlKenny v. Chief Constable of West Midlands Police (sub nom. Hunter v. Chief Constable of West Midlands Police), [1982] A.C. 529 at 536, and Foy v. Foy (No. 2) (1979), 26 O.R. (2d) 220 (C.A.); George v. Harris, [2000] O.J. No. 1762 (S.C.J.)).

[23] Among the meanings attached to all these terms are variations on the theme that the pleading is without merit, or asks for relief that cannot or should not be given, or discloses no reasonable cause of action or defence. If this were all the terms meant, it would not be necessary to include them in the Rules, as Rule 21.01(1)(b) already empowers the court to strike out a pleading that discloses no reasonable cause of action or defence.

[24] In addition, however, these terms are used to describe violations of the rules of pleadings and procedural violations. When used in these circumstances, the terms are employed to describe pleadings which:

a) violate the rules of pleadings;

b) are confused, rambling, ambiguous or difficult to understand;

c) contain irrelevant or immaterial facts, or evidence as opposed to facts;

d) are redundant or unnecessarily prolix;

e) are vindictive or used for an ulterior purpose;

f) would involve the parties in a dispute that is wholly apart from the issues;

g) contain opinions or argument;

h) while technically permissible, are still contrary to the intent of the rules of pleading (see Winkler v. Winkler (1990), 70 Man. R. (2d) 47 (Q.B.) at p. 50; Re Canada Metal Co. Ltd. et al. and Heap et al. (1975), 7 O.R. (2d)

> 185 (C.A.) at 192; Mayor of London v. Horner (1914), 111 L.T. 512 (C.A.) at 514 adopted in Keddie v. Dumas Hotels Ltd. (Cariboo Trails Hotel) (1985), 62 B.C.L.R. 145 (C.A.); Bush v. Saskatchewan (Minister of Environment & Resource Management), [1996] S.J. No. 534 (Sask. Q.B.) and Meyers and Lee v. Freeholders Oil Company Limited and Canada Permanent Trust Co. (1956), 19 W.W.R. (N.S.) 546 at 546; Rogers v. Clark (1900), 13 Man. R. 189 (K.B.) at 196; Gittings v. Caneco Audio-Publishers Inc., [1988] B.C.J. No. 532 (B.C.C.A.); Amendt v. Canada Life Assurance Co., [1999] S.J. No. 157 (Sask. Q.B.); Orme v. Law Society of Upper Canada, [2003] O.J. No. 887 (S.C.J.); George v. Harris, supra).

The court continued at paragraph 49:

> [49] The problems identified in the Prince Edward Island cases which may lead to having a statement of claim being struck as frivolous, vexatious, an abuse of process, or something which may prejudice or delay the fair trial of the action are:
>
> 1) unnecessary length;
>
> 2) improper pleading of evidence rather than material facts to support a party's claim;
>
> 3) difficulty in ascertaining what the plaintiff seeks;
>
> 4) repeated breach of the rules of pleading ("plain and obvious");
>
> 5) impossibility of fixing the claim by a series of amendments;
>
> 6) whether a series of amendments would make of it a new statement of claim;
>
> 7) whether the defendant may be embarrassed or prejudiced in meeting the claim;
>
> 8) whether the claim pleads "facts" which are speculative.

[31] The Newfoundland Court of Appeal discussed the terms frivolous and vexatious in *Hynes v. Pro Dive Marine Services Ltd.*, 2016 NLCA 17, 2016 CarswellNfld 162 at para. 13:

> The meaning of frivolous or vexatious under rule 14.24(1)(b) is discussed in *Walsh v. Johnson*, 2010 NLCA 6, 293 Nfld. & P.E.I.R. 101. A frivolous action is one that has "no substance", or "is obviously unsustainable or without arguable merit" (paragraphs 19 and 21). A vexatious action is:
>
> > [20] ... one that is brought for an improper purpose such as to harass, annoy or embarrass a party and not for the legitimate purpose of seeking the vindication of legal rights.

> A frivolous action may also be vexatious if the respondent is required "to engage counsel and respond to something that cannot succeed ... because it would be an abuse of the court's process" (paragraph 21).

[32] In summary, a pleading must contain material facts necessary to establish the cause of action and show the applicability of any point of law pleaded. It must also enable the defendant to know the case he has to meet and avoid surprise when the plaintiff seeks to prove a material fact. When unconscionable conduct is being alleged these particulars must be more detailed. The difficulty is where to draw the line. The line gets blurred when the cause of action alleges unconscionable conduct.

Causes of Action

[33] The Plaintiffs raise the following causes of action in their statement of claim: misfeasance in Public Office; negligence; negligent misrepresentation; deceit/fraud; and, conspiracy which has resulted in damages to the Plaintiffs.

[34] In *CMT et al v Gov't of PEI et al.*, 2016 PESC 4, the court discussed the need to plead in greater detail when pleading conspiracy, fraud or bad faith at paras 47-52:

> 47 The government also seeks to strike out the plaintiffs' claims of conspiracy, stating those claims do not disclose a reasonable cause of action given the insufficiency of material facts set out in the statement of claim. That claim is framed as follows:
>
> > 1. The Plaintiffs claim:
> >
> > (b) alternatively, against all of the Defendants, damages for conspiring to intentionally interfere in economic relations in the sum of $25,000,000.00;
>
> 48 Once again, this issue was addressed in *Ayangma*, which case was relied upon by counsel for the plaintiffs and the defendants. The court noted, at paras. 94-96:
>
> 94 As to conspiracy, in *H.V.K. v. Children's Aid Society of Haldimand-Norfolk*[2003] O.J. No. 1572 (S.C.J.), Himel, J. relied on *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 155 D.L.R. (4th) 627 (C.A.) in stating that **the pleading must set out certain material facts in making a claim for the tort of conspiracy**. At paragraph 21 he stated:
>
> > (1) all of the parties to the conspiracy must be identified and their relationship to each other described;
> >
> > (2) **agreements between the various defendants must be pleaded with all facts material to such agreements** including the parties to each

> agreement, the date of the agreement and the object and purpose of each agreement;
>
> (3) the overt acts of each of the alleged conspirators in pursuance or furtherance of the conspiracy must be pleaded with clarity and precision, including the times and dates and such overt acts;
>
> (4) the pleading must allege the injury and the damage occasioned to the plaintiff and special damage in the sense of a monetary loss which the plaintiff has sustained must be pleaded and particularized.

49 Allegations in the nature of conspiracy, fraud, or bad faith require a higher degree of disclosure and precision than other types of allegations or claims made in the statement of claim. The parties must be made aware, in the statement of claim, of the details of the alleged agreement they purportedly entered into, their relationship to their alleged co-conspirators, the precise actions they purportedly took in furtherance of the conspiracy, and the specific damages purportedly arising from the alleged conspiracy. (See *Pindoff Record Sales Ltd. v. CBS Music Products Inc.*, [1989] O.J. No. 1302, 1989 CarswellOnt 490 (Ont. H.C.), at paras. 10-14).

50 Paragraphs 275, 277 and 278 in the statement of claim allege conspiracy. However, there are no material facts pleaded with respect to the alleged conspiratorial acts of each of the defendants, nor are there any details of the intended conspiracy. The relationship between the alleged co-conspirators is not described. The damages allegedly occasioned to the plaintiffs were not particularized in any manner, but instead were simply expressed as a monetary amount in the sum of $25 million.

51 Counsel for the plaintiffs argue that, in accordance with *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), 1990 CanLii 90, (1990), 74 D.L.R. (4th) 321 (S.C.C.), and *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), the court ought to generously construe the statement of claim and overlook deficiencies or inadequacies which are merely the result of drafting deficiencies. Further they submit claims should not be struck out merely because they are long, and involve complex issues of fact and law, or novel legal propositions.

52 There is nothing in the defendants' submissions which suggest they are seeking to strike claims because they are complex or novel. The "plain and obvious" test established in *Hunt* did not nullify the effect of the Rules of Court or rules of pleading. It is clear from both *Hunt* and *Operation Dismantle*, that some degree of accommodation is fair and proper when a common sense reading of the statement of claim discloses a proper cause of action despite drafting deficiencies. However, that does not give a plaintiff license to violate multiple rules of drafting or ignore fundamental principles of fairness and disclosure when the plaintiff's claims require another party to ascertain, with some precision, the case it must meet. The defendants are not required to scour through a lengthy statement of claim to ascertain which details sprinkled throughout the document might constitute actions the plaintiffs view as conspiratorial.

> [emphasis in decision]

[35] I agree with the court in *CMT et al.* that pleadings need to be more detailed when pleading the tort of conspiracy, bad faith or fraud. However, it does not mean that the general rules and principles around pleadings are ignored. The added details should only contain material facts specific to pleading these torts. There is no need to plead more. What is required will depend on the material facts needed to establish the particular tort.

[36] At paragraph 18 of *CMT et al.* the Court stated that the material facts will depend on the particular cause of action:

> [18] There is a substantial difference between a dispute which plays itself out in public and one that is presented to the courts for resolution. A public dispute may be limited by little more than the laws of defamation. However, for a legal dispute presented to the courts, there are some significant and purposeful terms of engagement. Those terms of engagement will assist in determining which, if any, statements in the statement of claim are to be struck out.

Conclusion

[37] The Defendants claim that the various paragraphs violate the rules of pleading because they either plead evidence and/or the pleadings are frivolous, vexatious and otherwise an abuse of the court's process.

[38] The cases referenced above identify that pleadings should only contain material facts. They should not contain secondary facts, quote viva voce evidence of witnesses, or the texts of documents. The pleading of evidence is generally not permitted because none of the rules of evidence have been applied to the evidentiary matters referenced in the pleading. There are exceptions to this rule such as when pleading references to the evidence to provide context, particulars, a narrative to claim or defence.

[39] Taking into consideration the caselaw and authorities on pleadings referenced above, in reviewing the Plaintiffs' Statement of Claim I make the following conclusions taking into consideration that the difference between pleading material facts and pleading evidence is a difference in degree and not in kind:

- Paragraph 16, the underlined portion, will be struck on the basis that it contains opinion/argument

- Paragraph 17, the underlined portion, will be struck on the basis that it contains opinion/argument
- Paragraph 18 will remain as plead
- Paragraph 19 does offend the rules of pleadings but is inconsequential in terms of prejudice and will remain as plead
- Paragraph 20, the underlined portion, will be struck based on opinion and pleading evidence
- Paragraph 21 will remain as plead
- Paragraph 22 does offend the rules of pleadings but is inconsequential in terms of prejudice and will remain as plead
- Paragraph 23 does offend the rules of pleadings but is inconsequential in terms of prejudice and will remain as plead
- Paragraph 24 will remain as plead
- Paragraph 25 will remain as plead
- Paragraph 26 will remain as plead because there are no causes of action against the third parties
- Paragraph 27 will remain as plead
- Paragraph 28 is struck on the basis that it contains evidence and immaterial facts
- Paragraph 29 will remain as plead
- Paragraph 30, the underlined portion, will be struck based on opinion
- Paragraph 31 will remain as plead
- Paragraph 32 is struck on the basis it contains evidence and immaterial facts
- Paragraph 33, the underlined portion, is struck
- Paragraph 34 is struck on the basis it does not contain material facts
- Paragraph 35, the allegation against a known party does not lead to a cause of action being raised by the plaintiff and will remain as plead. However, the last sentence is struck on the basis of opinion
- Paragraph 36 is struck on the basis it does not plead material facts

- Paragraph 37 is struck on the basis it does not plead material facts
- Paragraph 41 is struck on the basis it does not plead material facts
- Paragraph 44 does offend the rules of pleadings but is inconsequential in terms of prejudice and will remain as plead
- Paragraph 45 will remain as plead
- Paragraph 49 will remain as plead
- Paragraph 50 is fine on the basis that negligence is one of the causes of action plead
- Paragraph 51 does offend the rules of pleadings but is inconsequential in terms of prejudice and will remain as plead
- Paragraph 57 will remain as plead
- Paragraph 58 is struck on the basis that it contains opinion and argument
- Paragraph 59 is struck on the basis that it contains opinion and argument
- Paragraph 60 will remain as plead
- Paragraph 70, the underlined portion, is struck on the basis of opinion and argument
- Paragraph 76 is struck on the basis the majority of the paragraph pleads evidence
- Paragraph 82 is struck as it references earlier paragraphs that have been struck in this decision
- Paragraph 84 is struck as it references earlier paragraphs that have been struck in this decision
- Paragraph 92 is struck as it references earlier paragraphs that have been struck in this decision
- Paragraph 95 is struck as it references earlier paragraphs that have been struck in this decision

  Paragraph 97 is struck as it references earlier paragraphs that have been struck in this decision

Remedy

[40] I agree with the Court in *CMT et al. v. Gov't of PEI et al.*, 2016 PESC 4 at paras. 82 and 83, where the Statement of Claim had to be struck in its entirety because of the number of paragraphs that were struck as a result of improper pleading but providing the Plaintiff with an opportunity to file a newly drafted statement of claim:

> 82 Notwithstanding I have eliminated the most offensive paragraphs, the statement of claim in its entirety should not be allowed to stand. It is not for the defendants or the courts to pick through the remains of a statement of claim which constitutes "a wholesale violation of the rules of pleadings" in an effort to identify what limited aspects of the prolix claim are left. The claim as filed, and even as remains after numerous pleadings are struck out, would prejudice or delay the fair trial of the action. I do not consider the claim as written to be capable of being "fixed" by a series of amendments and deletions. The court's processes are established with a view to achieving a result that is fair and just to all parties, be they plaintiffs or defendants. This statement of claim constitutes an abuse of those processes of the court. For all of the foregoing reasons, I do hereby strike out the statement of claim in its entirety.
>
> 83 Having said that, Rule 25.11 provides that when the court strikes out all or part of the pleading, it may do so "with or without leave to amend". I consider it only fair and just to grant the plaintiffs the opportunity to start afresh and file a newly drafted statement of claim. The Rules of Court are not difficult to follow. If the plaintiffs are incapable of succinctly stating the material facts of their claim without reliance on inappropriate or improper pleadings, their claim should not be allowed to proceed. Any newly drafted statement of claim must not only take into account the specific issues addressed herein, but must also reflect the overall intention of the rules of pleading.

[41] The Plaintiff shall file a newly drafted Statement of Claim within 21 days of this decision.

[42] The Defendants, AGNS and Dr. Bowes, are entitled to costs on this motion. If the parties are unable to agree on costs, I will receive written submissions within 30 calendar days of this decision.

Bodurtha, J

SCHEDULE "A"

Paragraph	Violation of the Rules of Pleading
Rule 38: Pleadings Containing Evidence and Immaterial Facts	
16	At the time of admission, he was believed to be suffering from a S.T.E.M.I. Heart attack brought on by urosepsis. He also had renal distress and symptoms that included cardiac and pleural edema. He was experiencing disorientation and delusions and seemed stupefied: and, he was vomiting a brown liquid mixed with a white powdery dough-like substance. The renal failure and other symptoms were resolved the next day, with the exception of the edema, which took a few days longer.
17	On October 31, 2013, while still in hospital, John James Layes again vomited a brown liquid mixed with a white powdery dough-like substance and displayed symptoms that included severe pleural edema and extreme build up of urine along with disturbances to his sight and hearing and mental incoherence. The excess fluid in his lungs was removed by pleural effusion and the pleural fluid was visually clean and free of any indication of disease or infection. The urine buildup was removed by catheterization and John James Layes other symptoms cleared up the following day.
18	By mid-November 2013, John James Layes had recovered to the point that he was able to eat regularly, stand and walk with assistance and participate in physiotherapy. He was also able to tend to the affairs of his gravel business by telephone from his bedside
19	John James Layes was released home from hospital on November 27, 2013 and returned home to resume his normal activities. He also received new prescriptions to replace the medications cancelled on September 28, 2013.
20	On November 28, 2013, John James Layes was experiencing severe distress from an inability to urinate and had difficulty remembering events since his return home. As a result, he was readmitted to St. Martha's Hospital the same day.

21	On November 29, 2013, when visiting John James Layes in hospital, the Plaintiff Kevin Joseph Layes observed that John James Layes' body was severely bruised on the forehead, abdomen, neck, back, buttocks, and arms and legs. John James Layes' body was also covered in skin-prick holes on the abdomen, chest, groin and buttocks and these holes were covered in a white powder-like substance.
22	During this visit, John James Layes told the Plaintiff Kevin Joseph Layes that when he (John James Layes) returned home from hospital he was "attacked" by several persons who pinned him down and forced him to ingest a "white powder".
23	On December 2, 2013, Rose Layes travelled to Maclsaac's Funeral Home in Antigonish to attempt to make funeral arrangements for John James Layes.
24	On December 5, 2013, Dr. Sturmy recommended to physiotherapy staff, home care staff. the Plaintiffs. Rose Layes, John James Layes. Jr. and Pearl (Layes) Kelly that John James Layes be "no-coded" under Dr. Sturmy's self named "Sturmy Comfort Care Program" for seniors.
25	The "no code" order would mean that John James Layes would be deprived of medications, oxygen, and other medical assistance to preserve life and all physiotherapy would be cancelled. He would be moved into a private room away from contact with any other patients and authorized staff would be permitted to see him.
26	The other family members agreed to the "no code" order over the objections of the Plaintiffs and the "no-code" under "Sturmy's Comfort Care Program" was put in place.
27	On December 6, 2013, the Plaintiff Kevin Joseph Layes returned to St. Martha's Hospital with the original power of attorney designating the Plaintiff Kevin Joseph Layes as the only person authorized to make decisions regarding medical care on behalf of John James Layes and was able to get the "no code" rescinded and basic medical care restored.

28	On December 9, 2013, Dr. Sturmy called the Plaintiffs on their cell phone and spoke to the Plaintiffs for exactly 80 minutes. a. During the phone call, Dr. Sturmy informed the Plaintiffs that he had a special program called the "Sturmy Comfort Care Program" designed to ensure benefit for the living and that lie was going to do what was best for John James Layes' own good. b. Dr. Sturmy was angry and very agitated during the call. c. Dr. Sturmy said that he previously had term life insurance on his mother for which he paid the premiums for many years and that he would have gained millions of dollars from this insurance if she had died before her eightieth birthday. He said his family fought him to keep her alive and she lived to age eighty-three causing him to lose the premiums and the insurance payout. d. Dr. Sturmy said that his "Sturmy Comfort Care Program" on John James Layes could cover what Dr. Sturmy lost on his mother's death. e. He told the Plaintiffs to stay out of his business and accept the fact that John James Layes needs to die.
29	After this phone call, the Plaintiffs immediately made arrangements to travel to Antigonish to have John James Layes released from St. Martha's Hospital and away from Dr. Sturmy and his so called "Sturmy Comfort Care Program".
30	At about 5:00 pm., the Plaintiffs visited John James Layes in hospital in Antigonish after travelling from Enfield and found him in good health.
31	The Plaintiffs immediately requested the hospital staff have documents drafted to have John James Layes released from hospital to live with the Plaintiffs in Enfield and away from Dr. Sturmy
32	The Plaintiff Kevin Joseph Layes left John James Layes' room briefly to go to the parking lot and on his return he found John James Layes without bedding or clothing and showing symptoms of mental disorientation. John James Layes said that he was "stupefied" and reported being attacked and fed a white powder while the Plaintiff

	Kevin Joseph Layes was in the parking lot. John James Layes said that Dr. Sturmy was "in on it" and asked Plaintiff Kevin Joseph Layes to "call the Mounties".
33	On December 10, 2013, John James Layes was released from St. Martha's Hospital into the Plaintiffs' care but only after Dr. Sturmy, from his Main Street office requested C-Spine x-rays.
34	On December 12, 2013 John James Layes and Rose Layes were residing at the Plaintiffs' house. John James Layes was resting comfortably so the Plaintiffs went out for the day, leaving John James Layes in the care of Rose Layes.
35	On returning home that evening, the Plaintiffs found that Rose Layes had taken away John James Layes home oxygen, food and water and had not provided basic sanitary' cleansing. John James Layes was again displaying symptoms of being mentally disorientated and stupefied and kept saying "stop, I don't want to take the white powder anymore".
36	The Plaintiffs took care of John James Layes by giving him food to eat, cleaning him and making sure he was settled comfortably into his bed. The Plaintiffs then went to bed and John James Layes spent the rest of the night with Rose Layes.
37	In the morning of December 13, 2013, John James Layes was again in distress and was displaying symptoms of being mentally disorientated and stupefied. He said: "Why are they trying to kill me? I don't deserve to be treated like this, I don't want to die in your house Kevin".
41	On January 1 8, 2014, on the morning of his death. John James Layes made a dying declaration in these words: "Rose did it. Rose killed me."
44	On or about April 14, 2014, the Nova Scotia Medical Examiner's Office sent to NMS Labs in Willow Grove Pennsylvania, a toxicology laboratory under contract to the Nova Scotia Medical Examiner's Office, the following tissue specimens that Dr. Bowes extracted from the body of John James Layes during the autopsy of March 7, 2014: Liver Tissue 38.28 grams Spleen Tissue 25.28 grams Vitreous Fluid 2.25 ml.'

	and, in addition. a homogenate of liver tissue containing one part liver tissue extracted from the body of John James Layes during the autopsy and 19 parts diluent.
45	Dr. Bowes instructed NMS Labs to test only the homogenate of liver tissue diluted 19+1 and to store the other specimens.
49	After receiving the April 29, 2014 report by NMS Labs, the Plaintiff Kevin Joseph Layes had a hair specimen from John James Layes tested by Chemtox Labs near Strasbourg France; and Chemtox issued a report dated July 3 1, 2014. which the Plaintiff Kevin Layes shared with Dr. Bowes on or about August 5,2()14.
51	Dr. Bowes claimed that the Chemtox finding must have resulted from exogenous contamination of the hair specimen that it tested. In exercise of his authority under section 52 of the Health Protection Act, SNS 2004, c. 41 as amended, Dr. Bowes refused exhumation of John James Layes to obtain specimens for more detailed toxicology testing as requested by the Plaintiffs and Chemtox Labs.
57	On or about November 13, 2015, the Plaintiff Kevin Joseph Layes requested Chemtox Labs near Strasbourg France to conduct further testing on the John James Layes' forensic hair specimen. The new testing was to eliminate the possibility of exogenous contamination asserted by Dr. Bowes.
58	On November 17, 2015, Chemtox Labs issued a supplementary' criminal forensic toxicology report regarding the hair specimen. This report stated that the Ketamine found in the previous toxicology report from Chemtox dated July 31, 2014 was the metabolized Norketamine metabolite and therefore was administered to John James Layes and processed through his liver. Norketamine cannot result from exogenous contamination. This confirmed that Ketamine had been administered to John James Layes for at least the final three (3) months of his life.
59	Ketamine is known to induce pleural edema, kidney and bladder destruction and cardiac edema when administered in excess and/or over an extended period of time. The health records of John James Layes over the last three (3) months of his life are consistent with Ketamine and illicit drug overdose symptoms.

60	On or about November 17, 2015, the Plaintiffs shared the November 17, 2015 Chemtox report with Dr. Bowes.
70	At all material times, Dr. Bowes knew or ought to have known that the Plaintiff, Kevin Joseph Layes relied on these assurances and was expending large sums of money on lawyers and other experts and on travel and other disbursements in order to determine the facts regarding NMS testing and in an attempt to get additional specimens from the body of John James Layes for further toxicology testing.
76	At all material times, NMS Labs knew or ought to have known that, shortly before he started with NMS Labs, a Washington State District Court had found that Dr. Logan, while heading the Washington State Toxicology Laboratory, had tolerated the filing of fraudulent test reports with the courts; and, that the Washington State Toxicology Laboratory's work product was "compromised by ethical lapses, systemic inaccuracy, negligence and violations of scientific principles". Inconsequence, the court suppressed the use of the Laboratory's work product as evidence in the impaired driving cases that were the subject of the petition to the court.
84	On October 6, 2014 NMS Labs Director Sherri Lynn Kacinko told the Plaintiff Kevin Joseph Layes by telephone that NMS Labs no longer had any specimens received on file 14089918 (the file of John James Layes) when she knew this statement to be untrue. In fact, she knew that for the past six months NMS had been holding large quantities of unadulterated liver, spleen and vitreous fluid specimens received on file 14089918 in its refrigerator at the Willow Grove location where Sheni Lynn Kaeinko was the laboratory director in charge.
Rule 88; Pleadings that are Frivolous, Vexatious, or Otherwise Abusive	
Opinion/Argument	
16	At the time of admission, he was believed to be suffering from a S.T.E.M.I. Heart attack brought on by urosepsis. He also had renal distress and symptoms that included cardiac and pleural edema. <u>He was experiencing disorientation and delusions and seemed stupefied: and, he was vomiting a brown liquid mixed with a white powdery dough-like substance</u>. The renal failure and other symptoms were resolved the next day, with the exception of the edema, which took a few days longer.

17	On October 31, 2013. while still in hospital, John James Layes again vomited a brown liquid mixed with a white powdery dough-like substance and displayed symptoms that included severe pleural edema and extreme build up of urine along with disturbances to his sight and hearing and mental incoherence. The excess fluid in his lungs was removed by pleural effusion and the pleural fluid was visually clean and free of any indication of disease or infection. The urine build up was removed by catheterization and John James Layes other symptoms cleared up the following day.
19	John James Layes was released home from hospital on November 27, 2013 and returned home to resume his normal activities. He also received new prescriptions to replace the medications cancelled on September 28, 2013.
20	On November 28, 2013, John James Layes was experiencing severe distress from an inability to urinate and had difficulty remembering events since his return home. As a result, he was readmitted to St. Martha's Hospital the same day.
30	At about 5:00 pm., the Plaintiffs visited John James Layes in hospital in Antigonish after travelling from Enfield and found him in good health.
50	The Chemtox report of July 3 1 , 2014 detected high levels of Ketamine and other drugs in the hair specimen and Dr. Bowes knew or ought to have known that the Chemtox findings were consistent with the drugs being administered to John James Layes over a three-month period leading to his death on January' 18, 2014.
58	On November 17, 2015. Chemtox Labs issued a supplementary' criminal forensic toxicology report regarding the hair specimen. This report stated that the Ketamine found in the previous toxicology report from Chemtox dated July 31, 2014 was the metabolized Norketamine metabolite and therefore was administered to John James Layes and processed through his liver. Norketamine cannot result from exogenous contamination. This confirmed that Ketamine had been administered to John James Laves for at least the final three (3) months of his life.
59	Ketamine is known to induce pleural edema, kidney and bladder destruction and cardiac edema when administered in excess and/or over an extended period of time. The health records of John James La es over the

	last three (3) months of his life are consistent with Ketamine and illicit drug overdose symptoms.
70	At all material times, Dr. Bowes knew or ought to have known that the Plaintiff, Kevin Joseph Layes relied on these assurances and was expending large sums of money on lawyers and other experts and on travel and other disbursements in order to determine the facts regarding NMS testing and in an attempt to get additional specimens from the body of John James Layes for further toxicology testing.
Allegations Against Non-Parties	
26	The other family members agreed to the "no code" order over the objections of the Plaintiffs and the "no-code" under "Sturmy's Comfort Care Program" was put in place.
35	On returning home that evening, the Plaintiffs found that Rose Layes had taken away John James Laves home oxygen. food and water and had not provided basic sanitary' cleansing. John James Layes was again displaying symptoms of being mentally disorientated and stupefied and kept saying "stop, I don't want to take the white powder anymore".
41	On January 1 8, 2014, on the morning of his death. John James Layes made a dying declaration in these words: "Rose did it. Rose killed me."

Immaterial and/or Irrelevant Facts	
23	On December 2, 2013, Rose Layes travelled to Maclsaac's Funeral Home in Antigonish to attempt to make funeral arrangements for John James Layes.
34	On December 12, 2013 John James Layes and Rose Layes were residing at the Plaintiffs' house. John James Layes was resting comfortably so the Plaintiffs went out for the day, leaving John James Layes in the care of Rose Layes.
36	The Plaintiffs took care of John James Layes by giving him food to eat, cleaning him and making sure he was settled comfortably into his bed. The Plaintiffs then went to bed and John James Layes spent the rest of the night with Rose Layes.