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Docket: CI 24-01-46561
(Winnipeg Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

NAMED PERSON,	)	Richard M. Beamish
(Plaintiff) Respondent,	)	Alexis Bailey
	)	for the Respondent
- and –	)	
	)	
KENNETH CHAMPAGNE and	)	Gordon A. McKinnon
THE GOVERNMENT OF MANITOBA,	)	Andrew D.F. Sain
(Defendants) Applicants.	)	for Champagne
	)	
	)	Tristan P. Sandulak
	)	Jim Koch
	)	for The Government of
	)	Manitoba
	)	
	)	
	)	JUDGMENT DELIVERED:
	)	December 16, 2024

GREENBERG J.

INTRODUCTION

[1] The plaintiff was a witness in a criminal trial before the defendant Kenneth Champagne, a judge of this court, in which a publication ban was issued to protect her identity. The plaintiff subsequently found out that Justice Champagne's decision in the

case had been posted on this court's website without removing information identifying her. She has filed this claim against Justice Champagne and the Government of Manitoba for damages that she alleges she suffered as a result. Both defendants have filed a motion to strike the statement of claim arguing that the facts alleged are too vague to disclose a cause of action and that judicial immunity and statutory immunity prevent the action from proceeding.

[2] For the reasons that follow, I am striking the statement of claim against both defendants without leave to amend.

BACKGROUND

[3] The statement of claim is a brief three pages. It alleges, as indicated above, that the plaintiff was a witness in a criminal trial before Justice Champagne and that, at the request of the Crown, Justice Champagne issued a publication ban to protect her identity. There is no indication in the claim as to the nature of the charge that was the subject of the trial or whether the ban was mandatory or discretionary. The claim states that Justice Champagne's decision was issued orally in 2023 (no specific date is provided) and that it was later published to the Court of King's Bench website "without the publication ban in place, naming the Plaintiff" (Statement of Claim, para. 9). When the plaintiff became aware that the decision had been posted without the ban in place, she contacted Victim Services and the decision was removed from the website. There is no indication in the claim as to how long the decision remained on the website before being removed.

[4] The plaintiff claims that by publishing the unedited decision, the defendants breached her right to privacy and breached an *ad hoc* fiduciary duty that they owed to

her. While the claim states that the plaintiff relies on ***The Privacy Act***, C.C.S.M. c. P125, in support of the allegation of breach of privacy, it does not set out the basis for claiming a relationship between the plaintiff and defendants that gives rise to an *ad hoc* fiduciary duty on the part of either defendant.

[5] The plaintiff says that she has suffered damage, including threats and violent attacks, and that she has been forced to shut down her business and leave the province.

[6] The claim does not indicate the form in which Justice Champagne's decision was posted on the court website, whether it was a written decision or a transcript of the oral reasons. There is no indication as to whether Justice Champagne had "signed off" on the decision or as to how the decision got onto the court website.

[7] The Government of Manitoba is named as a defendant "in respect of the office and staff employed by and responsible for the administration and functions of the Court of King's Bench" (Statement of Claim, para. 4). The claim does not distinguish between the allegations against Justice Champagne and the allegations against the Government of Manitoba. The only facts in the statement of claim regarding the breach of the publication ban are found in the following two paragraphs:

> 9. The Plaintiff states that the decision was released orally in 2023, and then later published to the Court of King's Bench website, without the publication ban in place, naming the Plaintiff directly and setting out the facts damaging to the Plaintiff, as had been anticipated if a publication ban had not been instituted and enforced.
>
> 10. The Plaintiff states that the decision published to the website clearly stated the full name multiple times and provided the details of testimony, and the Plaintiff's interactions with the accused, among other sensitive details.

[8] At a case management conference before the hearing of this motion, plaintiff's counsel was invited to amend the statement of claim to better articulate the facts on which they rely as they relate to each defendant. He declined to do so.

ISSUES

[9] The motions to strike the statement of claim raise the following issues with respect to each of the defendants:

- Are the allegations in the claim too vague to disclose any cause of action?
- Is the claim against the defendants precluded by the principes of judicial or statutory immunity?
- Can the facts alleged in the claim give rise to an *ad hoc* fiduciary duty?

PRINCIPLES OF LAW

Striking a Statement of Claim

[10] The court may strike a statement of claim if it is "plain and obvious" that, assuming the facts pleaded to be true, the claim does not disclose a cause of action (King's Bench Rule 25.11, ***Odhavji Estate v. Woodhouse***, 2003 SCC 69). In determining whether a cause of action is disclosed, the claim is to be read generously, but the court cannot look outside the four corners of the claim (***Grant v. Winnipeg Regional Health Authority et al.***, 2015 MBCA 44; ***Basaraba v. Manitoba***, 2006 MBCA 27). All of the essential elements of a cause of action must be pleaded (***McCreight v. Canada (Attorney General)***, 2013 ONCA 483). A claim should not be allowed to proceed on the basis that facts to support the claim may turn up as the case progresses. As explained by McLachlin C.J.C. in ***Knight v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42:

> 24 This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities - as they sometimes do - the remedy is to amend the pleadings to plead new facts at that time.

[11] While the novelty of a claim does not preclude it from proceeding, it is relevant in determining whether the claim is "doomed to fail." In ***Atlantic Lottery Corp. Inc. v. Babstock***, 2020 SCC 19, Brown J. explained:

> 19 Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial... That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial" ... If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy...
>
> [references omitted]

Judicial Immunity

[12] It is well-established that judges of superior courts are protected from civil suit for actions committed in the course of their judicial duties. Judicial immunity is intended to protect the public, not the judge, as it ensures that judges can act independently without fear of consequences for their actions (***Morier v. Rivard***, [1985] 2 S.C.R. 115). As the immunity is fundamental to judicial independence, it has a constitutional dimension to it (***Taylor v. Canada***, 2000 CarswellNat 3253 (Fed. C.A.)).

[13] While judicial immunity is broad, there is some debate about whether it is absolute. The court in ***Morier v. Rivard*** declined to decide whether there are exceptions to the principle (para. 110). In subsequent decisions of the Supreme Court, some justices of

the court have stated that judicial immunity is absolute, but there is no majority decision that has determined the issue (***Ernst v. Alberta Energy Regulator***, 2017 SCC 1, per McLachlin C.J.C., at para. 171; ***Canada (Attorney General v. Power)***, 2024 SCC 26, per Rowe J., at para. 376). While the ***Ernst*** decision dealt with the statutory immunity granted to an administrative board, Cromwell J.'s comments regarding exceptions to immunity are apt here. He explained that any exception to immunity, for example for acts of bad faith, would mean that a plaintiff could simply avoid the defence through "artful pleadings":

> 57 Immunity is easily frustrated where the mere pleading of an allegation of bad faith or punitive conduct in a statement of claim can call into question a decision-maker's conduct : *Gonzalez*, at para. 53. Even qualified immunity undermines the decision-maker's ability to act impartially and independently, as the mere threat of litigation, achieved by artful pleadings, will require the decision-maker to engage with claims brought against him or her. As Lord Denning M.R. held, to be truly free in thought, judges should not be "plagued with allegations of malice or ill-will or bias or anything of the kind": *Sirros*, at p. 136, cited by *Morier*, at pp. 739-40.

[14] Lower court decisions are divided on whether judicial immunity is absolute. For example, in ***Tsai v. Klug***, 2005 O.J. No. 2277; upheld on appeal 2006 O.J. No. 665 (C.A.); leave to appeal refused [2006] S.C.C.A. No. 169 (QL), Karakatsanis J. (as she then was) held that immunity to civil claims applies to any acts related to a judge's judicial capacity "whether they are proper judicial actions or not" (at para. 7). Similarly, in ***Hokhold v. Canada (Attorney General)***, 2021 BCCA 475; leave to appeal refused [2022] S.C.C.A. No. 254, the court held that judges are protected by "absolute immunity from suit in respect of *any* matters that arose during performance of the justice's judicial duties, without exemption for any of the gradients of fault, including fraud" (at para. 35). And in ***Shaw v. Trudel***, [1988] M.J. No. 537 (C.A.), the Manitoba Court of Appeal held

that immunity applies to judicial acts within their jurisdiction even if malice was involved. (see also ***Taha v. Clements***, 2021 PECA 5, ***Veeken v. British Columbia***, 2023 BCSC 943, upheld on appeal 2024 BCCA 80).

[15] While there are cases that acknowledge that there may be a bad faith exception to judicial immunity or an exception where a judge knowingly acts beyond his jurisdiction, there do not appear to be any reported cases where that exception has allowed a claim against a judge to proceed. (see e.g. ***Taylor v. Canada*** *supra*; ***McIntosh v. Shore***, 2024 ONSC 1767, at para. 52).

[16] Judicial immunity extends beyond pure judicial acts to administrative functions related to the judicial role. In ***Hokhold***, judicial immunity prevented suit against both the trial judge, for allegedly fabricating evidence to support a decision in favour of the plaintiff's ex-wife, and the chief justice, for acts performed in his administrative role. The allegation against the chief justice was that he had asked the RCMP to investigate the plaintiff because of security concerns related to the trial judge without a reasonable basis for doing so. The court in ***Hokhold*** held that, as the actions of the chief justice related to administrative functions exercised on behalf of the court, absolute immunity applied (at para. 40). (see also ***Simpson v. Koenigsberg***, 2018 BCSC 499)

[17] The breadth of judicial immunity is illustrated by the decision in ***Mayer v. Zuker***, [2009] O.J. No. 1354 (S.C.)(QL). There the plaintiff sued a judge for misfeasance in public office and other torts after the judge was disciplined by the Ontario Judicial Council for editing a transcript of his reasons in a way that substantially altered them. The claim alleged that the judge fabricated evidence and obstructed justice. The court held that

those allegations did not give rise to a civil claim, even if true. The plaintiff argued that judicial immunity did not apply to the editing of the transcript because that act did not occur in the courtroom. Low J. disagreed:

> 28 I do not accept those arguments. First, judicial functions encompass not only those activities that are carried out in open court and visible to the public but also a myriad of other activities that are never on view. The fact that activities occur below the water line does not diminish the fact that they are related to or ancillary to judging (the most obvious of these being the writing of reasons). Second, that the act of editing the transcripts was in the course of discharging judicial duties is evident from the fact of the finding of judicial misconduct by the Ontario Judicial Council concerning that conduct, a fact upon which the pleading relies. Third, while exceeding jurisdiction takes an act or decision of a judge out of the realm of correctness, it does not take the activity out of the realm of judging.

[18] In ***McIntosh v. Shore***, 2024 ONSC 1767, the plaintiff sued a judge, before whom he had ongoing litigation, for sending an email to 90 of the judge's colleagues which, the plaintiff alleged, contained defamatory remarks about him. The court struck the claim finding that, even if the judge acted improperly or in excess of her judicial authority, it was not actionable (para. 53).

[19] Judicial immunity applies to civil liability only. A judge is not immune from prosecution for criminal acts, even if they are related to their judicial functions, as was the case in ***Bourbonnais v. Canada (Attorney General)***, 2006 FCA 62, where the applicant, a member of the Immigration and Refugee Board, had solicited and accepted money in exchange for favourable decisions. Nor in ***Jogendra v. Campbell***, 2011 ONSC 272, at para. 36, did judicial immunity apply to sexual assaults committed by a justice of the peace on women seeking his services.

Fiduciary Duty

[20] The plaintiff does not allege that the relationship between the parties fell within one of the existing ("per se") recognized categories of fiduciary relationships. Rather, the statement of claim states that "in the circumstances of this case", an *ad hoc* fiduciary relationship arose between the plaintiff and the defendants and that the defendants breached that duty (para. 13).

[21] Generally, to establish an *ad hoc* fiduciary duty, there must be a "strong correspondence" with a traditional category, such as solicitor-client or guardian-ward (***Elders Advocates of Alberta Society v. Alberta***, 2011 SCC 24, para. 47). While the elements necessary to establish a fiduciary duty are the same whether the alleged fiduciary is a private actor or government, governments will owe fiduciary duties only in rare situations (para. 44). This is because the fiduciary's obligation is to put the interest of the beneficiary above others, whereas government's obligation is usually to act in the broad public interest. Those situations where a fiduciary duty has been found on the part of government, such as in the Crown's relationship to Aboriginal peoples, are unique and considered *sui generis*.

[22] Arguably, it would be even rarer to find a fiduciary relationship between a litigant and a judge. Such a relationship would conflict with the judge's role as an impartial arbiter. In rejecting the argument that the application judge owed a fiduciary duty to the parties, the Saskatchewan Court of Appeal in ***Mann v. Mann***, 2023 SKCA 100, commented:

> 45 In this case, the Chambers judge's role was to adjudicate the dispute between the brothers dispassionately, from a perspective of neutrality, on the record alone, all in accordance with the law. In other words, the Chambers judge was required

> to act judicially. The Chambers judge did not owe a duty of loyalty to James. He was not called to act in James's best interests. He had no personal interest in the matter, and he had no responsibility to subordinate Jason's interests to those of James. In short, the Chambers judge was not a "conservator". He did not and could not occupy the role of a fiduciary to any party.

ANALYSIS

The Claim Against Justice Champagne

[23] The allegation in the statement of claim is that the "defendants" breached the plaintiff's privacy and breached a fiduciary duty owed to the plaintiff by publishing Justice Champagne's unedited decision on the court website. The allegations do not distinguish between the actions of Justice Champagne and the actions of court staff for which the Government is responsible. The claim does not indicate what each of the defendants did to cause the publication. Notably, it does not indicate that a written version of Justice Champagne's decision was published. Nor does the claim distinguish between the two defendants in alleging the existence of a fiduciary duty.

[24] The facts pleaded, which are taken to be true, are that Justice Champagne released his decision orally. That means that he read his decision into the record in a courtroom. In doing so, his decision is protected by the publication ban that he ordered at the outset of the trial in the same way as the evidence given during the trial is protected. A judge need not anonymize or de-identify parties or witnesses when he delivers reasons orally. Justice Champagne did not breach the publication ban by delivering reasons orally even if he referred to the plaintiff by name in doing so.

[25] The statement of claim does not indicate how the reasons went from oral reasons to publication on the court website. It does not state that Justice Champagne issued a written version of his decision, nor does it state any other facts that show he had any

responsibility for the publication of his decision on the court website. There are no facts in the claim to support an allegation that Justice Champagne breached the publication ban. This is sufficient to grant the motion to strike the claim against him. But I will go on to look "outside the claim" to explain why the claim against Justice Champagne has no chance of success even if the plaintiff were allowed to amend her claim to add additional facts. I do this to explain why I am not granting the plaintiff leave to amend her claim.

The Additional Facts

[26] Included in the book of authorities filed by Justice Champagne on this motion are edited written reasons with an addendum which were released by Justice Champagne, presumably after the oral reasons were delivered. The written reasons were not put before me as evidence, nor could I consider them as "evidence" on a motion to strike as I am confined to relying on the facts pleaded within the four corners of the claim. The edited reasons and addendum effectively provide the facts as to what led to the breach of the publication ban, facts which were obviously known to the plaintiff but not included in the claim.

[27] Before I refer to the contents of the reasons and addendum, I note that the Government argued that judicial notice can be taken of Justice Champagne's written reasons and, therefore, that I can rely on them in assessing the sufficiency of the claim. Judicial notice is an evidentiary principle that allows the court to accept facts without formal proof. Since, on a motion to strike, I cannot look at facts outside the statement of claim, this evidentiary principle does not assist here.

[28] The parties might have argued, but did not, that the written reasons can be considered on the motion to strike because they are incorporated by reference into the statement of claim. In ***McCreight v. Canada (Attorney General)***, *supra*, the court explained:

> [32] As noted by Borins J. (as he then was) in *Montreal Trust Co.*, at para. 4, a statement of claim is deemed to include any documents incorporated by reference into the pleading and that form an integral part of the plaintiff's claim. Among other things, this enables the court to assess the substantive adequacy of the claim. In contrast, the inclusion of evidence necessary to prove a fact pleaded is impermissible. A motion to strike is unlike a motion for summary judgment, where the aim is to ascertain whether there is a genuine issue requiring a trial. On a motion to strike, a judge simply examines the pleading; as mentioned, evidence is neither necessary nor allowed. If the document is incorporated by reference into the pleading and forms an integral part of the factual matrix of the statement of claim, it may properly be considered as forming part of the pleading and a judge may refer to it on a motion to strike.

[29] Arguably, the reference to the "decision" in the statement of claim incorporates the written decision into the claim so that it can be considered in assessing the adequacy of the claim. But, it was the defendants who referred to the written reasons. As the plaintiff did not argue that the written reasons were an integral part of the factual matrix of her claim, I do not think I can rely on them as such. That said, I will refer to the written reasons and addendum to explain why, even if I allowed the plaintiff to amend her claim to plead the additional facts that are evident from the written decision, those facts would not support a cause of action against either defendant.

[30] The written reasons of Justice Champagne included in the book of authorities show that the publication ban issued by Justice Champagne was a discretionary ban under s. 486.5 of the ***Criminal Code***. Notice of the ban is set out at the head of those reasons, followed by this note indicating that the reasons are a corrected judgment:

> **Corrected Judgment:** An Erratum was issued on May 8, 2023. The text of the initial judgment is reproduced here with corrections and the Erratum is appended at the end of this Corrected Judgment.

[31] The erratum that is appended to the reasons states that the original judgment is amended by adding the notice of the publication ban, by de-identifying the accused, complainants and witnesses and by removing other information from the judgment that would identify those people. The erratum ends with this:

> Please replace the original judgment with the attached corrected judgment in its entirety.

[32] It is apparent from this corrected judgment that Justice Champagne issued a written version of his decision and that the original version did not provide notice of the publication ban or remove information that would identify the plaintiff. The original version was published and later replaced with the corrected judgment. If these additional facts had been pleaded in the statement of claim, the claim would show that Justice Champagne breached the publication ban by issuing reasons that were not anonymized and that whoever is responsible for posting the reasons on the Government website posted reasons that were not anonymized and, therefore, also breached the ban. However, as I will explain, while the additional facts would show the defendants breached the ban, they do not support a cause of action against Justice Champagne or the Government for breach of privacy or for breach of fiduciary duty.

Judicial immunity

[33] There can be no doubt that the issuing of reasons for a decision is a judicial act that is protected by judicial immunity even if the reasons contain errors or omissions. The issuing of reasons is an essential part of the judicial process. The plaintiff argues

that the posting of a decision is an administrative act to which judicial immunity does not apply. There are no facts in the claim that allege that Justice Champagne was involved in the posting of the decision on the court website or in directing others to do so. The only thing that would be clear from the claim, if amplified by the written reasons, is that Justice Champagne "signed off" on reasons without including notice of the ban or editing the decision to implement the ban. That is to say, he made a mistake in writing the reasons. Even the narrowest interpretation of judicial immunity would prevent a claim against a judge for mistakes or omissions in the writing of reasons. To find otherwise would undermine the very reason for the immunity – the freedom of the judge to make decisions without fear of consequences.

[34] To the extent that Justice Champagne had some role in directing publication of his reasons, the publication is an extension of the judicial act of delivering reasons. The reasons for a decision are of interest not only to the parties but to the public at large. As stated by Binnie J. in ***R. v. Sheppard***, 2002 SCC 26, at para. 55, "In its most general sense, the obligation to provide reasons for a decision is owed to the public at large." As such, they must be accessible to the public at large.

[35] Even if the publication of reasons is considered to be an administrative act, it is one that is directly connected to the judge's judicial role and therefore protected by immunity. While the plaintiff argues that judicial immunity does not apply to administrative acts, she has produced no case law to support that proposition. In fact, the case law referred to above shows that the immunity does protect administrative acts connected to the judicial function.

[36] In her written brief, the plaintiff argued that the defendants cannot rely on judicial immunity because they have not pleaded it as a defence. At the hearing, counsel for the plaintiff resiled from that position and acknowledged that a motion to strike could be brought. Indeed, the court in ***Morier v. Rivard*** confirmed that motions to strike a claim were an appropriate procedure for determining if judicial immunity precludes a claim. As stated by Chouinard J., at para. 114: "It is important to avoid litigation or to terminate it as quickly as possible when it cannot succeed in law."

[37] The plaintiff seemed to argue that Justice Champagne's actions here should fall within an exception to judicial immunity. Her counsel acknowledged that he is not relying on any existing exception, such as they are. There is no suggestion of fraud here, nor any suggestion that Justice Champagne knowingly acted in excess of his jurisdiction. Rather, plaintiff's counsel argued that the court should recognize a new exception to judicial immunity. In his oral submissions, the only basis that he articulated for establishing a new exception was that the plaintiff has been wronged and therefore there must be a remedy. I note that the claim states that when the plaintiff advised Victim Services that an unredacted version of the reasons had been posted, the decision was taken off the court website. There is no indication in the claim as to how long the unredacted decision was on the website before being removed. I also note, lest there be any suggestion that justice is not served by not allowing the plaintiff to pursue a remedy in damages, that Justice Champagne's reasons (para. 23-24) indicate that the plaintiff had herself posted information about the case with identifying information (her photograph) on her Facebook account long before Justice Champagne issued his reasons.

[38] The plaintiff has not referred to a single case to support her position that judicial immunity should not apply in the circumstances of this case. With or without the additional facts gleaned from the corrected judgment, judicial immunity prevents the claim from being pursued and it should be struck.

Fiduciary Duty

[39] Even if judicial immunity does not prevent the claim against Justice Champagne from proceeding, the claim does not establish a cause of action for breach of fiduciary duty. The statement of claim does not address the elements of that cause of action. As I said, in asserting a breach of fiduciary duty, the claim does not distinguish between the two defendants. When asked at the hearing what paragraphs of the claim set out the claim for breach of fiduciary duty, plaintiff's counsel pointed to these paragraphs:

> 12. The Plaintiff submits that by publishing the decision in unedited (sic) a forum of public record and not complying with the issued publication ban, the Defendants breached their duty to maintain the Plaintiff's privacy to which the Plaintiff had a reasonable expectation in reliance on the undertaking from the Defendants.
>
> 13. The Plaintiff further submits in the circumstances of this case, that an ad hoc fiduciary relationship arose between the Plaintiff and the Defendants, and the actions of the Defendants breached that duty to the Plaintiff and caused the Plaintiff irreparable harm.

[40] The statement of claim does not articulate facts that show how the plaintiff's relationship with either defendant is analogous to existing categories of fiduciary relationships. It seems to allege that the publication ban itself gave rise to a fiduciary duty. There is nothing in the claim to explain why the issuing of that order gave rise to a duty of "utmost loyalty" on the part of Justice Champagne or created a vulnerability on the part of the plaintiff that could be subject to abuse (***Elder***, paras. 28, 36 and 43). Moreover, whatever "relationship" a judge would have with a witness is very different

than any relationship that exists between a witness and the court staff who manage the court website. The fact that the plaintiff does not distinguish between the two undermines any reading of the claim that would support a cause of action against either for breach of fiduciary duty.

The Claim Against the Government of Manitoba

[41] The statement of claim states that Justice Champagne's decision was posted to the court website without the publication ban in place. That fact is assumed to be true. The claim does not articulate what role each of the defendants had in posting the decision on the website. While I do not think one can infer that judges are involved in the mechanics of publishing a decision, it is reasonable to infer that a member of the court staff would have been involved in posting the decision on the court website. And, in doing so, they breached the publication ban. That said, the fact that a member of the court staff breached the ban does not itself give rise to a cause of action against the Government for breach of privacy or breach of fiduciary duty.

[42] Insofar as the breach of privacy is concerned, the claim does not allege that the court staff knowingly breached the ban. Nor could the claim make that allegation since it is implicit in the claim, and explicit in the corrected judgment, that the decision was published without notice of the publication ban. So, the court staff would not have known that the decision they posted was subject to a publication ban. The statement of claim acknowledges that the decision was taken down when the Government was notified that it had not been edited to comply with the ban.

[43] ***The Privacy Act***, C.C.S.M. c. P125, on which the plaintiff relies, creates a tort where a person "substantially, unreasonably, and without claim of right, violates the privacy of another person" (s. 2(1)). Section 5(b) of the *Act* creates a defence where:

> the defendant, having acted reasonably in that regard, neither knew or should reasonably have known that the act, conduct or publication constituting the violation would have violated the privacy of any person;

[44] Arguably, the defence set out in s. 5 must be pleaded in the statement of defence and, therefore, cannot be considered on a motion to strike. However, the tort is not established unless the defendant "substantially, unreasonably and without claim of right" breached the plaintiff's right to privacy. Without particulars as to this essential element of the tort of privacy, the claim does not support the cause of action.

[45] Insofar as the alleged breach of fiduciary duty is concerned, it would be a rare case where Government would be found to owe a fiduciary duty to an individual. While the plaintiff says that her claim should not be struck simply because it is novel, the claim does not set out any facts that would suggest the claim would have any traction. As I explained earlier, the fact that the claim does not distinguish the allegations against the two defendants undermines any argument of a unique relationship of trust between the Government and the plaintiff. And if the claim were amended to add the additional facts set out in the corrected judgment, it would be even clearer that there was no fiduciary relationship between the two. The suggestion that court staff took on a duty of utmost loyalty by simply posting a decision that they would not have known contained a publication ban takes this beyond a novel claim to an absurd one.

Statutory Immunity

[46] The Government also argues that, even if the claim articulated a basis for breach of privacy or breach of fiduciary duty, the statutory immunity provided by s. 4(6) of ***The Proceedings Against the Crown Act***, C.C.S.M. c. P140, prevents the claim from proceeding against it. That section provides:

> **Limitation of liability in respect of judicial acts**
>
> 4(6) No proceedings lie against the Crown under this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge responsibilities of a judicial nature vested in him, or responsibilities that he has in connection with the execution of judicial process.
>
> [emphasis added]

[47] Section 4(6) only applies to tort claims. Breach of privacy is a tort (***The Privacy Act***, s. 2(1)); so, the immunity would apply to it. The parties did not address whether breach of fiduciary duty is a "tort" to which s. 4 applies. However, for the purpose of this discussion, I assume that the section does apply.

[48] Section 4(6) provides immunity in two situations: 1) with respect to anything done by a Crown servant to discharge responsibilities of a "judicial nature" and 2) with respect to responsibilities in connection with the execution of judicial process. The Government argues that both situations apply here. I disagree. In my view, "execution of judicial process" refers to the implementation or enforcement of a court order or judgment such as the collection of maintenance under an order (***Donovan v. Government of Manitoba***, 2006 MBQB 131). Posting a decision on the court website would not fall within "execution of judicial process."

[49] The Government makes a more convincing argument that, in posting decisions to the court website, court staff are discharging responsibilities of a judicial nature because,

in doing so, they are implementing the judge's obligation to make his decision accessible to the public. That is to say, the publication of reasons is part of the judicial act of issuing reasons.

[50] Manitoba relies on ***Collins v. Ontario,*** 2023 ONSC 2160; upheld on appeal 2023 ONCA 646, where the court considered Ontario legislation comparable to s. 4(6). In that case, the plaintiff alleged that court staff had obstructed her access to justice by rejecting her filings without cause. Smith J. held that the court staff had immunity from liability for actions performed "in the exercise of their ordinary duties" (at para. 29). As this finding is conclusory with little analysis, it is not of great assistance. But, as the Government argued, it would make sense that court staff should not be liable to civil action for assisting judges in carrying out functions for which the judge has immunity. As reasoned by Keith J., in ***K.G. v. H.G.***, 2021 NSSC 335, at para. 28 (explaining why the applicant could not subpoena a judge's assistant to support his motion that the judge should recuse himself from the applicant's matrimonial proceedings):

> There is no evidence that Associate Chief Justice O'Neil's judicial assistant (Trish Thompson) and Justice Forgeron's judicial assistant (Tanya McCarthy) were acting in any way other than in the ordinary course of their employment, exclusively to facilitate the ability of Associate Chief Justice O'Neil and Justice Forgeron to perform their judicial functions. Mr. G. is not entitled to circumvent the principle of judicial immunity by doing indirectly what he cannot do directly; or sidestep judicial immunity by demanding information from those whose jobs are entirely dedicated to helping judges fulfil their roles and responsibilities.

[51] The application of s. 4(6) to the facts in this case is essentially a case of first impression. I am inclined to accept the Government argument, particularly since the plaintiff did not respond to it. However, in view of the deficiencies in the claim explained above, I do not need to make a determination as to whether s. 4(6) provides immunity.

The statement of claim does not disclose a reasonable cause of action against the Government of Manitoba.

Leave to Amend

[52] It is plain and obvious that the claim against the defendants cannot succeed. The statement of claim is devoid of particulars that would establish a cause of action for breach of privacy or breach of fiduciary duty against either defendant. Before this motion proceeded, plaintiff's counsel was offered an opportunity to amend the claim but declined to do so. In any event, even if the additional facts in the corrected judgment were added to the claim, the action would be doomed to fail. Nor did the plaintiff suggest any amendments that could be made that would give rise to a cause of action against either defendant.

[53] The statement of claim is struck as against both defendants without leave to amend. Costs may be spoken to if not agreed upon.

_____J.