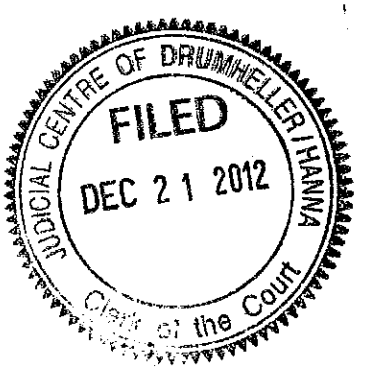

COURT FILE NUMBER	Court File No. 0702-00120
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	DRUMHELLER
PLAINTIFF (RESPONDENT)	**JESSICA ERNST**
DEFENDANTS (APPLICANTS)	ENCANA CORPORATION, ENERGY RESOURCES CONSERVATION BOARD and **HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA**
DOCUMENT	**BRIEF OF ARGUMENT AND BOOK OF AUTHORITIES OF THE RESPONDENT JESSICA ERNST IN RESPONSE TO THE APPLICATION OF HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA TO BE HEARD ON JANUARY 18, 2013**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF THE PARTY FILING THIS DOCUMENT

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PART I: BACKGROUND

The Action

1. This Action is a complex water contamination lawsuit involving seven causes of action against three defendants, including two government regulatory agencies, one of which is the Applicant, the Defendant Her Majesty the Queen in Right of Alberta ("Alberta").

2. In the Fresh Statement of Claim (the "Statement of Claim"), filed on June 25, 2012, pursuant to a court order, the Plaintiff Ms. Jessica Ernst alleges that the EnCana Corporation ("EnCana") contaminated her well water as a result of a negligent coalbed methane drilling program at dozens of gas wells surrounding Ms. Ernst's home.

3. Ms. Ernst has also brought claims in negligence against the Defendant Alberta for failing to take reasonable steps to protect her and her property from water contamination and other damage caused by EnCana's drilling operations, including by negligently failing to conduct an adequate investigation and inspection in accordance with Alberta's published inspection and enforcement scheme. Finally, Ms. Ernst has brought a negligence claim and a claim for breach of her right to freedom of expression as guaranteed by the *Canadian Charter of Rights and Freedoms* against the Energy Resources Conservation Board ("ERCB").

Fresh Statement of Claim, dated June 25, 2012 ("Statement of Claim").

4. The lawsuit remains in the early stages of litigation. No statements of defence have been filed by any of the Defendants and the pleadings remain open.

Issues raised in this Application

5. The Defendant Alberta brings an Application that seeks to strike out particular paragraphs or portion of paragraphs of the Statement of Claim under Rule 3.68 as being "frivolous, irrelevant, or improper". The Application does not allege that there is no cause of action pleaded, and does not seek to dismiss the claims. Rather, the Defendant Alberta complains of alleged narrow, formal flaws in the pleading, takes a scattershot approach to attacking the Statement of Claim, and mischaracterizes the nature of the impugned paragraphs which are, in fact, relevant to Alberta's knowledge of possible water contamination.

6. The sole issue raised by this Application is as follows: *Is it plain and obvious and beyond doubt that particular paragraphs should be struck out as being "frivolous, irrelevant or improper"?*

PART II: LAW AND ARGUMENT

The purpose of pleadings

7. A pleading must be succinct and must state the relevant "facts on which a party relies, but not the evidence by which the facts are to be proved".

> ***Alberta Rules of Court*, r 13.6(1)(a), r 13.6(2)(a) [Tab 1].**

8. The primary purpose of pleadings is clarity and disclosure, and to ensure that the defendant knows the case it must meet:

> The essence of a properly drawn pleading is clarity and disclosure. With respect to a statement of claim in particular, the defendant, or each defendant if there be more than one, must know from the face of the record precisely what case he, or each of them, has to answer. . . . Perhaps the best test of the well and properly drawn pleading is this, that a stranger to the litigation to the proceeding, reasonably versed in legal terminology, might pick up the document and upon first reading readily ascertain the particulars of the cause of action, the specific nature of the defendant's alleged breach of duty or other deficiency, the precise nature of the remedy sought. (Emphasis added)
>
> ***Touche Ross Ltd v McCardle* (1987), 66 Nfld & P.E.I.R. 257 (Sup Ct - Gen Div) (QL) at para 4-5 [Tab 2].**

Legal test to strike out portions of a statement of claim

9. The Defendant Alberta seeks to strike out particular paragraphs from the Statement of Claim under r. 3.68 of the *Alberta Rules of Court*:

> 3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out.
>
> ***Alberta Rules of Court*, r 3.68 [Tab 1].**

10. The requested remedy is discretionary.

11. To ground this request to strike out various paragraphs, the Defendant relies on r. 3.68(2)(c), alleging that the "commencement document or pleading is frivolous, irrelevant or improper" or otherwise an abuse of process. The request is based on an assessment of alleged technical issues with the Statement of Claim.

> **Brief of Argument, The Defendant Her Majesty the Queen in Right of Alberta (the "Alberta Brief") at paras 2, 15, 18.**
> ***Alberta Rules of Court*, r 3.68(2)(c), (d) [Tab 1].**

12. The burden on a party seeking to strike out pleadings is an "extremely onerous one". On an application to strike out a statement of claim, the defendant bears the "extremely high" onus of "proving that the Plaintiff's action is bound to fail". Pursuant to Rule 3.68, a court should only strike out a pleading if it is "plain and obvious or beyond reasonable doubt" that the facts, taken as proved, do not disclose a reasonable cause of action.

> ***Alberta Rules of Court*, r. 3.68 [Tab 1]**
> ***Hunt v Carey Canada Inc*, [1990] 2 SCR 959 (QL) at paras 32-33 [Tab 3].**
> ***Alberta Adolescent Recovery Centre v Canadian Broadcasting Corporation*, 2012 ABQB 48 (QL) at para 29 [Tab 4].**

13. The same onerous burden applies to a party seeking to strike out portions of a claim. "The court must exercise the same caution in striking portions of a claim as striking the whole of the statement of claim." The Plaintiff is entitled to a broad and generous reading of the pleadings, and the analysis should be concerned with matters of substance, not of form. The plaintiff may plead anything arguably relevant; the court should be cautious and only strike out portions of the Claim in a clear case. For a pleading to be found to be "frivolous" it must be brought in bad faith or be hopeless.

> ***Guccione v Bell*, 1999 ABQB 219 (QL) at paras 6-7 [Tab 5].**
> ***Donaldson v Farrell*, 2011 ABQB 11 (QL) at para 24 [Tab 6].**
> ***Alberta Adolescent Recovery Centre v Canadian Broadcasting Corporation*, 2012 ABQB 48 (QL) at para 28 [Tab 4].**

14. Courts have repeatedly held that the court should be loath to strike out a portion of the claim where the matter is to go to trial in any event. The case should not be tried piecemeal. Moreover, there is the risk that striking a paragraph will remove something relevant: "there is always some danger of a pruner cutting off a fruitful bough mistaking it for an unfruitful one".

> ***Murphy v Kent Drilling Co* (1996), 190 A.R. 77 (ABQB) (QL) at paras 9-10 [Tab 7].**

Issue: The Impugned Paragraphs Should Not Be Struck Out

Summary

15. The Defendant Alberta seeks to strike out paragraphs 64, 65, 66, 67, 69, 70, 72, 74, 77, 79, 84, and 85 of the Statement of Claim.

16. Alberta attacks these paragraphs mainly because they reference complaints of other landowners regarding well water or the Rosebud Aquifer generally, stating that such pleadings are "akin to a class action" or somehow involve third parties to the dispute.

See eg Alberta Brief at paras 23, 29, 32, 34 and 40.

17. With respect, Alberta Environment's concerns are misplaced. The Statement of Claim makes these references to plead facts relevant to the knowledge of Alberta Environment about possible contamination of well water in Ms. Ernst's area – facts which are highly relevant and necessary to her negligence claim against Alberta, and which are properly included in the Statement of Claim.

18. The Plaintiff denies that the above-mentioned paragraphs, or any portions of these paragraphs, are frivolous, improper or irrelevant, or otherwise an abuse of process. The Statement of Claim is succinct, clear, cogent, and indicates what the Plaintiff is alleging. The Plaintiff has pleaded materials facts but not the evidence by which those facts may be proven.

19. The Plaintiff submits that striking out portions of the Statement of Claim would undermine the purpose of the pleading by removing essential allegations from the Claim. In addition, it is far from "plain and obvious" that portions of the pleading should be struck out as frivolous, improper or irrelevant, even on the formal and selective approach taken by the Defendant Alberta.

20. In the Plaintiff's view, Alberta's Application takes a scattershot approach, selecting certain words and phrases for attack within proper, concise, and understandable pleadings. When read in context, the impugned words and phrases are clearly necessary and relevant pleadings. The Plaintiff submits that engaging in the piecemeal approach requested by Alberta would unnecessarily consume the Court's time and resources and prejudice the Plaintiff's claim.

21. Alberta's Application is based primarily on a fundamental misunderstanding of the nature of the negligence claims against it. Alberta attacks references in the Statement of Claim to the well water of Ms. Ernst's neighbours and the Rosebud Aquifer (from which the Plaintiff and many others draw water) as unduly broadening the scope of the claim or as advancing the claims of others. However, the Plaintiff has not pled what actually happened to the neighbours' well water. These references are contained in factual allegations about the knowledge of Alberta Environment about possible contamination of well water in Ms. Ernst's area, and in the Rosebud Aquifer. These facts are relevant and necessary for the Plaintiff's claim against Alberta in negligence, specifically to Alberta's alleged duty of care and standard of care. The Statement of Claim calls for no inquiry into "outside facts" or facts related to outside parties.

22. Alberta's attacks on the Statement of Claim, and the Plaintiff's responses, can be summarized in three categories:

(a) First, as stated above, Alberta's main complaint is that certain paragraphs reference water well problems experienced by neighbouring landowners and safety concerns with water drawn from the Rosebud Aquifer. The Plaintiff submits that these paragraphs plead relevant facts about the knowledge and representations of Alberta Environment;

(b) Second, Alberta attacks certain paragraphs as pleading evidence. The Plaintiff submits that these paragraphs plead only material facts relevant to the cause of action against Alberta and do not contain evidence; and

(c) Third, Alberta attacks certain paragraphs as argumentative. The Plaintiff submits that these paragraphs are descriptive, not argumentative.

23. In the sections that follow, the Plaintiff will address the key categories of complaints above, giving examples where appropriate.

24. In addition, the Plaintiff submits that Alberta's selective attacks on the pleadings amount to an attempt to engage the Court in an exercise in editing which runs counter to the Foundational Rules of Court.

Alberta's knowledge and representations are relevant and must be pleaded

25. Alberta argues that the Statement of Claim contains irrelevant or improper allegations because it makes reference to the complaints of other landowners who suspected contamination of the Rosebud Aquifer. This argument is made in a number of ways, including that these references unduly broaden the scope of the action, that they are "akin to allegations contained in a class action", that the Plaintiff is advancing the claims of others, that the allegations would require "similar fact evidence", or the Plaintiff seeks to have the Court conduct a public inquiry.

Alberta Brief at paras 22-35, 39-40, 45, 50-51, 52-54, 56-57, 59.

26. With respect, Alberta's submission fundamentally mischaracterizes the nature and purpose of these paragraphs. The paragraphs which mention Ms. Ernst's neighbours do so in the context of pleading the knowledge of Alberta Environment regarding problems with the Rosebud Aquifer which were the proper subject of Alberta Environment investigations on the role of oil and gas activities in these problems.

27. For its claim of regulatory negligence against Alberta (and for the similar claim against the ERCB), the Plaintiff is required to plead sufficient material facts to establish foreseeability; to establish a relationship of sufficient proximity between the defendant and plaintiff; to establish the requisite standard of care; to establish a breach of the standard of care; and to establish causation, harm, and damages, including punitive damages.

See Statement of Claim at paras 59-80.

28. The Claim against Alberta for regulatory negligence depends upon what Alberta Environment knew or should have known, and, in light of this knowledge and information, how it should have reacted upon learning of potential contamination at Ms. Ernst's water well. The impugned paragraphs plead material facts regarding the Defendant Alberta's knowledge of complaints of suspected contamination of the Rosebud Aquifer, allegations that are relevant to the standard of care owed by the regulator to the Plaintiff and whether the standard of care was breached. For instance, paragraph 65 reads:

> By mid 2005, Alberta Environment knew that a number of landowners had made complaints regarding suspected contamination of the Rosebud Aquifer potentially caused by oil and gas development. At that time, despite repeated complaints, Alberta Environment did not conduct an investigation or take any steps to respond to reported contamination of the Rosebud Aquifer. (Emphasis added)

Statement of Claim at para 66.

29. This paragraph does not plead what in fact happened at the neighbours' wells or land, and does not require an inquiry into these issues. Instead, it pleads what Alberta Environment knew at a particular time. It does not plead anything about whether the wells of other landowners were in fact contaminated, or whether such contamination was caused by EnCana. The knowledge of Alberta Environment regarding environmental concerns at a specific geographical location adjacent to Ms. Ernst's land is highly relevant to the question of how the regulator should have engaged with Ms. Ernst's specific complaints about her water.

30. Far from unduly broadening the scope the claim, the impugned paragraphs focus the claims on what Alberta Environment knew or ought to have known with regard to the Plaintiff's well water drawn from the Rosebud Aquifer. As the pleadings are restricted to what knowledge Alberta Environment had at particular times, it will not necessitate an inquiry into what happened at neighbouring homes.

31. The Plaintiff has not advanced the claims of others, but is simply pleading the material facts required to show that Alberta Environment breached a duty of care to her. No similar fact evidence will be required – only evidence about what Alberta Environment knew, based in part on communications from other landowners.

32. Similarly, Paragraph 64 of the Claim alleges that the representations of Alberta Environment gave rise to reliance on the part of the Plaintiff to respond to complaints about possible. Alberta Environment made numerous specific representation to Ms. Ernst about how Alberta Environment would respond to her well water concerns. In addition, Alberta Environment made public representations about what landowners with contamination concerns, including Ms. Ernst, could expect from Alberta Environment's "Compliance Assurance Program". In both cases, these representations are facts relevant to the Plaintiff's reliance on Alberta Environment. References to "other landowners" do not necessitate any inquiry into what actually happened to the water of neighbouring landowners.

Statement of Claim at paras 62-64.
Alberta Brief at paras 22-23.

33. The allegations against Alberta are entirely focused on Alberta Environment and the Plaintiff – what the regulator knew or should have known, and what it did or should have done in response to the Plaintiff's situation.

34. References to other landowners and the Rosebud Aquifer do not somehow transform this Claim into a class action or a request for a public inquiry into oil and gas exploration in Alberta, as suggested by Alberta. With respect, such attacks show an attempt to avoid the real issues in this action.

The paragraphs do not contain evidence

35. Alberta argues that certain paragraphs of the Statement of Claim contain evidence.

Alberta Brief at paras 36, 38, 48, 51

36. The Plaintiff denies that these paragraphs contain evidence. The paragraphs are factual allegations necessary to the claims. Several of the impugned paragraphs relate to the testing of water which revealed high levels of certain harmful substances in water from Ms. Ernst's well, and in water drawn from the Rosebud Aquifer. The evidence required to prove the results of the tests has not been plead in the Statement of Claim. That these empirical tests occurred and revealed water contamination are, again, facts relevant to what Alberta Environment knew or should have known about problems in the Plaintiff's well water, which in turn is relevant to the Plaintiff's Claim of regulatory negligence.

Statement of Claim at paras 69, 70, 75.

37. In addition, Alberta attacks Paragraph 75 of the Statement of Claim as containing evidence which should be the subject of an expert report. This paragraph discusses Alberta Environment's restriction of an Alberta Research Council review on the Plaintiff's water contamination. The Plaintiff submits that these allegations, including that Alberta Environment "prevented an adequate review", are proper and factual pleadings. Expert evidence may indeed be used to prove these allegations, but this paragraph does not plead that evidence.

Statement of Claim at para 75.
Alberta Brief at paras 46-48.

The paragraphs do not contain argument

38. Alberta seeks to strike out paragraphs which contain particular words that it attacks as argumentative or speculative. For instance, Paragraph 69 of the Statement of Claim pleads that tests conducted on water wells showed "hazardous chemicals and petroleum pollutants" in water drawn from the Rosebud Aquifer, as well as high concentrations of methane. Words including "hazardous" and "pollutants", as well as "hazardous" and "contaminated" elsewhere in the Statement of Claim, are descriptive and not argumentative or speculative. These references describe the type of information provided to Alberta Environment, information relevant to the Claim against Alberta in regulatory negligence.

Alberta Brief at paras. 36, 38, 41, 44, 48-49, 51
Statement of Claim at para 69.

39. Finally, Alberta submits that some allegations are improper because they are determinations that should be made following the presentation of evidence and in argument. Alberta has highlighted some of the factual issues – which have been precisely alleged in the Statement of Claim – that the trial judge will be asked to decide following the presentation of evidence and argument. For instance, Alberta states that "What Alberta Environment knew, and whether Ms. Ernst's water is contaminated and the cause of the contamination is up to the trial judge to determine following the presentation of evidence". In the Plaintiff's view, these types of allegations are proper, and it is the obvious task of the trial judge to determine whether the Plaintiff's allegations have been proven at trial.

Alberta Brief at paras 41, 58, 59.

Editing the statement of claim would be contrary to the Foundational Rules of Court

40. Alberta does not allege that the Claim or any particular cause of action should be entirely struck out, but is merely asking the Court to engage in editing of the current Claim. Alberta requests that certain paragraphs, or portions of those paragraphs, be struck (based largely, as discussed above, on a mischaracterization of the purpose of those paragraphs).

Alberta Brief at paras 1-2.

41. As pointed out by this Court, "more time and money is wasted on this rule (applications to strike out under r. 3.68) than any other". Alberta's Application is concerned with form rather than substance and does nothing but delay the trial of the action and add expense on all sides. The Statement of Claim states the allegations against Alberta with clarity and allows Alberta to plead in defence. Dissecting or parsing the Statement of Claim as suggested by Alberta would serve no purpose and would be an ineffective use of Court resources.

***Donaldson, supra* at para. 24 [Tab 6].**
***Guccione v Bell, supra*, at para 7 [Tab 5].**

42. These Applications should be viewed through the lens of the Foundational Rules of the *Alberta Rules of Court* which state, in part:

> [T]hese rules are intended to be used
> (a) to identify the real issues in dispute
> (b) to facilitate the quickest means of resolving a claim at the least expense.
> ***Alberta Rules of Court*, r 1.2(2), [Tab 1].**

43. It is submitted that the best way to achieve the goals of the Foundational Rules, and to facilitate the quickest means of resolving the Claim, is to simply allow the claim to move forward, not to engage in selective and non-substantive editing.

44. The Defendant's Application to strike particular paragraphs as being "frivolous, irrelevant or improper" is without merit and should be dismissed.

PART III: RELIEF SOUGHT

45. The Plaintiff (Respondent) Jessica Ernst respectfully requests the following relief:

(a) An Order dismissing the Application brought by Alberta;

(b) An Order granting costs of this Application to Ms. Ernst on such a basis as this Honourable Court deems just and appropriate in the circumstances; and

(c) Such further and other relief as counsel may advise and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21 day of December, 2012.

KLIPPENSTEINS BARRISTERS & SOLICITORS

Per: _____

Murray Klippenstein

_____

W. Cory Wanless

Counsel for the Respondent,
Jessica Ernst

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LIST OF AUTHORITIES

TAB 1

EXCERPTS FROM ALBERTA RULES OF COURT, ALTA REG 124/2010

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used
(a) to identify the real issues in dispute,
(b) to facilitate the quickest means of resolving a claim at the least expense,
[...]

Court options to deal with significant deficiencies

3.68(1) If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
(a) that all or any part of a claim or defence be struck out;
(b) that a commencement document or pleading be amended or set aside;
(c) that judgment or an order be entered;
(d) that an action, an application or a proceeding be stayed.

(2) The conditions for the order are one or more of the following:
(a) the Court has no jurisdiction;
(b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
(c) a commencement document or pleading is frivolous, irrelevant or improper;
(d) a commencement document or pleading constitutes an abuse of process;
(e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

(3) No evidence may be submitted on an application made on the basis of the condition set out in subrule (2)(b).

(4) The Court may
(a) strike out all or part of an affidavit that contains frivolous, irrelevant or improper information;
(b) strike out all or any pleadings if a party without sufficient cause does not
    (i) serve an affidavit of records in accordance with rule 5.5,
    (ii) comply with rule 5.10, or
    (iii) comply with an order under rule 5.11.

[...]

Pleadings: general requirements

13.6(1) A pleading must be
(a) succinct, and
(b) divided into consecutively numbered paragraphs, with dates and numbers expressed in numerals unless words or a combination of words and numerals makes the meaning clearer.

(2) A pleading must state any of the following matters that are relevant:
(a) the facts on which a party relies, but not the evidence by which the facts are to be proved;
[...]

TAB 2

Indexed as:

Touche Ross Ltd. v. McCardle

Between
Touche Ross Ltd. and ano., Plaintiffs, and
Frederick McCardle and ors., Defendants

[1987] P.E.I.J. No. 90

66 Nfld. & P.E.I.R. 257

GDC-7335

Prince Edward Island Supreme Court - General Division

Heard - August 11, October 5, 1987
Judgment - October 9, 1987

McQuaid J.

Application to strike out pleadings. Rule 14.25(1) -- Discretionary relief -- Criteria to be applied when exercising discretion.

Statutes cited:

Rules of Civil Procedure, Rule 14.13, 14.25(1).

Authors cited:

Supreme Court Annual Practice, 1985.

David W. Hooley and James T. Revell, for the plaintiffs.
James W. Macnutt, for the respondents.

McQUAID J.: -- This is an application on behalf of the defendants, and each of them, made pursuant to Civil Procedure Rule 14.25(1) to strike out the plaintiffs' statement of claim. Certain ancillary relief is also sought, which will be dealt with, if necessary, later in this ruling.

The Rule in question reads:

> The Court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,
>
> (a) it discloses no reasonable cause of action or defence;
> (b) it is fake, scandalous, frivolous or vexatious;
> (c) it may prejudice, embarrass or delay the fair trial of the proceeding;
> (d) it is otherwise an abuse of the process of the court;
>
> and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

The English equivalent is Order 18, Rule 19. The commentary under this Rule, as indicated in the Annual Practice, 1985, is that this is a permissive, not mandatory, remedy, conferring a discretionary jurisdiction in the Court, but one to be exercised only in a case which is clear beyond doubt. Leave to amend is required under the Rule but unless there is reason to suppose that the case can be improved by amendment, such leave will not be given.

The essence of a properly drawn pleading is clarity and disclosure. With respect to a statement of claim in particular, the defendant, or each defendant if there be more than one, must know from the face of the record precisely what case he, or each of them, has to answer. He must not be left to speculate or to guess the particulars of the case alleged against him and of the remedy sought from him. He must not be left to ascertain this through some esoteric process of divination.

Perhaps the best test of a well and properly drawn pleading is this, that a stranger to the proceeding, reasonably versed in legal terminology, might pick up the document and upon first reading readily ascertain the particulars of the cause of action, the specific nature of the defendant's alleged breach of duty or other deficiency, the precise nature of the remedy sought and the reason why such a remedy is, in fact, sought. Unless all of this information is patently and readily available on the face of the record, then, it seems to me, the pleading is, itself, defective.

Elementary as it may appear, the cause of action must first be clearly identified, not only in the mind of the draftsman but, more especially, patently in the document. Where there is more than one plaintiff, that cause of action must be joint in each. Where there is more than one defendant, that cause of action must also be joint in each and made to appear so with respect to each defendant. Where a single remedy is sought against several defendants, the record must be equally clear in what respect and for what reason each of the several defendants is jointly and severally liable.

In those situations in which there is either a multitude of plaintiffs or a multitude of defendants, or both, involving a common enterprise but in which the involvement or interest of all plaintiffs and/or of all defendants is not identical in all respects, or where the cause of action alleged does not touch all equally, then it may well be more appropriate that, for purposes of pleading, distinct actions be commenced in order to identify each plaintiff and/or defendant as to their separate, distinct or unique circumstances or interest, all of which may, for purposes of trial, be consolidated, with, however, such several judgments to follow as circumstances may require.

Turning to the pleadings, the statement of claim now before the Court for consideration under Rule 14.25(1) above referred to discloses that there are two plaintiffs. One is Touche Ross Ltd., a

well known and equally respectable accounting firm, identified as being "agent of the Prince Edward Island Lending Authority under a General Assignment of Book Debts"; the second plaintiff is the Lending Authority itself.

There are ten named defendants, three being the brothers McCardle, two being, presumably, the wives thereof, four being corporations owned or controlled by one or another of the members of the McCardle family, and the tenth being another member of the same family.

The statement of claim consists of some 51 paragraphs. These identify the various parties to the proceeding and narrate, in chronological order, what are alleged to be the interlocking financial arrangements among the various members of the McCardle family, as between themselves and their companies on the one hand, and the Lending Authority on the other. Also enumerated are certain alleged breaches of the Bills of Sale Act, the Bulk Sales Act, the Frauds on Creditors Act and the Statute of Elizabeth, in consequence of which it is alleged that certain identified transactions "should be void".

It is also pleaded that one of the defendants, P.E.I. Produce Company Ltd., is not tainted by certain of those transactions which "should be void", nor is it indebted to the plaintiffs, as are all the other defendants, in the amount of approximately $720,000.

The final paragraph of the statement of claim, being paragraph 52, reads:

The Plaintiffs therefore claim:

1. Special damages in the amount of $719,904.11 plus per diem interest from May 31, 1987, in the amount of $209.55 until the date of judgment;
2. Further special damages;
3. General damages;
4. Punitive damages as against all of the parties;
5. Exemplary damages;
6. Interest;
7. Its costs to be taxed on a solicitor/client basis;
8. Such other relief as this Court may in its discretion award.

This is obviously a catch-all prayer for relief which requires some analysis before it can be taken seriously. It obviously seeks all remedies as against all defendants, jointly and severally, presumably founded on a cause of action commonly applicable to each individual defendant, regardless of the nature or degree of respective individual involvement.

This patently cannot be the situation for the statement of claim itself, in several of its paragraphs, exonerates one of the defendants, P.E.I. Produce Company Ltd., from sundry allegations of wrongdoing attributed to other defendants, or certain of them, as well as from any demand for the sum of $719,904.11.

Nowhere, other than in its prayer for relief, do the plaintiffs refer to any circumstances which they allege give rise to special damages.

A basic principle of pleading with respect to special damages is that it is the duty of the plaintiff to plead full particulars to show the nature and extent of the damages, i.e., the amount which he claims to be recoverable so as fully to inform the defendant of the case he has to meet and to assist him in computing any payment into court. If a plaintiff is able to base his claim for damages on a

precise calculation, he must plead particulars of the facts which make the calculation possible; similarly, such particulars must be pleaded where the claim is based on not a precise but an estimated calculation of damages. The mere statement or prayer of a claim for damages will not support such a claim.

Attention is drawn to the provisions of Rule 14.13:

> A statement of claim, counterclaim, and third party notice, shall state specifically,
>
> (a) particulars of any damages, whether special or general, that are ascertained or ascertainable and capable of being calculated in terms of money, and these damages with the amount thereof shall be claimed as special damages;
> (b) particular of any other general damages, but the amount thereof need not be stated;
> (c) any other specific relief or remedy being claimed, other than a claim for general or other relief, but the costs need not be claimed.

Falling under subparagraph (c) above would be such claims for the extraordinary relief of punitive and exemplary damages, although I must confess that I have unable to distinguish between the two. The rule and practice is clear that exemplary damages must be specifically pleaded, together with the facts relied upon. The object of the rule is to give the defendant fair warning of what is going to be claimed, with the relevant facts, and thus to prevent surprise at trial, to avoid the need for any adjournment of the trial of this ground and, at the same time, to extend the ambit of discovery before trial.

Relative to this same aspect of relief claimed, there exists some degree of confusion.

4. Punitive damages as against all of the parties;
5. Exemplary damages;

Assuming that there does exist a distinction between punitive and exemplary damages, if the former are claimed as against all of the parties, against whom might it be inferred that exemplary damages are claimed? Again, the pleadings must lay such a factual background as to permit a response by the appropriate party.

Upon argument in reply, counsel for the plaintiffs defined the cause of action in these terms, and this is a direct quote:

> All parties deliberately or negligently entered into a series of transactions the purpose of which was to deprive, delay or hinder Touche Ross and the P.E.I. Lending Authority from doing what they were legally entitled to do, i.e., to realize on security, collect money, and pay what was owed. The claim is jointly and severally against all ten defendants.

This would appear to be a classic definition of a conspiracy.

If that, indeed, be the cause of action, with respect to each of the ten defendants individually, it would require a most unique reading of the statement of claim to ascertain it.

In its claim for relief, the plaintiffs include an item "Interest". Interest has already been claimed with respect to the alleged debt. Presumably, this item of interest is with respect to some other, unidentified, matter. The defendants, and each of them, as well as the Court, are entitled to know, from the face of the pleadings, with respect to what and against whom interest is being claimed.

Finally, there is the claim for "costs to be taxes [sic] on a solicitor/client basis". Costs are always, of course, in the sole discretion of the Court. Where they are awarded, it is normally on a party and party basis. If the Court is to be asked to award costs on any other basis, again the pleadings should be sufficiently clear on their face that the Court may be informed of that fact and why, so that the opposite party might be in a position to defend.

Having regard to the fact that it is of cardinal importance that the essence of the pleadings is to inform; to inform the Court clearly and succinctly of the issues and to inform the opposite party of the case to be met; they will, essentially, consist of two parts, the material facts upon which the litigation is based and the relief sought, which, of course, must clearly flow not only legally but logically from those material facts. Again, I refer to that most essential and invaluable reference, the White Book, 1985, and particularly at page 261 wherein it is declared as a fundamental that a proper pleading should state: (1) material facts, not law; (2) material facts, not evidence; (3) material facts only; (4) all material facts; (5) in summary form, i.e., briefly, succinctly, and in strict chronological order.

Having reviewed in some detail the statement of claim filed herein and weighed it against the several criteria which the authorities have propounded, I conclude that, in its present form, it is defective to the degree that it cannot be adequately cured by amendment and should properly be struck out. It will be ordered accordingly.

If it is the plaintiffs' intention to pursue this further, they might consider initiating several concurrent proceedings wherein individual identifiable causes of action are undertaken against individual defendants or, as the case may be, against a grouping of individual defendants with respect to whom such a cause of action might be common. This observation is, of course, gratuitous and not necessarily to be taken as a directive. How and in what manner the plaintiffs elect to proceed is a matter which lies entirely within their discretion.

The applicant/defendants will have their costs, as taxed, on a party and party scale, such costs to be paid before they shall be required to plead to any new statement or statements of claim which the plaintiffs or either or them may elect to file.

McQUAID J.

TAB 3

Indexed as:

Hunt v. Carey Canada Inc.

Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd.; appellants;

v.

George Ernest Hunt, respondent, and T & N, P.L.C. and Flintkote Mines Limited; respondents.

And between

Flintkote Mines Limited, National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd., appellants;

v.

George Ernest Hunt, respondent, and T & N, P.L.C. and Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., respondents.

[1990] 2 S.C.R. 959

[1990] S.C.J. No. 93

1990 CanLII 90

File Nos.: 21508, 21536.

Supreme Court of Canada

1990: February 22 / 1990: October 4.

Present: Lamer C.J.* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (57 paras.)

* Chief Justice at the time of judgment.

Practice -- Motion to strike -- Action brought by person suffering from disease allegedly caused by exposure to asbestos fibres -- Allegation of conspiracy to withhold information of potential health risks -- Allegations of other nominate torts -- Circumstances in which a statement of claim (or portions of it) could be struck out -- Whether allegations based on the tort of [page960] conspiracy should be struck out -- Rules of Court [British Columbia], Rule 19(24).

Respondent Hunt, a retired electrician, brought an action alleging that he had contracted mesothelioma because of exposure to asbestos fibres over the course of his employment. The defendants had been involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. It was alleged that they knew from 1934 that asbestos fibres could cause disease in those exposed to the fibres. Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N, P.L.C. were sued not only in negligence but also for their alleged conspiracy to withhold information about the dangers associated with asbestos which ultimately resulted in Mr. Hunt's contracting mesothelioma. Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal by order of the British Columbia Court of Appeal.

Carey Canada Inc. successfully applied to have the action against it struck for want of a reasonable claim. (The action had been based solely on allegations of conspiracy.) The Court of Appeal allowed an appeal from that decision. The issues here dealt with the circumstances in which a statement of claim (or portions of it) could be struck out, and whether the allegations based on the tort of conspiracy should be struck out.

Held: The appeals should be dismissed.

The test to be applied is whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable claim. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

Here, it was not "plain and obvious" that the plaintiff's statement of claim failed to disclose a reasonable claim, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim of conspiracy. Nor was it plain and obvious that allowing this action to proceed would amount to an abuse of process. Whether or not there is good reason to extend the tort to the present context is for the trial judge to consider in light of the evidence.

[page961]

It is not for this Court on a motion to strike to reach a decision as to the plaintiff's chances of success. It is enough that the plaintiff has some chance of success. Whether or not a predominant purpose had been established and whether or not Quebec's Business Concerns Records Act limited the range of information that the defendants could produce at trial was not relevant to whether the plaintiff's statement of claim disclosed a reasonable claim. Striking out cannot be justified because a pleading reveals "an arguable, difficult or important point of law". On the contrary, it may well be critical that the action be allowed to proceed.

Alleging the tort of conspiracy is not precluded by the allegation of another tort. While it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. Whether the plaintiff should be barred from recovery under the tort of conspiracy can only be determined when the question of whether it has established that the defendant did in fact commit the other alleged torts has been decided.

Cases Cited

Considered: Dyson v. Attorney-General, [1911] 1 K.B. 410; Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094; Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735; Lonrho Ltd. v. Shell Petroleum Co. (No. 2), [1982] A.C. 173; Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452; distinguished: Frame v. Smith, [1987] 2 S.C.R. 99; referred to: Metropolitan Bank, Ltd. v. Pooley, [1881-85] All E.R. 949; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489; Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd., [1899] 1 Q.B. 86; Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co., [1892] 3 Ch. 274; Evans v. Barclays Bank and Galloway, [1924] W.N. 97; Kemsley v. Foot, [1951] 1 T.L.R. 197; Nagle v. Feilden, [1966] 2 Q.B. 633; Rex ex rel. Tolfree v. Clark, [1943] O.R. 501; Gilbert Surgical Supply Co. v. F. W. Horner Ltd., [1960] O.W.N. 289; Minnes v. Minnes (1962), 39 W.W.R. 112; McNaughton and McNaughton v. Baker (1988), 25 B.C.L.R. (2d) 17; Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441; Dumont v. Canada (Attorney General), [1990] 1 S.C.R. 279; [page962] Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563; Mogul Steamship Co. v. McGregor, Gow & Co. (1889), 23 Q.B.D. 598.

Statutes and Regulations Cited

Business Concerns Records Act, R.S.Q. 1977, c. D-12.
Rules of Civil Procedure, O. Reg. 560/84, Rule 21.01.
Rules of Court [British Columbia], Rule 19(24).
Rules of the Supreme Court [England], R.S.C. 1883, O. 25, r. 4 [rep. & sub. R.S.C. (Revision) 1962, O. 18, r. 19].

Supreme Court of Judicature Act, 1873, (Eng.) 36 & 37 Vict., c. 66.

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Burns, Peter. "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C. L. Rev. 229.
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Halsbury's Laws of England, vol. 36, 4th ed. London: Butterworths, 1981.
McLachlin, Beverly M. and James P. Taylor. British Columbia Practice, vol. 1, 2nd ed. Vancouver: Butterworths, 1979.
Milsom, S. F. C. Historical Foundations of the Common Law, 2nd ed. Toronto: Butterworths, 1981.

APPEALS from a judgment of the British Columbia Court of Appeal reversing the judgment of Hollinrake J. dismissing the action against Carey Canada Inc. on the basis that it disclosed no reasonable claim. Appeals dismissed.

Jack Giles, Q.C., and Robert McDonell, for Carey Canada Inc.
D. M. M. Goldie, Q.C., for Lac d'amiante du Québec Ltée.
Marvyn Koenigsberg, for National Gypsum Co.
David Martin and Michael P. Maryn, for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited.
James A. Macaulay, c.r., and K. N. Affleck, for T & N, P.L.C.

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Robert Ward and S. E. Fraser, for Flintkote Mines Limited.
J. J. Camp, Q.C., and P. G. Foy, for George Ernest Hunt.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The judgment of the Court was delivered by

1 **WILSON J.**:-- The issue raised in these appeals is whether it is open to the respondent to proceed with an action against the appellants for the tort of conspiracy. In particular, the appeals

29 Once again then the "plain and obvious" test has been firmly embraced. The British Columbia [page979] Court of Appeal has confirmed that the summary proceedings available under the rule in question do not afford an appropriate forum in which to engage in a detailed examination of the strengths and weaknesses of the plaintiff's case. The sole question is whether, assuming that all the facts the plaintiff alleges are true, the plaintiff can present a question "fit to be tried". The complexity or novelty of the question that the plaintiff wishes to bring to trial should not act as a bar to that trial taking place.

(ii) Supreme Court of Canada

30 While this Court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the Court in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, stated at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": Ross v. Scottish Union and National Insurance Co.

31 I had occasion to affirm this proposition in Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441. At pages 486-87 I provided the following summary of the law in this area (with which the rest of the Court concurred):

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of success" (Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in Dowson v. Government of Canada (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?"

And at p. 477 I observed:

> It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that [page980] reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs. [Emphasis added.]

32 Most recently, in Dumont v. Canada (Attorney General), [1990] 1 S.C.R. 279, I made clear at p. 280 that it was my view that the test set out in Inuit Tapirisat was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

33 Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18, r. 19: 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 ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

34 The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even although it may call for a complex or novel application of the tort of conspiracy.

(2) Should Mr. Hunt's Allegations Based on the Tort of Conspiracy Be Struck from his Statement of Claim?

35 In the last decade the tort of conspiracy has received a considerable amount of attention. In [page981] England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff. The law with respect to the first situation is not in doubt:

> If A and B agree to commit acts which would be lawful if done by either of them alone but which are done in combination and cause damage to C, no tortious conspiracy actionable at the suit of C exists unless the predominant purpose of A and B in making the agreement and carrying out the acts which cause the damage is to injure C and not to protect the lawful commercial interests of A and B. This proposition is established by five decisions at the highest level: Mogul Steamship Co. Ltd. v. McGregor, Gow & Co. [1892] A.C. 25; Quinn v. Leathem, [1901] A.C. 495; Sorrell v. Smith, [1925] A.C. 700; Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch, [1942] A.C. 435 and Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2), [1982] A.C. 173. [See: Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563, at p. 593, per Slade L.J.] [Emphasis added.]

Courts in England have, however, encountered greater difficulty in stating with precision the applicable principles governing situations in which unlawful means are employed. In particular, they have struggled to decide whether the plaintiff must establish, not just that the defendants used

TAB 4

Case Name:

Alberta Adolescent Recovery Centre v. Canadian Broadcasting Corp.

Between
Alberta Adolescent Recovery Centre, Plaintiff, and Canadian Broadcasting Corporation, Gillian Findlay, Morris Karp and David Studer, Defendants

[2012] A.J. No. 61

2012 ABQB 48

Docket: 1101 05339

Registry: Calgary

Alberta Court of Queen's Bench
Judicial District of Calgary

S.L. Martin J.

Heard: November 8 and 10, 2011.
Judgment: January 19, 2012.

(75 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Application by the individual defendants to strike the claim against them dismissed -- The individual defendants worked on the defendant CBC's program The Fifth Estate -- One episode dealt with an adolescent treatment program operated by the plaintiff -- The plaintiff commenced a defamation action -- Sufficient notice was given to the CBC but the notices were not addressed or copied to the individual defendants -- There was no evidence as to whether the individual defendants received notice in some fashion -- Accordingly, it was not plain and obvious that the plaintiff's substantial compliance argument would fail -- Defamation Act, s. 13.

Tort law -- Practice and procedure -- Pleadings -- Amendment -- Adding or striking out claim -- Application by the individual defendants to strike the claim against them dismissed -- The individual defendants worked on the defendant CBC's program The Fifth Estate -- One episode dealt with an adolescent treatment program operated by the plaintiff -- The plaintiff commenced a defamation

action -- Sufficient notice was given to the CBC but the notices were not addressed or copied to the individual defendants -- There was no evidence as to whether the individual defendants received notice in some fashion -- Accordingly, it was not plain and obvious that the plaintiff's substantial compliance argument would fail -- Defamation Act, s. 13.

Application by the individual defendants to strike the plaintiff Alberta Adolescent Recovery Centre's claim against them. The individual defendants worked on the defendant Canadian Broadcasting Corporation's program The Fifth Estate. An episode of the program, entitled Powerless, dealt with a treatment program for adolescents with alleged substance abuse problems. The treatment program was operated by the plaintiff. On April 14, 2011, the plaintiff commenced an action against the CBC and the individual defendants, claiming that the program was defamatory to it. Sufficient and timely notice was given to the CBC through correspondence sent to the CBC's Toronto and Ottawa offices. However, while the individual defendants were referenced in that correspondence, the notices were not addressed or copied to the individual defendants by name. The individual defendants took the position that they did not receive the notice required under section 13 of the Defamation Act by personal service and, therefore, they ought to be released from the litigation.

HELD: Application dismissed. The law likely permitted substantial compliance and there was no evidence as to whether the individual defendants were given copies of the notices or whether they received notice in some other fashion. As such, it was not plain and obvious that the plaintiff would not succeed on its substantial compliance argument.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Alta. Reg. 124/2010, Rule 3.68, Rule 11.5

Defamation Act, RSA 2000, c. D-7, s. 12, s. 13, s. 15

Libel and Slander Act, R.S.O. 1990, c. L. 12, s. 5

Counsel:

Grant Stapon, Q.C., for the Plaintiff, Alberta Adolescent Recovery Centre.

Fred Kozak, Q.C. and Matthew Woodley, for the Defendants, Canadian Broadcasting Corporation, et al.

Memorandum of Decision

1 S.L. MARTIN J.:-- The question at the heart of this application in whether Gillian Findlay, Morris Karp and David Studer should be removed as defendants because they did not receive a notice said to be required under the *Defamation Act*, R.S.A. 2000, c. D-7.

2 This apparently simple question is in fact complex and raises fundamental issues concerning if and how the *Defamation Act* applies to both an initial television broadcast and a television program's subsequent continuous availability on the internet; the nature of the Plaintiff's asserted cause of action; whether a proper notice served on a corporation binds the individual employees of the

24 This argument is at the heart of their application to strike the Plaintiff's claim against them, under both the *Act* and Rule 3.68.

Rule 3.68

25 The general principles governing an application to strike a statement of claim for failure to disclose a cause of action are relatively settled. While the matter is now governed by Rule 3.68 of the *Alberta Rules of Court*, Alta. Reg. 124/2010, the test remains whether it is plain and obvious or beyond a reasonable doubt that the claim cannot succeed.

26 In *Donaldson v. Farrell*, 2011 ABQB 11 at paras. 9 and 30, Graesser J. held that the new Rule 3.68 and the old Rule 129, Alta. Reg. 390/1968 were similar and that Rule 3.68 has not modified or lessened the test for striking out pleadings or determining whether a pleading discloses a reasonable claim: see also *Martin v. General Teamsters, Local Union No. 362*, 2011 ABQB 412 at para. 6; *Reece v. Edmonton (City)*, 2011 ABCA 238 at para. 14; *Wong v. Leung*, 2011 ABQB 688 at para. 13.

27 The Alberta Court of Appeal summarized the general requirements for striking pleadings for failing to disclose a cause of action in *Tottrup v. Lund*, 2000 ABCA 121, 186 D.L.R. (4th) 226 at paras. 8-9:

> [8] ... In brief, the Court must assume that the allegations of fact made by the plaintiff are true. The Court then determines whether those facts disclose a cause of action in law. The test set out by the Supreme Court in *Hunt v. Carey Canada Ltd.*, [1990] 2 S.C.R. 959 at 980, 74 D.L.R. (4th) 321, is whether it is "'plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action." Caution is required before concluding that the plaintiff has no chance of success. The plaintiff is entitled to a broad reading of the pleadings. ... In addition, a determination that there is no cause of action on one set of pleadings is generally no bar to framing a new action on different facts.
>
> [9] Although the pleadings should be liberally interpreted, the Court has a duty to apply the Rule as it is intended. If the alleged facts, examined in light of the existing law, do not disclose a cause of action the claim should be struck. Needless litigation should be avoided.

28 A pleading is frivolous if it is brought in bad faith or if it is hopeless: *Chevalier v. Sunshine Village Corp.*, 2011 ABQB 544 at para. 20. In *Wong v. Leung*, at para. 30, this Court ruled that the test for determining whether pleadings were vexatious under the old rules is the test to be applied to determine whether pleadings are an abuse of process under the new Rule 3.68. One such test is whether it is obvious that the claim cannot succeed.

29 The Defendants have the onus of proving that the Plaintiff's action is bound to fail. The onus is extremely high. In *Wanke v. University of Calgary,* 2011 ABCA 235 at para. 16, the Alberta Court of Appeal quoted with approval the following passage from *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980:

> [A]ssuming 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 ... .

30 In *Barcan v. Zorkin* (1987), 55 Alta. L.R. (2d) 210 at 211 (C.A.), the Alberta Court of Appeal reversed the lower court's ruling that the plaintiff's action be struck due to its failure to serve a defamation notice on the defendant. The Court ruled that the action should only be struck if it was "bound to fail". The facts did not clearly establish that the named defendant had published the allegedly defamatory material. The Court ruled that as the statement of claim disclosed a cause of action and the facts were in dispute, it could not conclude that the plaintiff's action was bound to fail.

Application of Rule 3.68 to the Case at Bar

31 There are many issues arising and argued that illustrate that summary dismissal is not possible at this preliminary stage in the proceedings. The number and nature of these issues and the contradictory positions advanced by each party highlight just how many important uncertainties exist. The result is that there is nothing plain and obvious about the Plaintiff's or the Defendants' potential success at trial.

32 While I will list five separate issues, in what may be seen as their logical order, it is the fifth issue that operates as the Defendant's key obstacle to summary judgment at this stage. The Defendants may succeed in their argument on the first four issues and yet lose the point if they fail on the fifth. On that fifth issue, I conclude that the Defendants have not met the high threshold of proving that it is plain and obvious that the Plaintiff could not succeed on its claim that substantial compliance with the service requirement may be both sufficient and present in fact. I provide no opinion or conclusion on how each of the following five issues should be decided. That is the proper province of a trial judge after all evidence is submitted and full argument heard.

33 The relevant issues include the following.

34 First, does the *Defamation Act* even apply to the initial television broadcast of the Program? The Act defines broadcast in a manner that no longer captures the technological reality of modern television transmission, referring as it does to "electromagnetic waves of frequencies lower than 3000 gigahertz." The Plaintiff argues that the *Act* should be read restrictively as it constricts common law rights and that no notice is required because the *Act* does not apply. The Defendants call for a purposive, remedial and contextual approach to the *Act* so that its policy goals can be maintained in light of changing technology. In short, the Program was broadcast, even without gigahertz.

35 Second, does the *Defamation Act* apply to the Program posted to the CBC website and available on the Internet? There are two aspects worthy of note. First, does posting the Program on the internet constitute a publication of the Program? Second, if it does, and the publication is defamatory, when does the act of defamation occur - only on the first day it appears on the Internet or every day that it is available on the Internet?

TAB 5

Indexed as:

Guccione v. Bell

Between
Andy Guccione, appellant (plaintiff), and
David I. Bell, Al Goertzen, Rob Westeen,
John Doe #1, John Doe #2, John Doe #3 and John Doe #4,
respondent, and
David I. Bell (defendant)
(Action No. 9703 00977)
And between
Andy Guccione, appellant (plaintiff), and
David I. Bell, William Crawford, Greg Andrews,
Doug Myers and Dennis Rach, respondents (defendants)
(Action No. 9703 01454)

[1999] A.J. No. 310

1999 ABQB 219

239 A.R. 277

87 A.C.W.S. (3d) 197

Action Nos. 9703 00977 and 9703 01454

Alberta Court of Queen's Bench
Judicial District of Edmonton

Johnstone J.
(In Chambers)

Heard: January 12, 1999.
Judgment: March 22, 1999. Filed: March 23, 1999.

(8 pp.)

Counsel:

Thomas M. Engel, for the appellant.
Daniel P. Carroll, for the respondents.

REASONS FOR JUDGMENT

JOHNSTONE J.:--

INTRODUCTION

1 This application is an appeal de novo from the Master in Chambers who allowed an application under Rule 129 to strike out certain pleadings in two Statements of Claim.

2 There is similarity between the claims. The only difference is that Action No. 9703- 01454 involves striking of the words "or negligently" whereas Action No. 9703-00977 contains no such words. Because of the similarity between the claims, it is therefore only necessary to set out the pertinent allegations contained in one of the Statements of Claim (Action No. 9703-01454). The pleadings which were struck by Master Funduk are underlined. The following reasons will refer to the paragraphs as numbered below, and will apply equally to the similar paragraphs in the second claim despite different numbering.

3 The portions of the Statement of Claim that were struck by Master Funduk are set forth below and underlined:

> 3. Both the Plaintiff and the Defendants are members of their professional governing body, the Alberta Veterinary Medical Association ("A.V.M.A.") and as such, are subject to the A.V.M.A.'s rules, bylaws and Code of Ethics. They are also subject to the Veterinary Profession Act.
> 4. Starting in about October, 1996, the Defendants conspired together to inflict economic damage on the Plaintiff's practice and did inflict such damage by making false and defamatory statements to clients and potential clients of the Plaintiff and by initiating a false and malicious complaint against the Plaintiff to the A.V.M.A. and by communicating false information to the A.V.M.A. The Defendants continue to act in furtherance of their conspiracy and the Plaintiff continues to suffer economic damage, losing about $13,000.00 per month.
> 5. The Defendants, or any one of them or any combination of them, either on their own or as parties, falsely and maliciously or negligently spoke and made the following publications to the following people and/or organizations: . . . (particulars omitted)
> 6. The said words were uttered in the course of conversations about the skill, competence and ethics of the Plaintiff and, in their natural and ordinary meaning, meant and were understood to mean that the Plaintiff was incompetent, unskilled, unprofessional and dishonest in his practice.
> 7. The Defendants have, in consequence of the above, violated the Veterinary Profession Act and the A.V.M.A. Code of Ethics.
> 8. As a consequence of the above the Plaintiff was and continues to be injured in his credit and reputation in his profession and has and continues to

be put to legal expenses to defend the wrongful complaints made to the A.V.M.A.

BACKGROUND

4 The Appellant (Plaintiff) submits that the original facts pleaded give rise to causes of action in defamation, malicious prosecution, abuse of process and conspiracy to cause damage by lawful means. The Appellant further submits that some portion of the pleadings which were struck support the claim founded in defamation, as well as claims for exemplary or punitive and aggravated damages. Finally, the Appellant argues that the costs awarded by the Master on double column 6 of the old Schedule C on each action were excessive, as the claims are almost identical and should be awarded on single column 6 and apportioned 50 percent to each action.

5 The Respondents' (Defendants') original Notice of Motion in this matter requested an order to strike a portion of the pleadings on all of the enumerated grounds referred to in Rule 129. The Respondents argue that any cause of action arising from the facts pleaded relates to a claim for damage to reputation, and as such is governed exclusively by the law of defamation. The Respondents obviously support the learned Master's award of costs. They argue that it is justified given the fact that although the issues were substantially the same, they were not identical and substantial time was expended to "track the differences". Further, the costs that would have been awarded based upon the new Schedule C (which came into effect September 1, 1998 shortly after Master Funduk's decision) would have been significantly higher.

DETERMINATION

6 It is important to view an application to strike under Rule 129 in the proper light. The decision of the Alberta Court of Appeal in Peterson v. Highwood Distillers (1998), 158 D.L.R. (4th) 569 affirms the principle that a court should always be generous in assessing pleadings and that pleadings should not be struck unless it is beyond a reasonable doubt that the plaintiff cannot succeed. This principle was also recently affirmed by our Court of Appeal in Kvaerner Enviropower v. Tanar Industries Ltd., [1998] A.J. No. 1027 (C.A.) (Q.L.). In that case the Court of Appeal also confirmed once again that the test for applications under Rule 129(1) was an onerous one. Every phrase or sentence or paragraph in a Statement of Claim need not, and cannot, disclose an independent cause of action: Alexander v. Pacific Trans-Ocean Resources Ltd. (1991), 120 A.R. 22 (C.A.).

7 A motion to strike pleadings is not to be used to decide difficult points: McEwen v. N.W. Coal and Navigation Co. (1889), 1 Terr.L.R. 203 (C.A.); Alexander v. Pacific, supra. The court must exercise the same caution in striking portions of a claim as in striking the whole of the Statement of Claim: Valentine v. Bee-Bell (1993), 161 A.R. 1 (M.C.), citing the Alberta Supreme Court Appeal Division in Sargent v. Can. Coachways Ltd., [1949] 1 W.W.R. 305. It may be that certain paragraphs can only be relied on by the plaintiff for limited purposes: Morris v. Wiltshire (CA) Times 15 Feb 1994. Finally, the court should be concerned with matters of substance, and not of form: Operation Dismantle Inc. v. R., [1985] 1 S.C.R. 441; Colonia Life Holdings Ltd. v. Fargreen Enterprises Ltd. (1990), 1 O.R. (3d) 703 (Gen.Div.).

Paragraph 5

8 In light of the Appellant's written argument, the Appellant has impliedly conceded to striking out the phrase "or negligently" in paragraph 5 of the Statement of Claim in Action No. 9703-01454. The Appellant's counsel states at page 2 of his brief that he agrees with the decision of the Master

insofar as it applied the principle that, excepting the claims for malicious prosecution, abuse of process and conspiracy to cause damage by lawful means, all other claims made by the Appellant that flow as a result of published false statements have merged in the tort of defamation. This of course, therefore, excludes the tort of negligence.

Paragraphs 3 and 7

9 The Appellant cites D.B. Casson, Odgers on High Court Pleading and Practice, 23rd ed., (London: Sweet & Maxwell: 1991), p.143 as authority for the proposition that facts which are matters in aggravation of damages should be pleaded. McElory v. Cowper-Smith and Woodman, [1967] S.C.R. 425 (S.C.C.) is conclusive authority to the effect that not only aggravated damages, but also punitive damages may be awarded in defamation cases where the circumstances so warrant. Even assuming that the only cause of action arising from the facts alleged is defamation, paragraphs 3 and 7 may be relevant to an award of exemplary or punitive damages, as it is arguable that they relate to the standard of morality or decent conduct to which members of the veterinary profession are to be held. Since the substance of the pleadings is in issue here, and not the form, the location of paragraphs 3 and 7 does not minimize their potential relevance to the issue of damages.

Paragraph 8

10 At p.10 of his written submissions, counsel for the Respondents, referring to the latter portion of paragraph 8, writes that "to the extent that these expenses flow as a consequence of the communications allegedly made by the Defendants which found the defamation claim, the Appellant is at liberty to apply for leave to amend his damages claim as he deems fit without reference to the alleged conspiracy". However, paragraph 8 of the Statement of Claim does not make reference to any conspiracy, but simply refers to legal expenses incurred as a result of wrongful complaints to the A.V.M.A. Even if the pleadings sound only in defamation, paragraph 8 would require no deletion or amendment, as the defamatory statements detailed in paragraph 5 include communications by the Defendants to the A.V.M.A., and it is arguable that costs of the defence may be recoverable as special damages.

Paragraph 4

11 This leaves us with paragraph 4. Counsel for the Respondents submit that defamation is the gravamen of the Appellant's complaint, and that as a matter of law claims for damage to reputation are governed exclusively by the law of defamation, relying on Foaminol Ltd. v. British Plastics Ltd., [1941] 2 All E.R. 393 (K.B.); Lonrho v. Fayed, [1994] 1 All E.R. 188 (C.A.) and cases cited therein, and Fulton v. Globe and Mail (1996), 194 A.R. 254 (M.C.); aff'd. with variation 53 Alta. L.R. (3d) 212. Foaminol, supra, dealt with claims for loss of reputation caused by a breach of contract. The Court in that case held that the loss of reputation is a matter for which damages cannot generally be claimed except in actions for defamation. This statement of law is much less categorical than that espoused by the Respondents. It is further tempered by the Court's conclusion that the mere fact that the pecuniary loss is brought about by the loss of reputation caused by a breach contract is not sufficient to preclude the plaintiffs from recovering in respect of a pecuniary loss by way of a breach of contract if such pecuniary loss can be established (at p. 400). Fulton v. Globe and Mail, supra, deals specifically with alternative claims in defamation and negligence. The Appellant has already conceded that the claim in negligence cannot stand.

12 Lonrho v. Fayed, supra, involves the issue of framing a claim for damages for injury to reputation as a "lawful means" conspiracy action. At p.195 of that decision, Dillon L.J. states:

> Justification - truth - is an absolute defence to an action for defamation, and it would in my judgment, be lamentable if a plaintiff could recover damages against defendants who had combined to tell the truth about the plaintiff and so had destroyed his unwarranted reputation.

13 The Appellant argues that the pleadings support a claim in conspiracy to cause damage by lawful means. The logic espoused by Dillon L.J. precludes such a claim in this case. Furthermore, the Respondents submit that the facts set out in paragraph 4 do not support such a claim, since the means alleged would be unlawful. Indeed, it is difficult to see how the facts in paragraph 4 could support the claim of conspiracy to cause damage by lawful means as suggested by the Appellant.

14 However, the Appellant goes on to argue that the fact that the Respondents conspired together would constitute severe, high-handed, wanton, callous and reprehensible behaviour which would support exemplary or punitive and aggravated damage claims. Insofar as damages are concerned, paragraph 5 contains language sufficient to allow the Appellant to lead evidence on the issue of the Defendants acting in concert to effect the defamation.

15 The remaining issue is that of malicious prosecution or abuse of process. Nelles v. Her Majesty (Ontario), [1989] 2 S.C.R. 170 sets out the requirements for the tort of malicious prosecution. The Appellant has failed to plead one of the required elements, namely, that the proceedings in question terminated in favour of the Appellant. The Appellant requests leave to amend so that if the proceedings had been terminated in favour of the Plaintiff, the Plaintiff would have the opportunity to advance the claim. The Respondent contends that the phrase "by initiating a false and malicious complaint against the Plaintiff to the A.V.M.A." is simply one of the alleged modes by which the alleged conspiracy was carried out and is not a plea of an independent cause of action. The Respondents go on to argue that if malicious prosecution is alleged, then that claim is essentially for damages, direct and consequential, arising from an alleged loss of reputation which are exclusively governed by the law of defamation.

16 J.G. Fleming, in The Law of Torts, 9th ed. (Sydney: Law Book Co., 1998) discusses defamation and malicious prosecution at p.673:

> . . . [M]alicious prosecution . . . bears close resemblance to defamation, both being infringements of essentially the same complex of interests on the part of the plaintiff.
>
> . . . [T]his action [malicious prosecution] was never absorbed into the law of defamation.

The Respondents have not produced any authority which would negate this proposition.

17 Therefore, although it is clear that defamation largely governs claims for loss of reputation, the Respondent's statement of the ambit of defamation goes too far.

18 The question whether a claim of malicious prosecution would be tenable with respect to the disciplinary proceedings in question is better left to the trial judge. Should the Appellant desire leave to amend to include the missing element, the parties are invited to make submissions as to whether such an amendment is permissible. However, even if the Appellant cannot amend the

pleadings to meet the requirements set out in Nelles, supra, the impugned phrase may support the claim in defamation, and should not be struck.

19 The Appellant also argues that certain facts relevant to the defamation claim were struck out in striking out paragraph 4 in its entirety. Those concerns are addressed below.

CONCLUSION

20 The underlined portions of the Statement of Claim in Action No. 9703-01454, and the identical portions of the Statement of Claim in Action No. 9703-00977, are struck as follows and paragraph 4 is amended as indicated by the bolded letters for grammatical reasons:

> 3. Both the Plaintiff and the Defendants are members of their professional governing body, the Alberta Veterinary Medical Association ("A.V.M.A.") and as such, are subject to the A.V.M.A.'s rules, bylaws and Code of Ethics. They are also subject to the Veterinary Profession Act.
> 4. Starting in about October 1996, the Defendants conspired together to inflicted economic damage on the Plaintiff's practice and did inflict such damage by making false and defamatory statements to clients and potential clients of the Plaintiff and by initiating a false and malicious complaint against the Plaintiff to the A.V.M.A. and by communicating false information to the A.V.M.A. The Defendants continue to act in furtherance of their conspiracy and the Plaintiff continues to suffer economic damage, losing about $13,000.00 per month.
> 5. The Defendants, or any one of them or any combination of them, either on their own or as parties, falsely and maliciously or negligently spoke and made the following publications to the following people and/or organizations: . . . (particulars omitted)
> 6. The said words were uttered in the course of conversations about the skill, competence and ethics of the Plaintiff and, in their natural and ordinary meaning, meant and were understood to mean that the Plaintiff was incompetent, unskilled, unprofessional and dishonest in his practice.
> 7. The Defendants have, in consequence of the above, violated the Veterinary Profession Act and the A.V.M.A. Code of Ethics.
> 8. As a consequence of the above the Plaintiff was and continues to be injured in his credit and reputation in his profession and has and continues to be put to legal expenses to defend the wrongful complaints made to the A.V.M.A.

21 If the Appellant desires leave to amend to include the missing element relating to malicious prosecution, the parties are invited to make submissions as to whether such an amendment is permissible, once the Appellant has revealed the nature of the proposed amendment.

COSTS

22 Mr. Engel argues that the award of costs by the learned Master for each application on double column 6 was excessive because the claims were virtually identical. Mr. Carroll submits that the costs are reasonable given Master Funduk's decision was rendered on July 20, 1998, merely one month and ten days before the new Schedule C came into place at much higher rates [Column 4,

Item 7(1)]. Under the new Schedule C the fees for such a contested application before a Master is $1,250.00 whereas under the old Schedule C double column 6 is $800.00. Mr. Carroll does concede that 1 times column 6, namely $1,200.00, would be more appropriate given the similarity in the two actions. Mr. Engel argues single column 6 apportioned between the two actions, at $400.00 each. I accept the submissions of Mr. Carroll and therefore reduce the cost award to $1,200.00 for the total of both actions.

23 Costs of this appeal will be left for the trial judge's determination.

JOHNSTONE J.

cp/i/kjm

TAB 6

Case Name:

Donaldson v. Farrell

Between
Lesley Dawn Donaldson, Respondent (Plaintiff), and Brian Farrell, Brian Farrell Professional Corporation, James M. Gillespie, Gillespie Inc., Gillespie Farrell Chartered Accountants LLP, Karen M. Rackel, Karen M. Rackel Professional Corporation, Bernard Lavallee, Bernard D. Lavallee Professional Corporation, Lavallee Rackel LLP, Laura Dawn Bibby, Irene Denise Telfer, John Doe and Jane Doe, Applicants (Defendants)

[2011] A.J. No. 18

2011 ABQB 11

Docket: 0903 01031

Registry: Edmonton

Alberta Court of Queen's Bench
Judicial District of Edmonton

R.A. Graesser J.

Heard: December 15, 2010.
Judgment: January 6, 2011.
Released: January 7, 2011.

(37 paras.)

Civil litigation -- Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Failure to disclose a cause of action of defence -- False, frivolous, vexatious or abuse of process -- Application by defendants to strike statement of claim allowed in part -- Allegations of breach of fiduciary duty and negligence against defendant Farrell were already being litigated with passing of accounts -- Staying duplicate allegations would invite uncertainty and increase time and expense -- Revisiting negligence and breach of fiduciary duty claims were be abuse of process so they were struck -- Defendants Farrell and Bibby argued intentional infliction of mental distress claim did not

disclose cause of action -- However, whether defendants' actions were capable of harming person of ordinary fortitude was matter for trial so not clear claim would fail.

Tort law -- Intentional infliction of mental suffering -- Elements of tort -- Application by defendants to strike statement of claim allowed in part -- Allegations of breach of fiduciary duty and negligence against defendant Farrell were already being litigated with passing of accounts -- Staying duplicate allegations would invite uncertainty and increase time and expense -- Revisiting negligence and breach of fiduciary duty claims were be abuse of process so they were struck -- Defendants Farrell and Bibby argued intentional infliction of mental distress claim did not disclose cause of action -- However, whether defendants' actions were capable of harming person of ordinary fortitude was matter for trial so not clear claim would fail.

Statutes, Regulations and Rules Cited:

Administration of Estates Act, RSA 2000, c. A-2, s. 47

Rules of Court, Rule 1.2, Rule 3.68, Rule 4-2, Rule 129

Counsel:

C.D. McCoy, for the Respondent, Leslie Dawn Donaldson.

Louis M.H. Belzil, for the Applicant, Brian Farrell.

Melissa Sadownik, for the Applicant, Laura Dawn Bibby.

Reasons for Judgment

R.A. GRAESSER J.:--

Nature of Application

1 The Defendants Brian Farrell, Brian Farrell Professional Corporation (collectively "Mr. Farrell") and Laura Dawn Bibby apply pursuant to Rule 3.68 to strike the Statement of Claim against them. The Statement of Claim was filed January 22, 2009 and was served on the Defendants in December, 2009.

2 The basis of the application for Mr. Farrell is that the claims against him other than as they relate to the allegations of intentional infliction of mental suffering are already being litigated in connection with the passing of accounts in the Estate of Patrick John Bibby, Action SES03 126079, and therefore this action is an abuse of process. As to the claim relating to mental suffering, Mr. Farrell argues that the Statement of Claim does not disclose a cause of action against him.

3 Ms. Bibby argues that the Statement of Claim discloses no cause of action against her.

Background

4 Patrick John Bibby died on January 5, 2007. The administration of his estate has led to many unhappy differences between the Plaintiff, her sister Ms. Bibby, the Executor, Mr. Farrell, the Estate solicitor, Karen Rackel, and Mr. Bibby's companion Irene Denise Telfer. I am case managing

the passing of accounts in the Estate action, and have directed that certain issues between Ms. Donaldson and the Executor be tried.

5 The Statement of Claim in this action was issued before, but served after, my decision of February 25, 2009, ***Re Bibby Estate***, 2009 ABQB 111 and my decision of May 25, 2009, ***Re Bibby Estate***, 2009 ABQB 321 dealing with Ms. Donaldson's claims against Mr. Farrell. In those decisions, I directed that certain claims against Mr. Farrell as Executor be tried pursuant to s. 47 of the *Administration of Estates Act*, RSA 2000, C. A-2. A number of claims being advanced by Ms. Donaldson were expressly not directed to be tried.

6 There is also separate litigation between Ms. Donaldson and Ms. Telfer, being action 0903 00068 relating to issues arising out of Mr. Bibby's death.

7 The application to strike was brought by Mr. Farrell under the old *Rules of Court* (Rule 129) in February, 2010. Ms. Donaldson subsequently brought her application to strike, but through scheduling difficulties, the application was not heard until December 15, 2010.

Rule 3.68

8 Rule 3.68, which is the rule relied on by the Applicants, provides:

> **3.68(1)** If the circumstances warrant and a condition under subrule (2) applies, the Court may order one or more of the following:
>
> (a) that all or any part of a claim or defence be struck out;
> (b) that a commencement document or pleading be amended or set aside;
> (c) that judgment or an order be entered;
> (d) that an action, an application or a proceeding be stayed.
>
> **(2)** The conditions for the order are one or more of the following:
>
> (a) the Court has no jurisdiction;
> (b) a commencement document or pleading discloses no reasonable claim or defence to a claim;
> (c) a commencement document or pleading is frivolous, irrelevant or improper;
> (d) a commencement document or pleading constitutes an abuse of process;
> (e) an irregularity in a commencement document or pleading is so prejudicial to the claim that it is sufficient to defeat the claim.

9 Rule 3.68 is similar to old Rule 129, which provided:

> **129(1)** The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
>
> (a) it discloses no cause of action or defence, as the case may be, or
> (b) it is scandalous, frivolous or vexatious, or
> (c) it may prejudice, embarrass or delay the fair trial of the action, or

(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

10 However, the Rule 3.68 must be viewed through the lens of the foundational rule, Rule 1.2, which provides:

> **1.2(1)** The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> **(2)** In particular, these rules are intended to be used
>
> (a) to identify the real issues in dispute,
> (b) to facilitate the quickest means of resolving a claim at the least expense,
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
> (d) to oblige the parties to communicate honestly, openly and in a timely way, and
> (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments..

Issues

1. Are the claims against Mr. Farrell other than those relating to infliction of mental suffering an abuse of process?
2. If such claims are an abuse of process, should the Statement of Claim be struck, should it be amended, or should the action be stayed?
3. Do the claims against Mr. Farrell and Ms. Bibby relating to the intention of mental suffering fail to disclose a cause of action?

1. Abuse of Process

11 Mr. McCoy, on behalf of Ms. Donaldson, concedes that "any portion of the Claim that has already been addressed by the Surrogate Court must be struck; however, such an action is wholly premature until such time as the Surrogate Court process is concluded".

12 I am not persuaded that the Statement of Claim against Mr. Farrell raises any new policy considerations relating to the conduct of executors in the administration of estates. Neglect and breach of fiduciary duty can be addressed (and is being addressed) under the *Administration of Estates Act*. ***Edwards v. Law Society of Upper Canada***, 2001 SCC 80 and ***Childs v. Desormeaux***, 2006 SCC 18, cited by Mr. McCoy, do not save the duplicated claims from being stayed or struck.

13 As such, the issue here is as to remedy. Mr. Belzil, on behalf of Mr. Farrell, wants the duplicated claims struck. Mr. McCoy, on behalf of Ms. Donaldson, argues that the duplicated claims should be stayed. Both are possible remedies under R. 3.68.

2. Remedies - Struck, amended or stayed?

14 Here, the lens of the foundational rules must be applied. How best can the issue be dealt with to see that Ms. Donaldson's claims, and Mr. Farrell's defences are "fairly and justly resolved in a timely and cost-effective way"? Achieving that objective is a balancing act as "fair and just" is not necessarily accomplished in a "timely and cost-effective way". Hence the challenge of balancing the objectives, and applying proportionality to issues as mandated by R. 1.2(4):

> **(4)** The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

15 I was referred to ***Edmonton Northlands v. Edmonton Oilers Hockey Corporation***, [1993] A.J. No. 1001 (Q.B.), which in turn cites ***German v. Major***, (1985), 62 A.R. 2 (C.A.) for the proposition that "commencing a second action while one is currently pending is an abuse of process." (At para. 26). Having regard to the foundational rules, those cases remain good law and their rationales are strengthened.

16 Little purpose is achieved by staying the duplicated claims. Here, a stay of the claims may invite some later uncertainty as to what was included in the Estate action and what was not. At a minimum, it likely requires that some steps be taken after the Estate action has been resolved. That may be some time away, and thus "timely and cost effective" are both offended by a stay.

17 There is nothing unfair or unjust about striking the duplicated claims now. That is the inevitable result of the completion of the Estate action, which is intended to deal with all claims of neglect and breach of trust on Mr. Farrell's part that have been allowed to proceed under s. 47 of the *Administration of Estates Act*. There has already been a screening process (similar to R. 129) of claims by Ms. Donaldson against Mr. Farrell in the Estate action, and it would be an abuse of process to revisit those matters now, or worse yet stay such issues to be dealt with years down the road.

18 As a result, the appropriate remedy is to strike the duplicated claims. To some extent, when only some of the claims in a Statement of Claim are being struck, that involves amendments to the Statement of Claim (which is also one of the remedies under R. 3.68).

19 Here, the particulars of negligence and breach of trust or breach of fiduciary duty against Mr. Farrell are also particulars of the intentional or negligent infliction of mental suffering on Ms. Donaldson. As such, as against Mr. Farrell, paragraphs 12(a)(i) and 12(a)(ii) are struck. Portions of paragraph 31 (prayer for relief) are also struck against Mr. Farrell, being 31(b) and 31(c).

3. Cause of action

20 Ms. Donaldson alleges that the conduct of Mr. Farrell and Ms. Bibby (and Ms. Rackel and Ms. Telfer) amounted to a negligent or intentional infliction of metal suffering on Ms. Donaldson. She seeks general damages of $500,000, punitive or aggravated/exemplary damages of $500,000 plus interest and costs.

21 Both Mr. Farrell and Ms. Bibby rely on the Supreme Court of Canada decision in ***Mustapha v. Culligan of Canada Ltd.***, 2008 SCC 27, and argue that Ms. Donaldson's claims in relation to her mental suffering cannot succeed.

22 Both Mr. Belzil, on Mr. Farrell's behalf, and Ms. Sadownik on Ms. Bibby's behalf, argue that the infliction of mental suffering claims against their clients do not disclose a cause of action because ***Mustapha*** held that defendants in such claims are entitled (in terms of forseeability) to as-

sume that plaintiffs are of ordinary fortitude. There is no indication here that Ms. Bibby is other than of ordinary fortitude. They argue that none of the allegations in the Statement of Claim relating to the infliction of mental suffering would cause mental suffering to a person of "ordinary fortitude".

23 With respect, the arguments advanced by Mr. Belzil and Ms. Sadownik are arguments that might be made on a summary dismissal application, where the merits or strength of the cause of action can be considered. They are not applicable to arguments that the Statement of Claim discloses no cause of action.

24 The commentary in W.A. Stevenson's and J.E. Côté's *Alberta Civil Procedure Handbook* (Edmonton: 2010, vol.1) at p. 3-100 & 3-101 on Rule 3.68 (3) is appropriate and consistent with the foundational rules:

> "More time and money is wasted over this Rule than any other. There are two reasons for that. The first reason is smaller. Even where there is some small hope of disposing of a suit summarily, it can almost always be done under R. 7.3 and usually more easily. The grounds for the two Rules are very different, but almost any fatal flaw in an opponent's pleading would also give ground for summary judgment under R. 7.3.
>
> The second reason is very large. Rarely is there a fatal flaw which falls within R. 3.68. Therefore, the most common misuse of R. 3.68 is trying to strike out claims which are only probably bad, not certainly bad.
>
> Aside from rare cases of true abuse of process, the only other paragraph of R. 3.68(2) offering any real hope is (b), disclosing no cause of action (if the statement of claim is under attack), or disclosing no ground of defence (if the statement of defence is). Paragraph (c) is not really an independent ground of attack, because it is probably impossible to have any relevant pleading disclosing a cause of action (or defence) which would fit within (c). What is more, even when attacks under (c) or (d) succeed, they usually only remove or amend a short passage in the impugned pleading, and that does little to help the party attacking the pleading.
>
> There are some rare types of abuse of process discussed below, falling under para. (d) of R. 3.68(2). Sometimes a motion to strike out a statement of claim is based on it being frivolous, vexatious, embarrassing or an abuse of process, rather than on absence of cause of action. Nevertheless the plaintiff can still plead anything arguably relevant, and the court should still be cautious and only strike out in a clear case."

25 Additionally, ***Mustapha*** deals with foreseeability and remoteness in relation to psychological injuries. It does not purport to otherwise limit the cause of action for negligent or intentional infliction of mental suffering.

26 ***Mustapha*** was a trial decision, not a motion to strike. There, the Supreme Court found that the plaintiff had failed to prove that it was foreseeable that a person of ordinary fortitude would suffer injury from seeing flies in a bottle of drinking water he was about to instal.

27 Importantly for this case, the Supreme Court noted at paras. 16 and 17:

> **16** To say this is not to marginalize or penalize those particularly vulnerable to mental injury. It is merely to confirm that the law of tort imposes an obligation to compensate for any harm done on the basis of *reasonable* foresight, not as insurance. The law of negligence seeks to impose a result that is fair to both plaintiffs and defendants, and that is socially useful. In this quest, it draws the line for compensability of damage, not at perfection, but at reasonable foreseeability. Once a plaintiff establishes the foreseeability that a mental injury would occur in a person of ordinary fortitude, by contrast, the defendant must take the plaintiff as it finds him for purposes of damage. As stated in *White*, [1998] 3 W.L.R. 1509, at p. 1512, focusing on the person of ordinary fortitude for the purposes of determining foreseeability "is not to be confused with the 'eggshell skull' situation, where as a result of a breach of duty the damage inflicted proves to be more serious than expected". Rather, it is a threshold test for establishing compensability of damages at law.
>
> **17** I add this. In those cases where it is proved that the defendant had actual knowledge of the plaintiff's particular sensibilities, the ordinary fortitude requirement need not be applied strictly. If the evidence demonstrates that the defendant knew that the plaintiff was of less than ordinary fortitude, the plaintiff's injury may have been reasonably foreseeable to the defendant. In this case, however, there was no evidence to support a finding that Culligan knew of Mr. Mustapha's particular sensibilities.

28 I do not see that forseeability is a matter the plaintiff must plead, or put another way, I do not see that the failure to plead forseeability by a plaintiff is fatal to pleading the essential elements of the cause of action of infliction of mental suffering. I leave that for another day and another application. Ordinarily, lack of forseeability or remoteness were matters that were plead by defendants as defences to plaintiffs' claims. Having regard to ***Mustapha***, some plaintiffs may choose to plead forseeability; others may also continue the old practice of waiting to see if the defendant brings it into issue. The latter course may be more appropriate now, having regard to foundational Rule 4-2 relating to the identification of the **real** issues in the dispute. The new rules should not be interpreted as requiring prolix pleadings. The opposite is intended. Get to the issues and get them resolved fairly, but quickly and economically.

29 At this stage of the lawsuit, it is not obvious that all of the allegations in paragraphs 14 and 15 of the Statement of Claim (as regards Mr. Farrell) and paragraphs 11, 18 and 19 (as regards Ms. Bibby) are incapable of causing mental distress or psychological harm to a person of ordinary fortitude. It is also not obvious that Mr. Farrell and Ms. Bibby did not know, or should not have known, about any frailties or sensibilities Ms. Donaldson had which may have made psychological injury foreseeable.

30 The claims in that regard are not bound to fail. I do not see that the new rules have modified or lessened the test for striking out pleadings. As stated at para. 7 in ***Mackay v. Farm Business Consultants Inc.***, 2006 ABCA 316 (quoting from ***Korte v. Deloitte Haskins & Sells***, (1993), 8 Alta. L.R. (3d) 337), "the test for striking pleadings under Rule 129 is not in issue. It is whether it is plain and obvious or beyond reasonable doubt that the claim cannot succeed."

31 That test is consistent with countless other cases on the subject, including the cases cited on Ms. Donaldson's behalf of which ***Odhavji Estate v. Woodhouse***, [2003] 3 S.C.R. 263 is the most prominent.

32 I cannot say that the Statement of Claim fails to disclose causes of action against Mr. Farrell and Ms. Bibby for psychological harm including intentional or negligent infliction of mental suffering. While some of the specific allegations in the various paragraphs of the Statement of Claim may not support the damage claim, I doubt that the Applicants want to go through the exercise mentioned in *Stevenson & Cote*: turning the judge into a free lawyer for the opponent and improving the opponent's pleadings.

33 The Applicants have other remedies available to them such as summary dismissal proceedings if they consider that some of Ms. Donaldson's claims are hopeless. The Applicants' applications to strike the intentional or negligent infliction of mental suffering claims are dismissed.

Road Ahead

34 Mr. McCoy had proposed that the 2009 action be stayed pending the conclusion of the Estate litigation. As noted above, my conclusion on remedies under R. 3.68 is that a stay should be reserved for exceptional cases. There are undoubtedly cases where a stay makes perfect sense. But in other cases, it may simply be putting off the inevitable. Here, having regard to the obvious animosity between the two sides to the dispute, there is merit in requiring the 2009 action to proceed parallel with the Estate litigation. While Ms. Bibby is not a direct party to the Estate litigation, she is clearly interested in the outcome. And while Mr. Gillespie, Ms. Rackel and Ms. Telfer are not parties to the Estate litigation, the results of that litigation will inform the claims against them.

35 The Estate litigation is in case management. It is my view that the 2009 litigation and the lawsuit between Ms. Donaldson and Ms. Telfer should be case managed with the Estate litigation, and should likely be tried with or consecutively to the Estate litigation before the same trial judge, for efficiency, economy and to avoid potentially inconsistent results. I will recommend to the Associate Chief Justice that I be appointed case manager of this lawsuit and the Donaldson v. Telfer lawsuit.

36 If appointed, I will convene a case management conference to develop a litigation plan with the parties to effectively manage these disputes to resolution.

Costs

37 There has been mixed success on the applications. Portions of the Statement of Claim have been struck as against Mr. Farrell. Mr. Farrell and Ms. Bibby have been unsuccessful in having the infliction of mental suffering claims dismissed. Ms. Bibby's participation in the applications did not add significantly to the length or complexity of the proceedings. Costs of this application should therefore be in the cause.

R.A. GRAESSER J.

cp/e/qlcct/qljzg/qlpxm/qljyw

TAB 7

Indexed as:

Murphy v. Kenting Drilling Co. (c.o.b. Kenting Hi-Tower Drilling)

Between
Brendon Murphy, plaintiff, and
Kenting Drilling Co. Ltd., carrying on business under the Firm name and style of Kenting Hi-Tower Drilling and the said Kenting Drilling Co. Ltd., defendants

[1996] A.J. No. 920

190 A.R. 77

3 C.P.C. (4th) 29

65 A.C.W.S. (3d) 399

Action No. 9401 01709

Alberta Court of Queen's Bench
Judicial District of Calgary

Master Waller
(In Chambers)

Judgment: filed August 30, 1996.

(7 pp.)

Practice -- Pleadings -- Striking out pleadings -- Grounds, action prescribed or barred by limitation period -- Limitation of actions -- Actions in contract -- Actions for breach of contract -- Fraudulent concealment, effect of.

This was an application for an order striking a portion of a statement of claim. The plaintiff, Murphy, was injured while working for the defendant, Kenting Drilling. The injury occurred soon after Murphy was hired. Five years later, Murphy sought disability coverage against Kenting's insurer. The insurer refused to make payment on the basis that the coverage did not commence until Murphy had been employed by Kenting for three months. It denied payment on the basis that coverage did

not apply for the first 90 days following the commencement of Murphy's employment. Murphy filed a statement of claim for breach of contract and fraudulent concealment against Kenting nine years after the accident. Murphy alleged that Kenting breached the terms of his employment by failing to provide for insurance against employment-related injuries. Kenting argued that this claim was brought outside the limitation period and that any paragraphs in the statement of claim relating to the accident had to be struck.

HELD: The application was allowed, in part. Only the breach of contract claim was brought outside the limitation period. The fraudulent concealment claim was still valid. However, the paragraphs of the claim containing the breach of contract allegations were not struck out because they were also related to the fraudulent concealment claim.

Counsel:

T.L. Petersen, for the plaintiff.
R.D. Maxwell, for the defendant.

Reasons for Decision

1 MASTER WALLER:-- The defendants seek to strike portions of the plaintiff's statement of claim on the basis that those particular allegations are barred by limitation.

2 The plaintiff was injured on the job on July 12, 1985 shortly after commencing employment with the defendants.

3 In November of 1990 the plaintiff sought disability coverage against Aetna Insurance Company the defendants' group insurer who denied payment on the basis that coverage did not apply until 90 days following the commencement of employment.

4 The plaintiff's statement of claim was issued on February 3, 1994.

5 After the defendants' motion was filed the plaintiff amended his statement of claim in an attempt to counteract the effect of the defendants' application. Setting aside any issue as to the propriety of an ex parte amendment in these circumstances I prefer to deal with the statement of claim as amended.

6 The paragraphs sought to be struck by the defendants are paragraphs 9 and 9A which read as follows:

> 9. The Defendant breached the agreement set out in paragraphs 4 and 5 herein in that it did not ensure that the Plaintiff was covered by disability insurance, effective on the commencement of employment, despite having agreed to provide same, thereby causing the Plaintiff loss and damage. The Defendant knew or ought to have known at all material times that the Plaintiff had no coverage under the Aetna policy with respect to the Plaintiff's loss. The first day the misrepresented breach was discovered, or could have reasonably been discovered was about August 23, 1991. The Defendant also breached its agreement with the

> Plaintiff, in that it did not report the disability claim to Aetna, until requested to do so by the Plaintiff.
>
> 9A. Alternatively, despite the Plaintiff's ongoing disability, the reimbursement for the Plaintiff's lost income was substantially reduced below that contemplated by paragraph 4A herein, and during May or June 1991, the Plaintiff requested that the Defendant ensure continued reimbursement of his ongoing lost wages and other costs, as agreed by the Defendant. Despite this and repeated requests, the Defendant has refused and/or neglected to fully reimburse the Plaintiff for his loss wages and costs contrary to its agreement with the Plaintiff, thereby causing the Plaintiff loss and damages.

7 I have concluded that any cause of action based on simple breach of contract as alleged in paragraphs 9 and 9A is statute barred as the plaintiff's statement of claim was not issued until February 3, 1994. I come to that conclusion after reviewing the plaintiff's amended reply to demand for particulars which clearly establish that alleged contractual breach occurred on July 11, 1985, the day of commencement of the plaintiff's employment. The plaintiff's argument that the breach was a continuing one, extending the limitation period month by month during which disability payments were not made has long been laid to rest in this province by our Court of Appeal. In three decisions Costigan v. Ruzicka, [1984] 6 W.W.R. 1; Fidelity Trust Co. v. 98956 Inv. Co. (Receiver of), 61 Alta. L.R. (2d) 193 and Lubcar Ltd. et al. v. Pembina Resources Ltd., 131 A.R. 79, our Court of Appeal has consistently rejected the concept of extended limitation periods by reason of a continuing or ongoing breach.

8 But this does not end the matter. At the conclusion of the hearing of this matter I posed the question to counsel whether the offending paragraphs should be struck on the basis that such striking might imperil the statement of claim as a whole? Other paragraphs in the statement of claim allege fraudulent concealment which is not a statute barred cause of action and which should go to trial. As the plaintiff was not in a position to address this issue, I afforded an opportunity to counsel to make written submissions.

9 The Court should be loath to strike out a portion of a claim where the matter is to go to trial in any case. In Sentinel Review Co. v. Robinson, [1927] 2 D.L.R. 60 at p. 63 Meredith C.J. C.P. overturned a Master who had struck certain portions of a defence using these words:

> It is manifestly better, when it can be done without prejudice to the interests of either party, that all questions in one action should be considered at one time by one Court, thereby avoiding possible conflict of opinion and certain delay and needless costs
>
> Where a pleading is manifestly bad and is embarrassing, an officer at Chambers, as well as a Judge at Chambers, has power to strike out the pleading, but, it should not be necessary to add, that powers should be exercised only in plain cases. There is always some danger of a pruner cutting off a fruitful bough mistaking it for an unfruitful one.

10 Lamont J. in The Canadian Grain Co. v. Lepo, (1916) 35 W.L.R. 688 at 690 expresses a similar sentiment:

> Where, however, as here, after striking out the paragraphs which may be properly struck out, the plaintiff has to go to trial to prove his entire case, I do not see that any good purpose would be served by striking out any of these paragraphs. I agree with the remarks of Ritchie, J. in Holmes v. Taylor, supra, where he said: "If the cause is to go to trial, it had better go with the defence unmutilated."
>
> This rule was never intended to afford the plaintiff the opportunity of trying the case piecemeal. The object of the rule was to prevent the delay and expense of an unreal defence. I do not wish to be understood as holding that under no circumstances should a portion of a defence be struck out, but, generally speaking, but little will be gained by striking out an individual paragraph where the plaintiff has to go to Court to prove his case. If he has material sufficient to justify a Court in striking out the paragraph it will usually be found sufficient to establish his allegation at the trial. At any rate, the rules relating to admissions of facts for use at the trial afford the plaintiff ample protection.

11 In essence I must be satisfied that striking the offending paragraphs in no way imperils the statement of claim as a whole.

12 The plaintiff makes two specific claims. First he says that he has been denied his contractual right to claim for his disability benefits from Aetna which the defendants warranted he would be entitled to do as a term of his employment. Secondly, he says if the defendants did not have the insurance in place as they agreed they were in breach of their agreement to ensure the he received the equivalent of those benefits from them. Only paragraphs 9 and 9A contain allegations of the alleged contractual breach. No where else in the statement of claim does the averment of a breach occur. While it is true that paragraphs 4 and 5 set out the terms of the contract it is difficult for me to see how the statement of claim would not be emasculated if I were to remove paragraphs 9 and 9A. The contractual breach must be pleaded in the context of the fraudulent concealment claim. I recognize that the result may appear anomalous but I have concluded that the inclusion of the impugned paragraphs will not prejudice the defendants given these written reasons. Any issues of relevance at discovery can easily be determined by reference to the reasons.

13 Accordingly, I refuse to strike paragraphs 9 and 9A of the statement of claim, notwithstanding that the cause of action contained in these paragraphs is statute barred.

MASTER WALLER

qp/s/mii/mjb/DRS/DRS/DRS/DRS