

CANADA / JUDGMENT

Muldoe v. Derzak

2021 BCCA 199

COURT

British Columbia Court of Appeal

DECIDED

18 May 2021

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2021 BCCA 199 Muldoe v. Derzak

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Muldoe v. Derzak,

2021 BCCA 199

Date: 20210518

Docket: CA47067

Between:

Gregory Keith Muldoe

Appellant

(Plaintiff)

And

Michael Derzak and the Workers' Compensation Board

Respondents

(Defendants)

Before:

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Fisher

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

September 25, 2020 (Muldoe v. Red Chris Development Company Ltd.,
2020 BCSC 1966, Smithers Docket S18363).

Counsel for the Appellant

(via videoconference):

I.B. Lawson

Counsel for the Respondents

(via videoconference):

B. Parkin

D.T. Eleff

Place and Date of Hearing:

Vancouver, British Columbia

May 6, 2021

Place and Date of Judgment:

Vancouver, British Columbia

May 18, 2021

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice MacKenzie

The Honourable Madam Justice Fisher

Summary:

The appellant claimed against the Workers' Compensation Board and its employee, Michael Derzak, for intentional interference with economic relations and misfeasance in public office in denying him ongoing disability benefits for a back injury. A judge in chambers dismissed Mr. Derzak's claims under Rule 9-5(1) of the Supreme Court Civil Rules as having no reasonable prospect of success and as frivolous, vexatious, and an abuse of process. The appellant appeals the judge's order striking his claims. Held: Appeal dismissed. The judge did not err to strike his claims as having no reasonable prospect of success. The appellant has not pleaded material facts sufficient to establish the elements of either cause of action, and the amendment he suggests would not cure the defects. Both intentional torts require some unlawful act or conduct for which the appellant has not provided any factual basis in his pleadings.

Reasons for Judgment of the Honourable Mr. Justice Butler:

Introduction

- [1] Gregory Muldoe appeals an order striking his claim against the Workers' Compensation Board (the "Board") and Michael Derzak, an employee of the Board, pursuant to Rule 9-5(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009. The appellant argues the chambers judge erred in finding the appellant had no reasonable claim against Mr. Derzak and the Board (together, the "respondents") and that the claim was frivolous, vexatious, and an abuse of process.
- [2] This appeal turns on the question as to whether the appellant pleaded material facts sufficient to disclose a reasonable claim for intentional interference with economic relations or misfeasance in public office. When the pleadings are examined in the context of the statutory scheme established by the Workers Compensation Act, R.S.B.C. 2019, c. 1 [Act] for workers to claim benefits for workplace injuries, I am of the view it is plain and obvious that neither claim has a reasonable prospect of success. Accepting the allegations in his pleadings as true, the appellant has not pleaded material facts sufficient to establish the elements of either cause of action. I would dismiss the appeal accordingly.

Background

- [3] On February 27, 2018, the appellant injured his back in the course of his employment as a millwright with Red Chris Development Company Ltd. ("Red Chris"). He filed a claim for compensation with the Board and Mr. Derzak was appointed as his case manager. Mr. Derzak assessed the appellant and awarded him temporary disability or wage loss benefits from the date of the injury.
- [4] On September 25, 2018, Mr. Derzak notified the appellant that he was no longer deemed to be temporarily disabled and that he was able to return to work. The appellant disagreed with that assessment but he returned to work as directed on October 1, 2018. He had difficulty performing his duties when he returned and says that he was further injured shortly after doing so. Nevertheless, after speaking with the appellant and reviewing medical evidence, Mr. Derzak informed the appellant on October 17, 2018, that his injuries were not considered to have resulted in permanent injury and that his wage loss benefits would be terminated as of that date.
- [5] On November 2, 2018, Red Chris dismissed the appellant from his employment, citing poor attendance at work. On November 29, 2018, the appellant filed a request for review of Mr. Derzak's decision to the Board's Review Division. On April 17, 2019, the Review Division ruled in the appellant's favour. It found that his condition had not been stabilized or resolved as of October 17, 2018 and ordered benefits extending beyond that date, the extent and duration of which were to be determined by the Board. The appellant did not further appeal this determination to the Workers' Compensation Appeal Tribunal ("WCAT").

- [6] Following the April 17, 2019 decision, the appellant was assigned a different case manager. On June 11, 2019, the Board awarded the appellant additional wage loss benefits from October 17, 2018 to November 14, 2018. The Board advised the appellant that it had determined that his injury did not result in permanent partial disability. On July 8, 2019, the Board subsequently approved 12 weeks of retroactive vocational rehabilitation benefits from November 19, 2018 to February 10, 2019. The appellant did not seek review of either the June 11 or July 8 decisions of the Board.
- [7] On October 9, 2019, the appellant commenced an action against Red Chris for wrongful dismissal and the respondents for the torts of intentional interference with economic interests and misfeasance in public office. In his notice of civil claim, he alleged that Mr. Derzak directed him to return to work on October 1, 2018 despite being aware of the following facts:
- 16.
- (a) the Defendant Red Chris informed the Defendant Derzak on September 17, 2018 that they were unable to accommodate a modified return-to-work schedule for the Plaintiff, and they required him to be 100% fit for duty when he returns to work;
 - (b) the Defendant Derzak was told by the Plaintiff that the Plaintiff continued to be disabled and that his employer required that he be fully recovered before he returned to work;
 - (c) the Plaintiff was scheduled to receive steroid injections on October 17, [2]018 as treatment for his symptoms;
 - (d) the Plaintiff's employment as a millwright required regular lifting of 50 pounds or more; and
 - (e) orthopedic surgeon Dr. Charles Fisher gave an opinion on August 24, 2018 that the plaintiff "must be protected from any heavy lifting or repetitive bending and lifting" if he returns to work.
- [8] The appellant also alleged that when Mr. Derzak made the October 17, 2018 decision (that the appellant was "no longer temporarily disabled") he was aware that:
- 17.
- (a) the Plaintiff informed him on October 2, 2018 that he had been sent home from work on account of ongoing back pain;
 - (b) the Plaintiff's family physician reported to the Defendant Board on October 2, 2018 that the Plaintiff was unable to walk or stand for long periods and was unable to lift heavy objects.
18. The Defendant Derzak's conduct was more than negligent in the performance of his duties as an adjudicator. The Defendant Derzak used his power for the purpose of causing the Plaintiff to suffer harm.
- [9] Under the legal basis for his claim, the appellant alleged:

3. By directing the Plaintiff to return to work while knowing the employer had no modified return-to-work schedule for him and further required the Plaintiff to be "100%" before returning to work, the Defendant Derzak committed the tort of intentional interference with economic interests, which resulted in the Plaintiff's dismissal and caused him to suffer damage and loss.
4. By doing the acts set out in paragraphs 16 to 18 at Part 1, the Defendant Derzak acted with the express purpose of harming the Plaintiff and so committed the tort of misfeasance in public office, which caused the Plaintiff to suffer damage and loss. A public officer does not have authority to exercise his or her powers for an improper purpose.
5. The Defendant Board is vicariously liable for torts committed by its employees in the course of their employment.

[Citations omitted.]

- [10] On July 8, 2020, the Board and Mr. Derzak brought an application to strike the claims against them, without leave to amend.

Reasons

- [11] The judge heard the respondents' application on September 25, 2020, and gave oral reasons the same day. He commenced his analysis by noting that the notice of civil claim contained no particulars of the illegal or unlawful means by which Mr. Derzak was said to have committed either of the torts of intentional interference with economic relations or misfeasance in public office.
- [12] The judge then discussed the comprehensive scheme for workers' compensation in British Columbia established by the Act, through which workers give up their right to sue employers for work-related injuries in exchange for no-fault compensation administered by the Board. He referred to s. 122 of the Act, a strong privative clause giving the Board exclusive jurisdiction to hear and determine questions of law and fact in respect of workplace injuries. The judge also referred to the series of internal review processes available to a worker who wants to challenge a decision of the Board, culminating with an appeal to the WCAT, and noted that only a final decision of the WCAT can be challenged by way of judicial review to the Supreme Court of British Columbia.
- [13] The judge then considered s. 332 of the Act, which provides protection for the Board and its employees in respect of actions brought against them for matters within their jurisdiction:

An action may not be maintained or brought against the Board or a director, officer or employee of the Board in respect of any act, omission or decision

- (a) that was within the jurisdiction of the Board, or

- (b) that the Board, director, officer or employee believed was within the jurisdiction of the Board.
- [14] The judge observed that this provision "makes it clear that an injured worker may not bring or maintain an action arising out of a workplace-related injury against the Board or its staff, in relation to any act, omission or decision that was within or believed to be within the Board's jurisdiction": at para. 23. He noted the absence of any pleading alleging that the actions of the Board or Mr. Derzak were outside of the Board's jurisdiction. He rejected the appellant's submission that his claim was novel or analogous to an allegation that Mr. Derzak had punched the appellant:
- [26] The difficulty with that submission is that it does not reflect the reality of the plaintiff's claim. All of the allegations against Mr. Derzak involve the carrying out of his case manager function while employed by the Board and within the jurisdiction of the Board.
- [15] At para. 27, the judge acknowledged that while evidence is not generally admissible on applications under Rule 9-5(1)(a), it was admissible on applications brought pursuant to subrules (b) to (d). Further, he observed that when dealing with an application to strike under Rule 9-5(1)(a), a court may subject allegations based on assumption and speculation (rather than asserted facts) to a "skeptical analysis".
- [16] In applying these principles, the judge found that the claims against the Board and Mr. Derzak directly engaged issues in respect of which the Board has exclusive jurisdiction and were barred by s. 332 of the Act. He concluded that the appellant advanced no claim that Mr. Derzak acted outside of his authority as an employee of the Board; rather, his pleadings suggested the contrary by alleging that the Board was vicariously liable for torts committed by Mr. Derzak in the course of his employment. Acknowledging that pleadings should only be struck in the clearest of cases, he nevertheless struck the claims:
- [30] The plaintiff's claim against the Board and Mr. Derzak discloses no reasonable claim, is unnecessary, in my view, is scandalous, frivolous, and/or vexatious and, plainly, in my view, is an abuse of the process of the court. It is plain and obvious that the claim has no reasonable prospect for success as there is no genuine issue for trial.

Without further analysis relating to the elements of either of the intentional torts alleged, he granted the respondents' application to strike the claim "pursuant to each of Rules 9-5(1)(a) and/or (b) and/or (d)."

On Appeal

- [17] The appellant raises two related grounds of appeal: first, that the judge erred by finding that the pleading disclosed no reasonable claim pursuant to Rule 9-5(1)(a); and second, that he erred in striking the claim as frivolous, vexatious, or an abuse of process pursuant to Rule 9-5(1)(b) and (d).

- [18] On the first ground, the appellant emphasizes that in considering whether a pleading discloses a reasonable claim, the court is required to assume that the allegations in the pleadings are true. In this case, he argues that the judge failed to assume the truth of his clearly pleaded allegation that Mr. Derzak committed the torts of intentional interference with the appellant's economic interests and misfeasance in public office, and that as a result of those tortious acts, the appellant suffered injury. He asserts that his allegations that Mr. Derzak "used his power for the purpose of causing the Plaintiff to suffer harm" and that "he acted with the express purpose of harming the Plaintiff" is a sufficient allegation of a wrongful act for both torts.
- [19] The appellant argues the judge wrongly concluded that s. 332 of the Act confers immunity on the Board and its employees for intentional torts. He submits that the claims he advanced against the Board and Mr. Derzak are not matters within the Board's exclusive jurisdiction. Rather, the Board has no jurisdiction to award compensation to a worker who is injured as a result of an intentional tort committed by a Board employee, such as, for example, a claim of sexual assault by a Board employee.
- [20] As such, the appellant says that s. 332 of the Act has no application to the specific claims advanced in his notice of civil claim. This is because s. 332 only affords protection to Board employees for acts done within the jurisdiction of the Board. The pleadings allege that Mr. Derzak committed intentional torts with intent to injure him, which is distinct from obtaining compensation for a work injury and outside of the Board's exclusive jurisdiction.
- [21] On the second ground of appeal, the appellant says the claim cannot be regarded as unnecessary because there is no other avenue for him to pursue to obtain compensation for the intentional torts he claims. He notes that the judge did not address this aspect of Rule 9-5(1)(b), just as he did not consider whether the claim was "scandalous". He further argues the claim cannot be regarded as frivolous, vexatious, or an abuse of process because he is not mounting a collateral attack on any order of the Board but instead claiming compensation for its tortious wrongdoing. Finally, he says the judge erred in relying on his pleading that the Board was vicariously liable to conclude that there was no allegation that Mr. Derzak acted outside of his authority. He says that the judge should have permitted an amendment to cure that defect--rather than reading the pleading to admit that Mr. Derzak was acting within the Board's authority--and that vicarious liability does not require a finding that the employee acted within the scope of their authority in the first place.
- [22] The respondents submit the judge did not err to conclude that it was plain and obvious that the claims against them had no reasonable prospect of success and should be struck accordingly under Rule 9-5(1). They say it is important to recognize the strong privative clause set out in s. 122 of the Act, which gives the Board exclusive jurisdiction to inquire into matters related to workplaces injuries, and the protection afforded to the Board and its employees by s. 332. The latter applies both to acts, omissions or decisions made within the jurisdiction of the Board but also where the Board or employee merely believed their actions to be within the Board's jurisdiction.

- [23] The respondents stress that the only material facts alleged in the pleading relate to actions taken by Mr. Derzak in adjudicating the appellant's claim for benefits, and his determination that the appellant was no longer entitled to benefits after October 17, 2018. Pursuant to s. 122(2)(b) and (c) of the Act, the existence and degree of a worker's disability and the permanence of such a disability by reason of injury fall within the exclusive jurisdiction of the Board. Accordingly, the allegations said to form the basis of the claims fall within the exclusive jurisdiction of the Board. This is contrary to the appellant's example of a Board employee committing sexual assault, as that is not an act that could be within or believed to be within the jurisdiction of the Board.
- [24] The respondents acknowledge that when considering an application to strike under Rule 9-5(1)(a), a court must assume the truth of the facts alleged in the pleadings. However, they say the appellant pleads only bare allegations of wrongdoing, supported by assumptions and speculation which are not allegations of material fact sufficient to support a claim. The respondents say the judge correctly concluded that the pleadings do not allege any material facts in support of either of the appellant's claims, beyond bare allegations of legal fault.

Analysis

- [25] Before beginning my analysis, I must note that it is unfortunate the judge did not consider the elements of the two torts alleged in order to provide a more detailed analysis as to why he was of the view that the pleadings did not disclose a reasonable claim. Similarly, the judge provided no analysis for his conclusion that the claims should be struck as unnecessary, scandalous, frivolous, vexatious, or an abuse of process. However, I am of the view that the sole question before the court is whether the notice of civil claim reasonably discloses a cause of action either for intentional interference with economic relations or misfeasance in public office. If it does not, then the claim must be struck; if it does, then there is no possibility that the claims could be struck under Rule 9-5(1)(b) and (d) as frivolous, vexatious, or an abuse of process.
- [26] Having considered the material facts alleged in the context of the claims advanced, I would agree with the judge that the appellant's notice of civil claim does not disclose a reasonable claim against the respondents. It is therefore unnecessary to consider whether the claim should have been struck under Rule 9-5(1)(b) and (d).

Standard of Review

- [27] Whether a pleading discloses a cause of action is a question of law; the standard of review on an application to strike pleadings pursuant to Rule 9-5(1)(a) is generally viewed as one of correctness: *Kindylides v. Does*, 2020 BCCA 330 at para. 19; *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at para. 44, leave to appeal ref'd [2018] S.C.C.A. No. 25. While there is some authority to the contrary, the respondents do not take the position that any deference is owed to the chambers judge's decision. The question on this appeal is thus whether the judge's decision to strike the claim as disclosing no reasonable cause of action

was correct.

[28] In his factum, the appellant argues in the alternative that the chambers judge should have permitted an amendment to allege that Mr. Derzak acted outside of his authority. The respondents' application in the court below was for an order striking the pleadings without leave to amend, which the judge granted. The judge's decision to refuse leave to amend pleadings following an application to strike is an exercise of discretion: *Watchel v. British Columbia*, 2020 BCCA 100 at para. 29. Accordingly, the standard of review is deferential and the question on appeal is whether the chambers judge misdirected himself, gave no or insufficient weight to relevant considerations, or made a decision that is so clearly wrong as to amount to an injustice: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.

Statutory Framework and Applicable Test

[29] Rule 9-5(1) provides:

- (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 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.

Rule 9-5(2) states that no evidence is admissible on an application under subrule 1(a).

[30] The test to be applied on applications to strike is stringent, as described in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, citing *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980:

... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ... should the relevant portions of a plaintiff's statement of claim be struck out ...

[Emphasis added.]

- [31] The requirement to allege a sufficient factual basis for the claim requires the pleading of relevant material facts. The appellant submitted that the current Rules, unlike the former rules, allow pleadings to be in a summary form without the kind of detail that was formerly required. This is not correct. The requirements have not changed in a significant way. Rule 3-7(18) provides that where a party "relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or if particulars may be necessary, full particulars, with dates and items if applicable, must be stated in the pleading." As provided by Rule 3-7(9), "[c]onclusions of law must not be pleaded unless the material facts supporting them are pleaded." A material fact is one that is essential to formulate a cause of action. If supporting material facts are omitted, a cause of action is not effectively pleaded: *Young v. Borzoni*, 2007 BCCA 16 at para. 20.
- [32] Applying the Rules and these principles to this case requires consideration of the elements of the two causes of action alleged by the appellant. I will consider the causes of action separately.

Intentional Interference with Economic Relations

- [33] In *A.I. Enterprises Ltd. v. Bram Enterprises Ltd.*, 2014 SCC 12, the Court clarified the elements of the tort of intentional or unlawful interference with economic relations. Justice Cromwell, writing for the Court, described the various terms used to describe the tort but referred to it as the "unlawful means" tort: at para. 2. As that nomenclature indicates, an essential element of the tort is that the defendant committed an unlawful act. Justice Cromwell emphasized the narrow bounds of the tort at para. 5, and summarized its elements:
- [23] The unlawful means tort creates a type of "parasitic" liability in a three-party situation: it allows a plaintiff to sue a defendant for economic loss resulting from the defendant's unlawful act against a third party. Liability to the plaintiff is based on (or parasitic upon) the defendant's unlawful act against the third party. While the elements of the tort have been described in a number of ways, its core captures the intentional infliction of economic injury on C (the plaintiff) by A (the defendant)'s use of unlawful means against B (the third party) There is no dispute here that this is an intentional tort; the focus of the dispute in this case is on the unlawful means element.

[Internal citations omitted; emphasis added.]

The Court elaborated that at its core, the tort has two key ingredients: intention and unlawfulness. The gist of the tort is the intentional infliction of economic harm by unlawful means: at para. 28.

- [34] In *Low v. Pfizer Canada Inc.*, 2015 BCCA 506, Justice Garson summarized the elements:

- [77] The elements of the tort may therefore be described as follows:

- a) an unlawful act committed against a third party;
- b) intended to cause economic harm to the plaintiff; and
- c) resulting in economic harm to the plaintiff.

[35] In my view, examination of the pleadings reveals a failure to allege the first element. In essence, he has only pleaded a legal conclusion: that Mr. Derzak committed the "unlawful means" tort (a conclusion of law) without pleading the required material facts.

[36] The reasons of the judge set out the entirety of the pleadings directed at the claims against the respondents. The "factual basis" of the claim is contained at paras. 16-18 of the notice of civil claim and the legal basis is set out at para. 3, Part 3. Read generously, there is no question that the appellant alleges the second of the three material facts required for this cause of action--the intentional infliction of economic injury on the plaintiff by Mr. Derzak.

[37] However, it is also clear that he has failed to plead any material facts relating to the first element: that Mr. Derzak used unlawful means. The only material facts alleged are that Mr. Derzak made decisions regarding the extent of the appellant's disability and his ability to work. As the respondents argue, pursuant to s. 122(2)(b) to (d) of the Act, the existence and degree of a worker's disability and the permanence of such a disability by reason of injury fall within the exclusive jurisdiction of the Board. These were decisions that Mr. Derzak was authorized to make and for which no claim could be made against him pursuant to s. 332 of the Act. The allegation that the decisions were wrong and contrary to the medical evidence is not an allegation that he used unlawful means. That is so even if his actions were negligent; and the appellant pleads no facts to support his assertion that Mr. Derzak's conduct was "more than negligent" or unlawful in any way.

[38] Further, no material fact is pleaded in support of the "third party" element of the tort. The tort is "parasitic", as the use of unlawful means must be directed against a third party with the intent to injure the plaintiff. Not only does the appellant fail to plead the use of unlawful means, he fails to plead any "parasitic" act; that is, an act directed at a third party. Mr. Derzak's acts, as alleged, related directly to the appellant, and his claim for benefits. He makes no allegation of the use of unlawful means directed at Red Chris or any other third party.

[39] The failure to plead that Mr. Derzak used unlawful means directed at a third party to cause economic injury to the appellant is a fatal omission when claiming intentional interference with economic relations. It is plain and obvious that the appellant's claim discloses no reasonable cause of action and I find that the judge did not err to strike it under Rule 9-5(1) (a).

Misfeasance in Public Office

[40] The elements of a claim for misfeasance of public office were considered in detail in *Odhavji Estate*. Justice Iacobucci noted that the authorities establish two ways in which the tort could be committed. He described 'Category A' as conduct by a public official that is specifically intended to injure a person or class of persons. 'Category B' involves a public official who acts with knowledge both that he or she had no power to do the act complained of and that the act is likely to injure the plaintiff. He then described the elements of the tort:

[23] In my view, there are two such elements. First, the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer. Second, the public officer must have been aware both that his or her conduct was unlawful and that it was likely to harm the plaintiff. What distinguishes one form of misfeasance in a public office from the other is the manner in which the plaintiff proves each ingredient of the tort. In Category B, the plaintiff must prove the two ingredients of the tort independently of one another. In Category A, the fact that the public officer has acted for the express purpose of harming the plaintiff is sufficient to satisfy each ingredient of the tort, owing to the fact that a public officer does not have the authority to exercise his or her powers for an improper purpose, such as deliberately harming a member of the public. In each instance, the tort involves deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff.

[Emphasis added.]

In addition, a claimant must show that the actions of the tortfeasor caused legally recoverable damages: *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General)*, 2015 BCCA 163 at para. 130.

[41] In this case, the appellant's claim appears to fall into category A: he alleges that Mr. Derzak acted "with the express purpose of harming [him] and so committed the tort of misfeasance in public office". He also states that a public officer "does not have authority to exercise his or her powers for an improper purpose", and that Mr. Derzak "used his powers for the purpose of causing [him] to suffer harm". As explained in *Odhavji Estate*, proof that a public official has engaged in deliberate and unlawful conduct to cause harm to the claimant, is sufficient to establish both ingredients of the tort.

[42] However, the appellant does not elaborate or allege any other material facts other than to state that Mr. Derzak's purpose in denying him benefits was to cause him to suffer harm. When considering misfeasance in public office, acting for an improper purpose is sufficient to establish unlawfulness. But, as with the "unlawful means" tort, the appellant failed to plead any particulars of unlawful conduct in support of this cause of action other than the bare assertion that Mr. Derzak intended to harm him by denying his ongoing entitlement to benefits. He has not alleged, for example, that Mr. Derzak acted fraudulently or that he made a decision about the appellant's ability to work knowing that it was false. This is particularly problematic given the nature of the factual allegations in the notice of civil

claim, the provisions of the Act and the proper approach to claims of public misfeasance. I will explain each of these in turn.

- [43] First, as I have already explained, the factual allegations merely allege that Mr. Derzak determined that the appellant was no longer temporarily disabled and "made a written decision" to that effect despite his awareness of certain evidence to the contrary. This included evidence that his employer was unable to accommodate a modified return-to-work schedule; that the appellant told Mr. Derzak that he continued to be disabled; that he was scheduled for upcoming treatment; that his job as a millwright required heavy lifting; and that his surgeon opined, months before his determination, that the appellant must be protected from heavy lifting if he returned to work. He further notes that Mr. Derzak's October 17, 2018 decision was made despite his awareness that he had been sent home for back pain days before, and that his family physician reported that he was unable to walk or stand for long periods or lift heavy objects.
- [44] None of these factual allegations, assuming their truth, allege that Mr. Derzak engaged in unlawful conduct or that he committed any act outside of his role as the appellant's case manager. The allegations suggest that he made an incorrect decision on the appellant's entitlement to benefits--as the Review Board subsequently concluded--but the bare allegation that Mr. Derzak made a decision that was inconsistent with medical evidence is not an allegation of unlawful conduct and is not, without more, sufficient to support a pleading of misfeasance in public office.
- [45] Second, these allegations concern matters over which the Board has exclusive jurisdiction pursuant to s. 122 (2) of the Act:
- (2) Without restricting the generality of subsection (1), the Board has exclusive jurisdiction to inquire into, hear and determine the following:
 - (b) the existence and degree of a worker's disability by reason of injury;
 - (c) the permanence of a worker's disability by reason of an injury;
 - (d) the degree of impairment of a worker's earning capacity by reason of an injury;
- [46] To use the language of the appellant, the alleged conduct attributed to Mr. Derzak falls clearly within the "jurisdictional envelope" granted to the Board and carried out by him in his role as case manager. Accordingly, pursuant to s. 332, the appellant cannot maintain or bring this action in respect of Mr. Derzak's acts, omissions or decisions in performing that role, unless it could be established that he acted outside of his statutory jurisdiction. To support a claim of misfeasance of public office, some unlawful conduct is required. Like the judge, I note that the appellant alleges no material facts to support a finding that Mr. Derzak acted in an unlawful manner.

- [47] The appellant refers, by way of analogy, to a claim of sexual assault against a Board employee. I agree that such an allegation would clearly fall outside of the Board's exclusive jurisdiction relating to workplace injuries, but it is not a useful analogy. The actions of the employee and the injury suffered through such an assault are entirely unrelated to the Board's jurisdiction to determine a worker's entitlement to benefits.
- [48] In oral submissions, the appellant argued that the pleading of an intent to harm was sufficient in part because he was not in possession of information that would enable him to plead particulars of unlawful conduct; any allegations he could make at this stage of the proceedings would be speculative. That is not an answer for a failure to plead material facts. As Chief Justice McLachlin emphasized in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, a plaintiff must clearly plead the facts relied upon:
- [22] 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.
- [49] Third, this Court has cautioned that claims for misfeasance of public office must be advanced, scrutinized and resolved with caution and restraint. In *Rain Coast Water Corp v. British Columbia*, 2019 BCCA 201, Justice Dickson stated:
- [3] The appeal raises issues of procedural fairness, limitations and the requirements of proof of serious allegations of wrongdoing against public officers in the discharge of their duties. Primarily fact-driven, it serves to remind all concerned that claims for damages for the misuse of public power by dissatisfied citizens must be advanced, scrutinized and resolved with caution and restraint. As Justice Newbury explained in *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619, the tort of misfeasance in public office provides redress for egregious intentional misconduct, not for what may be, at worst, maladministration, official incompetence or bad judgment in the execution of public duties. For this reason, when addressing claims of misfeasance in public office, the courts strike a careful balance between curbing unlawful behaviour by governmental officials, on the one hand, and, on the other, protecting those charged with making decisions for the public good from unmeritorious claims by those adversely affected by their decisions.
- [Emphasis added.]
- [50] I am of the view that the caution and restraint brought to consideration of such claims includes careful scrutiny of pleadings alleging claims of misfeasance of public office. Applying these concerns to the facts pleaded in the notice of civil claim, I am not satisfied that the claim as pleaded alleges any intentional misconduct--egregious or otherwise--or that it has any real prospect for success. As I have indicated, the conduct of Mr. Derzak that is called into question is nothing more than adjudicating a claim based on information

provided. Mr. Derzak is protected from claims for his acts and omissions by s. 332. This includes claims based on maladministration, incompetence and bad judgment. In my view, the bare allegation that Mr. Derzak carried out his duties with an intent to harm is not sufficient, without more, to allow the appellant to maintain this claim.

- [51] This is particularly so given the nature of the duties that must be carried out every day by the Board and its employees and the statutory protection offered in the Act. To find that it is sufficient to merely allege intent to harm while carrying out duties under the Act would potentially open the Board and its employees to countless actions in misfeasance by workers who are dissatisfied with the adjudication of their claims. This is precisely the mischief at which s. 332 is directed. It cannot have been the intention of the legislature to permit such claims to proceed without the pleading of sufficient particulars of material facts in support of an allegation of unlawfulness and malicious intent.
- [52] As the respondents argue, the statutory scheme includes detailed processes and numerous safeguards for injured employees who disagree with decisions of the Board. Indeed, in this case the appellant took advantage of the Board's internal review processes and received additional benefits as a result of those reviews. He did not appeal the two successful rulings he received following the October 17, 2018 decision.
- [53] In summary, having regard to the provisions of ss. 122 and 332 of the Act, the appellant's failure to plead any particulars of Mr. Derzak's unlawful conduct is a fatal omission when claiming misfeasance in public office. I would conclude that the chambers judge did not err in striking that claim as having no reasonable prospect of success.

Possible Amendment

- [54] Even though the respondents' application sought an order that the claims be struck "without leave to amend", the appellant did not argue in the court below that he should be permitted an opportunity to amend. As a consequence, the judge did not rule on a possible amendment. The appellant's factum raises the amendment issue in a limited way. He argues that if the claim was struck because there was no discrete pleading that Mr. Derzak acted outside of his authority or jurisdiction, he should have been permitted an amendment to make that assertion. When pressed on this issue at the hearing of the appeal, counsel submitted that the only amendment the plaintiff could or would make is to allege that Mr. Derzak acted outside of his authority or jurisdiction when he made the two decisions particularized at paras. 16-18 of the notice of civil claim. He does not seek to particularize Mr. Derzak's alleged unlawful conduct in any way.

[55] In my view, there is no merit to this argument. If the only amendment is to state, without further particulars, that the actions carried out by Mr. Derzak in assessing the appellant's claim were beyond his jurisdiction, that would not cure the problem I have identified. The pleading would still amount to no more than a legal conclusion without the support of material facts. Accordingly, I would not permit the appellant an opportunity to amend his notice of civil claim.

Summary and Disposition

[56] In summary, I am of the view that the judge did not err to conclude that the appellant's claims for intentional interference with economic relations and misfeasance in public office have no reasonable prospect of success. I would accordingly dismiss the appeal without permitting the appellant an opportunity to amend.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Madam Justice Fisher"

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Prepared on 29 October 2026 · Esheria