CITATION: Mohammad v. Springer Nature, 2024 ONSC 3338
COURT FILE NO.: CV-23-00692955-0000
DATE: 20240610

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: AHMAD MOHAMMAD, Plaintiff

AND:

SPRINGER NATURE, Defendant

BEFORE: Akazaki J.

COUNSEL: Ahmad Mohammad, Self-Represented

Eric Leinveer and Z. William Totzke, for the Defendant

HEARD: May 31, 2024

ENDORSEMENT

INTRODUCTION

[1] This is a motion under rule 21 to strike out the statement of claim, without leave to amend, on the basis that it discloses no reasonable cause of action.

[2] The plaintiff is a researcher and was a Ph.D. candidate at McMaster University, which the plaintiff submitted was "not very high university." I say this, not because of any validity to the submission, but rather to illustrate the plaintiff's (a) certainty of his opinion and (b) lack of a social filter. He filed a letter from his physician stating that he required accommodation for his Asperger's Syndrome. I am grateful to the plaintiff and to his doctor for this doctor's note. It helped me to understand the statement of claim in full context.

[3] The statement of claim seeks a court order requiring the defendant, a leading academic journal, to retract a 1997 paper called "Sound Alters Visual Motion Perception," by Robert Sekuler, Allison B. Sekular, and Rene Lau. The researchers reportedly recorded the perceptions of human subjects observing the movements of targets while listening to 2.5 ms clicks with sound pressure of 75 dB. What I read and could understand of it was very interesting and well written. The plaintiff's objection to it is that he was unable to replicate the experimental data. After he asked for the data from one of the co-authors, who happened to be the external reviewer for his doctoral thesis, she promised to retrieve them but ultimately failed to deliver. He made a similar request from the defendant publisher, but it, too, was unresponsive.

[4] The plaintiff formed the opinion that the paper was founded on fraudulent research. If the action proceeded to trial, he referred to others in this field available to corroborate that opinion. As a result of having read the paper, he was upset by the thought that the defendant could publish it without proper due diligence. During the hearing, he accepted that the defendant is not in the business of verifying authors' experiments by performing its own. He knew that academic journals rely on peer reviewers to critique manuscripts. The plaintiff also heard from a mentor that more than 60% of academic publishing, including leading journals, is based on faulty peer review and is therefore fraudulent. That is a bold and dubious assertion, but it is immaterial to the issues raised in the statement of claim. It concerns only one paper and not some indeterminate bulk of scientific publishing.

[5] As a result of the defendant's publication of the paper, a great sense of injustice welled up in him. He described in the statement of claim that he was "extremely annoyed" by the fact that this paper has been cited 780 times in the academic literature. (I suppose if one faulty paper informs many others, the successive number of faulty papers over time could increase logarithmically. Perhaps that is what the plaintiff's mentor had meant by the proliferation of fraudulent research.) In the draft amended statement of claim, which I allowed the plaintiff to submit to provide a glimpse of any amendment, he described how he suffered a "mental tort." He also took umbrage at the fact that the researchers obtained public funding for the research, despite their alleged violation of the federal Tri-Agency Framework for Responsible Conduct of Research.

[6] The defendant correctly pointed out that the alleged violation of that federal government policy was immaterial to a cause of action, not only because an individual researcher has no standing to sue for another researcher's breach of the policy, but also because the specific policy post-dated the article. I can take judicial notice from the federal government website that the Canadian Panel on Research Ethics published the first iteration of the policy in 1998, the year after the article's publication. For the sake of argument, however, I will construe the basis of the plaintiff's claim that it refers to his upset that the researchers obtained some form of public funding for the research, even if the Tri-Agency Framework did not apply.

[7] The plaintiff also filed an affidavit, which I am not permitted to admit under subrule 21.01(2). However, I allowed it in the same manner as the draft amendment, as a supplement to the factum and an interpretive aid. Factums are required under rule 21.03. In the affidavit, he disclosed the fact that his accusation of scientific fraud led to conflict between him and the external reviewer and then with his thesis supervisor. The conflict led to his expulsion from the McMaster Ph.D. program.

[8] In *Mohammad v. Spring Nature*, 2023 ONSC 2197, Papageorgiou J. declined to dismiss the case under rule 2.1 because the claim was not "frivolous, vexatious, or an abuse of process." However, at paras. 21-27 of her decision, she was unable to find any case law covering the plaintiff's complaint and opined that this action was a candidate for a rule 21 review. The plaintiff's submissions in the rule 2.1 process were not before me. However, with the aid of the plaintiff's written materials on the rule 21 motion, including his doctor's note, the court was able to gain a fuller appreciation of the basis of the claim. For the

reasons below, I share my colleague's conclusion that the action is not frivolous, vexatious, or abusive. Further, I was able to conclude that the action has no chance of success because it does not disclose a complaint with respect to which the law provides a remedy.

TEST ON RULE 21 MOTION AND DELAY

[9] I accept all the plaintiff's allegations as proven or capable of proof except where they strain credulity, in accordance with the well-established principles applicable to rule 21 pleadings motions. The defendant must show it is plain and obvious that the plaintiff could not succeed at trial. Novelty of cause of action will not defeat the plaintiff. See *SP v Hollister*, 2024 ONSC 2414, at para. 4; *Burnac Produce Limited v. Hugh Bowman*, 2024 ONSC 1817, at para. 5. If the statement of claim discloses no recognized cause of action, the defendant may move for an order striking it out. If the pleading can be saved by amendment, such as inclusion of a missing element, the court must permit leave to amend. However, if the substance of the claim is clear and it cannot be saved by amending it, the principle of finality requires that the pleading be struck out without leave to amend.

[10] In addition to the plaintiff's explanations for his claim, both in writing and orally during the hearing, he argued that rule 21.02 required the moving party to proceed promptly. Delay "may be taken into account by the court in awarding costs." In *Fleet Street Financial Corp. v. Levinson*, 2003 CanLII 21878 (ON SC), at para 17, Rouleau J. (as he then was), with the aid of the equally applicable French version, interpreted the rule as not limiting the sanction for delay to costs. Delay could be a bar to the motion, but not if the issue is the defectiveness of the whole action: *Fleet Street*, at para. 18. That reasoning makes eminent sense. A defendant should not be allowed to pick at parts of a pleading after the proceeding has overcome various interlocutory hurdles, only to have the proceeding go ahead on the remainder. Surgical strikes should be performed at the outset. Otherwise, trial judges can readily separate the meritorious pleadings from the doubtful ones. However, there is no benefit to the parties or to the administration of justice if, at any stage, the claim cannot stand on any of the points advanced and a trial would be a waste of time.

[11] In addition to the fact the defendant seeks dismissal of the entire action, I find no delay on its part. The statement of claim issued on January 13, 2023. The rule 2.1 decision came out within the ordinary delay of the court for review of a pleading pursuant to that rule. Papageorgiou J. released her decision on April 6, 2023. The defendant brought the rule 21 motion on May 9, 2023. The ensuing delay to trial reflected the court's institutional motions backlog.

[12] Finally, the plaintiff did not obtain and file the medical report until at least late April 2024. That report was instructive in establishing that the plaintiff's claim based on being "annoyed" was more than a frivolous claim. In a statement of claim prepared by a skillful lawyer, the pleading would have made at least a reference to the plaintiff's condition and made that annoyance more significant from a legal perspective. Absent that report, I would have shared my colleague's bewilderment after reviewing the text of the statement of claim and would not have gained a full appreciation of the claim.

[13] Therefore, there was no delay in bringing the motion, and none that could have been perceived by the plaintiff disqualified the defendant. Accordingly, the motion is not barred by rule 21.02.

IS THE PLAINTIFF'S COMPLAINT A CAUSE OF ACTION?

What Academic Controversies Are Justiciable?

[14] As I stated earlier, I was fascinated by the topic exposed in the article. However, I profess no deep understanding of what I read. Perhaps, one day, the subject matter, the sensory elements of advanced neuroscience, could inform the evidence in a murder trial where the defence casts doubt on eyewitness evidence because of the influence of surrounding noise. Or the sound of oncoming emergency vehicles might alter driver perception of highway traffic, in a manner affecting the outcome of a civil action arising from a motor vehicle accident. Scientific debates, subject to the Supreme Court of Canada's cautions regarding the trial court's gatekeeper role, do inform the work of this court: *R. v. J.-L.J.*, [2000] 2 SCR 600, at para 33. However, resolving such debates for their own sake is not part of its work.

[15] Absent justiciable issues regarding the actual legal rights or liabilities of parties, it is not the role of a Superior Court, in Ontario or in any other common-law jurisdiction, to decide academic controversies. It is not so much there are not judges on this court who might be able to adjudicate. Rather, whatever such a judge says, the result will not matter except to parties to an actual legal dispute. It certainly would not matter to the readers of Springer Nature.

[16] That is not to say that scientific fraud, as the the *Lancet*'s 1998 publication of a paper linking the measles, mumps and rubella (MMR) vaccine and autism, cannot have legal consequences to affected parties. When a respected medical journal's failed peer review exposes patients to harm and communities to epidemics, legal consequences can follow. A retraction, such as the one made by the *Lancet* and as requested by the plaintiff here, might mitigate liability. But in the absence of a role in deciding a real legal dispute involving a true victim of the wrongful publication, the plaintiff's complaint against the defendant's publication of the article is flawed due to mootness, as stated by Sopinka J. in *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342, at 344:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.

[17] On its face, the statement of claim does not disclose a legal consequence to the plaintiff beyond being annoyed. His professed discovery of the failings of the defendant's article made him impervious to reliance on it or to any consequence of such reliance. His

academic pique is no more actionable than is the upset to thousands of immunologists by the harm to their patients and to populations resulting from the *Lancet* article. If the plaintiff is right and the publication has damaged the integrity and reputation of the defendant, the defendant is a victim, not the plaintiff. He lacks standing to bring a personal action because of his legal status as a bystander: *Campisi v. Ontario (Attorney General)*, 2018 ONCA 869, at para. 4, leave to the SCC dismissed 2019 CanLII 55714.

[18] I need not consider whether the plaintiff could have been a taxpayer in 1997. There is no cause of action by an individual taxpayer for another's misuse of public grant money.

[19] I therefore conclude that neither the plaintiff's annoyance nor his status as a taxpayer in the researchers' abuse of public grants, on the face of the pleading and as explained in other documents from the plaintiff, discloses a reasonable cause of action for which the court has jurisdiction to decide.

THE MENTAL TORT CLAIM

[20] The only issue which drew my attention as requiring further analysis was his explanation that he suffered harm from a "mental tort." That phrase appears in the draft amendment, and therefore I assume it would be in an amendment if I were to grant leave to amend. I accept that a person with the plaintiff's condition annoyance can lead to serious consequences, at least subjectively. I do not offer this comment because there was any evidence admissible on the motion, but rather in an effort to understand the pleadings in the most generous way: *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 SCR 45, at para 21. The plaintiff stated at the hearing that the claim should not be struck because it discloses a cause of action, although amendment might be helpful.

[21] I will accept as true, or capable of proof at trial, that an individual with the plaintiff's condition can react to intellectual or academic injustice in a different manner than persons who do not have Asperger's. As elaborated below, that condition appears to be a material fact in the plaintiff's draft amended statement of claim, in which he described the "mental tort" and his expulsion from McMaster "for nothing but having a sharp scientific mind." Indeed, the ability to see injustices that ordinary people fail to see can be a great burden. Exposure to a thought can bear consequences as much as physical slights. But can such consequences support a civil action?

[22] This is not the first occasion the courts of Ontario have considered claims based on what they have seen or have been forced to think about, rather than some physical or psychological injury inflicted on them some other way. In the case of the latter type of harm, the line between what the law recognizes and does not recognize as actionable can be difficult for the lay person to make out.

[23] I will first rule out the "mental tort" being a claim for intentional infliction of mental suffering. This is a cause of action formerly known as infliction of nervous shock, which historically required a physical element. Recognition of mental harm has relaxed that requirement, but not the necessity for psychological harm. The elements of that tort are

(1) flagrant or outrageous conduct, (2) calculation to cause harm, and (3) visible and provable illness. The first two elements are objective, and the third is subjective: *Colistro v. Tbaytel*, 2019 ONCA 197, at paras. 14-15. Nothing in the statement of claim or other interpretive material disclose any of these elements. As noted below in relation to the negligence analysis, any idea that the defendant calculated to harm the plaintiff when it published the article in 1997 would be patently absurd. The combination of the three elements also generally entails conduct near or targeted at the affected person: *Halsbury's Laws of Canada: Torts* (Toronto, LexisNexis, 2020), pp. 226-28.

[24] I therefore turn to the other possible tort for mental harm: negligence. A manufacturer of a consumable good owes a duty of care to the consumer. *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] AC 562 (H.L.) is considered the seminal case in the law of negligence and arose from illness caused after the plaintiff drank from a bottle containing a decomposed snail. Canada's own dead-animal-in-a-bottle case resulted in theoretical acceptance of such a case leading to liability for psychological damages on the basis of seeing the dead animal without consuming the drink: *Mustapha v. Culligan of Canada Ltd*., [2008] 2 SCR 114, at para. 6.

[25] In *Mustapha*, the plaintiff saw a dead fly in a bottle of spring water. He began to think about what he had saw and became obsessed with it to the point of developing a psychological disorder. The Supreme Court of Canada assumed the bottler had breached the standard of care, in that bottled water is marketed as pure and should not contain dead insects. The Court also refused to disturb the findings at trial that the plaintiff sustained damages in the form of psychiatric illness. The claim ultimately failed because the plaintiff's injury was too remote from the breach to have been a reasonably foreseeable consequence.

[26] In this case, assuming the statement of claim and the commentary in the plaintiff's affidavit, factum, and medical report are all true or capable of proof at trial, I will for the sake of argument accept that the defendant owed its readership, consumers of its product, a duty of care to meet certain publication standards. Such readership could, in theory extend to all contemporary readers. After a while, all scientific publishing is subject to be discredited or devalued by something more accurate, more experimentally sound, or more logical.

[27] Assuming the plaintiff's allegations that the researchers' data were fraudulent, I should assume breach of the standard of care. For the purposes of this motion, I will not consider the intersection between tort law and the freedom of expression under s. 2 of the *Charter of Rights and Freedoms*. The remedy of a retraction, as sought by the plaintiff, would certainly cause such a conflict. I do not need to consider the free speech argument, because the plaintiff's case in tort fails on two basic elements of tort liability: injury and causation.

[28] The plaintiff pleads that he was annoyed by the article having been published and garnered respect in the neuroscientific academy when, he opined, it was based on false data. This led to his row with his external Ph.D. reviewer, one of the co-authors of the article, and ultimately his supervisor. It is not clear how that led to his expulsion, but I accept that fact

for the purposes of the motion. Perhaps evidence will come out that the university should have done more to accommodate the plaintiff's brain condition, but that is not an issue for me to decide. The triggering of upset, however severe, is not the same as a mental injury that leads to a personal injury. In *Mustapha*, McLachlin C.J.C. wrote:

> [9] This said, psychological disturbance that rises to the level of personal injury must be distinguished from psychological upset. Personal injury at law connotes serious trauma or illness: see *Hinz v. Berry*, [1970] 2 Q.B. 40 (C.A.), at p. 42; *Page v. Smith*, at p. 189; Linden and Feldthusen, at pp. 425-27. The law does not recognize upset, disgust, anxiety, agitation or other mental states that fall short of injury. …

[29] As stated in the medical report filed by the plaintiff, his Asperger's Syndrome, also described as ASD-Autistic Spectrum Disorder, is a neurodevelopmental condition involving the "lack of emotional processing" that results in "racing thoughts and overthinking which causes him great distress for many days." The doctor wrote this in connection with written communication because of the isolated nature of the process. I can take judicial notice of the condition at a very basic level that this condition is no longer considered a disease or illness. People with the condition are simply different in their brain processing than most people.

[30] The impact of the plaintiff's belief in the academic fraud was unfortunate, in that I imagine any Ph.D. candidate without his condition would not have embarked on a dispute with his external reviewer and with his thesis supervisor based on an allegation of scientific fraud. To the plaintiff's credit, I do appreciate that if a central element of a researcher's doctoral subject entails a dilemma such as building on the 1997 article or dismissing its value, it could be hard for a person less endowed with diplomacy to figure out a way out of the box.

[31] In the classic "thin skull" or "crumbling skull" analysis, nothing the defendant did or fail to do cause the plaintiff to be compromised psychologically. Rather, the manifestation of his disgust or agitation, however severe and long-lasting, is not psychological disturbance in the sense of an actual injury. He has not pleaded that the annoyance or "mental tort" caused him to be more annoyed at other things and thereby affected him organically. It was also not the case of a diner mistakenly crying out "fire!" in a crowded restaurant and causing injury to those rushing to get out. There is simply no relation between the alleged publication and any actual injury suffered by the plaintiff.

[32] Consequently, the law does not recognize actionable psychological injury arising from the plaintiff being "extremely annoyed by the fact that this paper is cited by 780 scientific research articles to date; and Nature journal doesn't take any action against the paper."

[33] The second part of the *Mustapha* analysis entails assessing the foreseeability of the article as a cause of the injury. Did the publication of the paper over two decades prior to the claim breach a standard of care in a way that the defendant could possibly foresee the plaintiff's reaction? Apart from the role of the medical report as a supplement or interpretive aid to the pleadings, there is no evidence about the extent of knowledge of

Asperger's in 1997. The plaintiff ended up in a dispute with the paper's co-author because she was involved in his doctoral candidacy. In that regard, the medical report stated his year of birth as 1985. Could the defendant have predicted in 1997, when the plaintiff was twelve years of age, that he or child of that age would (1) eventually become a doctoral candidate reviewed by one of the co-authors and, more importantly, (2) develop Asperger's and have an intensely hostile response to the perceived flaws in the paper?

[34] The answer to this last question, as far as the Supreme Court's guidance in *Mustapha* is concerned, is that the law does not recognize the causal mechanism of the plaintiff's claim to a "mental tort" in all cases. For better or for worse, foreseeability in causation in cases involving this type of injury is measured objectively, on an ordinary person standard. The following passages from *Mustapha* bear repeating in full:

> [15] As the Court of Appeal found, at para. 49, the requirement that a mental injury would occur in a person of ordinary fortitude, set out in Vanek, at paras. 59-61, is inherent in the notion of foreseeability. This is true whether one considers foreseeability at the remoteness or at the duty of care stage. As stated in *Tame v. New South Wales* (2002), 211 C.L.R. 317, [2002] HCA 35, per Gleeson C.J., this "is a way of expressing the idea that there are some people with such a degree of susceptibility to psychiatric injury that it is ordinarily unreasonable to require strangers to have in contemplation the possibility of harm to them, or to expect strangers to take care to avoid such harm" (para. 16). To put it another way, unusual or extreme reactions to events caused by negligence are imaginable but not reasonably foreseeable.
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> [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 damages. As stated in *White*, 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 damage at law.

[35] A reason to restrict the law in this area is the unfairness of expecting defendants to foresee every reaction to a publication – the mind being so subjective. No such need for limitation exists with physical injury, as the incidence of injury is far more objectively predictable.

[36] I must therefore conclude that the plaintiff's claim, as pleaded and as explained through the additional court filings, has no chance of success because the statement of claim does not disclose a type of injury the law recognizes and because the injury in question was too remote for the publication of the article to be considered a foreseeable cause.

CONCLUSION

[37] Based on my determination that the plaintiff's statement of claim, as augmented by various interpretive aids and the draft amendment, I conclude that the statement of claim must be struck out, without leave to amend. The nature of the complaint, even read in the context of the plaintiff's neurological condition and generously hearing out the plaintiff's explanations, does not disclose a reasonable cause of action. Certainly, there is no chance at all that the court could be persuaded to order a retraction of the article or to award the plaintiff compensatory damages.

[38] The defendant has claimed $23,350.32 in partial indemnity costs, based on $38,917.20 in actual legal costs expended to defend the proceeding. I appreciate the plaintiff may not fully appreciate how the court, based on legal standards intended to regulate the affairs at the level of the lowest common denominator, cannot regulate the affairs of the academy in the way he believes. However, the plaintiff should have sought out legal advice and discontinued the claim before it came to this conclusion. The prior ruling in the rule 2.1 motion ought to have instructed the plaintiff that its claim was likely to be struck out. The plaintiff has caused the defendant to incur the legal expenses, and the primary rule of costs in this court is that costs follow the event. I therefore award costs in the amount of $23,350.32, inclusive of disbursements and HST. This does not preclude the defendant from accepting a lower figure or from waiving costs, at the defendant's discretion.

Akazaki J.

Date: June 10, 2024