
CANADA / JUDGMENT

Nesbitt v. Neufeld

2010 BCSC 42

COURT

Supreme Court of British Columbia

DECIDED

13 January 2010

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2010 BCSC 42 Nesbitt v. Neufeld

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nesbitt v. Neufeld,

2010 BCSC 42

Date: 20100113

Docket: S118846

Registry: New Westminster

Between:

Patrick Michael Nesbitt

Plaintiff

And

Wendy Lee Neufeld

Defendant

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Patrick Michael Nesbitt appeared on his own behalf:

Counsel for the Defendant:

M.A. Misner

Place and Date of Hearing:

New Westminster, B.C.

November 24, 2009

Place and Date of Judgment:

New Westminster, B.C.

January 13, 2010

- [1] This application is brought by the defendant, Wendy Lee Neufeld, to strike paragraphs 2 to 164 of the statement of claim filed by the plaintiff, Patrick Michael Nesbitt ("Dr. Nesbitt"). The application is pursuant to Rules 1(5), 2(2)(d), 19(1), (9.1), (11), (12) and Rule 32 of the Rules of Court (the "Rules") and s. 3(2) of the Limitation Act, R.S.B.C. 1996, c. 266. Ms. Neufeld is seeking special costs.
- [2] After hearing submissions of Ms. Neufeld's counsel and those of Dr. Nesbitt, I allowed Ms. Neufeld's application by striking out paragraphs 2 to 164 of Dr. Nesbitt's statement of claim. I ordered that if Dr. Nesbitt wished to pursue this proceeding that he amend his statement of claim by December 8, 2009, and deliver a copy of the filed amended statement of claim to Ms. Neufeld's counsel no later than 12 noon on December 11, 2009.

BACKGROUND

- [3] Ms. Neufeld and Dr. Nesbitt are the parents of a 6-year old daughter. Ms. Neufeld commenced an action in the Chilliwack Registry, Action No. E5902, naming Dr. Nesbitt as a defendant. Dr. Nesbitt, in this proceeding, is represented by counsel. Action No. E5902 relates to the custody and access of their daughter.
- [4] The factual background of this action, commenced by Dr. Nesbitt, relates to his and Ms. Neufeld's ongoing dispute relating to their daughter.
- [5] Ms. Neufeld commenced an action against Dr. Nesbitt seeking damages for defamation. This action was commenced in the New Westminster Registry.
- [6] On April 30, 2009, Dr. Nesbitt filed in this action a 164-paragraph statement of claim in which he purports Ms. Neufeld wronged him in several ways. Dr. Nesbitt claims damages for these alleged wrongs.
- [7] On May 1, 2009, Dr. Nesbitt filed an amended writ of summons. He did not file an amended statement of claim. In the amended writ of summons, Dr. Nesbitt claims:
- 1) False arrest. Occurring on 23 Feb. 2006 resulting in two days imprisonment
 - 2) Malicious prosecution. For trial on above arrest, tried 8 Jan. 2007, and for which I was acquitted.

- 3) Defamation of character. Beginning in Nov. 2005 and continuing to the present time, in which the Plaintiff has been [falsely] accused of being crazy, violent, a pedophile, of thieving, of being dangerous to others , of stealing personal and professional property.
- 4) Assault and battery.
- 5) Abduction.
- 6) Intentional infliction of emotional harm.
- 7) Loss of consortium.
- 8) Infliction of psychiatric injury.
- 9) Infliction of economic loss.
- 10) Harassment.

POSITIONS

Ms. Neufeld

- [8] Ms. Neufeld alleges that Dr. Nesbitt's statement of claim discloses no reasonable claim (Rule 19(24)(a) of the Rules), the pleadings have structural defects (Rule 19(24)(b) and (c) of the Rules) and is an abuse of process (Rule 19(24)(d) of the Rules).
- [9] Further, the statement of claim is prolix and refers to evidence offending Rule 19(1). In addition, the statement of claim includes conclusion of law without pleading the material facts on which it relies.
- [10] Ms. Neufeld argues that the statement of claim fails to establish a nexus between the alleged wrongs and quantifiable damages to Dr. Nesbitt.
- [11] Ms. Neufeld alleges all of this makes it impossible for her to understand the case she must meet.

Dr. Nesbitt

- [12] Dr. Nesbitt's position is that he has followed the Rules and followed the instructions of self-help resources in drafting his statement of claim.

THE LAW

- [13] The Rule 19 of the Rules are as follows:

Contents

- (1) A pleading shall be as brief as the nature of the case will permit and must contain a statement in summary form of the material facts on which the party relies, but not the evidence by which the facts are to be proved.

Pleading conclusions of law

(9.1) Conclusions of law may be pleaded only if the material facts supporting them are pleaded.

Where particulars necessary

(11) Where the party pleading relies on misrepresentation, fraud, breach of trust, wilful default or undue influence, or where particulars may be necessary, full particulars, with dates and items if applicable, shall be stated in the pleading. If the particulars of debt, expenses or damages are lengthy, the party may refer to this fact and instead of pleading the particulars shall deliver the particulars in a separate document either before or with the pleading.

Particulars in libel or slander

- (12) In an action for libel or slander,
- (a) where the plaintiff alleges that the words or matter complained of were used in a derogatory sense other than their ordinary meaning, the plaintiff shall give particulars of the facts and matters on which the plaintiff relies in support of that sense, and
 - (b) where the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and that in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, the defendant shall give particulars stating which of the words complained of the defendant alleges are statements of fact and of the facts and matters relied on in support of the allegation that the words are true.

Scandalous, frivolous or vexatious matters

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

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

[14] Section 3(2) of the Limitation Act reads as follows:

Limitation periods

...

- (2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:
- (a) subject to subsection (4) (k), for damages in respect of injury to person or property, including economic loss arising from the injury, whether based on contract, tort or statutory duty;
 - (b) for trespass to property not included in paragraph (a);
 - (c) for defamation;
 - (d) for false imprisonment;
 - (e) for malicious prosecution;
 - (f) for tort under the Privacy Act;
 - (g) under the Family Compensation Act;
 - (h) for seduction;
 - (i) under section 27 of the Engineers and Geoscientists Act.

[15] The British Columbia Court of Appeal in *Young v. Borzoni*, 2007 BCCA 16, at para. 19, stated the following test for applications that seek to have statements of claims struck:

[19] The Supreme Court of Canada set out in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 the test for striking out a statement of claim on the basis that it disclosed no reasonable claim:

[14] ... a court may strike out a statement of claim that discloses no reasonable cause of action. The rules with respect to striking out a statement of claim are much the same in other provinces. In British Columbia, for example, Rule 19(24)(a) of the Rules of Court, B.C. Reg. 221/90, states that a court may strike out a pleading on the ground that it discloses no reasonable claim.

[15] An excellent statement of the test for striking out a claim under such provisions is that set out by Wilson J. in *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

The test is a stringent one. The facts are to be taken as pleaded. When so taken, the question that must then be determined is whether ... it is "plain and obvious" that the action must fail. It is only if the statement of claim is certain to fail because it contains a "radical defect" that the plaintiff should be driven from the judgment.

[16] I agree with Ms. Neufeld's argument contained in her outline dated September 3, 2009. Dr. Nesbitt's statement of claim is prolix, and is little more than an irrelevant opinion of Dr. Nesbitt and others, and events that have happened that have no relevance to the claims being made. On this basis alone, it could be struck out in its entirety (*Stephen v. British Columbia (Ministry of Children & Family Development)*, 2008 BCSC 1656).

[17] There are conclusions of law plead by Dr. Nesbitt that do not set out any of the material facts on which he relies. In *Delaney & Friends Cartoon Productions Ltd.*, 2005 BCSC 371, at para. 9, Joyce J. states:

A material fact is one that is essential in order to formulate a complete cause of action. If a material fact is omitted, a cause of action is not effectively pleaded.

[18] Dr. Nesbitt has failed to plead the words or actions that he alleges are defamatory in accordance with Rule 19(12) of the Rules.

[19] Scandalous, frivolous, vexatious or embarrassing pleadings have been defined by Joyce J. in *Stephen*:

[50] In *Citizens for Foreign Aid Reform Inc. v. Canadian Jewish Congress* (1999), 36 C.P.C. (4th) 266 (BCSC) at para. 47, Romilly J. summarized what must be established in order to find that pleadings are "unnecessary, scandalous, frivolous or vexatious" under Rule 19(24)(b):

Irrelevancy and embarrassment are both established when pleadings are so confusing that it is difficult to understand what is being pleaded: *Gittings v. Caneco Audio-Publishers Inc.* (1987), 17 B.C.L.R. (2d) 38 (BCSC). An "embarrassing" and "scandalous" pleading is one that is so irrelevant that it will involve the parties in useless expense and will prejudice the trial of the action by involving them in a dispute apart from the issues: *Keddie v. Dumas Hotels Ltd.* (1985), 62 B.C.L.R. 145 (BCCA) at 147. An allegation which is scandalous will not be struck if it is relevant to the proceedings. It will only be struck if irrelevant as well as scandalous: *College of Dental Surgeons (British Columbia) v. Cleland* (1968), 66 W.W.R. 499 (BCCA). A pleading is "unnecessary" or "vexatious" if it does not go to establishing the plaintiff's cause of action or does not advance any claim known in law: *Strauts v. Harrigan* (December 2, 1991), Doc. Vancouver C913631 (BCSC). A pleading that is superfluous will not be struck out if it is not necessarily unnecessary or otherwise objectionable: *Lutz v. Canadian Puget Sound Lumber* (1920), 28 B.C.R. 39 (BCCA). A pleading is "frivolous" if it is obviously unsustainable, not in the sense that it lacks an evidentiary basis, but because of the doctrine of estoppel: *Chrisgian v. B.C. Rail Ltd.* (July 3, 1992) Doc. Prince George 20714 (B.C. Master).

- [20] Abuse of process is when a proceeding is being used for some ulterior or improper purpose (Budgell v. Oppal, 2007 BCSC 991).
- [21] I will assess Dr. Nesbitt's statement of claim in accordance with its headings and paragraphs. I will not comment on each paragraph.

The Parties

- [22] Dr. Nesbitt's and Ms. Neufeld's respective historical health problems stated in paragraphs 4 to 6 have no relevancy to the various claims made by Dr. Nesbitt.
- [23] Paragraphs 7, 8, 11 and 12 are intended to embarrass, as well are unnecessary to the statement of claim.
- [24] Paragraphs 13 to 18 are irrelevant.

Assault and Battery

- [25] Paragraphs 19 and 20. In paragraph 19, Dr. Nesbitt does not allege when this event occurred. He acknowledged, when making his submissions, that this event is out of time and statute barred pursuant to the Statute of Limitations. Paragraph 20 has nothing to do with any of the allegations against Ms. Neufeld and is irrelevant.

Intentional Infliction of Emotional Harm and Defamation

- [26] Paragraphs 21 to 55 do not describe the defamatory words, nor any particulars as required by Rule 19(12)(a) of the Rules.
- [27] Paragraphs 21 to 55 are allegations about Ms. Neufeld and Dr. Nesbitt's arrangements concerning their daughter's visit with Dr. Nesbitt. The closest that Dr. Nesbitt comes to alleging defamatory words are those alleged to have been spoken on February 5 (presumably in 2006), when Dr. Nesbitt was called a "dead-beat dad." It was not alleged as to whom this was stated, who was present and how it damaged Dr. Nesbitt. Further, assuming that it occurred in 2006, it is statute barred.
- [28] In paragraphs 50 to 54, Dr. Nesbitt sets out inquiries he made as to why his access to his daughter is supervised and why it is necessary. None of this has anything to do with intentional infliction of emotional harm or defamation.
- [29] Paragraphs 21 to 55 in the statement of claim relate to the litigation over the custody and access of his daughter in Action No.E5902, and the evidence that Dr. Nesbitt has to support his position in that litigation.

False Arrest and False Imprisonment

- [30] In paragraph 56 of the statement of claim, Dr. Nesbitt alleges that Ms. Neufeld had him arrested and charged under s. 810 of the Criminal Code.

- [31] Dr. Nesbitt, in the statement of claim, acknowledges that the police arrested and imprisoned him, not Ms. Neufeld. He blames Ms. Neufeld for these events. As a result of all of this, Dr. Nesbitt alleges he does not see his daughter. Further, he alleges the event occurred on February 21, 2006, making the claim statute barred.
- [32] In paragraphs 67 and 69, Dr. Nesbitt refers to his health problems which have nothing to do with any claim against Ms. Neufeld for false arrest and false imprisonment.
- [33] Dr. Nesbitt then launches into a description of Ms. Neufeld's evidence at his criminal trial in paragraph 71. In paragraph 72, Dr. Nesbitt quotes the Crown prosecutor and concludes at paragraph 73 that the statement made by the Crown prosecutor meets the criteria for malicious prosecution. It does not.
- [34] In paragraph 74, Dr. Nesbitt claims that the false arrest and imprisonment "caused Post Traumatic Stress Disorder type symptoms, which are still persisting to this day." There is no connection alleged to this event and any damages suffered by Dr. Nesbitt.
- [35] The allegations in paragraphs 75 to 108 relate to Ms. Neufeld deleting emails of Dr. Nesbitt. Dr. Nesbitt claims that in July of 2005, Ms. Neufeld wrote emails in his name saying "derogatory things about my relationships with women." (paragraph 78). The derogatory things are not identified. This event is also statute barred.
- [36] Dr. Nesbitt alleges that on July 3, 2005 and October 16, 2005, and on other occasions not identified, Ms. Neufeld sent emails to some named persons in Dr. Nesbitt's name stating "derogatory things about my relationships with and attitudes towards women." (paragraph 79). The statements are not identified as to their content. Further, both incidents are statute barred. These emails make no connection between the acts alleged and any claim for damages.
- [37] In paragraphs 84 and 93 of the statement of claim, Dr. Nesbitt sets out a series of unrelated events and evidence of what Ms. Neufeld alleges that Dr. Nesbitt did, the evidence that Dr. Nesbitt has to counter Ms. Neufeld's allegations and how all of this may have affected his access to his daughter.
- [38] In paragraphs 80 to 93, Dr. Nesbitt analyses the need for two restraining orders and their being used to prevent him from seeing his daughter.
- [39] Paragraphs 94 to 95 are an attempt to summarize the evidence of professionals who have given opinions to the need of supervision of Dr. Nesbitt when he exercises access to his daughter.

- [40] In paragraph 97, "the formal and informal supervision has caused me both psychiatric injury and economic loss." There are no particulars of these losses or damages. It would appear that it is the professional, Dr. England, who is recommending informal supervision and not Ms. Neufeld. Quoting other professional opinions, Dr. Nesbitt is attempting to show other opinions that contradict that of Dr. England. This evidence is unrelated to the allegations of defamation. It is obviously evidence that will be used in the custody action.
- [41] Dr. Nesbitt, in paragraphs 106 to 108, alleges that Ms. Neufeld defamed him by stating that he inappropriately dressed their daughter and put lipstick on her, which he denies. He then refers to specific people who would give evidence stating that his daughter was not inappropriately dressed by him. Dr. Nesbitt does not state who or when these events occurred. It would appear that these are allegations which are the subject matter of the custody and access action relating to his daughter. Dr. Nesbitt makes no claim he was damaged by these allegations.

Abduction

- [42] In paragraph 109, Dr. Nesbitt alleges that Ms. Neufeld arranged to "have me 'kidnapped' by the supervisor" who on March 17, 2007 was supervising Dr. Nesbitt's access with his daughter. This kidnapping, as alleged by Dr. Nesbitt, occurred when the supervisor returned to a different parking lot than the usual parking lot for the return of his daughter to Ms. Neufeld. As this event occurred not with his consent or knowledge, this, Dr. Nesbitt claims, is abduction. According to Dr. Nesbitt, this affected his plans to meet friends to go to a St. Patrick's Day party and his plans to give his daughter certain things he had in his car located in the other parking lot.
- [43] Further on, in paragraphs 112 to 115, Dr. Nesbitt describes certain events that occurred between him and Ms. Neufeld that constituted breach of the restraining order. He alleges that he has a video of this entire event.
- [44] For a second time Dr. Nesbitt returns to the heading "DEFAMATION AND INTENTIONAL INFLICTION OF EMOTIONAL HARM/PSYCHIATRIC INJURY". Paragraphs 116 to 132 of the statement of claim are complaints of cancellation of access to his daughter and false allegations about Dr. Nesbitt's behaviour with his daughter. In addition, Dr. Nesbitt accuses Ms. Neufeld of immoral behaviour.
- [45] In paragraphs 119 and 121, Dr. Nesbitt states that in order to get Ms. Neufeld 'oriented to reality' he acknowledged that he emailed members of Ms. Neufeld's rotary club advising them of Ms. Neufeld and her friends' inappropriate behaviour.
- [46] The balance of the allegations relate to websites described by Dr. Nesbitt referring to Ms. Neufeld and other people, most of which makes no sense. Further, Dr. Nesbitt analyses Ms. Neufeld psychologically.
- [47] In paragraph 132 of the statement of claim, Dr. Nesbitt states:

To assuage Wendy's false fears that I was libelling her I agreed to a Consent Order that I would not distribute any information about Joyce Beal, Susan Elias, Wendy, her brothers, or her father. In spite of this Wendy started a Defamation Lawsuit against me, threatening to go through with it unless I signed a declaration agreeing to things which I had nothing to do with.

Wendy's Lawsuit Harassment

[48] Paragraphs 133 to 135 relate to the law suit that Ms. Neufeld filed against Dr. Nesbitt in the New Westminster Registry. These have no place in this statement of claim, do not relate to the claims that Dr. Nesbitt is making, and are matters that should be raised in that particular action brought by Ms. Neufeld.

Terry Voth and Molly

[49] At paragraphs 136 to 147, Dr. Nesbitt accuses Terry Voth, who is not a party to this action and who he alleges is Ms. Neufeld's common law husband, of conduct of which Ms. Neufeld complains of Dr. Nesbitt. Dr. Nesbitt states that he has complained of Mr. Voth's behaviour to the Ministry of Child and Family Services. This and the other paragraphs set out no reasonable cause of action and are obviously evidence that may be referred to in the child custody action.

Denial of Funeral, Recitals, Public Events, & Facebook

[50] In paragraph 141, Dr. Nesbitt claims that as part of a consent agreement that he signed, he stated he would not publically mention Ms. Neufeld or her family members, which included Ms. Neufeld's father. Ms. Neufeld's father died. Dr. Nesbitt travelled to attend the funeral and was asked by a mutual family friend not to attend. He asked a friend to videotape his daughter singing at her grandfather's funeral. It apparently was videotaped, and at the request of Ms. Neufeld, the tape was erased.

[51] Dr. Nesbitt then decided to post to his Facebook page a eulogy that he wrote for Ms. Neufeld's deceased father. He complains that Ms. Neufeld apparently had this removed, along with other pictures, alleging that Ms. Neufeld said it was in violation of the consent order. Dr. Nesbitt claimed that Ms. Neufeld tried to have him arrested again. There are no particulars of when this happened and he states:

I view this as her way of harassing me again, and once again by using the police.

[52] Under the heading "Recitals" at paragraphs 149 to 159, Dr. Nesbitt accuses Ms. Neufeld of preventing him from attending events that his daughter attends, both in public and private places.

[53] In paragraph 162 of the statement of claim, Dr. Nesbitt accuses Ms. Neufeld of harassment for the past several years, particularizing those forms of harassment, which include the peace bond and the restraining order granted by the courts.

[54] In paragraph 163, Dr. Nesbitt alleges that Ms. Neufeld inflicted emotional, physical harm and loss of consortium, psychiatric injury and economic loss by insisting on supervised visits, restricting access to his daughter. Dr. Nesbitt also alleges that Ms. Neufeld refuses to submit to a s. 15 assessment, restricting the places where Dr. Nesbitt takes his daughter, training his daughter not to recognize him, insinuating that affection between a father and daughter is wrong. Finally, at paragraph 163 i., Dr. Nesbitt alleges:

Libelling and slandering Patrick before mutual acquaintances and colleagues, the details of which are scattered throughout this statement.

[55] Loss of consortium is no longer a claim and has been barred by statute.

[56] Dr. Nesbitt's statement of claim discloses no reasonable claim, and if there are claims that could be resolved by amendments, they are barred by the Limitations Act. Some of the allegations are not properly plead by not stating material facts on which they are based. The statement of claim is prolix and is an abuse of process. It is for these reasons I have struck Dr. Nesbitt's statement of claim.

[57] Under the heading "Remedies Sought", Dr. Nesbitt has claimed general damages but he has not described what damages he suffered or connected them with any causes of action. He has claimed aggravated damages and punitive damages without establishing the cause of action in which he based those claims. There is no claim anywhere in the statement of claim as to special damages.

COSTS

[58] The financial statement of Dr. Nesbitt in the custody and access action, discloses sufficient assets so, that at the very least, Dr. Nesbitt could have sought advice as to the suitability of commencing this action based on these pleadings.

[59] It is obvious that paragraphs 2 to 164 of Dr. Nesbitt's statement of claim were intended to punish Ms. Neufeld. The statement of claim was a personal attack on Ms. Neufeld. The statement of claim names other parties who have nothing to do with the allegations that Dr. Nesbitt makes against Ms. Neufeld, and who have nothing to do with any reasonable cause of action.

[60] Special costs may be awarded against a litigant when the litigant's conduct is "reprehensible" being misconduct deserving of "reproof or rebuke" (*Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 BCLR (3d) 242 and *Young*).

[61] I can only conclude that this action, as depicted in the statement of claim, is intended to punish Ms. Neufeld for bringing on the defamation action against Dr. Nesbitt and the events in the child custody and access action.

[62] I award special costs to Ms. Neufeld for this application.

"H.C. Hyslop J."

HYSLOP J.

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