CITATION: Ovari v. Brant Community Healthcare System, 2023 ONSC 6933
COURT FILE NO.: CV-2200000237-0000
DATE: 20231208

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Tomas Ovari, Plaintiff

AND:

Brant Community Healthcare System/Brantford General Hospital, Dr. David McNeil/President & CEO, Penmarvian Retirement Home, Grand River Estates Retirement Home and LHIN/Home and Community Care Support Services, Defendants

BEFORE: Justice David A. Broad

COUNSEL: Plaintiff, self-represented

Counsel - Matthew Umbrio, for the Defendants Brant Community Healthcare System. (Incorrectly styled as "Brant Community Health Care System/Brantford General Hospital), Dr. David McNeil/President & CEO, and the Hamilton Niagara Haldimand Brant Local Health Integration Network, operating as Home and Community Care Support Services Hamilton Niagara Haldimand Brant (incorrectly styled as "LHIN/Home and Community Care Support Services")

HEARD: IN CHAMBERS

ENDORSEMENT

The Action

[1] The plaintiff Tomas Ovari commenced this action by Statement of Claim issued October 31, 2022. The action arises out of the care and treatment that the plaintiff's mother Ms. Ovari ("Ms. Ovari") received while she was a resident at Penmarvian Retirement Home and admitted to the Brantford General Hospital for various periods of time from 2016 until her death in September 2020.

[2] The Statement of Claim claims against all of the named defendants without distinction damages in the amount of $10,000,000 for:

(a) Mental and emotional distress;

(b) Negligence and incompetence;

(c) Kidnapping for profit;

(d) Murder;

(e) Violation of the Canadian Charter.

[3] The Statement of Claim also claims aggravated, exemplary and punitive damages, prejudgement interest and costs on a solicitor and client basis.

The Motion

[4] The defendants Brant Community Healthcare System, Dr. David McNeil, and the Hamilton Niagara Haldimand Brant Local Health Integration Network, operating as Home and Community Care Support Services Hamilton Niagara Haldimand Brant (collectively the "Hospital Defendants") have brought a motion for the following relief:

(a) striking, staying or dismissing the plaintiff's claim against them on the basis that it discloses no reasonable cause of action pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*;

(b) or in the alternative striking out portions of the plaintiff's claim against them, without leave to amend, on the basis that the claim is scandalous, frivolous or vexatious pursuant to Rule 25.11(b) or, in the alternative is an abuse of process pursuant to Rule 25.11(c).

[5] The Notice of Motion was stated to be returnable at the Courthouse 70 Wellington Street, Brantford, Ontario on August 30, 2023 at 10 AM as a holding date.

[6] Plaintiff was served with the following materials on the following dates:

(a) Motion Record on July 21, 2023;

(b) Hospital Defendants' Factum on August 18, 2023; and

(c) Hospital Defendants' Book of Authorities on August 21, 2023

[7] Copies of the foregoing materials were served on the plaintiff by email in accordance with Rule 16.01(4)(b)(iv) which provides as follows:

> Any document that is not required to be served personally or by an alternative to personal service, may be served on a party acting in person or on a person who is not a party, by e-mailing a copy to the last e-mail address for service provided by the party or other person or, if no such e-mail address has been provided, to the party's or person's last known e-mail address in accordance with subrule 16.06.1(1), but, where service is made under this subclause between 4 p.m. and midnight, it is deemed to have been made on the following day.

[8] The plaintiff did not respond to service of the Motion Record on him within the time prescribed by the Rules of Civil Procedure or at all, and accordingly, the motion has come before me for determination on an uncontested basis.

Motion to strike out the Statement of Claim as disclosing no reasonable cause of action under Rule 21.01(b)

(a) Guiding Principles

[9] Rule 21.01(b) provides that a party may move to strike out a pleading on the ground that it discloses no reasonable cause of action or defence.

[10] Pursuant to rule 21.01(2) no evidence is admissible on a motion under rule 21.01(1)(b).

[11] Although no evidence is admissible on a motion under rule 21.01(1)(b), the judge hearing the motion is entitled to consider the documents specifically referred to and relied on in the pleading sought to be struck. These documents are not "evidence" precluded by rule 21.01(1)(b) but are, in effect, incorporated into the pleading (see *Web Offset Publications Ltd. v. Vickery*, [1999] O.J. No. 2760 (Ont. C.A.) (C.A.) at para. 3 and *Rowland v. Stephan* 2017 ONSC 7276at para. 19).

[12] The Court of Appeal summarized the applicable principles on a rule 21.01(1)(b) motion in the case of *McCreight v. Canada (Attorney–General)* 2013 ONCA 483 at paras. 39–40, as follows:

a) the claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action;

b) there is a need, in the interest of efficiency and correct results, to weed out hopeless claims - a housekeeping dimension which underlies rule 21;

c) if the cause of action pleaded has been recognized, all of its essential elements must be pleaded;

d) if the cause of action has not been recognized, this is not necessarily fatal but there must be a reasonable prospect that the claim will succeed;

e) a claim should not be struck merely because it is novel;

f) the facts pleaded are accepted as being true for the purposes of the motion, unless they are manifestly incapable of being proven;

g) the pleading forms the basis of the motion, and accordingly, possible future facts that have not been pleaded may not supplement the pleading;

h) the pleading must be read generously in favour of the plaintiff, with allowances for drafting deficiencies; and

i) a motion to strike should not be confused with a summary judgment motion which has a different test, a different purpose, and different rules relating to evidence.

[13] The jurisprudence has stressed that the threshold for sustaining a pleading is not high. A "germ or scintilla" of a cause of action will be sufficient (see *O'Farrell v. Attorney General of Canada* 2016 ONSC 6342at para. 33, citing *1597203 Ontario Ltd. v. Ontario*, [2007] O.J. No. 2349 (Ont. S.C.J.) (S.C.J.)).

[14] In the case of *Dalex v. Schwartz Levitsky & Feldman*, (1994) 19 O.R. (3d) 463, (Ont. Ct. Gen Div.) Epstein, J. (as she then was) offered the following important observation respecting the narrow scope of a successful motion to strike a pleading under rule 21.01(1)(b):

> . . . although the court has inherent jurisdiction to strike out a pleading as disclosing no legally tenable position, such power should be exercised sparingly and only when there is no doubt that no cause of action or defence exists. In order to foreclose the consideration of an issue past the pleadings stage, the moving party must show that there is an existing bar in the form of a decided case directly on point from the same jurisdiction demonstrating that the very issue has been squarely dealt with and rejected by our courts. Only by restricting successful attacks of this nature to the narrowest of cases can the common law have a full opportunity to be refined or extended (see: *Krouse v. Chrysler Canada Ltd.*, [1970] 3 O.R. 135 (H.C.)).

(b) Preliminary Issue respecting fresh step by delivery of a Statement of Defence

[15] Rule 2.02(b) provides that a motion to attack an irregularity shall not be made, except with leave of the court, if the moving party has taken any further step in the proceeding after obtaining knowledge of the regularity.

[16] The Statement of Claim was issued on October 31, 2022. The Hospital Defendants served their Statement of Defence and Crossclaim on December 6, 2022 and served an amended Statement of Defence and Crossclaim on December 15, 2022.

[17] The defendants Penmarvian Retirement Home ("Penmarvian") and Grand River Estate Retirement Home served their Statement of Defence and Crossclaim on December 16, 2022.

[18] In *Bell v. Booth Centennial Healthcare Linen Services*, [2006] O.J. No. 4646 (Ont. S.C.J.) (S.C.J.) Brown J. (as he then was) noted at para. 6 that the time for bringing a motion under Rule 21.01(1)(b) is before the defendant pleads over, as the filing of a statement of defence signifies that the claim contains recognizable causes of action to which the defendant can respond (see also *Canadian National Railway v. Holmes*, 2014 ONSC 6390 (Ont. S.C.J.), leave refused, 2014 ONSC 6390 (Div. Ct.), at para. 28).

[19] However, recent caselaw has modified the seemingly rigid approach suggested in *Bell*, by adopting a more contextual approach to the issues of whether delivery of the statement of

defence may bar a motion to strike a claim as disclosing no reasonable cause of action and whether delay will bar such a motion.

[20] In the case of *Potis Holdings Ltd. v. The Law Society of Upper Canada*, 2019 ONCA 618 (Ont. C.A.) the plaintiff/appellant, relying on *Bell*, argued that the practice of bringing a motion to strike after delivering a defence should be discouraged and that the motions judge erred in hearing the defendant's motion to strike as it has not applied for leave to bring the motion after having filed its defence.

[21] Jamal, J.A., writing for the panel, disagreed with these submissions, observing as follows at para. 14:

> While generally a defendant should move to strike a claim as disclosing no reasonable cause of action before filing a statement of defence, in some instances a defendant may bring such a motion without leave even after delivering a defence. One such instance is where it is obvious from the defendant's pleading that the defendant takes issue with the sufficiency of the plaintiff's claim: *Arsenijevich v. Ontario (Provincial Police*), 2019 ONCA 150 (Ont. C.A.) , at para. 7.

[22] In the recent case of *Dosen v. Meloche Monnex Financial Services Inc. (Security National Insurance Company)*, 2021 ONCA 141 (Ont. C.A.) the Court of Appeal applied a contextual analysis to the question of whether the moving parties' delay barred the bringing of the motion to strike. Coroza, J.A., writing for the panel, stated at paras. 71-72:

> Case law is clear that delay in bringing a motion under r. 21.01, including r. 21.01(3)(d), can be a sufficient ground to dismiss the motion. In *Fleet Street Financial Corp. v. Levinson*, [2003] O.T.C. 94 (S.C.), Rouleau J. (as he then was), stated, at para. 16:
>
> > The obligation to act promptly is clear and the failure to bring a rule 21.01 motion promptly can, in the appropriate circumstances, be the basis for the judge exercising his discretion pursuant to rule 21.01 not to grant the relief sought.

What constitutes "appropriate circumstances" to dismiss a r. 21.01 motion for delay partly depends on what effect the motion will have on trial efficiency.

[23] Although the Hospital Defendants' Statement of Defence did not expressly state the position that the plaintiff's claim did not disclose a reasonable cause of action against them, I am satisfied that it is obvious from the Hospital Defendants' pleading that they did take issue with the sufficiency of the plaintiffs' claim.

[24] The motion to strike will not interfere with trial efficiency. The action is still at the pleadings stage. It appears that documentary discovery has not been completed and there have been no examinations for discovery scheduled or conducted. Case Management has not been ordered and the action is far from being ready to be set down for trial.

[25] I therefore find that it is appropriate for the Court to hear the defendants' motion to strike the Statement of Claim pursuant to rule 21.01 on its merits.

(c) Allegations in the Statement of Claim

[26] The Statement of Claim is rambling, contains inflammatory statements, does not restrict itself to pleading facts but pleads evidence, and is replete with irrelevant assertions of opinion.

[27] To assist with understanding the context within which the plaintiff has advanced his claim, the following observations are helpful:

(a) Brant Community Healthcare System (the "Hospital") is a public hospital operating in the Province of Ontario pursuant to the *Public Hospitals Act*, RSO 1990, c. P. 40.

(b) David McNeil was, at all material times, the Hospital's CEO and President;

(c) the Hamilton Niagara Haldimand Brant Local Health Integration Network (the "LIHN") operates pursuant to the provisions of the *Local Health System Integration Act, 2006*, S.O. 2006, c. 4 and the *Connecting Care Act, 2019*, S.O. 2019, c. 5;

(d) Ms. Ovari resided at Penmarvian Retirement Home since October 2016, following an admission to hospital. Ms. Ovari received case management, placement, and other services from the LHIN commencing in October 2016;

(e) in February 2020, Ms. Ovari attended at the Hospital's emergency department and was diagnosed with a subdural hematoma following an unwitnessed fall at Penmarvian. She was admitted to the Hospital's stroke unit;

(f) in April 2020 Ms. Ovari returned to Penmarvian where she experienced multiple falls and exhibited signs of further deterioration. She was readmitted to Hospital shortly thereafter;

(g) The Hospital and the LHIN had discussions on several occasions with the plaintiff respecting Ms. Ovari's potential discharge from the hospital to the place where the plaintiff was living;

(h) Ms. Ovari was admitted to acute care at the Hospital in August 2020 and ultimately passed away on September 7, 2020.

[28] In their Factum the Moving Parties summarized what appeared to be the key material facts alleged by the plaintiff in his Statement of Claim as follows. I find this summary of the alleged material facts derived from the Statement of Claim to be fair and balanced:

(i) In 2016, there was a meeting at the Hospital where the Plaintiff was told by various members of the Hospital and the HNHB LHIN that Ms. Ovari would be forced into Penmarvian. The Plaintiff alleges Penmarvian had serious issues caring for its residents (para 8);

(ii) Ms. Ovari was secretly sent to the Hospital by the staff at Penmarvian for a fall she suffered. The Plaintiff alleges he was lied to about this fall (para 9);

(iii) The Plaintiff argued for the release of Ms. Ovari and was granted this release,

only for a nurse to cancel the mutually agreed-to release at the last minute (para 10);

(iv) Ms. Ovari was kidnapped and held for no justifiable medical reason, illegally, and solely for a profit (paras 11-14);

(v) Ms. Ovari was murdered by the Hospital's carelessness (para 15);

(vi) Ms. Ovari contracted either COVID or she aspirated food which resulted in an infection (para 19);

(vi) Ms. Ovari was not released as the Hospital required OHIP revenue to justify the amount of staff they had (para 20, 26);

(vii) the staff at the Hospital did not watch Ms. Ovari as there was no medical reason for her to be hospitalized. The Hospital's only concern was the billable OHIP revenue for the Hospital;

(viii) as against the LHIN the plaintiff alleged that it, along with Penmarvian, resisted Ms. Ovari's discharge from the retirement home prior to her admissions to the Hospital.

(d) Claims against David McNeil

[29] It is noted that the Statement of Claim does not include any specific claims related to the negligence of the LHIN, nor any specific allegations or material facts relating to the conduct of Mr. McNeil. The plaintiff does not allege that Mr. McNeil was involved at any time with Ms. Ovari's care, nor that he had any dealings, interactions, or communications with the plaintiff.

[30] The Court of Appeal in the case of *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.* [1995] O.J. No. 3556 (C.A.) observed at para. 25 that cases in which employees and

officers of corporations have been found personally liable for actions ostensibly carried out under a corporate name are rare in the absence of findings of fraud, deceit, dishonesty or want of authority on the part of the employees or officer sought to be implicated.

[31] The Court stated that those cases in which the corporate veil has been pierced usually involve transactions where the use of the corporate structure was a sham from the outset or was an afterthought to a deal which had gone sour or where the employees or officers were privy to the tort of inducing breach of contract between the company and the plaintiff and the facts giving rise to personal liability were specifically pleaded. Additionally, there have been attempts by injured parties to attach liability to the principals of failed businesses through insolvency litigation.

[32] Absent allegations which fit within these categories, officers or employees of corporations are protected from personal liability unless it can be shown that their actions are themselves tortious or exhibit a separate identity or interest from that of the company, so as to make the act or conduct complained of their own.

[33] In the case of *Immocreek Corp. v. Pretiosa Enterprises Ltd.*, [2000] O.J. No. 1405 (C.A.) the Court of Appeal made it clear at para. 35 that if a party wants to seek damages for personal liability in a case where its *prima facie* relationship is with a corporation, the party must plead clearly the basis for such relief. The pleadings must address specifically the cause of action asserted against the personal defendant and why he or she is being sued separately from the corporation.

[34] The Statement of Claim in the case at bar does not comply with the requirements identified in *Immocreek*. Specifically, the Claim fails to:

(a) plead specific facts giving rise to any cause of action against Mr. McNeil;

(b) set out the basis for suing Mr. McNeil separately from the Hospital;

(c) plead any basis for claiming personal liability, or piercing the corporate veil;

(d) allege that Mr. NcNeil was acting outside the scope of his employment or authority;

(e) claim that Mr. McNeil was acting for his personal gain or benefit or for any interest other than that of the Hospital; and

(f) allege fraud, deceit, dishonesty or want of authority on the part of Mr. McNeil.

[35] I find that the Statement of Claim fails to raise any reasonable cause of action against Mr. McNeil and that it is plain and obvious that the claim cannot succeed against him and must be struck.

(e) Claims against the Hospital and the LHIN

[36] As against the Hospital and the LHIN the Statement of Claim advances claims for negligence, murder and "kidnapping for profit."

[37] In the case of *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 the Supreme Court of Canada confirmed that a successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.

[38] The plaintiff has not pleaded in the Statement of Claim that the Hospital Defendants owed him a duty of care. Nor has he pleaded that he has experienced legally compensable damages or injuries, or that a departure from the required standard of care by the hospital defendants caused him any damages. No particulars about the nature and degree of damages for which the plaintiff is seeking compensation are pled.

[39] Importantly, the plaintiff's claim is for damages which are personal to him resulting from Ms. Ovari's treatment and death. He does not act on behalf of Ms. Ovari's estate, nor has he brought a claim as a plaintiff under Part V of the *Family Law Act*, R.S.O. 1990, c, F.3.

[40] It is clear from the jurisprudence that a healthcare professional does not owe a duty of care to a non-patient third party, including a close family member or substitute decision-maker, as the recognition of such a duty would have the potential to put the professional in a conflict of interest because the wishes of a close family member or substitute

decision-maker may not align with the healthcare professional's medical opinion of what is in the patient's best interests (see *Wawrzniak v. Livingstone,* 2019 ONSC 4900 at paras. 370-371 and *Alafi v. Linderbach,* 2022 ONSC 1435 at paras. 60-63 and 73.

[41] I find that on the basis of the facts pled in the Statement of Claim the Hospital Defendants did not owe the plaintiff a duty of care in his personal capacity and accordingly, the claim in negligence must fail.

[42] I agree with the submission of the Hospital Defendants in their Factum that murder and "kidnapping for profit" are not recognized torts in Ontario. Sections 279 and 235 of the *Criminal Code of Canada*, cited by the plaintiff in the Statement of Claim, have no application. These claims must also fail.

[43] The plaintiff makes reference to the *Charter of Rights and Freedoms* in the Statement of Claim, in particular to mobility rights and the right under section 9 not to be arbitrarily detained or imprisoned. It is clear from the context that the plaintiff complains of the alleged restriction placed by the Hospital Defendants on Ms. Ovari's freedom to exercise a choice to leave the hospital when she wanted to.

[44] Quite apart from whether the Hospital Defendants may be the subject of a claim alleging a breach of section 9, section 24(1) of the *Charter* provides that standing to advance such a claim is limited to persons whose private rights were at stake or who were specifically affected by the issue. As noted, the plaintiff does not act on behalf of Ms. Ovari's estate. There is no question that the principles applying to public interest standing have any application. I therefore find that the plaintiff has no standing to advance a *Charter* claim. The claim under the *Charter* must also fail

Alternative Claims in the Notice of Motion.

[45] In light of my findings set forth above that the Statement of Claim discloses no reasonable cause of action and must be struck, it is not necessary to address the alternative claims in the Notice of Motion that the claim is frivolous or vexatious or is otherwise an abuse of the process of the court, nor the alternative claim advanced in the

Hospital Defendants' Factum that the plaintiff's claim is barred by operation of the *Limitations Act, 2002,* S.O. 2002 c. 24; Schedule "B."

Should the Plaintiff be granted leave to amend the Statement of Claim?

[46] The Hospital Defendants have submitted that the Statement of Claim should be struck out without leave to amend.

[47] The principles and considerations applicable to the question of whether leave to amend a pleading found to be defective were very usefully reviewed by Epstein, J. (as she then was) in the case of *Aristocrat Restaurants Ltd. v. Ontario,* [2003] O.J. No. 5331 (Ont. S.C.J.) at paras. 80-86. The following principles may be drawn from this case:

(a) The approach that amendments should be presumptively approved unless they would occasion prejudice that cannot be compensated by costs or an adjournment, they are shown to be scandalous, frivolous, vexatious, or an abuse of the Courts process, or they disclose no reasonable cause of action, is relevant to the issue of whether, on a motion to strike a pleading, a court should exercise its discretion to grant leave to amend;

(b) leave to amend should properly be given where a pleading can be put right or improved by amendment and no injustice is done thereby;

(c) leave to amend should only be refused in the clearest of cases;

(d) depending on the circumstances of the case, striking out a pleading without granting leave to amend often does little to advance the ends of justice;

(e) in disposing of a motion to strike when a recognized cause of action has been improperly pleaded, but can be put right without non-compensable prejudice to the defendants, the preferred route is to afford the plaintiff the opportunity, upon appropriate terms, to plead the cause properly within the action before the court; and

(f) the foregoing approach makes practical sense and is in keeping with the objectives set out in rule 1.04, namely that the rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[48] I am not satisfied that the plaintiff's pleading can be put right or improved by amendment. As noted previously, there is a need, in the interest of efficiency and correct results, to weed out hopeless claims. The claim in the case is such a claim.

Disposition

[49] It is ordered that the Statement of Claim shall be struck out without leave to amend. Order signed as per draft submitted, including costs in the sum of $7,500.00 as set forth below.

Costs

[50] The Hospital Defendants claim costs against the plaintiff and have filed a Costs Outline setting forth a claim for partial indemnity costs in the sum of $14,336,92, comprised of fees of $10,565.40, fee for preparation of Bill of Costs in the sum of $455.10, HST on legal fees of $1,432.67 and disbursements of $1,883.75.

[51] The Costs Outline includes partial indemnity fees of $1,872 for discovery when it is not evident that documentary or oral discovery has been carried out. It also claims 32 hours of lawyer's time in reference to preparation of the motion materials which appears disproportionate. Moreover, the claim for disbursements includes items which are not assessable such as for faxes, telephone, CD/USB production, and travel.

[52] Applying the principles of reasonableness and proportionality, I order that the plaintiff pay costs to the Hospital Defendants fixed on a partial indemnity basis of $7,500.00 all inclusive.

D.A. Broad, J.

Date: December 08, 2023