CITATION: M.P. v. Ontario Power Generation Inc., 2024 ONSC 6295
COURT FILE NO.: CV-22-00682417-0000
DATE: 20241112

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: M.P., Plaintiff

AND:

ONTARIO POWER GENERATION INC., Defendant

BEFORE: Jane Dietrich J.

COUNSEL: *Mark Donald*, for the Plaintiff

Frank Cesario and Justin Choy, for the Defendant

HEARD: November 4, 2024

ENDORSEMENT

Introduction

[1] Ontario Power Generation Inc. (OPG), the defendant, brings a motion to strike the following causes of action from the plaintiff, M.P.'s Amended Amended Statement of Claim dated October 23, 2024 (the Claim) pursuant to rule 21.01(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 (the "Rules"):

a. the tort of negligent investigation;

b. the tort of intrusion upon seclusion by way of vicarious liability;

c. breach of fiduciary duty; and

d. the tort of harassment.

[2] The defendant also moves under Rules 25.06 and 25.11.

Background

[3] At the hearing of the motion, both counsel advised that for purposes of the motion, the operative pleading was the Amended Amended Statement of Claim dated October 23, 2024. Although that pleading has not yet been issued, it was agreed that consent to issue it had been provided and it was the relevant pleading for purposes of this motion.

[4] As pleaded in the Claim:

a. The plaintiff, M.P., is a former employee of OPG.

b. He was employed as a section manager at OPG's Darlington Nuclear Generating Station (the Darlington Station) between November 2016 and June 2021. His position entailed, among other things, his investigating and correcting conduct of certain unionized employees at the Darlington Station.

c. OPG is a crown corporation.

d. In February and March of 2021, an individual or group of individuals at the Darlington Station disseminated an internet news article reporting that M.P.'s wife was the biological daughter of convicted serial killer Bruce McArthur (referred to in this endorsement as the McArthur Connection).

e. At all material times, the individuals who disseminated the McArthur Connection were employees, agents, servants or representatives of OPG. The relevant conduct was done in the course of the individuals completing their work duties on OPG property, utilizing OPG equipment and/or resources; and benefitting from the zone of risk that OPG created via its systems of electronic dissemination.

f. An anonymous note was left on M.P.'s desk on or around March 8, 2021, indicating certain individuals were responsible for the dissemination of the relevant article and the McArthur Connection.

g. M.P. immediately reported the dissemination to his manager, OPG's human resources department and OPG's security department and was informed that an internal investigation would be undertaken to determine the identity of the individuals (the Investigation).

h. The Investigation was led by OPG employees, agents, servants or representatives.

i. OPG showed the individuals identified a copy of a judicial sealing order previously granted which made it unlawful to publish, broadcast or disseminate in any way any information specifically connecting M.P., his immediate family or the family name to Mr. McArthur.

j. The individuals who had been shown a copy of the sealing order, continued to disseminate the McArthur Connection.

k. To date, no action has ben taken against the individuals or any other persons involved with the dissemination of the McArthur Connection. At all material times, OPG's Investigation was inadequate or completely lacking.

l. Throughout February to June 2021, M.P. learned form OPG colleagues that the individuals were still discussing and disseminating the McArthur Connection. This

led to an OPG employee contacting the Toronto Police Service and making unfounded allegations regarding M.P. attempting to hide evidence in the McArthur criminal investigation. In turn, M.P. was contacted by Toronto Police Service.

m. M.P. continued to make the OPG investigation team aware of the ongoing activity, however, his efforts had no effect on the Investigation. Rather, M.P. was questioned by investigators on frivolous or irrelevant complaints made against him by the individuals.

n. In or around June of 2021, due to the ongoing distress and damage as a result of the dissemination of the McArthur Connection within OPG and OPG's subsequent failure to adequately investigate the issue, M.P. resigned from OPG (which he also claims amounts to constructive dismissal).

o. Following M.P. leaving OPG, M.P. started a new job. On or around January 26, 2022, M.P. was informed by the plant director at his new place of work that employees were disseminating the same article as had been disseminated at OPG. During the internal disciplinary process at the new employer, it was discovered that the article was sent to an employee at the new employer by an OPG employee. OPG was informed of the additional dissemination, but no action was taken.

p. OPG's failure to conduct a reasonable investigation, or any investigation at all, emboldened and encouraged the individuals and other employees at OPG to continue to disseminate the McArthur Connection without compunction. OPG's inaction in the Investigation created a culture of impunity.

q. Earlier, in 2018, when McArthur's crimes and conviction garnered media attention, M.P. informed OPG of the McArthur Connection. At that time, M.P.'s manager involved OPG's Nuclear Safety Team, which is a specialized investigative branch within OPG tasked with, among other things, investigating threats to OPG assets and staff. OPG promised M.P. that it would both liaise with the police and set-up online monitoring of whether M.P.'s name was associated with McArthur.

r. OPG's Nuclear Safety Team are peace officers at law and responsible for the safety and security of OPG staff and sites including the Darlington Station.

s. A member of the OPG Nuclear Safety Team promised M.P. that OPG would reach out to various police contacts M.P. had provided and certain other contacts to try to aid the Investigation.

[5] With respect to the tort of negligent investigation, the Claim specifically pleads:

a. OPG owed a duty of care to M.P. to conduct any investigation of the McArthur Connection in a reasonably competent manner, and to provide M.P. with a workplace free of harassment, abuse or bullying.

b. OPG breached this duty by the harassing, bullying and abusive actions of its own employees, agents, servants or representatives who disseminated the McArthur Connection both inside and outside of OPG.

c. OPG also directly pursued investigative steps which breached this duty of care. In breach of that duty, OPG engaged in conduct that fell below the standard of care of a reasonable investigation by, without limiting the generality of the foregoing:

i. Using investigative techniques that resulted in the collection of false, inaccurate, incomplete, inconsistent, unreliable and / or misleading information;

ii. Failing to obtain and consider all of the necessary evidence to complete a reasonable investigation;

iii. Arriving at unreasonable conclusions about the individuals and the risk they posed to M.P.;

iv. Relying on unreliable sources of information and failing to properly investigate the sources of such information; and

v. Breaching its duty of good faith and candour to M.P.

[6] With respect to the tort of intrusion upon seclusion, the Claim specifically pleads:

a. OPG's agents, servants or representatives intentionally disseminated the McArthur Connection;

b. This dissemination constituted an invasion, without lawful justification, of M.P.'s private affairs or concerns; and

c. This invasion would be regarded by a reasonable person as highly offensive causing distress, humiliation, or anguish.

[7] With respect to the breach of fiduciary duty, the Claim specifically pleads:

a. OPG owed M.P. a duty of trust or fiduciary duty in that:

i. M.P. reposed trust and faith in OPG to provide a harassment free workplace; to reasonably investigate any allegations of harassment, abuse or bullying; and to take appropriate steps as part of any investigation;

ii. OPG exerted control and power over M.P.'s interests in respect of providing a harassment-free workplace, and investigating any allegations of harassment; and

iii. M.P. was thereby vulnerable to OPG's actions or omissions on account of the power it held over M.P.

b. From 2018 until his departure, OPG and M.P. agreed that OPG would act on M.P.'s behalf in respect of the prevention of abuse and harassment towards himself and his family in relation to the McArthur Connection.

c. The harassment and abuse described in the Claim by the individuals (which was reported to OPG) made it impossible for M.P. to work diligently and without fear, and that OPG's failure to take reasonable steps, or any steps at all, constituted tacit permission or acquiescence of this conduct.

d. Under all the circumstances, OPG's management, including its Nuclear Safety Team had the unilateral power and discretion to affect M.P.'s interests and exercise power over his work life based on its investigation of the McArthur Connection, or lack thereof.

[8] With respect to the tort of harassment, the Claim specifically pleads:

a. OPG's agents, servants or representatives intentionally disseminated the McArthur Connection;

b. Dissemination was malicious, reckless and outrageous in character and degree so as to go beyond decency and tolerance;

c. The intent of the dissemination was to cause fear and to impugn the dignity of M.P.; and

d. M.P. did in fact suffer such harm.

[9] Additional causes of action, including, among others, breach of contract, breach of statutory or common law duty and contrastive dismissal are also pled, but are not the subject of this motion.

Issues

[10] The four issues to be decided on this motion are whether the following claims should be struck for failing to disclose a reasonable cause of action, on the basis that they are frivolous or vexatious, and/or for failing to plead all material facts:

a. the tort of negligent investigation;

b. the tort of intrusion upon seclusion by way of vicarious liability;

c. breach of fiduciary duty; and

d. the tort of harassment.

Analysis

[11] The relevant Rules, being 21.01(1)(b), 25.06(1) and 25.11 provide as follows:

> 21.01(1) A party may move before a judge, […]
>
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence, and the judge may make an order or grant judgment accordingly. […]
>
> 25.06(1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. […]
>
> 25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> e. may prejudice or delay the fair trial of the action;
>
> f. is scandalous, frivolous or vexatious; or
>
> g. is an abuse of the process of the court.

[12] The law under Rule 21.01(1)(b) has been summarized in *Darmar Farms Inc. v. Syngenta Canada et al*., 2018 ONSC 7129 [*Darmar*] at para. 16:

> (1) a claim will not be struck unless it is plain and obvious it cannot succeed: *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93;
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> (2) the facts pleaded are to be assumed to be true unless they are patently ridiculous or incapable of proof: *Prete v. Ontario* (1993), 1993 CanLII 3386 (ON CA), 16 O.R. (3d) 161, [1993] O.J. No. 2794 (C.A.); *Nash v. Ontario* (1995), 1995 CanLII 2934 (ON CA), 27 O.R. (3d) 1, [1995] O.J. No. 4043 (C.A.);
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> (3) a claim must be read with a forgiving eye for drafting deficiencies: *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police* (1990), 1990 CanLII 6611 (ON SC), 74 O.R. (2d) 225, [1990] O.J. No. 1584 (Div. Ct.);
>
> (4) the novelty of a cause of action is not determinative: *Hunt*, supra; *Doe*, supra; *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, [2011] S.C.J. No. 42, 2011 SCC 42;
>
> (5) the court is not precluded from striking a negligence claim simply because it asserts a novel duty of care. Whether such a duty of care exists is a question of law

> that is appropriately resolved on a Rule 21 motion: 2007 SCC 38 *Syl Apps Secure Treatment Centre v. D. (B.)* (CanLII), [2007] 3 S.C.R. 83, [2007] S.C.J. No. 38; and [page783]
>
> (6) a critical analysis is required in order to prevent untenable claims from proceeding, particularly given scarce judicial resources and the challenges of systemic delay: *Rayner v. McManus*, [2017] O.J. No. 2788, 2017 ONSC 3044 (Div. Ct.).

[13] In *R. v. Imperial Tobacco Canada Ltd.* [cited in *Darmar*] at para 19, the Supreme Court of Canada noted:

> 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.

[14] However, as stated in *Doyle Salewski Inc. v. Lalonde*, 2016 ONSC 5313 at para 50, the test for sustaining a pleading is not high, a germ or a scintilla of a cause of action will be sufficient.

[15] As set out in *Blunt v. Dr. Vaidyanathan,* 2018 ONSC 3243 [*Blunt*], at para 42: Pursuant to Rule 25.06(1), disclosure of material facts must be made. These include facts that establish the constituent elements of the claim or defence. The material facts are to be stated concisely, *i.e*. set out with precision and clarity. The plaintiff is required to plead facts capable of supporting each constituent element of the cause of action raised. Rule 25.06 mandates a minimum level of material fact disclosure. If the level is not reached, the remedy is a motion to strike.

[16] As well, as set out in *Blunt* at para 43: Pursuant to Rule 25.11, the court may strike out or expunge all or part of a pleading, with or without leave to amend, on the ground that the pleading may prejudice or delay the fair trial of the action; is scandalous, frivolous or vexatious; or is an abuse of the process of the court. The claim must be read as generously as possible. Any inadequacies in the form of the allegations which are merely the result of drafting deficiencies are to be accommodated. Material facts are to be taken as proven, unless it is plain and obvious that they are based on assumptive or speculative conclusions that are not capable of belief. Similar facts may be pleaded as long as the added complexity arising from their pleading does not outweigh their potential probative value.

[17] OPG and M.P. agree that in assessing the adequacy of pleadings under Rules 21.01, 25.06 and 25.11, the court must bear in mind their purposes as set out in *Blunt*, at para 32:

h. to define clearly and precisely the questions and controversy between the litigants;

i. to give fair notice of the precise case which is required to be met and precise remedies sought; and

j. to assist the court in its investigation of the truth of the allegations made.

The Tort of Negligent Investigation

[18] The tort of negligent investigation was recognized by the Supreme Court of Canada in *Hill v. Hamilton-Wentworth Regional Police Services Board* 2007 SCC 41 where it was held that police officers owed a duty of care to suspects being investigated for a crime.

[19] In *Correia v. Canac Kitchens*, 2008 ONCA 506 [*Canac*], the Ontario Court of Appeal addressed the issue of whether private actors can be held liable for the tort of negligent investigation. Although the Ontario Court of Appeal concluded that the tort should be expanded to allow a claim of negligent investigation against a private third-party investigation firm that was retained by the employer for the purpose of investigating issues of theft and drug dealing in the workplace, it expressly declined to recognize and impose a duty of care on employers when conducting an investigation with respect to their employees.

[20] In reaching this decision, the Ontario Court of Appeal noted that private investigation firms often exercise functionally equivalent powers of the police, but without the oversight and accountability. Accordingly, the Ontario Court of Appeal found at paragraph 71 and 72 that the investigation firm could be held liable for the tort of negligent investigation given that it was in the "business of investigation, performing functions analogous to those performed by the police" and because "[w]here, as here, the private firm performs a function analogous to the public police, they ought to be subject to similar liability".

[21] However, the Ontario Court of Appeal in that case expressly declined to recognize and impose a duty of care on the employer that would give rise to liability under the tort of negligent investigation. In *Canac*, the Ontario Court of Appeal upheld the motion judge's decision to strike the claim for negligent investigation as against the employer but allowed it to proceed against the private investigation firm.

[22] *Canac* was recently followed in *Lee v. Magna International Inc*. 2020 ONSC 3912 [*Magna*]. The plaintiff in *Magna* alleged that he had been constructively dismissed by his employer as a result of its failure to conduct an appropriate investigation, as required by the Occupational Health and Safety Act. The plaintiff further claimed that his employer was liable for the tort of negligent investigation. In Magna, the court held that amendments to the Occupational Health and Safety Act introduced following *Canac,* which imposed new standards regarding workplace investigations, did not give rise to a duty on behalf of employers under the tort of negligent investigation.

[23] M.P. does not take issue with the relevant case law. Rather, he argues that the OPG's position incorrectly equates the Nuclear Safety Team at OPG with OPG in its role as employer as opposed to the Nuclear Safety Team's position as "peace officers" under *The Security for Electricity Generating Facilities and Nuclear Facilities Act*, S.O. 2014 C.15, Sched. 3, S. 2. (the Nuclear Facilities Act).

[24] In *R. v. Ramnath*, 2018 ONCJ 853 [*Ramnath*] a member of Nuclear Safety Team arrested Mr. Ramnath on suspicion of impaired driving. In considering a challenge to the conduct of the relevant Nuclear Safety Team member, the court confirmed that the relevant officer was a security

officer who was employed by the Ontario Power Generation Nuclear Security and that the Nuclear Facilities Act designates such officers employed in that capacity to be "peace officers" while engaged in providing certain services [see para 7 of *Ramnath*].

[25] Section 2-4 of the Nuclear Facilities Act provides:

> 2. A person may be appointed in accordance with the regulations to provide security services in relation to premises where a restricted access facility is located.
>
> 3. Subject to the regulations, a person appointed under section 2 to provide security services in relation to premises where a restricted access facility is located is a peace officer *while engaged in providing those services*. (emphasis added)
>
> 4. A peace officer may exercise the following powers if it is reasonable to do so for the purpose of providing security services in relation to premises where a restricted access facility is located:
>
> 1. Require a person who wishes to enter the premises or who is on the premises,
>
> i. to produce identification, and
>
> ii. to provide information for the purpose of assessing whether the person poses a security risk.
>
> 2. Search, without warrant,
>
> i. a person who wishes to enter the premises or who is on the premises,
>
> ii. any vehicle that the person is driving, or in which the person is a passenger, while the person is on, entering or attempting to enter the premises, and
>
> iii. any property in the custody or care of the person.
>
> 3. Refuse to allow a person to enter the premises or bring property onto the premises, and use reasonable force if necessary to prevent the person from doing so.
>
> 4. Demand that a person immediately leave the premises or immediately remove property in the custody or care of the person from the premises and use reasonable force if necessary to remove the person or the property.

[26] The question to be answered, is whether the members of the OPG Nuclear Security Team were acting as peace officers under the Nuclear Facilities Act or as employer when they conducted the Investigation.

[27] Under section 4 of the Nuclear Facilities Act, they are peace officers when providing "security services in relation to premises where a restricted access facility is located" Under section 1 of the Nuclear Facilities Act, the 'security services' are defined to include, "without limitation guarding or patrolling for the purpose of protecting persons or property".

[28] If the Investigation is part of the Nuclear Safety Teams' role of as a peace officer, it must be while they are (i) providing security services (being without limitation, guarding or patrolling for the purpose of protecting persons or property) and (ii) in relation to premises where a restricted access facility is located.

[29] As noted above, according to the Claim, the Investigation was to be undertaken to determine the identity of the individuals who disseminated the McArthur Connection. M.P. then pleads that the OPG fell below the standard of care based on the investigative techniques used, failing to obtain and consider all necessary evidence, arriving at unreasonable conclusions about the individuals and the risk they posed to M.P., relying on unreasonable sources of information, failing to properly investigate the sources of information and breaching its duty of good faith and candour to M.P.

[30] The investigation as framed in the Claim does not relate to the guarding or patrolling the premises where a restricted access facility is located. To be part of 'security services' as defined in the Nuclear Facilities Act, it must therefore be encompassed in the 'without limitation' language. Even if I assume that the Darlington Facility is a restricted access facility, the Investigation does not appear, on its face, to relate to the premises on which a restricted access facility is located. M.P. claims that the Investigation was intended to protect him as a person located on the relevant premises. However, I find that based on the Claim, it is more appropriate to characterize the Investigation not as part of the Nuclear Safety Team's security services being provided under the Nuclear Facilities Act, but rather as part of OPG's role as employer. The Investigation of the McArthur Connection dissemination is not unique or related to the nature of the premises on which the Darlington Facility is located, it cannot be said to concern security specifically relating to electrical generating or nuclear facilities.

[31] Accordingly, I find that to the extent the OPG Nuclear Safety Team members were involved in the Investigation they were not doing so in their capacity as peace officers under the Nuclear Facilities Act but rather as representatives of OPG as employer. As a result, it is plain and obvious based on *Canac* that the claim of M.P. as against OPG for the tort of negligent investigation cannot succeed.

[32] I would allow this portion of OPG's motion and M.P. will remove paragraphs claims for negligent investigation from paras 1(i) and 39-42 of his Claim.

The Tort of Intrusion upon Seclusion by way of Vicarious Liability

[33] In order to establish a claim for intrusion upon seclusion, a plaintiff must demonstrate that: (i) the defendant's conduct was intentional or reckless; (ii) the defendant invaded, without lawful justification the plaintiff's private affairs or concerns; and (iii) a reasonable person would regard

the invasion as highly offensive, causing distress, humiliation or anguish: see *Jones v. Tsige*, 2012 ONCA 32 [*Jones*], at para 71.

[34] The Ontario Court of Appeal in *Jones* at para 57 explained that "the tort focuses on the act of intrusion, as opposed to dissemination or publication of information". Further, in paragraph 72, the Ontario Court of Appeal explained that the three elements noted above would not open the floodgates as the tort "will arise only for deliberate and significant invasions of personal privacy…that, viewed objectively on the reasonable person standard, can be described as highly offensive."

[35] In order to establish liability for the tort of intrusion upon seclusion, the defendant must actually engage in an intrusive action themself, rather than fail to prevent the intrusive acts of another individual. In *Owsianik v. Equifax Canada Co*., 2022 ONCA 813, the Ontario Court of Appeal struck the plaintiffs' claim under the tort arising from the data breach of a company that stored personal information for commercial use. The Court found that while the defendant failed to take steps to prevent hackers from invading the privacy interests of the plaintiffs, the defendant did not itself interfere with such privacy interests.

[36] M.P. claims that the intentional conduct of OPG arises not because it failed to stop the individuals from disseminating the McArthur connection, but rather because OPG itself should be vicariously liable for the dissemination by the individuals as a result of the employer / employee relationship.

[37] M.P. submits that the Ontario Court of Appeal's decision in *Trans Union of Canada v. Obodo* 2022 ONCA 814 makes it explicit that an employer-employee relationship can ground a vicarious breach of privacy claim. In that case, the Ontario Court of Appeal dismissed an appellant's claim for intrusion upon seclusion against Trans Union of Canada as a result of the actions of a third-party hacker. The Ontario Court of Appeal held that that the appellant's claim for vicarious liability ignored that fact that the third-party hacker was not an employee of the plaintiff:

> An employer may be liable for the torts of its employees. Liability rests primarily on policy considerations which are, in turn, predicated on the existence of an employer-employee relationship and a connection in some sense between that relationship and the employee's tortious misconduct: *Bazley v. Curry*, 1999 CanLII 692 (SCC), [1999] 2 S.C.R. 534 [*Bazely*], at pp. 548-54; 671122 *Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59, [2001] 2 S.C.R. 983, at para. 25.

[38] Turning to the requirements of vicarious liability in paragraph 41 of *Bazely* the Supreme Court of Canada stated:

> …
>
> (2) The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues

> therefrom, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.
>
> (3) In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
>
> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[39] In applying the criteria set out in *Bazely*, the court in *Osmani v. Universal Structural Restorations Ltd*., 2022 ONSC 6979 [*Osmani*] held that an employer was vicariously liable for the tort of assault committed by one of its employees. In that case, an employee with direct supervision over the victim was found to have assaulted the victim (a subordinate employee). The conduct complained of came to the employer's attention, the employer told the employee to stop, but the assaultive incidents continued. The court found the employer did precious little to investigate the incidents or prevent their recurrence. Further the assault was committed by an employee who was tasked with supervising and directing the conduct of his crew against a member of his crew.

[40] In considering the court's finding in Osmani, it is also important to consider the Supreme Court of Canada's statement in *Bazely* at paragraph 42 that: It must be possible to say that the employer significantly increased the risk of the harm by putting the employee in his or her position and requiring him to perform the assigned tasks. In *Osmani*, the employer placing supervising employee in a position of control over the victim significantly increased the risk of harm.

[41] However, unlike the situation in Osmani, in the present case, I do not find anything in the employee/employer relationship that significantly increased the risk of the harm by the individuals. Accepting as pled that the individuals used OPG provided technology and computer systems and that M.P. had a managerial role over the individuals, I do not find that the wrongful conduct of the individuals pled (i.e their dissemination of the McArthur Connection) was sufficiently related to

the individuals' employment so as to ground a finding of vicarious liability. Rather, it amounted to an incidental connection to the employment enterprise as referred to in *Bazely*.

[42] I also note in this regard that the conduct complained of by the individuals is one of dissemination of personal information as opposed to intrusion. As held in *Jones*, dissemination by itself is not enough to ground a finding of intrusion upon seclusion.

[43] Accordingly, I would allow this portion of OPG's motion and M.P. will remove the claims for intrusion upon seclusion from paragraphs 1(i) and 48 his Claim.

Breach of Fiduciary Duty

[44] The parties agree that an employment relationship is not presumptively fiduciary in nature, but a fiduciary relationship may arise on an *ad hoc* basis. There must be something beyond the contractual employment relationship in order for a fiduciary obligation to be imposed. It is a question of context and the factual circumstances which exist as to whether an employer acts as a fiduciary for an employee: see Canada (*Attorney General) v. Confederation Life Insurance Co.* 1995 CanLII 7097 (ON SC), at para 169.

[45] In *Elder Advocates of Alberta Society v. Alberta* 2011 SCC 24 [*Elder Advocates*] at para 36, the Supreme Court of Canada summarised the test as follows:

> [36] In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[46] In *Elder Advocates*, the Supreme Court of Canada at para 31 required as part of the first portion of the test that the party asserting the fiduciary duty "…must be able to point to a forsaking by the alleged fiduciary of the interests of all others in favour of those of the beneficiary, in relation to the specific legal interest at stake".

[47] Counsel for M.P. argued that there are cases where a claim of a fiduciary duty being owed to an employee by an employer has not been struck at the pleading stage. For example, in *Jackson v. Canada (Attorney General*) 2006 CanLII 32311, the Ontario Court of Appeal found that a breach of fiduciary duty could potentially be established where the employer, Correctional Services Canada failed to protect an employee address listing which found its way into the hands of the prison population.

[48] Further, in *Thomas v. Woolworth Canada Ltd.,* [1996] O.J. No. 2760 (Gen. Div.). at para. 6, in discussing alleged claims of sexual assault by the plaintiff, the court held it is not plain and obvious that no fiduciary duty arises where a continuing course of demeaning conduct reported to

the employer which makes it impossible for the employee to continue to work in dignity and without fear is permitted without any action by the employer and those in authority (and therefore with its tacit permission or acquiescence).

[49] Both of the cases noted by M.P. predate the Supreme Court of Canada's analysis in *Elder Advocates* and do not provide an analysis of the first portion of test outlined therein.

[50] In this regard, M.P. pleads that from 2018 until M.P.'s departure from OPG, OPG and M.P. agreed that OPG would act on M.P.'s behalf in respect of the prevention of abuse and harassment towards himself and his family in relation to McArthur Connection. Specifically, the Claim states that in 2018, M.P. informed his manager of the McArthur Connection and his desire to keep that information confidential. In turn, M.P.'s manager and members of the Nuclear Safety Team promised to liaise with police in order to ensure the safety of M.P. and his family as well as set up online monitoring of whether M.P.'s name was connected in any way to McArthur.

[51] It does not appear to me that the facts as pleaded – a promise to liaise with police and set up online monitoring – amount to a forsaking by OPG of their interests in favour of M.P.'s. Accordingly, the first branch of the *ad hoc* fiduciary test set is not met.

[52] Accordingly, I would allow this portion of OPG's motion and M.P. will remove the claims for breach of fiduciary duty from paragraphs 1(i) and 43-46 of his Claim.

The Tort of Harassment

[53] In *Merrifield v. Canada (Attorney General),* 2019 ONCA 205, the court held that there is no cause of action in tort at common law for harassment, but at para 53 went on to say: "In summary, while we do not foreclose the development of a properly conceived tort of harassment that might apply in appropriate contexts, we conclude that Merrifield has presented no compelling reason to recognize a new tort of harassment in this case."

[54] From a policy perspective, the Ontario Court of Appeal in *Merrifield* at para 42 noted that in that case there were other legal remedies available to address the conduct that was alleged to constitute harassment. Like in *Merrifield*, there are multiple additional causes of action that remain in M.P.'s Claim against OPG including breach of contract, breach of statutory or common law duty and contrastive dismissal which have also pled by M.P., but are not the subject of this motion.

[55] In *Caplan v. Atas,* 2021 ONSC 670, at paras. 163 – 175, Corbett J. held that a new tort of "internet harassment" should be recognized in Ontario and found that the defendant's conduct met the following test drawn from American case law:

> [W]here the defendant maliciously or recklessly engages in communications conduct so outrageous in character, duration, and extreme in degree, so as to go beyond all possible bounds of decency and tolerance, with the intent to cause fear, anxiety, emotional upset or to impugn the dignity of the plaintiff, and the plaintiff suffers such harm.

[56] Here, none of the allegations of harassment is conduct of the sort referred to in *Atas.* Accordingly, I would allow this portion of OPG's motion and M.P. will remove the claims for the tort of harassment from paragraphs 1(i) and 49 his Claim.

Disposition

[57] To summarize, I would grant OPG's motion to strike the portions of M.P.'s claim relating to the tort of negligent investigation, the tort of intrusion upon seclusion by way of vicarious liability; breach of fiduciary duty; and the tort of harassment.

[58] In OPG's factum, in connection with the tort of negligent investigation OPG suggested certain additional paragraphs (21-24, 30, and 35) referencing the failure of OPG to adequately conduct the Investigation also be struck. However, to the extent these paragraphs are relevant to other remaining causes of action (i.e., breach of contract, breach of statutory or common law duty and constructive dismissal) I decline to do so.

[59] Fixing costs is a discretionary decision under s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. In exercising my discretion, I may consider the result in the proceeding, any offer to settle or to contribute made in writing, and the factors listed in Rule 57.01. These factors include but are not limited to: (i) the result in the proceeding; (ii) the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer; (iii) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed; (iv) the amount claimed and the amount recovered in the proceeding; (v) the complexity of the proceeding; (vi) the importance of the issues; and (vii) the conduct of any party that tended to shorten or lengthen unnecessarily the duration of the proceeding. Rule 57.01(1)(f) provides that the court may also consider "any other matter relevant to the question of costs."

[60] In exercising my discretion to fix costs, I must consider what is fair and reasonable for the unsuccessful party to pay in this proceeding and balance the compensation of the successful party with the goal of fostering access to justice: *Boucher v Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (C.A.) at paras. 26 and 37.

[61] For these reasons, I fix the costs of the motion at $7,000, inclusive of disbursements and Harmonized Sales Tax, and order the plaintiff to pay that amount to the defendant within 30 days of the date of this order.

Jane Dietrich J.

Date: November 12, 2024