IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Chen v. Horvath,* 2024 BCSC 290

Date: 20240123
Docket: S232121
Registry: Vancouver

Between:

Danny Chen

Plaintiff

And

James Horvath

Defendant

Before: The Honourable Justice Gomery

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	B. Yu
Counsel for the Defendant:	J. Morris
Place and Date of Hearing:	Vancouver, B.C. January 11, 2024
Place and Date of Judgment:	Vancouver, B.C. January 23, 2024

Introduction

[1] **THE COURT:** Mr. Chen was the plaintiff in actions resulting from motor vehicle accidents. The defendants in these actions were insured by the Insurance Corporation of British Columbia ("ICBC"). Mr. Horvath is a claims examiner or adjuster employed by ICBC. He was assigned to deal with Mr. Chen's claims.

[2] Mr. Chen has sued Mr. Horvath for damages arising from their dealings together. Mr. Chen pleads that in two discussions in April 2020, with the trial date approaching, Mr. Horvath threatened him. The threat was that, if the action proceeded to trial, Mr. Horvath, on behalf of the defendants, would expose unlawful activity on Mr. Chen's part. In particular, the court would be advised that Mr. Chen was money laundering and running a brothel. Mr. Chen pleads that these allegations were false and were made to pressure him into settling for a small amount instead of going to trial. Mr. Chen pleads that these allegations caused him emotional distress and, as a consequence of Mr. Horvath's threat, he pursued his claims less aggressively than he would have otherwise and lost the trial date.

[3] Mr. Chen pleads that Mr. Horvath's threat gives him causes of action in tort for intentional infliction of emotional distress and intimidation. He advances a separate claim for defamation based on statements made by Mr. Horvath to his co-workers at ICBC.

[4] On this application, Mr. Horvath applies to strike the factual pleadings that ground the claims for intimidation and intentional infliction of emotional distress. He submits that it is plain and obvious that they do not state reasonable causes of action. Mr. Chen opposes the application.

Law Governing Applications to Strike

[5] Pursuant to Rule 3-1(2)(a) of the *Supreme Court Civil Rules*, notice of civil claim must "set out a concise statement of the material facts giving rise to the claim". It must also set out the relief sought (sub-rule (b)) and provide a concise summary of the legal basis for the claim (subrule (c)).

[6] Applications to strike pleadings are governed by Rule 9-5(1). The rule contemplates that a pleading may be struck on the ground that it fails to state a reasonable claim or defence. Pleadings should only be struck under Rule 9-5(1) where, assuming the facts pleaded to be true, it is plain and obvious that the attack on it is well-found; *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 [*Imperial Tobacco*] at para. 17; *Willow v. Chong*, 2013 BCSC 1083 at para. 20; *Nevsun Resources Ltd. v. Araya,* 2020 SCC 5 at paras. 64–66.

[7] In *Imperial Tobacco*, Chief Justice McLachlin gave judgment for the Court. She noted that the power to strike out claims that do not have a reasonable prospect of success is important for effective and fair litigation. She stated:

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[8] On the other hand, the power to strike claims must not be used to stultify the law by shutting down arguable claims that have not yet been legally recognized. Accordingly, the Chief Justice stated at para. 21:

> [21] … The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*, [[1932] A.C. 562 (H.L.)]. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.
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> [Emphasis added.]

[9] Accordingly, in considering an application to strike, the pleading in question should be read "generously and as a whole; *Lee v. GY Lee & Associates Limited*, 2014 BCCA 400 at para. 14. Where they are functionally adequate, in that they provide an outline of material allegations and the relief sought, minor defects may be overlooked if the defendants are not prejudiced by them; *William v. British Columbia*, 2012 BCCA 285 at para. 106. However, it is critical that all the necessary

elements of the claim be pleaded. Chief Justice McLachlin made this point in *Imperial Tobacco* at para. 22 where she stated:

> [22] … It is incumbent on the claimant to clearly plead the facts upon which is relies in making its claim. A claimant is not entitled to rely on the It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

Analysis

The claim for intentional infliction of emotional distress

[10] The tort of intentional infliction of emotional distress requires a plaintiff to demonstrate conduct that is

1) flagrant and extreme;
2) plainly calculated to produce harm; and
3) which results in visible and provable illness.

Lu v. Shen, 2020 BCSC 490 at para. 257.

[11] Even read generously, Mr. Chen's notice of civil claim does not state material facts essential to the cause of action for intentional infliction of emotional distress. It pleads that Mr. Horvath's allegations were completely irrelevant, but not that they were flagrant and extreme. As a potential allegation bearing on this question, it does not plead that Mr. Horvath knew the allegations were false. It does not plead that Mr. Horvath's threat was plainly calculated to harm Mr. Chen. It does not plead that Mr. Chen suffered visible and provable illness. I do not accept that what the pleading describes as “extreme emotional distress” is equivalent to visible and provable illness. Emotional distress is often invisible.

[12] I conclude that it is plain and obvious that the claim for intentional infliction of emotional distress cannot succeed on the basis of the material facts pleaded in the notice of civil claim.

The claim for intimidation

[13] The tort of intimidation requires a threat by the defendant to commit an unlawful act as a result of which the plaintiff does or refrains from doing something they are entitled to do; *Dusik v. Newton* (1985), 62 B.C.L.R. 1, 1985 CanLII 406 (C.A.) at para. 7.

[14] Mr. Chen's notice of civil claim does not state material facts essential to the cause of action for intimidation. It does not identify an unlawful act threatened by Mr. Horvath. Telling the court that Mr. Chen was money laundering and running a brothel, even if false, would not be unlawful. Evidence and submissions to the court are protected by absolute privilege; *Lefebvre v. Durakovic*, 2018 BCCA 201 at para. 22.

[15] I conclude that it is plain and obvious that the claim for intimidation cannot succeed on the basis of the material facts pleaded in the notice of civil claim.

Mr. Horvath's broader argument

[16] Mr. Horvath submits that the claims in issue cannot succeed for a more fundamental reason, because he maintains that the entirety of his communications with Mr. Chen concerning the litigation are protected by absolute privilege. He submits that their communications could not, in any event, found an action for intentional infliction of emotional distress or intimidation. He relies on Justice Saunders' description of absolute privilege in *Oei v. Hui*, 2020 BCCA 214 at paras. 39 and 46.

[17] The issue in *Oei* was whether pleadings were subject to absolute privilege. Mr. Horvath also refers to *Peak Innovations Inc. V. Pacific Rim Brackets Ltd.*, 2009 BCSC 1034 at paras. 24–30; *Lefebvre*, *supra*; and *Wilson v. Switlo*, 2011 BCSC 1287 at paras. 389–390.

[18] Some of these cases make broad statements about the scope of absolute privilege and where it applies. Mr. Horvath relies in particular on a passage from a judgment of Cromwell J.A., as he then was, in *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115 at paras. 113–114, which is cited with approval in *Lefebvre* at para. 22. The passage refers to absolute privilege as afforded to witnesses immunity against actions of any kind based on their testimony in court. The argument puts this observation together with cases that extend absolute privilege, as a defence to a defamation claim, to out-of-court communications such as a cease-and-desist letter written in anticipation of legal proceedings in *Peak Innovations Inc.* The argument is that statements made in discussions with a view to the settlement of litigation cannot ground any cause of action, even for deceit.

[19] I do not think that it is plain and obvious that the doctrine of absolute privilege would preclude a properly pleaded plan for an intentional tort, other than defamation, based on statements made in settlement negotiations. None of the cases cited by counsel goes so far. It seems that the scope of protection afforded in the context of settlement negations or discussions adjacent to settlement negotiations may be narrower than the scope of protection afforded to witnesses and other participants in a judicial proceeding. In *Elliott*, at para. 102, also cited with approval in *Lefebvre*, Cromwell J.A. states that, “how far the immunity extends to things said and done out-of-court is a grey area”. I think it is obvious that a fraudulent misstatement made in the course of negotiations for the settlement of the lawsuit could found a cause of action, and the question becomes whether the same could be said of other intentional torts.

[20] As with Justice Cromwell, in *Amato v. Welsh*, 2013 ONCA 258 at para. 68, Cronk J.A., giving judgment for the Ontario Court of Appeal, described the absolute privilege doctrine as evolving and observed that its boundaries are not firmly set. The law's policy in relation to questions such as these is to determine them at trial or on a summary trial and not on an application to strike pleadings. This policy is reflected in the plain and obvious test and the jurisprudence governing applications to strike that I have canvassed. Determining the extent of the protection afforded

parties to litigation by the doctrine of absolute privilege requires factual context not offered by the current application.

Disposition

[21] For these reasons, the application is allowed. The plaintiff's claims for intimidation and intentional infliction of emotional distress are struck with leave to amend within 30 days of this order. If the plaintiff does not amend, the defendant may apply for such further order as is appropriate.

[DISCUSSION RE COSTS]

[22] THE COURT: Very well. Costs of the application are in the cause.

"Gomery J."