

CANADA / JUDGMENT

Lefebvre v. Durakovic

2018 BCCA 201

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 201 Lefebvre v. Durakovic

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Lefebvre v. Durakovic,

2018 BCCA 201

Date: 20180516

Dockets: CA42316; CA43251

Docket CA42316

Between:

Lorraine Lefebvre

Appellant

(Plaintiff)

And

Joseph Patrick Durakovic, Administrator of the Estate of Adam Paul Durakovic

and Joseph Patrick Durakovic

Respondents

(Defendants)

- and -

Docket CA43251

Between:

Lorraine Lefebvre

Appellant

(Plaintiff)

And

Joseph Patrick Durakovic, Administrator of the Estate of Adam Paul Durakovic and Joseph Patrick Durakovic

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Fisher

On appeal from: Orders of the Supreme Court of British Columbia, dated October 2, 2014 (A.P.D. Estate (Re), Vancouver Docket No. S134094) and October 20, 2015 (L.L. v. J.P.D., 2015 BCSC 1905, Vancouver Docket No. S134094).

Oral Reasons for Judgment

Counsel for the Appellant:

D.F. Sutherland, Q.C.

D.W. Burnett, Q.C.

Counsel for the Respondent:

R.A. Kasting

Place and Date of Hearing:

Vancouver, British Columbia

May 14, 2018

Place and Date of Judgment:

Vancouver, British Columbia

May 16, 2018

Summary:

The plaintiff, in a notice of civil claim and in proposed amendments to the claim, sought to sue the defendant for giving false evidence in a hearing before a registrar, and for posting a copy of a chambers judgment, without commentary or amendment, on a website. The chambers judge struck those elements of the claim and refused the amendments. The defendant unsuccessfully sought to have the entire notice of claim struck as an abuse of process. Both parties appealed. Held: Appeals and cross-appeal dismissed. A witness enjoys absolute immunity in respect of evidence given in court. Republication, without abridgement, alteration, or commentary, of a judgment that remains in force does not afford a party aggrieved by the judgment a civil claim. A decision not to strike a claim as an abuse of process involves questions of mixed fact and law, and calls for deference on the part of an appellate court. While elements of the claim and the plaintiff's conduct of the litigation were objectionable, the judge made no reversible error in finding that she should have an opportunity to pursue the viable portions of it.

- [1] GROBERMAN J.A.: The plaintiff appeals from an order striking out portions of her notice of civil claim and an order refusing leave to make certain amendments to that claim. The defendant cross-appeals from a dismissal of his application to strike the claim in its entirety.

The Estate Litigation

- [2] The litigation arises out of the administration of the estate of the parties' son, Adam Paul Durakovic, who died in a motor vehicle accident in 2007. He died intestate, leaving an estate that both this Court and the Supreme Court have indicated has a net value of approximately \$33,000, though the plaintiff hypothesizes that there are additional assets that remain undisclosed.
- [3] The plaintiff and a lawyer who was a friend of hers commenced work on the administration of the estate, but in July of 2007, the parties agreed that the defendant would administer the estate. He obtained letters of administration and by July 2008, he was ready to pass the estate's accounts. He provided some details to the plaintiff, but she did not accept the legitimacy of the accounts. It became clear that the defendant would have to proceed to a formal passing of the accounts before a registrar.
- [4] In October 2008, a master referred the passing of accounts to the registrar, directing that the registrar report back to the court with a recommendation. In January 2009, a lengthy pre-hearing conference took place before a registrar. It was apparent that the matter would not be straightforward. Despite the relatively small value of the estate, the plaintiff estimated that there would be fifteen witnesses, and that her examination of the witnesses would occupy approximately 18.5 hours. The registrar gave directions for disclosure of documents with a view to having the parties prepared in advance of the hearing.

- [5] The defendant disclosed documents, and proposed dates for a second pre-hearing conference. The plaintiff was not satisfied with the disclosure, however, and took the position that it was premature to schedule a second pre-hearing conference. While counsel for the defendant eventually scheduled a second pre-hearing conference, it was adjourned indefinitely, and never took place.
- [6] The registrar's hearing was set to commence on December 14, 2009. The plaintiff did not attend, but was represented by a newly-retained lawyer, who sought an adjournment. The registrar referred to the plaintiff having a pattern of engaging and dismissing counsel. She noted that two days had been set aside for the hearing, and she dismissed the application for an adjournment. Thereafter, the lawyer withdrew from the hearing. The hearing was stood down to await the plaintiff's appearance, but she did not attend. The hearing proceeded for the balance of the day in her absence. The registrar reserved, requesting written submissions on costs.
- [7] The plaintiff contacted the court registry on December 16, stating that her non-attendance was not wilful or deliberate, and advising that she would be filing an application and affidavit materials dealing with her non-appearance. A few days later, the registrar received a request from another lawyer retained by the plaintiff, seeking to re-open the hearing. The registrar refused the request, on the basis that she had finished her report and recommendation. She considered that any arguments that the plaintiff wished to make could be addressed to the judge receiving the recommendations.
- [8] The registrar issued her report on December 30, 2009. Except for some minor amendments, she recommended acceptance of the accounts. She also recommended that the plaintiff be required to pay the costs of the passing of accounts, on the basis that she had unnecessarily lengthened the proceedings. The registrar found her conduct to have been "reprehensible" as that word was used in *Garcia v. Cranbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.), and recommended that costs be payable as special costs.
- [9] The recommendations were considered by Bauman C.J.S.C. (as he then was) in reasons pronounced March 1, 2010 (*Re Durakovic Estate*, 2010 BCSC 260). He did not accede to the plaintiff's application to re-open the matter, as he was of the view that she had been guilty of "wilful delay or default" in failing to attend at the registrar's hearing. In the end, he accepted the registrar's recommendations, with one small change. He also found that it was appropriate to order that the plaintiff pay special costs in respect of the passing of accounts.
- [10] The reasons of the Chief Justice were 64 paragraphs long, and appended the registrar's report, which was a further 130 paragraphs long. Relatively small parts of the judgment and report concern conduct of the plaintiff.

- [11] The court did not impose any restrictions on publication of the judgment, and it was published in the ordinary course on the websites of both the British Columbia superior courts and the Canadian Legal Information Institute. The plaintiff alleges that the defendant's lawyer also put a copy of the judgment on his firm's website, though he has indicated that he only placed a link to the judgment on the site.
- [12] The plaintiff appealed the judgment of the Supreme Court on the passing of the accounts, and this Court allowed the appeal in a judgment indexed as 2011 BCCA 66. It found that the plaintiff was not guilty of "wilful delay or default" in failing to attend the registrar's hearing, and considered that the registrar should have entertained the plaintiff's reconsideration application. The court ordered that the passing of accounts be reconsidered, and that the plaintiff be afforded the opportunity to cross-examine witnesses and call evidence.

The Current Litigation

- [13] Neither party brought the matter back before the registrar. The plaintiff commenced a broad-ranging action against the defendant, alleging abuse of process, defamation, conversion, breach of trust, breach of contract, extortion, intentional infliction of emotional distress, intimidation, and negligence. Parts of the claim were struck by the chambers judge, while other parts were allowed to proceed.
- [14] On this appeal, the plaintiff contends that the judge wrongly struck an allegation that the defendant committed an abuse of process by giving false testimony before the registrar. She also contends that the judge erred in striking allegations that the defendant defamed her by republishing the reasons for judgment of Bauman C.J.B.C. before his judgment was overturned by this court.
- [15] In a cross-appeal, the defendant contends that the judge erred in failing to strike the entire claim as an abuse of process.

The Allegation of Abuse of Process by Giving False Evidence

- [16] In his initial judgment, the judge gave very brief reasons for striking the claim for giving false evidence:
- [31] The legal context for the plaintiff's claim here is that expressions made in the course of a judicial proceeding are subject to absolute privilege and complete immunity, even if published with malice. Further, no action lies against judges, counsel, parties, juries, or witnesses when they speak or write in the course of a judicial proceeding before a court recognized by law (R. McConchie, D. Potts, Canadian Libel and Slander Action, pgs. 465, 466).
- [38] It would be a major intervention into judicial proceedings if the evidence before the proceedings was subject to defamation: see page 466 of the McConchie and Potts text.

- [17] The claim that was struck alleged that the false evidence was defamatory. The plaintiff then sought leave to amend the notice of civil claim to allege that the giving of false evidence constituted an abuse of process. In his second judgment, the judge rejected the proposed claim:
- [22] [T]he immunity I discussed at para. 38 of the October 2014 judgment extends beyond defamation. Witnesses are absolutely immune from all civil liability for what they say and do in a judicial proceeding: *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115 at para. 102.
- [18] The plaintiff contends that the judge erred in striking the claim and in failing to allow the amendment. She contends that witness immunity is merely a qualified privilege, and that an action for abuse of process can include a claim based on the malicious provision of false evidence.
- [19] I would reject that assertion. The general rule that a person giving or tendering evidence to a court or an adjudicative tribunal enjoys an absolute immunity from suit in respect of the evidence is well established. Indeed, in *Hung v. Gardiner*, 2003 BCCA 257, at para. 6, Levine J.A., speaking for the Court, cited with approval the following language from *Sussman v. Eales* (1985), 33 C.C.L.T. 156 (Ont. H.C.J.) at 157, appeal allowed in part (1986), 25 C.P.C. (2d) 7 (Ont. C.A.):

The issue is whether the defendants enjoy immunity. The general rule is clear. No action will lie for defamatory statements contained in a document properly used in the course of any proceedings before a court of justice or tribunal recognized by law. The rule is well enough settled. The need for citing jurisprudential support has virtually disappeared.

[Emphasis by Levine J.A.]

- [20] Notwithstanding the disappearance of the need to cite jurisprudential support, I was, in one case (*McDaniel v. McDaniel*, 2008 BCSC 653, varied 2009 BCCA 53) treated to a brief containing over 100 authorities on the subject. In *Lower v. Stasiuk*, 2013 BCCA 389, this Court referred with approval to the decisions in *McDaniel*:
- [48] Witness immunity is well established at common law. Mr. Justice Groberman summarized the doctrine in *McDaniel v. McDaniel*, 2008 BCSC 653 at paras. 18-19:

Witnesses are absolutely immune from civil liability for anything that they say in court, even if what is said is false and even if they harboured malicious motives for giving evidence. The immunity is expansive. It applies to evidence given before quasi-judicial administrative tribunals as well as courts. It also applies to out-of-court statements made in the course of preparing to give testimony and even to discussions with counsel for the purpose of determining whether or not the witness has relevant evidence to give. Where litigation is in contemplation, statements made by a potential witness on the subject matter of the litigation will fall within the immunity: *Monje-Alvarez v. Monje-Alvarez* (1992), 69 B.C.L.R. (2d) 99, 93 D.L.R. (4th) 659 (BCCA).

The immunity is essential to the administration of justice. In order to foster an atmosphere in which witnesses and counsel are unfettered in their preparations for judicial proceedings, neither should face the possibility of a civil suit over their discussions. The immunity, however, does have limits. It does not apply to everything a lawyer does in his or her professional capacity, nor does it apply simply because matters discussed between the parties might potentially at some point come before a judicial or quasi-judicial body. The immunity is directed at facilitating the gathering and preparation of evidence for litigation. Where that is not the context in which a statement is made the immunity will not apply.

[49] On appeal from the decision of Groberman J. (McDaniel v. McDaniel, 2009 BCCA 53), this Court extended the application of witness immunity to a potential witness in the proceeding with respect to information provided to a solicitor involved in the litigation.

[Emphasis added.]

[21] In McDaniel, itself, this Court said:

[28] Before us, Mr. Phillips, for Jack McDaniel, has diligently pared down the 100 authorities to which he referred Mr. Justice Groberman, but he cites enough to demonstrate that the immunity in question is absolute so that it applies regardless of the lawyers' or the witness' malice (e.g. motive). Counsel cites these authorities:

Dawkins v. Lord Rokeby (1873), L.R. 8 Q.B. 255 (Ex. Ch.), aff'd. (1875), L.R. 7 H.L. 744

Hall v. Baxter (1922), 22 O.W.N. 207 at 209 (H.C.)

Foran v. Richman (1976), 10 O.R. (2d) 634 (C.A.)

Dooley v. C.N. Weber Ltd. (1994), 19 O.R. (3d) 779 (Gen. Div.)

Comeau v. Pole, 2003 NBQB 429, 46 C.P.C. (5th) 218, aff'd 2005 NBCA 113, 294 N.B.R. (2d) 366

Schut v. Magee, 2003 BCCA 417, 15 B.C.L.R. (4th) 250

Cimolai v. Hall, 2004 BCSC 153, 25 B.C.L.R. (4th) 117, at para. 32 quoting a once-leading American article, "Absolute Immunity in Defamation: Judicial Proceedings" (1909), 9 Col. L. Rev. 462 by Van Vechten Veeder

Astley v. Verdun (2007), 49 C.C.L.T. (3d) 96 at para. 13 (Ont. S.C.J.)

Elguindy v. Koren, [2008] O.J. No. 764 at paras. 35-36 (S.C.J.)

[22] The immunity of a witness from suit in respect of evidence given in court is merely the core aspect of a broader immunity, described by Cromwell J.A. in Elliott v. Insurance Crime Prevention Bureau, 2005 NSCA 115:

- [102] Witnesses are immune from civil liability for what they say and do in a judicial or quasi-judicial proceeding. This is the core of witness immunity. Outside that core, the immunity may also extend to things witnesses (and even potential witnesses) say and do out-of-court, provided that the extension is necessary in order to make the protection of testimony effective. But how far the immunity extends to things said and done out-of-court is a grey area.
- [112] The witness immunity rule is part of a larger immunity which applies to participants in judicial or quasi-judicial proceedings. As Raymond E. Brown puts it in 2 The Law of Defamation in Canada, looseleaf updated to 2004 Rel. 4, (Toronto: Carswell, 1999) at ¶ 12.4(1) and 12.4(4)(a), "An absolute privilege or immunity attaches to those communications which take place during, incidental to, and in the processing and furtherance of, judicial or quasi-judicial proceedings. No action for libel or slander will lie for words spoken or written during the ordinary course of those proceedings. ... The protection of this privilege extends to all the participants in the judicial or quasi-judicial proceeding including the judge, jury witnesses, parties and their counsel." See also *Watson v. M'Ewan*, [1905] A.C. 480 (H.L. (Sc.)); *Halls v. Mitchell*, 1928 CanLII 1 (SCC), [1928] S.C.R. 125.
- [113] While the immunity is most familiar in defamation cases, it also bars other causes of action. Halsbury says that: "A witness is protected from civil proceedings in respect of the evidence which he gives in judicial proceedings, and in respect of things said or done in the course of preparing evidence for such proceedings. The protection is against actions of any sort, and is not limited to actions for libel and slander.": Halsbury's Laws of England, 4th ed., vol. 17 (London: Butterworths, 1976) at ¶ 261 (emphasis added). Similarly, in *Martini v. Wrathall*, (1999), 1999 NSCA 105 (CanLII), 180 N.S.R. (2d) 38 (C.A.) (at ¶ 6) and *Horn Abbot Ltd. v. Reeves* (2000), 2000 NSCA 88 (CanLII), 189 D.L.R. (4th) 644 (¶ 15), this Court approved the proposition that witness immunity applies to all tort actions. (See also *Smith v. Canadian Pacific Railway* (2003), 2003 MBQB 290 (CanLII), 181 Man. R. (2d) 150 (Q.B. Master). It is not disputed in this case that the immunity applies to negligence actions.
- [114] The immunity applies to words said or conduct performed on a protected occasion, the protected occasion being a judicial or a quasi-judicial proceeding: Brown at ¶ 12.4(2). Thus, publishing defamatory words is not actionable if done in the course of judicial or quasi-judicial proceedings. It is critical to understand that it is not the nature of the conduct or the words which is the focus of the immunity, but the occasion on which the words are said or the conduct is performed.
- [23] The plaintiff's assertion that framing her claim as one for abuse of process gets around witness immunity enjoys no support in the case law. Indeed, if a claimant could get around the immunity simply by characterizing the giving of false evidence as an abuse of process, there would be little, if anything left of the immunity.

- [24] The plaintiff also contends that the immunity amounts to no more than a "qualified privilege", supporting that proposition with references to *Roy v. Prior*, [1971] A.C. 470 (H.L.) and *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130.
- [25] In *Roy v. Prior*, the plaintiff made a claim for malicious prosecution, alleging that the defendant improperly initiated proceedings to have him arrested. The defendant contended that because the furnishing of evidence was an essential element in procuring the arrest, the claim could not be brought. The court disagreed, differentiating between an action for malicious prosecution and a claim for damages that is based on the furnishing of false evidence. Lord Morris of Borth-y-Gest stated, at 477:

The plaintiff is not suing the defendant on or in respect of the evidence which the defendant gave in court. The plaintiff is suing the defendant because he alleges that the defendant procured his arrest by means of judicial process which the defendant instituted both maliciously and without reasonable cause. The fact that in order to procure the arrest someone (who might or might not be the defendant himself) would have to give evidence on oath (see s 4 of the Criminal Procedure (Attendance of Witnesses) Act, 1965) does not have the result that an action, if otherwise sustainable, could not be brought. The gist of the complaint, where malicious arrest is asserted, is not that some evidence is given (although if evidence is given falsely it may be contended that malice is indicated) but that an arrest has been secured as a result of some malicious proceeding for which there was no reasonable cause.

It is well settled that no action will lie against a witness for words spoken in giving evidence in a court even if the evidence is falsely and maliciously given (see *Dawkins v Lord Rokeby* (1873) L.R. 8 Q.B. 255 and *Watson v M'Ewan*, [1905] A.C. 480). If a witness gives false evidence he may be prosecuted if the crime of perjury has been committed but a civil action for damages in respect of the words spoken will not lie (see the judgment of Lord Goddard CJ in *Hargreaves v Bretherton*, [1959] 1 Q.B. 45).

- [26] In my view, the chambers judge observed this distinction in the current case. He struck the claims to damages for the furnishing of false evidence, but allowed the general claim of abuse of process to proceed.
- [27] *Hill v. Church of Scientology* was not a case in which the plaintiff sued a witness in respect of evidence given in court. Rather, it was a case in which court processes were abused and the defendants defamed the plaintiff by publicly making spurious allegations against him. The fact that the allegations were made, as well, in documents filed with the court did not serve to immunize the defendants from a suit.
- [28] The authorities are replete with cases affirming that even if a witness gives false evidence and does so maliciously, no action will lie for the words spoken in court. Nothing in *Roy v. Prior* or *Hill v. Church of Scientology* casts doubt on that firmly established proposition.

- [29] The plaintiff's final argument with respect to false testimony is that even if the giving of false evidence is not, itself, actionable, the references to false testimony in the pleadings ought to have been allowed to stand because the fact that such testimony was given will be admissible evidence in an abuse of process claim, with respect to issues of both liability and of damages.
- [30] This argument can be dealt with quickly. The references to false evidence in the pleadings were clearly intended to establish a cause of action and to make a claim for specific damages consequent on the false evidence. Those references were properly struck. Further, the allegation that the defendant gave false evidence is not a material fact needed to support any arguable claim made in the notice of civil claim.
- [31] The plaintiff contends that she must be able to tender evidence at trial showing that the defendant made false statements in the registrar's hearing. The question of whether such evidence is relevant or admissible will be one for the judge hearing the case. Such evidence might be admissible as part of the narrative, or to invite an inference that ulterior motives for taking proceedings were present. At this point, however, we are not concerned with the admissibility of evidence, but rather with a point of pleadings. I am not persuaded that the judge made any error in striking portions of the pleadings or in refusing amendments.

Republication of the Judgment

- [32] I turn then, to the second claim struck by the chambers judge. The judge was of the view that the plaintiff had no cause of action in respect of the republication of the chambers judge's reasons (and the appended registrar's report) on the website of the defendant's lawyer. The judge dealt with the issue only briefly in his original reasons for judgment, making reference to the open court principle. In his second set of reasons, he elaborated on the issue:
- [30] As noted in the October 2014 judgment, the plaintiff's claim is not that the defendant or his counsel published the March 2010 judgment with a narrative (paragraph 33) or with commentary (paragraph 37). Essentially, her claim is that accurate reproduction of reasons for judgment on counsel's website can itself amount to abuse of process, defamation, infliction of mental distress, intimidation, or negligence.
- [31] With respect to the period before the Court of Appeal judgment was rendered, I conclude that the plaintiff's claim is bound to fail. I am unable to see how publication of a public judgment that is part of the long-standing, open court tradition can give rise to any of the causes of action the plaintiff raises. In my view, the public nature of court judgments is not a matter of argument but a matter that cannot reasonably be in dispute.

- [32] Until they are overturned on appeal or overtaken by subsequent events, judgments are intended to present to the public how the court receives and considers evidence. In this case the plaintiff remains upset by the Registrar's decision even though it was set aside by the Court of Appeal. She is entitled to be upset, but the plaintiff cannot rewrite the history of the previous proceedings or limit or even expunge the decisions made in those proceedings.
- [33] Assuming the facts are as alleged, I am unable to find that publication of the March 2010 reasons before the appeal was decided can result in a successful legal claim on any of the grounds the plaintiff raises. The important policy reasons for protecting the public nature of legal proceedings and the resulting judgments supports the conclusion that this portion of the claim must fail. Hence, the paragraphs that relate solely to this allegation are struck; these appear to be paragraphs 39-40 and 45-48.
- [33] The judge did not strike out those parts of the notice of civil claim relating to republication of the chambers judge's reasons after they had been overturned by this Court. As no appeal is taken with respect to his decision not to strike those claims, we need not address them.
- [34] It is apparent that the accurate republication of a decision of a court is subject to at least qualified privilege. The materials provided by counsel on this application include a reference to the judgment of Fry L.J. in *McDougall v. Knight*, (1890), 25 Q.B.D. 1 (C.A.), at 11, which sets out the rationale for the privilege:

[T]he judgment of a judge of the land is in itself an act of such public and distinct character as to make it in the interest of the commonwealth that they should know it in toto, and provided it is either given verbatim correctly, or correctly summarized, it seems to me that the public policy requires that to be the law, and I have no hesitation in saying that I believe that to be the law at the present day. It appears to me that it would be to put an undue fetter on the press to hold that the publication of a judgment is not privileged unless the judgment fairly summarized the evidence. I cannot doubt that the judgments of Courts must be presumed to be fair, accurate, and adequate, and to make the person who reports such a judgment prove that it is so would be to put on him a burden inconsistent with the interests of the commonwealth.

- [35] The quotation applies, strictly speaking, to "the press", which, in 1890, would have been the main medium through which judgments would normally be publicly disseminated. In my view, the same rationale is available today in respect to publication through the World Wide Web.
- [36] The plaintiff says that the privilege that applies to the republication of a subsisting judgment of the court is a qualified privilege, not an absolute one. She asserts that the republication was with malice, and says that the judge should not have struck out the claim, as malice would defeat the claim of qualified privilege.

- [37] In my view, the judge was correct in finding that the plaintiff could have no claim in respect of the republication. The publication complained of in the parts of the claim that were struck was of a judgment that continued in force. The judgment was not the subject of any publication ban. In publishing the judgment, the defendant did not abridge or alter it, nor did he comment on it. It is not alleged that the context in which the judgment was published distorted the findings of the court.
- [38] Absent special circumstances (such as a publication ban), the publication of a judgment is in the public interest. A judgment is unlike other court documents, such as pleadings, arguments, or affidavits. A judgment is a public declaration of an independent, impartial body vested with the authority to make decisions.
- [39] The mere fact that a person feels aggrieved by the judgment of a court does not give them a right to restrict its publication or to claim damages in respect of it. Merely alleging that a person who republishes a judgment is motivated by malice does not turn the completely lawful dissemination of a public decision of the court into an actionable tort. The judge was right to strike the claim.
- [40] In agreeing that the plaintiff's claim was rightly disallowed, I do not wish to be taken as suggesting that no issues of law can arise from the republication of a judgment. In particular, I make no comment on the possibility that publication of some judgments could give rise to copyright issues, nor do I suggest that statutory concerns, such as the privacy legislation at issue in *A.T. v. Globe24h.com*, 2017 FC 114 cannot arise. Such matters raise other public concerns that are not in issue in this case.

Other Claims that Were Struck

- [41] In her factum, the plaintiff addressed other portions of her claim that were struck, but she did not advance those issues in oral argument. In my view, there is no merit in the contentions that the judge struck viable portions of the claim, and I would therefore dismiss the appeal.

The Cross Appeal

- [42] The defendant does not, in his cross-appeal, seek to strike individual allegations in the notice of claim. Rather, he says that the entire claim ought to be struck as an abuse of process.
- [43] A contention that a claim discloses no reasonable cause of action is a question of law, and will not, ordinarily, be a matter on which this court will defer to a chambers judge: *EY Holdings Ltd. v. Great Pacific Mortgage & Investments Ltd.*, 2017 BCCA 405 at paras. 24. On the other hand, the question of whether an action constitutes an abuse of process will typically involve questions of mixed fact and law, and deference to a chambers judge may be appropriate: *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at para. 41.

- [44] The judge considered the history of the litigation, the claims advanced, and the defendant's arguments contending that the action was an abuse of process. He concluded as follows:
- [79] It could be said that the dispute between the parties has become dysfunctional, well beyond the usual acrimony between litigants. Each attributes the blame for this to the other.
- [80] The ultimate resolution of this dispute will require a hearing before the Registrar (as directed by the Court of Appeal in February 2011) and the actions of the plaintiff have been largely responsible for that not taking place. She relies on her claim in this litigation for her position but a number of specific issues have been struck. The Dickensian nature of these proceedings has been commented on before and it is now appropriate for someone to question how an estate of \$33,000 can be the subject of such acrimony and expense (the plaintiff says she has spent \$130,000 on this litigation). The plaintiff says that the defendant is hiding assets from their son's estate and the estate is worth substantially more. However, it is not at all clear how the \$33,000 in the estate could be increased to the amounts contemplated by the plaintiff. As well, the plaintiff continues to claim that the publication of the March 2010 judgment on counsel's website was defamation. And she has simply re-numbered paragraphs that were previously struck.
- [81] However, the circumstances are not yet at a point where an application to strike her entire claim is justified. The defendant's application under Rule 9-5 to strike the entire claim of the plaintiff is dismissed.
- [82] Having said that, I conclude that the plaintiff is expanding this litigation in ways that are problematic.
- [45] I would agree with the judge's characterization of the plaintiff's claims. The manner in which the litigation is being pursued is out of proportion to what is at stake. That said, there are at least some claims that can only be pursued effectively by way of this action - in particular, claims of conversion and breach of trust. I cannot find any reversible error in the judge's conclusion that the plaintiff should be given an opportunity to show that she is able to pursue those claims in a manner that does not abuse the process of the court. His view that the pursuit of possibly legitimate claims has not, at this point, crossed into the realm of an abusive procedure is entitled to deference.
- [46] I would dismiss both the appeal and the cross-appeal.
- [47] FENLON J.A.: I agree.
- [48] FISHER J.A.: I agree.
- [49] GROBERMAN J.A.: The appeal and cross-appeal are dismissed.

"The Honourable Mr. Justice Groberman"

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