

CANADA / JUDGMENT

Kepa v. Catlin

2021 BCSC 1960

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 1960 Kepa v. Catlin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kepa v. Catlin,

2021 BCSC 1960

Date: 20211007

Docket: S188142

Registry: Vancouver

Between:

Marty Kepa

Plaintiff

And

West Vancouver Police Officer Rick Catlin; West Vancouver Special Constable Christopher Cottril;
West Vancouver By-Law Officer Sarah Almas; Unidentified West Vancouver Police Officers;
Unidentified Associates of West Vancouver Police Officers; Municipality of West Vancouver; BC
Minister of Justice

Defendants

Before: Master Elwood

Reasons for Judgment

The Plaintiff, appearing in person

M. Kepa

Counsel for the West Vancouver Police Defendants:

C. Fleck

Counsel for the Ministry of Attorney General:

J. Ruttle

Place and Date of Hearing:

Vancouver, B.C.

July 13, 2021

Place and Date of Judgment:

Vancouver, B.C.

October 7, 2021

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I. INTRODUCTION

- [1] The defendants apply under Rule 9-5 of the Supreme Court Civil Rules [Rules] for an order striking out the amended notice of civil claim in this action without leave to amend.

- [2] The amended notice of civil claim describes a conspiracy that began with a seemingly minor incident and arrest of the plaintiff in 2002 and unfolded over 17 years, across three continents and involving multiple law enforcement officers and their associates. The plaintiff says he has been devastated, both emotionally and financially, by the actions of the defendants. He seeks redress from the courts as a self-represented litigant.
- [3] The defendants argue that the amended notice of civil claim fails to meet the basic requirements of proper pleading. It is ludicrously long, they say, repetitious, confusing, in large part unintelligible, plainly unmanageable, and fails to disclose any reasonable claim.
- [4] For the reasons that follow, the amended notice of civil claim is struck out, with leave to amend on terms and conditions that will hopefully help to bring it in line with the mandatory rules of pleading.

II. BACKGROUND

- [5] On March 6, 2002, Marty Kepa was walking his dog on the Ambleside Beach in West Vancouver when he ventured into a "No Dogs Allowed" area. Mr. Kepa was approached by West Vancouver by-law officers who subsequently involved a West Vancouver police officer. Matters escalated, and Mr. Kepa was arrested and charged with assaulting a police officer. The charges were subsequently dismissed.
- [6] Mr. Kepa alleges that, following his arrest in March 2002, Constable Rick Catlin of the West Vancouver Police Department and other unidentified West Vancouver police officers and their associates unlawfully installed video and audio surveillance devices in his apartment in North Vancouver, and unlawfully searched his apartment.
- [7] Mr. Kepa alleges that, on March 15, 2002, Cst. Catlin called him and threatened him, and that during this telephone call, Cst. Catlin revealed unlawful conduct by the West Vancouver Police Department that had led to the death of a young man.
- [8] Having inadvertently uncovered this information, Mr. Kepa alleges, he was subjected to a campaign of unlawful confinement, torture, infliction of mental distress, nervous shock and other psychological, emotional and physiological injuries by Cst. Catlin and others, for the purpose of covering up their unlawful acts, including murder.
- [9] Mr. Kepa alleges that, from 2002 and continuing to the present day, Cst. Catlin and his associates committed various crimes and torts, including threatening him, counselling him to kill himself, demanding that he commit crimes and killing his dog. Mr. Kepa alleges that these actions have damaged his mental health, destroyed his career and driven him into poverty.

- [10] Mr. Kepa filed a notice of civil claim on July 24, 2018. He amended the notice of civil claim on July 18, 2019. The claim names Cst. Catlin, Special Constable Christopher Cottrill, By-Law Officer Sarah Almas, unidentified West Vancouver police officers, unidentified associates of West Vancouver police officers, the Municipality of West Vancouver and the BC Minister of Justice, as defendants.
- [11] The amended notice of civil claim advances approximately 100 causes of action, organized into claims against the various defendants. The alleged causes of action include assault, trespass, misfeasance in public office, intentional infliction of nervous shock, violation of rights and freedoms guaranteed by the Charter of Rights and Freedoms [Charter], breach of a number of provisions of the Criminal Code and breach of the Privacy Act.

III. ANALYSIS

A. Grounds for the Application to Strike

- [12] The defendants rely on Rule 9-5 of the Rules, with an emphasis on subrule 9- 5(1)(a). The relevant portions of Rule 9-5 are as follows:

Scandalous, frivolous or vexatious matters

- 1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
 - a) it discloses no reasonable claim or defence, as the case may be,
 - b) it is unnecessary, scandalous, frivolous or vexatious,
 - c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
 - d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

Admissibility of Evidence

- 2) No evidence is admissible on an application under subrule (1)(a).
- [13] On an application under Rule 9-5(1)(a), the question is whether it is plain and obvious the pleading discloses no reasonable claim. Evidence is not allowed on an application under subrule (a). The application proceeds on the basis the facts pleaded are true, unless they are manifestly incapable of being proven. The approach is generous; if an amendment can salvage an otherwise questionable claim, the court should permit the plaintiff an opportunity to amend: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17, 21-22; *Krist v. British Columbia*, 2017 BCCA 78, at paras. 22-23; *Berthin v. Berthin*, 2016 BCSC 2235, at para. 13-15.

- [14] Although the court must read the pleading generously, it is not required to presume the truth of allegations based purely on assumptions or wild speculation. Highly inflammatory pleadings may be subject to scrutiny by the court, albeit with great caution on an application to strike: *Grosz v. Royal Trust Corporation of Canada*, 2020 BCSC 128, at paras. 58, 104; *Willow v. Chong*, 2013 BCSC 1083, at para. 19; *Young v. Borzoni et al*, 2007 BCCA 16, at para. 25-31.
- [15] There is significant overlap amongst Rule 9-5(1)(a) and the other subrules of 9-5(1). Under subrule (b), a pleading is unnecessary or vexatious if it does not go to establishing a claim known in law, or it is so confusing that it is difficult to understand what is pleaded. Under subrule (c), a pleading may be embarrassing if it is so irrelevant that to allow it to stand would involve useless expense and prejudice to a fair trial. A pleading may also be an abuse of process under subrule (d) if allowing the proceeding to continue would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice: *Sahyoun v. Ho*, 2015 BCSC 392, at para. 58-63.
- [16] The Court of Appeal recently confirmed that Rule 9-5(1) authorizes the court to strike out pleadings that fail to comply with the various requirements of the Rules or that frustrate the objectives of proper pleadings: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 [*Mercantile Office Systems*].
- [17] In *Mercantile Office Systems*, the Court of Appeal explained that pleadings are foundational and guide the entire litigation process. The function of pleadings is to clearly define the issues of fact and law to be determined by the court. The objective is not to tell a story or to provide a narrative of events, but rather to state the material facts - the essential elements to formulate a claim or a defence - as succinctly as possible. *Mercantile Office Systems*, at paras. 44-48.
- [18] The basic rules for pleading a notice of civil claim are set out in Rules 3-1(2) and 3-7, and numerous decisions of this court. A notice of civil claim must:
- a) state facts and not merely conclusions of law;
 - b) include, for each cause of action, the material facts on which the plaintiff relies to establish a complete cause of action;
 - c) not include the evidence by which those facts are to be proved; and
 - d) be as concise as the case allows.
- Mercantile Office Systems*, at paras. 9-12, 19-20; *Simon v. Canada (Attorney General)*, 2015 BCSC 924, at paras. 15-19.
- [19] Where a claim is brought by a self-represented litigant, the court should consider amendments to correct defective pleadings. However, it is not the court's role to give advice to a plaintiff on how to cure the deficiencies: *Ahmed v. Assu*, 2014 BCSC 1768, at para. 19.

- [20] With these principles in mind, I will first consider Mr. Kepa's pleading at a general level, followed by specific objections raised by the defendants. I will then provide my conclusions with respect to the application to strike.

B. The Pleading Generally

- [21] The amended notice of civil claim in this case is 492 pages long. Part of the reason for this is that it includes the entire original claim, struck through. The actual length of the current claim is 397 pages, broken up into 726 numbered paragraphs, many with numerous sub-paragraphs. Regardless, it is a very long document.
- [22] Paragraphs 1-121 (pp. 1-34) of the amended notice of civil claim describe the March 6, 2002, incident and the conduct of the arresting officers. Paragraphs 122-149 (pp. 35-50) describe the conduct of Cst. Catlin, unnamed West Vancouver officers and unidentified associates, following the arrest up to March 15, 2002, including the alleged surveillance of Mr. Kepa and the alleged trespass into his North Vancouver home.
- [23] These first two sections the pleading assert claims in false arrest, negligent investigation, malicious prosecution, misfeasance in public office, breach of the Charter, criminal misconduct, trespass and conspiracy.
- [24] Paragraphs 150-366 (pp. 51-191) of the amended notice of civil claim describe the telephone call between Mr. Kepa and Cst. Catlin on March 15, 2002. This section of the claim contains very serious allegations against Cst. Catlin, including allegations that he confessed to involvement in the death of a West Vancouver resident, threatened to kill Mr. Kepa and his family, threatened to kill another individual and told Mr. Kepa to kill himself.
- [25] The description of the telephone call alone is over 140 pages. Many paragraphs include evidence, primarily Mr. Kepa's description of his state of mind and mental health. Other paragraphs are properly argument rather than pleading, primarily arguments about the defendants' motives. The material facts (the essential elements of the alleged causes of action) are obscured by the unnecessary content.
- [26] On the other hand, the pleading up to and including the telephone call on March 15, 2002, provides a coherent (albeit lengthy and repetitious) statement of the facts on which Mr. Kepa relies. Although inflammatory, the allegations of fact in this section of the claim are not manifestly incapable of proof (or disproof).
- [27] However, the pleading must be amended. The current pleading offends various mandatory requirements of the Rules. Most notably, it is weighed down by "story-telling", rather than providing a succinct statement of the essential elements of Mr. Kepa's claims.

- [28] The next section of the amended notice of civil claim, paras. 367-650 (pp. 193-336) describes a vast conspiracy of harassment, intimidation and defamation by Cst. Catlin, the West Vancouver Police Department and others. The narrative unfolds over many years, in British Columbia, Ontario, Amsterdam, Thailand and onboard a cruise ship.
- [29] This section of the pleading demands a skeptical analysis. I think it is fair to say that Mr. Kepa's allegations following the events in March 2002 descend into speculation and paranoia. From para. 367 onward, the pleading is rambling, confusing and very difficult to follow. The facts alleged are extremely improbable, to the point of being manifestly incapable of proof in a court of law.
- [30] There is no meaningful way for the defendants to defend against, or for the court to adjudicate fairly on, allegations of this nature. The section of the pleading following the telephone call on March 15, 2002, must be struck out in my view.
- [31] Paragraphs 651-692 (pp. 337-352) of the amended notice of civil claim describe complaints filed by the plaintiff with various police, government agencies and public officials in British Columbia and Ontario between 2008 and 2017. The facts alleged in this section are clearly irrelevant. This section of the pleading must also be struck out.

C. Allegations of Criminal Misconduct

- [32] The amended notice of civil claim contains many allegations of criminal misconduct. Standing alone, there is no cause of action for criminal misconduct unless the same facts give rise to civil liability.
- [33] On October 17, 2017, Mr. Kepa filed a requisition seeking a waiver of court fees in anticipation of filing a civil action. The subject matter of the proposed action was substantially the same as this action. The duty master dismissed the application because "the action has no chance of success". Mr. Justice Steeves dismissed Mr. Kepa's appeal from this decision, stating:
- [20] In my view, the plaintiff's claim, again, is very much focussed on his concerns of criminal wrongdoing by the defendants. His concerns in that area are a matter of the criminal justice system rather than a civil claim.
- [21] He does talk broadly about wrong doings in the relief sought in his claim, but other than that, the focus is on allegations of criminal wrongdoing.
- [34] As Mr. Justice Steeves explained, claims based solely on alleged Criminal Code violations are bound to fail. Criminal law is enforced through the criminal justice system, not civil litigation.

D. Liability of the Personal Defendants

- [35] Mr. Kepa makes allegations against a number of police officers personally.

- [36] Section 21 of the Police Act, RSBC 1996, c. 367, provides a qualified immunity for police officers against civil liability for anything said or done in the performance or intended performance of their duties:
- (2) No action for damages lies against a police officer or any other person appointed under this Act for anything said or done or omitted to be said or done by him or her in the performance or intended performance of his or her duty or in the exercise of his or her power or for any alleged neglect or default in the performance or intended performance of his or her duty or exercise of his or her power.
- (3) Subsection (2) does not provide a defence if
- (a) the police officer or other person appointed under this Act has, in relation to the conduct that is the subject matter of action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct, or
- (b) the cause of action is libel or slander.
- [37] Accordingly, a claim against a police officer must allege facts that, if true, could give rise to a claim of dishonesty, gross negligence, malicious or wilful misconduct, or a cause of action in libel or slander: *C.D. v. Canada (Attorney General)*, 2013 BCSC 919, at paras. 55-59.
- [38] The ultimate question of whether an officer's conduct is immunized from liability by s. 21 of the Police Act, however, is a defence that normally requires an examination of the evidence at a trial, or possibly a summary trial, where facts can be found: *Adams v. Hughes*, 2011 BCSC 1804, at para. 35.
- [39] Here, Mr. Kepa alleges dishonesty and malicious or wilful misconduct against Cst. Catlin. His claims against Cst. Catlin are not bound to fail based on s. 21 of the Police Act.
- [40] I did not hear argument on whether the defendant by-law enforcement officers are also entitled to the protection of s. 21 of the Police Act. Assuming they are, there are similar allegations against these defendants, meaning the claims against them are also not bound to fail based on s. 21.
- [41] The claim is complicated, however, by the inclusion of unidentified West Vancouver police officers and unidentified associates of West Vancouver police officers. In many places, it is not possible to identify which claims are being made against which police officers or private citizens, known or unknown. Often, Mr. Kepa attributes misconduct to the West Vancouver Police Department generally, or to unidentified associates of the Department collectively.
- [42] Mr. Kepa is not required to identify defendants whose identity he does not currently know. He may use meaningful placeholders, such as "Unidentified West Vancouver Police Officers", until he determines their identities through the discovery process. He will then need to apply to add those individuals as defendants.

- [43] However, allegations of personal misconduct against unidentified police officers cannot stand alone as material facts giving rise to a cause of action. "Associates" of unidentified police officers is too vague to have any meaning, even as a placeholder.
- [44] The generalized allegations against the West Vancouver Police Department and the claims against "associates" will need to be removed from amended notice of civil claim.

E. Liability of the Province

- [45] The amended notice of civil claim names the BC Minister of Justice as a defendant. There is no legal entity known as the BC Minister of Justice.
- [46] Her Majesty in right of the Province of British Columbia, the government's designation in the Crown Proceeding Act, RSBC 1996, c. 89, (the "Province"), filed a response to civil claim in response to the claims against the BC Minister of Justice.
- [47] The only possible claims against the Province would be based on s. 11(1) of the Police Act, which makes the Minister of Public Safety and Solicitor General, on behalf of the government, jointly and severally liable for torts committed by police officers in certain situations.
- [48] Section 11(1)(a) of the Police Act has no application in this case because none of the individual defendants was a provincial constable, IIO investigator or enforcement officer appointed by a ministry.
- [49] Section 11(1)(b) makes the Province jointly and severally liable for torts committed by municipal constables, such as Cst. Catlin, but only in the performance of their duties when acting in other than the municipality where they normally perform their duties.
- [50] Accordingly, the only possible claims against the Province would be for torts committed by the defendant Cst. Catlin, or other as of yet unidentified officers of the West Vancouver Police Department, acting in the performance of their duties outside of West Vancouver.
- [51] The Province cannot be held liable for the torts alleged by Mr. Kepa based on the events on Ambleside Beach or his arrest on March 6, 2002, because those events occurred within West Vancouver.
- [52] Mr. Kepa alleges a number of torts by Cst. Catlin and unidentified officers of the West Vancouver Police Department that may have occurred in North Vancouver. These include trespass, misfeasance in public office and intentional infliction of nervous shock.
- [53] The alleged telephone call that figures prominently in Mr. Kepa's claim may have been made by Constable Catlin from West Vancouver, meaning it may not attract liability for the Province under s. 11(b).

[54] In my view, a determination of whether the Province can be held liable for any of the torts alleged to have occurred outside of West Vancouver between March 6 and 15, 2002, requires evidence and findings of fact, and is therefore not suitable for decision on an application to strike under Rule 9-5 of the Rules.

[55] There are no other discernable claims against the Province.

F. Limitation Defences

[56] The defendants argue that any claims based on the events in March of 2002 are time barred by the expiry of the two-year time limit in s. 6(1) of the Limitation Act, S.B.C. 2012, c. 13.

[57] In *Fuoco Estate v. Kamloops (City)*, 2001 BCCA 325, the Court of Appeal held that statutory limitations is a defence that normally must be pleaded before it arises, and that, accordingly, an application to strike is generally not an appropriate procedure to resolve a limitations defence (para. 15). The Court stopped short, however, of stating "categorically" that a limitations argument cannot be advanced under what is now Rule 9-5(1)(a).

[58] More recently, in *Jansen v. Ross*, 2014 BCCA 173, the Court of Appeal overturned a decision in which the chambers judge struck out an action on grounds it was brought out of time under the Limitation Act. The Court found that the notice of civil claim itself did not raise the limitations issue; the issue only arose because it was pleaded in defence. Even then, the Court said, the limitations defence could not be decided in "an evidentiary vacuum" because the plaintiff proposed to rely on the postponement provisions of the Limitation Act (paras. 42-45).

[59] A claim may be struck out under Rule 9-5(1)(a) on grounds it is barred by the Limitation Act, but the expiry of the limitation period must be plain and obvious on the face of the notice of civil claim and it must not be subject to an issue, such as discoverability or postponement, that should be decided on full pleadings and evidence. See, for example, *Dong v. Real Estate Board of Greater Vancouver*, 2020 BCSC 2018, at paras. 36-45.

[60] Reading the amended notice of civil claim generously, as the court must do on an application to strike, it is not plain and obvious the claims relating to the events in March 2002 are time barred. Mr. Kepa appears to plead wilful concealment by the defendants. Also, the question of when Mr. Kepa discovered the claims - and in particular, when he knew or ought to have known that, having regard to the nature of the damage, a court proceeding would be an appropriate means to seek to remedy the damage (Limitation Act, s. 8(d)) - requires a contextual analysis of his claim, which is not well-suited to a pleadings-only application.

G. Conclusions with Respect to the Amended Notice of Civil Claim

- [61] The amended notice of civil claim up to and including the telephone call on March 15, 2002, requires amendment, but it is not incurable. Mr. Kepa may address the deficiencies identified in these reasons for judgment. Rather than attempting to edit his existing pleading, Mr. Kepa should start over and restate the material facts as succinctly as possible.
- [62] Given the current state of the pleading, it is difficult to analyse whether it includes the essential elements of the alleged causes of action. Accordingly, the defendants may renew their application to strike following receipt of an amended pleading.
- [63] The amended notice of civil claim following the telephone call on March 15, 2002, is so deeply flawed that it is difficult to conceive of potential amendments that could salvage a legally viable claim.
- [64] Denying a plaintiff, especially a self-represented litigant, an opportunity to rectify defective pleadings is a drastic remedy. It appears to me that Mr. Kepa attempted to bring his claim more in line with the law after Steeves J. dismissed his application for a waiver of fees. Unfortunately, the result is an excessively long and unworkable pleading.
- [65] Mr. Kepa will have leave to amend the entire claim. But he needs to appreciate that the current pleading of events following the telephone call in March 2002 violates virtually every rule of pleading. It frustrates all of the important objectives of proper pleadings. It is unsustainable as the basis for a legal proceeding. If his claim is to survive a further application by the defendants, any pleading of events after the telephone call needs to be fundamentally rewritten.
- [66] The defendants asked for an order that any amended pleading be drafted by a practicing lawyer. Assuming a master has the jurisdiction to make an order of this nature, I would not make the order in this case. There was evidence before Steeves J. that Mr. Kepa's only source of income is social assistance. It is clear that Mr. Kepa cannot afford to pay a lawyer. In my view, an order requiring Mr. Kepa to retain a lawyer to rewrite his pleading would impose an undue hardship on his access to justice.

IV. CONCLUSION

- [67] The amended notice of civil claim is struck out in its entirety.
- [68] Mr. Kepa is granted leave to amend the pleading on the following terms and conditions:
- a) The amended pleading must be prepared as a "Fresh Amended Notice of Civil Claim", without strikeout or underlining; it must include the new pleading only.
 - b) Paragraphs 1 to 366 of Part 1, Statement of Facts, must be revised with the following objectives. They must:
 - i. set out a concise statement of the material facts giving rise to the plaintiff's claims;

- ii. avoid unnecessary repetition, evidence or argument;
 - iii. identify as far as possible each of the defendants and their roles in the material events;
 - iv. set out the material facts in support of the plaintiff's claim of postponement or delayed discovery of the claims under the Limitation Act.
- c) Paragraphs 367 to 703 of Part 1, Statement of Facts, must be removed from the amended notice of civil claim and either left out of the amended pleading or else fundamentally rewritten with the objectives set out above.
 - d) The Legal Basis of the claim must be amended according to the changes in the Statement of Facts.
 - e) The total amended pleading must be no more than 30 pages.
 - f) The amended pleading must be filed and delivered to counsel for the defendants within 90 days of this order.
- [69] The defendants will be at liberty to apply again under Rule 9-5 of the Rules for an order striking out or dismissing all or parts of the Fresh Amended Notice of Civil Claim.
- [70] The defendants are entitled to costs of this application in the cause.

"Master Elwood"

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