

CANADA / JUDGMENT

McIvor v. British Columbia (Attorney General)

2015 BCSC 2658

COURT

Supreme Court of British Columbia

DECIDED

27 November 2015

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2015 BCSC 2658 McIvor v. British Columbia (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McIvor v. British Columbia (Attorney General),

2015 BCSC 2658

Date: 20151127

Docket: S15826

Registry: Salmon Arm

Between:

Leanne Faye McIvor

Plaintiff

And

Attorney General of British Columbia, Crown Counsel, Constable Cara Voltz, Minister of Justice BC, Department of Justice Canada, Rachel Lammers, Garrett Wynne, Law Society of British Columbia

Defendants

Before: The Honourable Mr. Justice Pearlman

Oral Reasons for Judgment

In Chambers

The Plaintiff:

Appeared on her own behalf

Counsel for the Attorney General of BC and Crown Counsel:

T. Callan

Counsel for Constable Cara Voltz, Minister of Justice BC and Department of Justice Canada:

S. Kelly

Counsel for Rachel Lammers:

R.T. Panton

Counsel for the Law Society of British Columbia:

M. Armstrong

Place and Date of Hearing:

Salmon Arm, B.C.

November 18, 2015

Place and Date of Judgment:

Salmon Arm, B.C.

November 27, 2015

- [1] THE COURT: Judgment. On June 1, 2015, the plaintiff, Leanne Faye McIvor, commenced this action by filing a Notice of Civil Claim in which she claimed damages and other relief against multiple defendants, including the Attorney General of British Columbia, Crown counsel, Mr. Garrett Wynne, her former solicitor, Ms. Rachel Lammers, the solicitor for her former spouse, and the Law Society of British Columbia. The plaintiff is self-represented.
- [2] In her Notice of Civil Claim, the plaintiff makes numerous allegations about events arising from a high conflict matrimonial dispute between Ms. McIvor and her husband. She attributes her failure to obtain the results she sought in the family law proceedings to the alleged negligence, breach of duty and misconduct of the various defendants against whom she claims this action.
- [3] The plaintiff's Notice of Civil Claim has gone through a number of iterations, the most recent of which is the Amended Notice of Civil Claim filed October 15, 2015.
- [4] There are three applications before the Court. First, the Attorney General of British Columbia and Crown counsel apply for an order that the action against them, and any claims made against the Minister of Justice of British Columbia with respect to the actions of Crown counsel, be dismissed, pursuant to Rule 9-5(1)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.

- [5] Second, the Law Society of British Columbia applies for an order striking out or dismissing the action against the Law Society pursuant to Rule 9-5(1)(a), (b), (c) and (d) or Rule 9-6(4) and (5).
- [6] The Law Society also seeks an order for costs.
- [7] Finally, the defendant Rachel Lammers applies for an order that the action be struck out and dismissed as against her pursuant to Rule 9-5(1), or alternatively, pursuant to Rule 9-6(4) and (5). Counsel for Ms. Lammers also seeks an order for special costs, or alternatively, ordinary costs, and for an order dispensing with the requirement that the plaintiff approve the form of the order made by the court at the conclusion of this application.
- [8] The defendants apply under Rule 9-5 on the basis that Ms. McIvor's action either discloses no reasonable claim or is unnecessary, scandalous, frivolous or vexatious and is otherwise an abuse of the process of the court. A claim may only be struck under Rule 9-5(1)(a) as disclosing no reasonable claim if it is plain and obvious, assuming the facts pleaded are true, that the claim discloses no reasonable cause of action, has no reasonable prospect of success or is certain to fail: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, and *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42. No evidence is admissible on an application under Rule 9-5(1)(a).
- [9] As Madam Justice Fisher observed in *Willow v. Chong*, 2013 BCSC 1083 at para. 19:
- The rule that material facts in a notice of civil claim must be taken as true does not mean that allegations based on assumption and speculation must be taken as true.
- [10] In appropriate cases, such allegations may be subject to a skeptical analysis, particularly where there are broad allegations of things like intolerance, deceit, harassment and intimidation.
- [11] The pleadings serve to define the issues of fact and law to be determined by the court. The plaintiff must clearly and concisely plead the material facts, which are the facts essential to make out a complete cause of action. Where several causes of action are alleged against multiple defendants, the claim must clearly set out the facts relating to the cause of action alleged against each defendant: *Stoneman v. Denman Island Local Trust Committee*, 2010 BCSC 636, and *Sahyoun v. Ho*, 2013 BCSC 1143 at paras. 18-19 and 51.
- [12] On an application to strike or dismiss under Rule 9-5, the court must consider whether a defective pleading can be corrected by amendment and whether it is appropriate to give leave to do so. Under Rule 9-6, the defendant seeks summary judgment dismissing the action on the basis that there is no genuine issue for trial with respect to the plaintiff's claims.
- [13] An application under Rule 9-6 asserts that the claim or defence is factually without merit. It differs from Rule 9-5 where the pleadings are attacked on the basis that the action or the defence, as the case may be, cannot succeed as a matter of law: *Drummond v. Moore*, 2012 BCSC 496.

[14] The test for summary judgment is whether there is a bona fide triable issue to be determined: *Skybridge Investments Ltd. v. Metro Motors Ltd.*, 2006 BCCA 500 [Skybridge]. The court must be satisfied that it is plain and obvious or beyond doubt that the action will not succeed. If the court is left in doubt about whether there is a triable issue, the application should be dismissed: *Progressive Construction Ltd. v. Newton* (1980), 25 B.C.L.R. 330 (S.C.).

[15] In *Skybridge* at para. 10, the Court held that:

A judge hearing an application pursuant to Rule 18(6) must: examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action.

[16] In determining whether there is a bona fide issue, the court assumes that uncontested material facts as pleaded by the plaintiff are true.

[17] The pleadings in the Amended Notice of Civil Claim are lengthy, prolix and often confusing. The statement of facts runs to some 20 pages and includes 173 paragraphs. I will begin with the claim against the Law Society of British Columbia. At paragraph 19, the plaintiff pleads the Law Society of British Columbia has a duty to her.

[18] At paragraph 152, the plaintiff pleads:

The Law Society of British Columbia owes me a duty of care to be protected from misconduct from the lawyers they represent, and is the basis of this claim naming them defendants.

[19] At paragraph 156, she pleads:

The duty of the Law Society of British Columbia is to act, to protect the public interest and not the interests of lawyers it regulates.

[20] And then at paragraph 159, there is a pleading:

The Law Society has a duty of care to the public – to preserve and protect the rights and freedoms of all persons and to ensure the Integrity and honour of lawyers and the justice system.

[21] At paragraph 170, the plaintiff pleads:

If lawyers damage members of the public in their official dealings then the governing agency is ultimately responsible for their breach.

[22] The relief sought against the Law Society of British Columbia is an award of general damages in the amount of \$100,000 for the tort of negligence. That pleading is then followed by the phrase "breach of duty of care owed to the public."

[23] The plaintiff's claim against the Law Society is in essence a claim for damages for negligence. The elements of a negligence action are:

- (a) that there was a duty of care owed to the plaintiff by the defendant;
- (b) that there was a breach of that duty of care in that the defendant failed to exercise the standard of care required in the circumstances;
- (c) the plaintiff suffered damages; and
- (d) the plaintiff's damage was caused by the defendant's breach.

[24] I begin with the duty of care. In *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 [Law Society of Upper Canada], the appellants urged the Court to find that a private law duty of care to persons who deposit monies into a lawyer's trust account as members of the public could be inferred from the Law Society's statutory mandate to protect the public interest.

[25] The Court did not accept that proposition. At para. 14, the Court said this:

The Law Society Act is geared for the protection of clients and thereby the public as a whole. It does not mean that the Law Society owes a private law duty of care to a member of the public who deposits money into a solicitor's trust account. Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties.

[26] The Court then went on to refer to the statutory obligations of the Law Society to oversee a scheme of public insurance and a compensation fund.

[27] The principle stated in *Law Society of Upper Canada* that the Law Society does not owe a private law duty of care to individual members of the public is one that has been applied in a wide variety of circumstances. See, for example, *Smith v. Law Society of Upper Canada* (2009), 180 A.C.W.S. (3d) 60 (Ont. S.C.J.), where the Court, at para.13, said this:

While it is true that the Law Society governs lawyers and paralegals in the public interest, the Law Society does not have a private duty of care to individual members of the public.

[28] Here, there is no pleading of any facts that could possibly give rise to a private duty of care. Nor is there any pleading of a breach of any standard of care, or of causation of damages alleged to have been suffered by the plaintiff.

[29] It is plain and obvious that the claim against the Law Society is certain to fail. The defects in the pleadings are not curable by amendment where no private law duty is owed by the Law Society to the plaintiff. Accordingly, the action against the Law Society of British Columbia is dismissed as disclosing no reasonable cause of action.

[30] I turn now to the claims against the Attorney General of British Columbia and Crown counsel. Those claims include claims in negligence and for damages for breach of the plaintiff's rights under s. 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter] based on the wrongful non-disclosure of a consent protection order dated April 25, 2013, and what the plaintiff refers to in her pleadings as "extenuating circumstances". In order to

understand the plaintiff's claim, it is necessary to refer to the pleadings at some length.

[31] At paragraph 5, the plaintiff pleads facts relating to a domestic violence incident on April 21, 2013, involving her husband. At paragraph 6, she admits that she uttered threats to her husband, Mr. McIvor. At paragraph 8, the plaintiff pleads that at the first Judicial Case Conference heard in the family law proceedings Master Bishop pronounced a consent protection order which bound both parties, and at paragraph 10, the plaintiff pleads that a day later on April 26, 2013, she was arrested for uttering threats and criminally charged by another defendant in this action, Constable Cara Voltz.

[32] At paragraph 11, the plaintiff states:

Mr. McIvor as I was told by the arresting officer, left the JCC meeting unbeknownst to me or my lawyer (I thought) and took the taped threats to the police. Const. Voltz at the time of arrest told me, "your ex doesn't want you charged or more drama, but brought this by the advice of his lawyer." I was also told by the officer that "he didn't believe that I would carry out the threats and that there has never been any violence or threats of violence and he was not scared for his life." This is not recorded on the police report. This was very important information that my children received – then they could not blame their father for any betrayal or ill will to their mother and they hung on to every one of those words.

[33] At paragraph 12 the plaintiff pleads that none of this circumstantial evidence is mentioned in the disclosure and that no extenuating circumstances were mentioned.

[34] At paragraph 58 the plaintiff pleads that:

There was no circumstances given to the Crown by the police officer – all Crown seen was a taped message and a slam dunk of a conviction. Concealing exculpatory evidence or failure to disclose important information is a breach of my Charter rights.

[35] At paragraph 64, the plaintiff pleads that the motives of the police in withholding information from Crown is a breach of her Charter rights. Then at paragraph 67, the plaintiff alleges that:

It is the duty and mandate of Crown counsel to play an important role in the prevention of wrongful convictions and to ensure the Charter of Rights to every individual that they come into contact. Crown counsel assess the evidence and thus is crucial that the Crown counsel are aware of the factors and circumstances that have been identified as common in wrongful conviction cases, and charter breaches.

[36] And then at paragraph 71(c), the plaintiff pleads:

There were exceptional circumstances that were never brought forth by the Crown and if they had then they were absent from the disclosure.

- [37] I observe that these pleadings are somewhat confusing insofar as the claim against the Attorney General and Crown counsel is concerned, insofar as in many of the paragraphs to which I have referred, the plaintiff pleads that the police failed to communicate what she says is material information to the Crown at all.
- [38] Elsewhere in the pleadings, the plaintiff appears to suggest the Crown knew or perhaps ought to have known of facts that she says were not disclosed to her.
- [39] At paragraph 72, the plaintiff pleads that she pled guilty in order to save money, time and psychological stress. At paragraph 75, her pleading includes an allegation that if the Crown "had the opportunity to see that this is a highly contentious divorce file and realized this was a onetime occurrence that had been rectified in a court by Master Bishop, by way of a protection order, that clearly would have made a difference to my defense."
- [40] At paragraph 81, there is a pleading that:

The theory of this case was incorrect, and for the Crown to support that theory and ignore lack of facts and circumstances that do not support it is a duty of care that is a constitutional right to be upheld.

- [41] The relief claimed against Crown counsel and the Attorney General of British Columbia is set out in paragraph 5 of the Prayer for Relief. The plaintiff claims compensation for denial of s. 7 Charter rights, wrongful conviction, improper court proceedings, non-disclosure of protection order and extenuating circumstances.
- [42] The plaintiff also requests non-monetary relief pursuant to s. 24 of the Charter, including a final order fairly resolving her family law litigation, up-to-date child support and a further protection order, as well as child custody visitation orders. I should say that none of the latter relief is available in this civil proceeding.
- [43] The plaintiff was charged with uttering threats to cause death or bodily harm contrary to s. 264(1.1) of the Criminal Code, R.S.C. 1985, c. C-46. As the plaintiff has admitted in the pleadings, she pleaded guilty to this charge. That charge related to the incident of April 21, 2013. As I have noted, the protection order was pronounced by Master Bishop on April 25, 2013.
- [44] The plaintiff was also charged with failure to comply with a probation order contrary to s. 733.1 of the Criminal Code and pled guilty to that charge. On June 19, 2014, the plaintiff was charged with disobedience of a court order, Master Bishop's protection order of April 25, 2013. The court imposed a peace bond and ordered that the plaintiff be bound by the recognizance and that she refrain from contacting her husband and his new partner, Ms. Beaulieu. The plaintiff breached that order and admits in her pleadings that she was warned that she should not endeavour to make an appointment to see Dr. Beaulieu.

[45] It is well established that there is no cause of action in negligence against Crown counsel. In *Miazga v. Kvello Estate*, 2009 SCC 51 at para. 81, the Court in the course of discussing the elements of the tort of malicious prosecution said this:

As discussed earlier, a demonstrable "improper purpose" is the key to maintaining the balance struck in *Nelles* between the need to ensure that the Attorney General and Crown prosecutors will not be hindered in the proper execution of their important public duties and the need to provide a remedy to individuals who have been wrongly and maliciously prosecuted. By requiring proof of an improper purpose, the malice element of the tort of malicious prosecution ensures that liability will not be imposed in cases where a prosecutor proceeds, absent reasonable and probable grounds, by reason of incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence.

[46] And see also *Griffith v. House*, 2002 BCSC 500 at para. 40.

[47] The plaintiff has no cause of action in negligence against the Attorney General of British Columbia or Crown counsel.

[48] Recently, in *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, the Court addressed the elements of a claim for Charter damages based on wrongful non-disclosure. At para. 84, the Court said:

Rather, the focus is on two key elements: the prosecutor's intent, and his or her actual or imputed knowledge. Specifically, a cause of action will lie against the state -- subject to proof of causation -- where a prosecutor breaches an accused's Charter rights by intentionally withholding information when he or she knows, or would reasonably be expected to know, that the information is material to the defence and that the failure to disclose will likely impinge on the accused's ability to make full answer and defence.

[49] And then at para. 85, the Court set out the following elements:

- (1) the prosecutor intentionally withheld information;
- (2) the prosecutor knew or ought reasonably to have known that the information was material to the defence and that the failure to disclose would likely impinge on his or her ability to make full answer and defence;
- (3) withholding the information violated his or her Charter rights; and
- (4) he or she suffered harm as a result. To withstand a motion to strike, a claimant would only need to plead facts which, taken as true, would be sufficient to support a finding on each of these elements.

[50] And then, at para. 93, the Court comments that:

A duty of care paradigm risks opening up a Pandora's Box of potential liability theories. For example, if prosecutors were subject to a duty of care, a claimant could allege that they failed to probe the police forcefully enough to ensure that relevant information was not being suppressed.

Such an approach would effectively impose an obligation on prosecutors to "police" the police. In my view, widening the Crown's exposure to liability in this way would be unwarranted. If police act improperly, then a civil claim can and should lie against them: See *Hill v.*

Hamilton-Wentworth Regional Police Services Board, 2007 SCC 41, [2007] 3 S.C.R. 129.

[51] Here, the pleadings do not allege material facts necessary to establish the elements of the claim for Charter damages for wrongful non-disclosure.

[52] In particular, there is no pleading of material fact that the Crown counsel intentionally withheld information. Nor is there any sufficient pleading that the plaintiff suffered harm as a result of the withholding of material information.

[53] Furthermore, here, the conduct giving rise to the charge of uttering threats occurred four days before the making of the consent protection order. I agree with the submission of counsel for the Attorney General and Crown counsel that the making of the consent protection order was irrelevant to that charge. Further, it was open to the plaintiff to raise any extenuating circumstances she sought to rely upon during the course of her prosecution.

[54] I find that the claims in negligence and for Charter damages against the Attorney General of British Columbia and Crown counsel are bound to fail. The plaintiff's action against those defendants, and to the extent it involves any claims against the Minister of Justice of British Columbia in relation to Crown counsel, are dismissed as disclosing no reasonable cause of action.

[55] Finally, I turn to the claims against Ms. Lammers. In her Prayer for Relief, the plaintiff claims punitive damages of \$300,000 against Ms. Lammers for the tort of fraudulent misrepresentation. She also pleads that Ms. Lammers engaged in intentional and reckless disregard of her duties as an officer of the court; that she knowingly withheld facts and material information from the court; and that she engaged in intentional torts including deceit, fraud and conspiracy.

[56] At the root of her claim against Ms. Lammers, is an allegation that Ms. Lammers fomented or encouraged the bringing of the criminal charge of uttering a threat against Ms. McIvor, and did so for the improper purpose of advancing Mr. McIvor's position in the matrimonial litigation.

[57] The allegations against Ms. Lammers include unethically trying to keep the plaintiff from her money, procuring perjury from a witness, engaging in a conspiracy to have the plaintiff criminally charged and violating the Rules of Professional Conduct.

[58] Throughout, Ms. Lammers acted as counsel for Mr. McIvor. As counsel for the opposing party, Ms. Lammers owed no duty of care to the plaintiff other than her professional obligations to act within the law and the Law Society Rules in her conduct of the litigation: *Kamahap Enterprises Ltd. v. Chu's Central Market Ltd.* (1989), 40 B.C.L.R. (2d) 288 (C.A.).

[59] Counsel for Ms. Lammers drew the Court's attention to the decision of British Columbia Court of Appeal in *Young v. Borzoni*, 2007 BCCA 16 at para. 51, where the Court cited the following passage from *Crooks v. Manolescu*, [1995] B.C.J. No. 17 (Q.L.) (S.C.):

The existence of a fiduciary duty or duty of care is not an allegation of fact, however, but a conclusion of law which must depend on proof (or for present purposes, allegations) of fact. And particulars of the breach of a duty are not relevant to the question of the existence of the duty. Thus, while I accept as a fact, for example, for the purposes of this hearing, that [solicitor B] filed affidavits which she ought to have known were false, that fact is of absolutely no significance to the question of the existence of a duty of care to the plaintiffs.

And then further down:

The impossibility of the existence of a duty of care that I referred to in paragraph 10 above is an impossibility on these pleadings. Clearly, a solicitor will in some circumstances be held to owe a duty to persons other than her own client, and so may be a barrister. I do not intend to say that [solicitor B] could in no circumstances be held to owe a duty of care to Ms. Crooks. But I do say that before such a duty can be found to exist, facts must be proved in evidence - and alleged in pleadings - which describe the relationship and the circumstances from which the duty arose.

[60] Here, throughout, Ms. Lammers was acting for an adverse party. She owed no duty of care to the plaintiff.

[61] With respect to the allegations of dishonest or unprofessional conduct, Ms. Lammers vehemently denies those allegations. More importantly for the purposes of this application she owed and owes duties to the Court, as I have already indicated, with respect to performing her functions as an advocate. However, any breach of those obligations, and I make no finding that there was any such breach, is a breach of an obligation owed to the court rather than to the opposing party. See *Martel v. Andrew*, 2005 ABCA 63, a decision of the Alberta Court of Appeal where the Court said at para. 12:

Further, the duty to the court is a public duty and owed as an officer of the court to the court and not a private duty owed to the opposite side in the lawsuit. There is ample authority that the duties that a lawyer owes to the opposing party are viewed very restrictively.

[62] I find that the claims advanced against Ms. Lammers are bound to fail. The plaintiff's action as against Ms. Lammers is dismissed as disclosing no reasonable cause of action. I also found that the pleadings raise no triable issue and would therefore also dismiss the claim against Ms. Lammers pursuant to Rule 9-6(4) and (5).

[63] With respect to costs, the Law Society requests an order for ordinary costs. The Law Society has succeeded on its application and is entitled to costs at Scale B to be assessed.

- [64] Counsel for Ms. Lammers applies for an order for special costs. Special costs are discretionary and may be awarded by the court where there is conduct on the part of a litigant that is deserving of the court's rebuke. Special costs may be awarded where a party makes unfounded allegations concerning the professional integrity or conduct of opposing counsel. See, for example, *The Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2011 BCSC 1558.
- [65] Here, the plaintiff has made allegations that go to the integrity and reputation of Ms. Lammers. A lawyer's principal asset is his or her reputation. I must also take into account the fact that the plaintiff is not represented by counsel. However, the plaintiff's status as a self-represented litigant does not provide her with a licence to conduct herself as she sees fit or without regard to the Rules of Court, or to make unfounded allegations of misconduct against an opposing counsel.
- [66] In this case, the allegations of misconduct appear to be confined to the allegations made in the Notice of Civil Claim. The action has proceeded no further as yet and will proceed no further against these defendants than the exchange of pleadings and the bringing of these applications.
- [67] Had this been a case where the plaintiff had persistently attacked the integrity and reputation of Ms. Lammers throughout a more lengthy litigation, I would have had no hesitation at all in making an order against the plaintiff for special costs. Again, bearing in mind the fact that the plaintiff is not represented by counsel I have determined to exercise my discretion against making an award of special costs. However, I should say that if the plaintiff were to pursue similar unfounded allegations attacking the integrity of the remaining defendant it would certainly be within the discretion of a judge hearing further applications in these proceedings to make an order for special costs.
- [68] The order I make is that Ms. Lammers will have the costs of this application as ordinary costs at Scale B.
- [69] That concludes my Reasons for Judgment.
- [70] MS. CALLAN: There is one last remaining thing. On the form of order we have an order that there is the requirement for Ms. McIvor to sign the form of order is dispensed with.
- [71] THE COURT: I do make that order, and I make it on the basis that counsel entering the order will ensure that Ms. McIvor is immediately provided with a copy of the signed order once it is returned from the Registry.

"Pearlman J."

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