

---

CANADA / JUDGMENT

## Knott v. British Columbia

2013 BCSC 529

---

COURT

Supreme Court of British Columbia

DECIDED

27 March 2013

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

---

2013 BCSC 529 Knott v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Knott v. British Columbia,

2013 BCSC 529

Date: 20130327

Docket: S062607

Registry: Vancouver

Between:

David Knott by his Litigation Guardian, the Public Guardian and Trustee of British Columbia and  
Gerald Spidel by his Litigation Guardian,

the Public Guardian and Trustee of British Columbia

Plaintiffs

And

Her Majesty the Queen in Right of the

Province of British Columbia

Defendant

Before: The Honourable Mr. Justice Bowden

Ruling on Application to Strike

In Chambers

Counsel for the Plaintiffs:

S. Sheina

Counsel for the Defendant:

L. Lee

Counsel for the proposed Defendant, Northern Health Authority:

M.M. Skorah, Q.C.

M. Willcock (Articled Student)

Place and Date of Hearing:

Vancouver, B.C.

April 27, 2012; January 14 and 18, 2013

Place and Date of Judgment:

Vancouver, B.C.

March 27, 2013

## I. The application

- [1] The defendant has applied under Rule 9-5 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules], for an order striking out the amended notice of civil claim (the "Claim"), filed by the plaintiffs.

## II. Background

- [2] These proceedings were commenced in April 2006 by the Public Guardian and Trustee, as litigation guardian on behalf of the plaintiffs, and have been moving slowly since then.
- [3] The defendant made a demand for particulars in 2009, and in April 2010 a response was filed. An application to strike was filed in February 2011, and the plaintiffs filed amended pleadings in June 2011. The action entered case management and came before me in October 2011. Further amendments to the pleadings were made by the plaintiffs in December 2011, and another application to strike was filed in April 2012. "Final" pleadings were filed on September 30, 2012; however, further amendments were permitted in January 2013, without prejudice to the defendant to proceed with its application to strike. It seems that the plaintiffs have been attempting to ward off this application by a series of amendments to their pleadings.
- [4] The facts are not in dispute. The plaintiffs both suffer from serious physical and intellectual disabilities requiring extended care services or what are now called "residential care services."

- 
- [5] David Knott was born on June 30, 1952, and Gerald Spidel was born on May 18, 1957. Knott was abandoned at birth and was made a ward of the Superintendent of Child Welfare. On December 18, 1953, he was admitted to Woodlands School where he was cared for until 1975. On May 21, 1975, he was placed in the Multi Level Care Unit ("MLCU") of Kitimat General Hospital ("KGH") in Kitimat, B.C.
- [6] Spidel was admitted to Woodlands School on December 14, 1960, where he was cared for until July 2, 1976, by which time he had been abandoned by his parents. On that date he was placed into the Extended Care Unit of GR Baker Memorial Hospital in Quesnel, B.C. On August 17, 1982, he was placed in the MLCU of KGH.
- [7] Sometime in the mid-1980s, the defendant undertook a deinstitutionalization initiative with respect to the care, planning and residential placement of adults with physical and intellectual disabilities and implemented policies and practices in relation thereto. The defendant created a division of the Ministry of Health known as "The Services to the Handicapped" to oversee the provision of services and placement of such handicapped individuals.
- [8] Pursuant to that initiative, in August 1987 unnamed employees or agents of the defendant reviewed the circumstances of Knott and Spidel and concluded that their placement at the MLCU of KGH was inappropriate. It was decided that by 1988 their cases would be reviewed and they would be placed in an alternate resource more appropriate to their needs.
- [9] Between 1987 and 2003 no further alternate care planning took place for Knott and Spidel. They continued to reside at KGH, where it is alleged their physical and emotional needs were not met and they received insufficient and inappropriate care. During that period no individual or entity had guardianship of the plaintiffs and they were not wards of the defendant.
- [10] While changes were made to the health service delivery model in the late 1990s, the defendant did not assign to anyone the responsibility to advocate for the plaintiffs.
- [11] The responsibility for the provision and funding of certain health services including services at KGH was transferred by the defendant to the North West Community Health Services Society on April 1, 1997, and on December 31, 2001, that Society amalgamated with the Northern Health Authority.
- [12] In or around 2002, an administrator at KGH advised the Ministry of Children and Family Development that the placement of the plaintiffs was inappropriate for their circumstances. As a result, in or about 2003 the plaintiffs began to receive some community support, services and benefits while still residing at KGH. In 2005 they were moved from KGH into residential care in the community where they currently reside.
- [13] The amended notice of civil claim alleges that the defendant owed a duty of care to the plaintiffs to provide long-term planning, supervision and residential placement appropriate to their condition; to not continue their placement in KGH after 1987 and to investigate,
-

monitor and supervise adequately the care, planning and residential placement of the plaintiffs while they resided at KGH. The plaintiffs further allege that the defendant breached its duty of care by failing to perform its duties to the plaintiff and that such failure was due to negligence.

[14] As a result of the alleged breach of its duty of care, the plaintiffs claim that they suffered and will continue to suffer harm and injury, including physical injury and other harm in respect of which they claim general and special damages and costs.

[15] The harm is described in paragraph 17 of the amended notice of civil claim as follows:

- a) (They) had little or no contact, or opportunity for contact, with family and community members;
- b) had little or no intellectual and physical stimulation, recreation or rehabilitation;
- c) were forcibly confined to their beds and otherwise forcibly and inappropriately restrained;
- d) received insufficient or inappropriate medical and dental care, including inappropriate and excessive medication;
- e) received inadequate assistance with personal hygiene;
- f) were inappropriately subject to "Do Not [Resuscitate]" orders; and
- g) did not obtain services which were available and which they were entitled to receive.

[16] Analysis

[17] Rule 9-5(1)(a) provides:

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

[18] The test for striking pleadings was stated by Chief Justice McLachlin in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 [Imperial Tobacco] at para. 17:

The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. Supreme Court Rules. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at para. 15; *Hunt v. Carey Canada Inc.* [1990] 2 S.C.R. 959, at p. 980.

Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial; see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

[19] Since submissions were made in this case, our Court of Appeal has released its decision in *British Columbia (Director of Civil Forfeiture) v. Flynn*, 2013 BCCA 91. In that case, the appellant sought to overturn a decision by a judge in chambers, dismissing his application to strike under Rule 9-5(1)(a) of the Rules. The issue in the substantive action involved statutory interpretation. The Court of Appeal reiterated the test in *Imperial Tobacco* and held that a chambers judge hearing a motion to strike pleadings founded on a complex question of statutory interpretation is not obligated to come to a conclusion regarding the interpretation, and it was open to him, in the exercise of his discretion, to leave that question to be decided at trial. As the case at bar involves a novel claim in negligence, it is my view that the application to strike will require a consideration of the elements of a cause of action in negligence and the test in *Anns/Cooper*.

[20] In their application response, the plaintiffs state that evidence will be presented in respect of some aspects of their Claim. In this regard the comments of Chief Justice McLachlin in *Imperial Tobacco* at para. 22, should be noted:

It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[21] The plaintiffs' Claim is based on the alleged negligence of the defendant. They say that the defendant owed a duty of care to them to provide long-term planning, supervision and residential placement appropriate to their conditions. They allege that the defendant breached its duty by failing to provide them with reasonably appropriate and adequate long-term planning, supervision and residential placement, and in failing to review their placement after the deinstitutionalization program in 1987, and in failing to investigate, monitor and adequately supervise the care of the plaintiffs while they resided at KGH after 1987.

[22] The plaintiffs admit that this is a unique claim and ask the Court to recognize a new duty of care. They allege that a "special relationship" existed between the plaintiffs and the defendant. While the facts in the Claim do not make the basis for a special relationship apparent, the plaintiffs say that evidence at trial will show a special relationship. Based on the comments of Chief Justice McLachlin in *Imperial Tobacco*, I cannot evaluate the possibility of success of the Claim if it relies on a special relationship.

[23] As the facts in the Claim do not fall into a previously established category where negligence has been recognized, the plaintiffs must meet the tests formulated by the Supreme Court of Canada in *Cooper v. Hobart*, [2001] S.C.J. No. 76, in applying *Anns v. Merton London Borough Council*, [1978] A.C. 728, (the "Anns/Cooper Test").

- [24] At the first stage of the test it must be determined whether the harm that occurred was the reasonably foreseeable consequence of the defendant's actions.
- [25] Thus, the plaintiffs must show that it was foreseeable to the defendant that a breach of the duties in paragraph 24 of the Claim would result in the harms described in paragraph 17.
- [26] It seems that the harms are not identifiable injuries, but rather the harms involve the plaintiffs not being provided with a particular service or being inappropriately treated while at KGH.
- [27] It is apparent that if the plaintiffs suffered the alleged harm, then it arose from the acts of the individuals who provided or failed to provide service to them while they were at KGH. In my view, the harm alleged did not result from the act of placing the plaintiffs in KGH nor can it be attributed to the negligence of the defendant. As in *Wynberg v. Ontario*, [2005] O.J. No. 1228, the underlying condition of the plaintiffs was independent from anything that the defendant did or did not do. The plaintiffs did not plead any facts that would show that their condition worsened because of the defendant's failure to place them in a different facility than the MLCU of KGH. The harms described are also vague and provide insufficient particulars for the defendant to defend against the allegations. For example, paragraph 17(g) does not say what services the plaintiffs were entitled to but did not receive, nor does it specify whether they required the services that were available.
- [28] I agree with the defendant that if the defendant owed the duties described in paragraph 24 to the plaintiffs, it was not reasonably foreseeable that the plaintiffs would suffer the alleged harm at the hands of the staff in KGH. For example, it was not foreseeable that KGH would prevent the plaintiffs from seeing family members if the family members had visited the hospital.
- [29] The alleged harms described in paragraphs 17(c) to (f) were not foreseeable in that they would only arise as a result of actions by professional staff at the hospital. The defendant could properly assume that the staff would act reasonably and comply with the standards of their particular governing bodies.
- [30] In my view the defendant, like anyone who may be involved in the placement of someone into a particular care facility, in continuing the placement of the plaintiffs in the MLCU, could not have reasonably foreseen the harm alleged in paragraph 17 of the Claim.
- [31] The *Anns/Cooper* Test requires that the facts pleaded establish that the defendant was in a proximate relationship with the plaintiffs that gave rise to the duties of care described in paragraph 24. In my view, the facts in the Claim do not establish proximity. The Claim does not allege that the plaintiffs relied on any representations of the defendant nor are facts pleaded that would result in the plaintiffs having any expectations or reliance upon the defendant. Although paragraph 5 of Part 3 of the Claim alleges a relationship of proximity, there are no facts pleaded that indicate the basis for a proximate relationship.

- [32] It should also be noted that to the extent that the placement of the plaintiffs involved policy decisions, such actions are immune from liability in negligence because they are made in the interests of the public and not of any one individual, and the government does not have a proximate relationship to an individual. (*Jones (Litigation guardian of) v. Donaghey*, [2010] B.C.J. No. 2071)
- [33] I have concluded that the facts pleaded by the plaintiffs do not establish a proximate relationship between the plaintiffs and the defendant, and a private law duty of care was not owed by the defendant to the plaintiffs. Thus, the first stage of the *Anns/Cooper* Test has not been satisfied.
- [34] While it is not necessary to consider the second stage of the *Anns/Cooper* Test, it is my view that if a duty of care were recognized on the part of the government in relation to the placement of individuals in a health care facility, as Chief Justice McLachlin said in *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 74:

It is arguable that to impose a duty of care on the plaintiff class on the facts pleaded would open the door to a claim in negligence by any patient in the health care system with an entitlement to receive funding for health services, whether primary or extended. This raises the spectre of unlimited liability to an unlimited class, decried by Cardozo C.J. in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), at p. 444: see *Design Services Ltd. v. Canada*, 2008 SCC 22, [2008] 1 S.C.R. 737, at paras. 59-66.

- [35] In the same vein, in *A.L. v. Ontario*, [2006] O.J. No 4673, the Ontario Court of Appeal, dealing with a claim arising out of a decision by Ontario to terminate the availability of agreements with individuals for the provision of special needs services required by a child in their custody, said at para. 33:

To recognize a private law duty of care would expose Ontario to claims for substantial damages by many families and individuals who believe that they have not received adequate services. In my view, to recognize a novel duty of care that would allow claims of this nature to proceed would be contrary to sound policy in this area of the law. A private law duty of care would represent an unwarranted and undesirable intrusion that could interfere with the sound administration of the CSFA. The Minister and the child welfare authorities have a difficult task to perform and limited resources at their disposal. Their priorities should be based on the general public interest, not on the interests of particular individuals, however difficult and sympathetic their circumstances may be.

- [36] Similarly, in this case the plaintiffs are seeking damages because they believe that they have not received adequate services in relation to their special needs.
- [37] I have reached the conclusion that this claim would also fail the second stage of the *Anns/Cooper* Test.

- [38] For these reasons I find that the pleadings do not disclose a duty of care on the part of the defendant and the cause of action as pleaded is bound to fail. It is plain and obvious that even after numerous amendments have been made, the pleadings do not disclose a reasonable cause of action in negligence. I allow the application of the defendant and strike the Claim in its entirety.
- [39] The parties are at liberty to speak to the issue of costs.
- [40] In response to the defendant's position that the plaintiffs brought the action against the wrong defendant, the plaintiffs applied to add the Northern Health Authority as a defendant. That application was adjourned pending this decision.
- [41] As stated, the responsibility for the provision and funding of certain health services was transferred by the defendant to the North West Community Health Services Society on April 1, 1997, and on December 31, 2001, that Society amalgamated with the Northern Health Authority. As a result, it appears that the Northern Health Authority assumed the rights and obligations of the Community Health Services Society which included responsibility for KGH. Without deciding the question, it may be that the Northern Health Authority was responsible for the provision of services to the plaintiffs while they resided at the MLCU.
- [42] The plaintiffs are given leave to continue their application to add the Northern Health Authority as a defendant in this action.
- [43] Costs of this application are awarded to the defendant at Scale B.

"Bowden J."

---

## Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE      <https://www.bccourts.ca/jdb-txt/SC/13/05/2013BCSC0529.htm>

CASE PAGE              <https://chat.esheria.ai/case-law/canada/knott-v-british-columbia-2013>

Prepared on 26 October 2026 · Esheria