KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 59**

Date: **2024 04 04**
Docket: KBG-SA-01384-2023
Judicial Centre: Saskatoon

BETWEEN:

GARRY ALEXANDER IRON

Plaintiff

- and -

BATEMAN'S JEWELERY

Defendant

Counsel:

Garry Alexander Iron	on his own behalf
George A. Green and Shelby A. Fitzgerald	for the defendant

FIAT — ELSON J.
April 4, 2024

Introduction

[1] On September 27, 2016, a now retired judge of this Court found the plaintiff in this action guilty of robbing the defendant's jewelry store. A concurrent verdict for breaching an undertaking necessarily came with this finding. The same judge later designated the plaintiff a dangerous offender and sentenced him to an indeterminate term of imprisonment.

[2] In an oral decision, dated March 7, 2022 (*R v Iron* (7 March 2022) Court of Appeal, CACR3317 (Sask CA)), the Saskatchewan Court of Appeal reversed both verdicts and entered acquittals in their place. The appellate Court found serious procedural flaws in how the lead investigating officer obtained eyewitness evidence. It further found that these flaws detracted from the probative value of the in-dock identification of the plaintiff at trial. An application for leave to appeal to the Supreme Court of Canada was dismissed on November 10, 2022 (*R v Iron*, [2022] SCCA No 142 (QL)).

[3] The plaintiff now brings this action. In it, he asserts that he was wrongfully convicted and that the defendant bears responsibility for that.

[4] The defendant has not yet served and filed a statement of defence to the claim. Instead, it elected to bring an application, principally pursuant to Rule 7-9(2)(b) of *The King's Bench Rules*, to strike the statement of claim in its entirety. The only ground engaged by this application is that the plaintiff's claim is frivolous. In support of its assertion of frivolity, the defendant relies on the doctrine of witness immunity.

[5] For the reasons that follow, I am satisfied that the defendant's application must be dismissed, but without an order for costs and without prejudice to bring further pre-trial applications to address the doctrine of witness immunity.

Background

[6] I briefly summarized the background to this claim in the Introduction. I will add a few more observations to that background under this heading.

[7] The sole issue in the criminal trial that led to the trial judge's verdict was the identity of the assailant who robbed the defendant's store on September 12, 2014. According to the evidence, the assailant entered the defendant's store and reviewed several pieces of jewelry with the assistance of the store's sales attendant. During the

interaction with the attendant, the store owner also observed the assailant. After several minutes, the man moved behind the sales counter while holding a knife. He then reached into the display case, grabbed a tray of rings and fled the store.

[8] In the police investigation that immediately followed, officers of the Saskatoon Police Service [SPS] took photographs and fingerprints, drew swabs for DNA purposes and seized a copy of the instore surveillance video. Apparently, the fingerprints were unusable. Further, and for reasons not disclosed in evidence, the DNA swabs were never submitted for analysis.

[9] The evidence also disclosed that the surveillance video proved less than ideal in revealing the assailant's face. Despite this, still-shot photographs from the video were placed in a parade bulletin and shown to SPS members. One member told the lead investigating officer that he believed the assailant depicted in the photographs was the plaintiff. This prompted the lead officer to obtain an out-of-custody photograph of the plaintiff from his parole officer. The lead officer then decided to use the photograph in a photo lineup presented to the sales attendant.

[10] When the photographs were prepared for the lineup, the photograph of the plaintiff had noticeable differences from the other photographs. The differences were twofold. Firstly, the photograph of the plaintiff was a close-up that depicted only his face. Secondly, because it was out-of-custody, the plaintiff's photograph did not have the same uniform background as the other photographs, which consisted of so-called "mug shots". When the sales attendant first reviewed the photographs, she could not pick out the assailant. Subsequently, in a second review, the sales attendant identified the plaintiff.

[11] After the photo lineup, the investigating officer provided a copy of the plaintiff's photograph to the store owner for him to keep. At trial, it came out that the owner showed the photograph to his staff, including the sales attendant, and then placed

it in a filing cabinet. Immediately before trial, both the owner and the sales attendant reviewed the photograph before testifying.

[12] In his verdict, the trial judge expressed concern about the conduct of the lead officer, opining that his actions leading to identification of the plaintiff came close to targeting him. Despite these concerns, the trial judge accepted the evidence of the sales attendant, the store owner and the SPS member who believed the still surveillance photograph depicted the plaintiff.

[13] On appeal, the Court of Appeal rendered its oral decision immediately after hearing counsel's submissions. In the oral decision, pronounced by Caldwell J.A., the Court said the following:

> [3] The only issue in the trial was the identity of the individual who had robbed a jewelry store. Two eyewitnesses identified Mr. Iron as the robber. However, their identification of Mr. Iron was tainted and the way in which those identifications were obtained was flawed. In our view, the frailties and flaws fundamentally undermined the reliability of the identification, this included:
>
> (a) The photograph of Mr. Iron used by the police in the photo-lineup was noticeably different from all but one of the other photographs used in the lineup.
>
> (b) The police provided a copy of Mr. Iron's photograph to the eyewitnesses to have on hand so that, as the Crown conceded, they could identify him in case the robber should return to the jewelry store.
>
> (c) Neither of the eyewitnesses provided the police with a statement.
>
> (d) The two eyewitnesses reviewed the photograph of Mr. Iron on the morning of the trial prior to identifying him in the dock.
>
> [4] Although the trial judge recognised the frailties of eyewitness identifications in general terms (*R v Bigsky*, 2006 SKCA 145), we interpret his reasons as using the two eyewitnesses' positive in-dock identification of Mr. Iron as a foundational basis for finding that he was, beyond a reasonable doubt, the robber. While in-dock identification is inherently unreliable in its own right, in our

> assessment, the procedural flaws in obtaining the eyewitness evidence further detract from the probative value of an in-dock identification and enhance the potential for prejudice.
>
> [5] In short, we can see no rehabilitative value in an in-dock identification in the circumstances of this case – a point the Crown conceded. Nor do we find the police officer's recognition of Mr. Iron from still images taken from the video of the robbery sufficient to rehabilitate the frailties in the eyewitness' identification or to overcome the problems with the photo lineup.
>
> [6] The Crown invited the Court to review the still images from the video of the robbery and the lineup photograph of Mr. Iron, which we did. The trial judge made no comparison findings in this regard. However, in our unanimous assessment, we see no basis upon which a trier of fact could review these photographs, whether considered alone or together with the other evidence, and conclude beyond a reasonable doubt that Mr. Iron had committed the offence under s. 344(1) of the *Criminal Code*.
>
> [7] In short, we are persuaded that the verdicts must be overturned because they are unreasonable. In the result, we would enter acquittals on the two charges.

[14] After the Supreme Court of Canada dismissed the Crown's request for leave to appeal, the plaintiff, now self-represented, issued his statement of claim on November 22, 2023. The pleading does not meet the requirements of Rule 13-8. It is handprinted with multiple spelling and grammatical errors as well as some unreadable passages. Despite its obvious flaws, it is certainly not the worst pleading this Court has seen from self-represented litigants. I think it appropriate to reproduce the pleading in this fiat. It reads as follows:

> On the date of his arrest, Dec 05, 2015 Garry Alexander Iron, went to court and was remanded in Saskatoon Correctional on those matters of arm robbery on Bateman's Jewelery on 2nd Ave South in Saskatoon
>
> disclosour of the investorgation of Bateman's Jewelery, which had statements, video evidence and a picture of the suspect was present at the time of the robbery at Bateman's Jewelery on Sept 12, 2014,
>
> which lead to trial of Bateman's Jewelery and trail judge found Garry Alexander Iron guilty of the conviction and trail judge sentance Garry Alexander Iron a dangerous offender
>
> Garry Alexander Iron file an 30 day appeal after 7 long years to the

Court of Appeals in Saskatchewan

which all Court of Appeals judge's agree to over-turn Garry A Iron conviction after 7 long years in the Saskatchewan Penitentary where he was be punishment for a crime he did not commit arm robbery on Bateman's Jewelery, Garry Alexander Iron was wrongfully convicted

Liabilitys

Bateman's Jewelery is liable for its business

Bateman's Jewelery is liable for hiring employee's for their business

Bateman's Jewelery is liable for staffmembers, or employee's for their business

Bateman's Jewelery is liable for acts, transgression, and wrong doings by their staffmembers, or employee's for their business

Bateman's Jewelery is at fault for damages cause by employee's or staffmembers

which lead to Garry Alexander Iron wrongfully conviction

Damages, causes, and effects

1 endangerment
2 false testimony
3 physical and mental harm
4 defamatory
5 lose of pay

A Endangerment

Gary Alexander Iron

and dealt with "ADHD" all his life being incarcerated in high maxium security centre in Saskatchewan Penitentary

first time in maxium security condition in maxium security are 21 hrs lock in arm length cells and most of days Its 24 hrs cause of incidents that acure in the maxium security

maxium security is where all the violent inmates are place, and the violence don't stop in Max that a term inmates use, it regard the maxium security prisons.

Garry Alexander Iron was place in the maxium security first time for a little over 2 yrs.

being in a high violent security unit

where Garry Alexander Iron was surrounded by:

- killers

- most violent inmates

- inmates with mental health that are violent

Garry Alexander Iron dealt with violent inmates on a regular bases..

Garry Alexander Iron had been involved with incidents,

incidents of defends himself

Incidents that shouldn't have acured cause of his wrongfully conviction

Garry Alexander Iron dealt with this on regular bases, and only time Gary Alexander Iron felt kind of safe is when his cell door shuts; and

why Garry Iron felt kind of safe cause when that cell door open anything could happen

with that stress, and knowing that was innocent for the arm robbery on Bate's Jewelery..

Bateman's Jewelery liabile for endangerment of Garry Alexander Iron life and well being

cause of Garry Alexander Iron wrongfully conviction.

B False Testimony

Bateman's Jewelery employee's made testimony that lead to Garry Alexander Iron wrongfully conviction and sentence

dangerous offender

Bateman's Jewelery is liable for it's employee's that Bateman's Jewelery hire as employee's for their business

C Physical Harm

Bateman's Jewelery responsible for physical harm that Garry Alexander Iron endured well incarcerated. Every incident that was physical that happen to Garry Alexander Iron well incarcerated in provincial and fedral jail

Bateman's Jewelery is liable for Garry Alexander Iron wrongfully conviction; and

Bateman's Jewelery is liable for act, transgression, of it's employee's, every incident that is [unreadable]

it shouldn't have accurred cause he was innocent, and wrongfully convicted.

D Mental Health Harm

Bateman's Jewelery is responible mental health harm

medical records of Saskatchewan Penitentary would state that he was ADHD, dealing with stress, depression; and

as a hard time sleeping..

All those mental health problem acurred well incarcerated

- depression –

- stress –

- hard-time sleeping –

shouldn't have happen cause his innocents, and wrongfully conviction..

E. Defamatory

Bateman' Jewelery is responible defamatory of his name; Garry Alexander Iron cause Bateman's Jewelery business; and Bateman's Jewelery employee's testify for Bateman's Jewelery business; and

said it was Garry Alexander Iron, and

now if any business Garry Alexander Iron [unreadable] and [unreadable] is name Garry Iron on the internet, it would come up that he rob Bateman's Jewelery..

That would lead to no opportunity in the futur of employment..

F. Lose of pay

Bateman's Jewelery is responible for loss of pay cause

7 years Garry Alexander Iron been incarcerated for wrongfully conviction;

Garry Alexander Iron would had a job; or

Garry Alexander Iron would had schooling; and had a [unreadable] that could of lead

supporting his family..

Bateman's Jewelery is liable for the 7 years of lose of pay cause on page 03 on liabilitys on page 03, number 1 to 5

Bateman's Jewelery is responible

Remedy

Bateman's Jewelery is responible for the pain, suffering, false

> testimony, defamatory, lose of pay; and
>
> lose of time. Garry Alexander had to endure; and
>
> most important it's employee's the business, Bateman's Jewelery employee's
>
> Resolve would a sum of money of $4.000.000..
>
> [Underlining in the original]

Position of the Defendant

[15] As earlier mentioned, the defendant pursues this application to strike the plaintiff's claim solely on the condition that it is "frivolous". As such, the application engages Rules 7-9(1)(a) and 7-9(2)(b) of *The King's Bench Rules*.

[16] The defendant posits that, as articulated in *C&J Hauling Ltd. v Mistik Management Ltd.*, 2010 SKQB 60 at para 15, 351 Sask R 199 [*C&J Hauling*], the plaintiff's claim is frivolous and that it is "groundless and pursued for the purpose of delay and embarrassment". According to the defendant's brief, this position is rooted in the argument that the concept of witness immunity, insofar as it applies to this case, precludes the plaintiff's claim from proceeding, thereby rendering it groundless.

Applicable Law

Application of Rule 7-9(2)(b)

[17] While the defendant's application is confined to a specific consideration of Rule 7-9(2)(b), I think it appropriate to recite Rule 7-9 in its entirety. It reads as follows:

> **7-9(1)** If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:
>
> (a) that all or any part of a pleading or other document be struck out;
>
> (b) that a pleading or other document amended or set aside;

> (c) that a judgment or an order be entered;
>
> (d) that the proceeding be stayed or dismissed.
>
> (2) The conditions for an order pursuant to subrule (1) are that the pleading or other document:
>
> (a) discloses no reasonable claim or defence, as the case may be;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> (d) may prejudice or delay the fair trial or hearing of the proceeding; or
>
> (e) is otherwise an abuse of process of the Court.
>
> (3) No evidence is admissible on an application pursuant to clause (2) (a).

[18] Rules similar to Rule 7-9 exist in various jurisdictions across Canada, including the Federal Court of Canada. Rule 7-9 is worded very similar to former Rule 173. Subject to the overarching impact of the Foundational Rules in Part 1 of *The King's Bench Rules*, the fundamental principles underlying Rule 173 of the former *Queen's Bench Rules*, remain applicable to Rule 7-9. See *Bell v Xtreme Mining & Demolition Inc.*, 2014 SKQB 177 at para 6; *Hope v Parkdale (Rural Municipality) No. 498*, 2014 SKQB 9 at para 15; *Rubbert v Boxrud*, 2014 SKQB 221 at para 35, 450 Sask R 147 [*Rubbert*].

[19] The overarching purpose of Rule 7-9, and former Rule 173 before it, has been addressed in several Saskatchewan authorities. In *Rubbert,* I addressed three of the authorities that describe the overall purpose of former Rule 173 before going on to apply that jurisprudence to the consideration of Rule 7-9. In this regard, I wrote the following at para. 34:

> [34] From a review of the relevant jurisprudence, it is apparent that the object of former Rule 173 was to prevent the delay and expense of a trial founded on an unreal claim or defence: *Montreal Trust Co. of Canada v. Jaynell Inc.* (1993), 111 Sask. R. 178, [1993] S.J. No. 274 (QL) (Q.B.), aff'd (1993), 116 Sask. R. 13, [1993] S.J. No. 548 (QL) (C.A.); *Ellis v. Canada (Office of the Prime Minister)*, 2001 SKQB

> 378, 210 Sask.R. 138, aff'd 2002 SKCA 35, [2002] S.J. No. 137 (QL); *RoyNat Inc. v. Northland Properties Ltd.*, [1994] 2 W.W.R. 43, 115 Sask.R. 272 (Q.B.). In the pursuit of this object, courts generally concluded that it was appropriate to strike a claim or defence where it was seriously defective or so devoid of merit that it could not inspire reasonable argument. While such remedies were never to be taken lightly, and were limited to exceptional cases, there were circumstances where the remedy is clearly justified.
>
> [Emphasis added]

[20] I would be remiss if I did not note that certain of the Saskatchewan authorities I cited in *Rubbert* also referenced various judgments of the Supreme Court of Canada, where the so-called "plain and obvious" test was articulated in the context of applications to strike claims or defences. As stated by Estey J. in *Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735 at 740, "… a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases where the court is satisfied that 'the case is beyond doubt'". See also *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441 at 449, and *Hunt v Carey Canada Inc.*, [1990] 2 SCR 959 at 980, (*sub nom. Hunt v T & N plc*) [1990] 2 SCR 959 (WL) at para 37).

[21] The plain and obvious standard has also been favourably compared to the standard applied in the United Kingdom. In *Lonrho plc. v Fayed*, [1992] AC 448 at 469, the House of Lords held that before a pleading could be summarily struck, the applicant would be required to show that the assertion raised in the pleading is either "unarguable" or "obviously and almost incontestably bad". See *Ameron International Corp. v Sable Offshore Energy Inc.*, 2007 NSCA 70, 41 CPC (6th) 329.

[22] Further guidance can be drawn from the Nova Scotia Court of Appeal decision in *Mabey v Mabey*, 2005 NSCA 35, 12 RFL (6th) 403 [*Mabey*]. In that case, the respondent had successfully brought a motion to strike a family proceeding which asserted the respondent's breach of a corollary relief judgment, along with a request for variation of spousal support and retractive child support. The decision was set aside on

appeal. At para. 13 of her reasons, Roscoe J.A. aptly described the plain and obvious test as one that required the requesting party to show that the claim or defence is "obviously unsustainable". She went on in the same paragraph to address the circumstances, including a strong defence, that should not present the impugned pleading from going forward. In this regard, Roscoe J.A. wrote the following:

> [13] … An application for variation should not be struck out unless it is certain to fail, or it is plain and obvious that it will not succeed. Neither the length the length and complexity of the issues, the novelty of the cause of action, nor the potential for the respondent to present a strong defence should prevent the applicant from proceeding with his or her case …."
>
> [Emphasis added]

[23] I now turn more specifically to the circumstance in which a "frivolous" pleading could be struck pursuant to Rule 7-9(2)(b) – on the basis that it is seriously defective or so devoid of merit that it is incapable of inspiring reasonable argument. From my reading of the jurisprudence, the first reported Saskatchewan authority to define the term, within the meaning of former Rule 173, was *Chisum Log Homes & Lumber Ltd. v Investment Saskatchewan Inc.*, 2007 SKQB 368, [2008] 2 WWR 320 [*Chisum*]. At para. 133 of *Chisum*, Ryan-Froslie J. (as she then was) set out separate definitions for the terms "scandalous", "frivolous" and "vexatious". She observed that: (1) a scandalous claim is one that improperly casts the defendant in a derogatory light; (2) a frivolous claim is one that is groundless and pursued for the purpose of embarrassment; and (3) a vexatious claim is one that is instituted maliciously and without cause. Aside from the decision in *C&J Hauling*, other authorities citing the above definition of frivolous include *Solgi v College of Physicians and Surgeons of Saskatchewan*, 2022 SKCA 96, 473 DLR (4th) 421 [*Solgi*]; *Harpold v Saskatchewan (Corrections and Policing)*, 2020 SKCA 98 [*Harpold*]; *Rubbert*; and *Paulsen v Saskatchewan (Ministry of Environment)*, 2013 SKQB 119, 418 Sask R 96. It is notable that, except for *Rubbert*, none of the above authorities resulted in any pleading being

struck on the ground of a claim or defence being frivolous.

[24] In the context of the case at bar, I find the Court of Appeal decisions in *Harpold* and *Solgi* are particularly instructive. I think it helpful to address the facts and reasoning of both cases.

[25] In *Harpold*, the plaintiff was facing charges under the *Criminal Code*, RSC 1985, c C-46, and had been released pending trial on an undertaking that later evolved into a recognizance. One of the conditions of the plaintiff's release included a residency requirement. When probation officers refused the plaintiff's request to modify the residency condition, the plaintiff brought an action for damages. He alleged that the refusal prevented him from accepting certain employment opportunities, thereby causing him to lose income. The defendant applied to strike the statement of claim on the grounds that it failed to disclose a reasonable cause of action, was frivolous and amounted to an abuse of process. The chambers judge allowed the application on all three grounds. In doing so, she noted that the defendant had pleaded the immunity provision of *The Correctional Services Act, 2012*, SS 2012, c C-39.2. In her view this immunity served as one of the reasons why the plaintiff could not succeed in his action.

[26] The plaintiff's appeal to the Saskatchewan Court of Appeal was allowed. Writing for the court, Schwann J.A. concluded that the claim did not amount to an abuse of process and that it pleaded sufficient material facts that could arguably support a claim based on the tort of misfeasance in public office. In addressing whether the claim was frivolous, the Court observed, correctly in my view, that this hinged on an assessment of the merits of the claim and the motivation of the plaintiff.

[27] Turning more specifically to the application of the immunity provision of the applicable statute, Schwann J.A. wrote, at para. 65, that "… the good faith immunity protection prescribed by s. 111 is simply a defence and, at that, hinges on a factual finding of good faith." After noting that the plaintiff did not specifically plead

bad faith, the Court accepted that he should be given an opportunity to amend his pleading to respond to the defence.

[28] In *Solgi*, the plaintiff was a family physician trained outside of Canada. He was permitted to participate in a program established by the Government of Saskatchewan which allowed for the acceptance of internationally trained family physicians. After completing the initial assessment, the plaintiff was granted a provisional licence by the defendant, College of Physicians and Surgeons [College]. The provisional licence was subject to a condition that he practise under the supervision of a named physician approved by the College until he received his full licence to practise medicine. At the time he pursued his provisional licence, there were two pathways by which the plaintiff could attain a regular licence. One involved successful completion of an assessment at the end of the mandatory supervision period, while the other involved certification by the College of Family Physicians of Canada [CCFP]. Before the plaintiff could complete his mandatory supervision, the College amended its Bylaws, which essentially limited holders of provisional licences from obtaining a regular licence through CCFP certification. Apparently, unaware of this, the plaintiff obtained his CCFP certification and began practising medicine in British Columbia on a provisional licence. He then informed the College of his intention to practise in Saskatchewan with a full licence. Upon learning that the plaintiff was no longer practising under the imposed conditions, the College suspended the plaintiff's provisional licence in Saskatchewan.

[29] The plaintiff then issued a statement of claim against the College, its council and its registrar. Essentially, the plaintiff complained about the assessment procedure after his supervision, as well as the inability to obtain a full licence through CCFP certification. He also alleged that the College acted in bad faith when it suspended his licence.

[30] The defendants applied to strike the statement of claim on various grounds, including the grounds described in Rule 7-9(2)(b). The chambers judge allowed the application and ordered that the statement of claim should be struck in its entirety (*Solgi v College of Physicians and Surgeons of Saskatchewan* (23 December 2021) Saskatoon, QBG-SA-00150-2021 (Sask QB)). He concluded that the defendant's claim was scandalous, frivolous and/or vexatious. As for the frivolous nature of the claim, the chambers judge specifically noted that the defendants did not appear to have done "anything outside of what they are very specifically given the power and responsibility to do within the discretionary orientation under *The Medical Professions Act, 1981*." See *Solgi*, para 41.

[31] On appeal, the chambers judge's decision was set aside with only one remedial paragraph struck from the claim. The Court of Appeal, speaking through Leurer J.A. (as he then was) was satisfied that the chambers judge had erred in his conclusion that the claim met all three conditions set out in Rule 7-9(2)(b). Turning specifically to the finding that the claim was frivolous, the Court was sharply critical of the chambers judge's comments about the defendants acting within their statutory power and responsibility. In this regard, Leurer J.A. wrote, at para. 52, that the existence of this power and responsibility could not support the assertion that the claim should be struck as groundless or lacking in substance. More directly, he said that the statutory power and responsibility was no answer to a claim that such power and responsibility was exercised for the express purpose of harming the plaintiff.

[32] Before I leave the discussion on the nature of a discretely frivolous claim or defence, I acknowledge that such a proceeding is often difficult to identify. They frequently overlap and are interchanged with the vexatious and abuse of process grounds. Having said this, the most glaring examples of frivolous pleadings have arisen in the last fifteen years or so through litigants making organized pseudo-legal commercial arguments ["OPCA"], as described by Rooke A.C.J.Q.B.in *Meads v*

Meads, 2012 ABQB 571, [2013] 3WWR 419. I addressed an OPCA situation in *Rubbert*. More recent instances where OPCA-based pleadings were found to be frivolous include *Arbabi v McLelland*, 2024 BCSC 91, and *AMEX Bank of Canada v Vincent*, 2023 ABKB 126. Other examples of frivolous proceeding could conceivably arise where evidence reveals that the party pursuing the matter knows it is groundless but nevertheless decides to pursue it. Of course, and as it commonly does, such a proceeding would overlap with the vexatious ground.

Doctrine of Witness Immunity

[33] As mentioned, the defendant relies on the doctrine of witness immunity to support its assertion that the plaintiff's claim is frivolous. Until the 2000s, this doctrine did not attract much judicial attention. Since the Nova Scotia Court of Appeal judgment in *Elliott v Insurance Crime Prevention Bureau*, 2005 NSCA 115, 256 DLR (4th) 674 [*Elliott*], however, a conspicuous body of jurisprudence has developed on the subject.

[34] In Peter Sankoff, *The Law of Witnesses in Canada*, loose-leaf (Rel 3, September 2023), vol 2 (Toronto: Thomson Reuters, 2023) at §21:14, the author summarized the nature of witness immunity as follows:

> There are two important aspects to the rule. The first is that anything testified to by a witness in judicial proceedings enjoys absolute privilege for the purposes of the law of defamation and cannot, therefore, be the subject of a civil action for slander. The second aspect is arguably even more significant, for it precludes anyone from bringing a civil action for harm supposedly caused by a witness's testimony. Effectively, this aspect of the immunity protects the witness from the legal repercussions that might otherwise arise because of *consequential* harm caused by their testimony. As a simple proposition, it may be stated that there is thus no civil tort of perjury, and one cannot sue another for damages arising out of a lie uttered on the witness stand. But the immunity's reach is wider than this, for it also protects witnesses from being sued for harm caused by negligence in connection with any testimony provided.
>
> [Emphasis in original]

[35] In *Elliott*, Cromwell J.A. (as he then was) articulated a more expansive description of the doctrine, one that described both the "core" of witness immunity and the "absolute" privilege that underlies the immunity. In these regards, he wrote the following at paras. 102 and 112-115:

> [102] Witnesses are immune from civil liability for what they say and do in a judicial or quasi-judicial proceeding. This is the core of witness immunity. Outside that core, the immunity may also extend to things witnesses (and even potential witnesses) say and do out-of-court, provided that the extension is necessary in order to make the protection of testimony effective. But how far the immunity extends to things said and done out-of-court is a grey area. …
>
> …
>
> [112] The witness immunity rule is part of a larger immunity which applies to participants in judicial or quasi-judicial proceedings. As Raymond E. Brown puts it in *The Law of Defamation in Canada*, looseleaf updated to 2004 Rel. 4, (Toronto: Carswell, 1999) at ¶ 12.4(1) and 12.4(4)(a), "An absolute privilege or immunity attaches to those communications which take place during, incidental to, and in the processing and furtherance of, judicial or quasi-judicial proceedings. No action for libel or slander will lie for words spoken or written during the ordinary course of those proceedings. ... The protection of this privilege extends to all the participants in the judicial or quasi-judicial proceeding including the judge, jury witnesses, parties and their counsel." [citations omitted]
>
> [113] While the immunity is most familiar in defamation cases, it also bars other causes of action. Halsbury says that: "A witness is protected from civil proceedings in respect of the evidence which he gives in judicial proceedings, and in respect of things said or done in the course of preparing evidence for such proceedings. The protection is against actions of any sort, and is not limited to actions for libel and slander.": *Halsbury's Laws of England*, 4th ed., vol. 17 (London: Butterworths, 1976) at ¶ 261 (emphasis added). Similarly, in *Martini v. Wrathall* (1999), 180 N.S.R. (2d) 38 (N.S. C.A.) (at ¶ 6) and *Horn Abbot Ltd. v. Reeves* (2000), 189 D.L.R. (4th) 644 (N.S. C.A.) (¶ 15), this Court approved the proposition that witness immunity applies to all tort actions. [citation omitted] It is not disputed in this case that the immunity applies to negligence actions.
>
> [114] The immunity applies to words said or conduct performed on a protected occasion, the protected occasion being a judicial or a quasi-judicial proceeding: *Brown* at ¶ 12.4(2). Thus, publishing defamatory words is not actionable if done in the course of judicial or quasi-judicial proceedings. It is critical to understand that it is not the

> nature of the conduct or the words which is the focus of the immunity, but the occasion on which the words are said or the conduct is performed. Saying exactly the same words will be either actionable or not depending on the occasion on which they are said. This is true whether the immunity is advanced as a defence in a defamation case or in other types of actions. The immunity applies only to a protected occasion.
>
> [115] The core of witness immunity is well established by authority. A witness has immunity in respect of what he or she says and does in court or in testimony before a quasi-judicial proceeding: [citation omitted]. The immunity also extends to a statement made by a witness if the statement is as to the nature of the evidence the witness can give and it is made to a professional person preparing the evidence to be presented in court: [citation omitted.
>
> [Emphasis in original]

[36] There is little doubt that, where the doctrine of witness immunity applies, particularly as part of the core of the immunity, it will amount to a substantive defence – perhaps one that precludes a claim's success. In the context of Rule 7-9(2)(b), however, the central question is whether the presence of witness immunity can render a claim so defective or so devoid of merit that it should be struck on the frivolous ground.

[37] I have conducted a brief review of various reported cases that have summarily considered the witness immunity defence described in *Elliott*. From that review, it is apparent that the procedural framework for the summary resolution of this issue has had an evolving history. There are two groups of authorities in this regard. The first group of cases addressed the issue through proceedings in the form of a summary trial, summary judgment or determination of an issue of law or fact. The second group of cases addressed the issue through applications to strike claims pursuant to rules that are the equivalent to Rule 7-9, but which were grounded solely on the absence of a reasonable cause of action.

[38] Authorities in the first group include *3746292 Manitoba Ltd. v Intact Insurance Co.*, 2016 MBQB 210; *Pearlman v Critchley*, 2011 BCSC 1479; and *N.(M.)*

v Froberg, 2009 ABQB 145, [2009] 11 WWR 518. As a footnote to this observation, I should also note that the application in *Elliott* initially came before the chambers judge through an application to determine points of fact or law, similar to our Rule 7-1. Accordingly, that case should be included in the first group.

[39] Authorities in the second group include *Patel v McMurtry*, 2023 SKCA 74 [*Patel*]; *Penney v L. B.*, 2021 NLSC 82[*Penney*]; *Durkin v Crease Harman LLP*, 2020 BCSC 642; *0742848 B.C. Ltd. v 426008 B.C. Ltd.*, 2019 BCSC 1869; *R.J.R. v P.M.R.*, 2019 BCSC 31; and *J.P. v Eirikson*, 2015 BCSC 847. In each of these cases, the applications to strike were grounded on the assertion that, having regard to the absolute privilege associated with witness immunity, it was plain and obvious that the subject claims did not disclose a reasonable cause of action.

[40] I am also compelled to note that, among the cases in the second group, caution was expressed about which procedural framework should be utilized in addressing the issue. In *Penney*, at paras 89-97, McGrath J. quite properly wrote about the limits that are engaged in an application to strike a pleading. As she did so, she also observed, at para. 89, that the question of witness immunity "could have been more fully argued under another Rule" such as rules relating to a summary trial or the determination of fact or law. In the end, when deciding the applications to strike brought by four defendants, McGrath J. struck the claims related to only two of the four defendants. She was not persuaded that the other two defendants had met the high threshold involved in an application to strike.

[41] The limits involved in an application to strike also arose, albeit somewhat differently, in *Reynolds v Kingston (Police Services Board)*, 2007 ONCA 166, 280 DLR (4th) 311 [*Reynolds*]. In that case, a pathologist testified at a preliminary hearing relating to a murder charge against the plaintiff, who was accused of killing her daughter. In his testimony, he attributed the child's cause of death to stab wounds

caused by a knife or scissors, as opposed to dog bites. A subsequent post-mortem examination, which revealed that a dog was responsible for some of the child's injuries, prompted the Crown to withdraw the charge. The plaintiff then brought an action alleging negligent investigation against the pathologist. Before the Ontario Divisional Court, the action was struck. The Divisional Court held that the witness immunity rule applied in such a way that it was plain and obvious the plaintiff could not succeed.

[42] On further appeal, this decision was set aside. The Ontario Court of Appeal held that the essence of the claim against the pathologist pertained to his role as a public official, and not to his role as a witness in a criminal proceeding. Moreover, the Court went on to say, at para. 25, that the action should be allowed to proceed to trial to enable the trial court to better assess the pathologist's immunity claim in the context of a complete factual record.

Analysis

[43] When this application came up for its hearing in chambers, the defendant's submission placed disproportionately more emphasis on the doctrine of witness immunity than it did to the principles governing Rule 7-9(2)(b). This lack of proportion became particularly evident with defence counsel's response to my question about how a substantive defence necessarily resulted in a frivolous claim. Counsel responded with a comment to the effect the witness immunity defence is so compelling that it rendered the plaintiff's claim groundless and, therefore, frivolous. In response to a further question, counsel could cite no authority to support this comment.

[44] Respectfully, I find the defendant's submission on the application of Rule 7-9 is shortsighted and that its reliance on the frivolous ground is particularly misplaced. The submission ignores the principled discussion in relevant authorities, such as *Mabey*, *Harpold* and *Solgi*. As I read these judgments, they make it clear that questions about whether a claim or defence is seriously defective or utterly meritless

are questions that transcend the strength of substantive defences or replies. In my view, this is particularly so where the applicant relies solely on the frivolous ground in Rule 7-9(2)(b). The presence of a compelling defence does not, by that fact alone, render a claim frivolous.

[45] Moreover, the definition of "frivolous", as articulated in *Chisum* and the authorities that have adopted it, suggests that the Court must have some regard for the motives of the party that filed the impugned pleading. A motive to inflict gratuitous embarrassment, readily discernible from the surrounding evidence or reasonably inferred from the actual pleading, is a near essential element in finding a claim to be frivolous. In the present case, there is no evidence in the supporting affidavit material to suggest any improper motive on the part of the plaintiff. Further, despite the shortcomings in the drafting of the plaintiff's claim, I cannot infer any improper motive from its wording.

[46] Having made the foregoing comments, I feel compelled to make some additional observations about the cases, including *Patel*, where the doctrine of witness immunity justified the striking of claims on the ground that they failed to disclose reasonable causes of action. Because those cases were all grounded on a different footing, they must be viewed differently from the application here, which is grounded solely on the frivolous condition. Given the different grounding of the cases that struck claims, it seems to me that the hearing judges in those cases regarded the doctrine of witness immunity as something more than a "garden variety" substantive defence. This is understandable. While the doctrine is, or can be likened to, a substantive defence, one must remember that its immunizing quality is derived from the absolute privilege that underlies it. In this context, and subject to other factual considerations which may impact its application to a given case (such as those in *Reynolds*), it seems to me that the doctrine is more capable of informing the existence, or not, of a reasonable cause of action than it is the existence, or not, of a frivolous claim.

Conclusion

[47] In the result, I find that the defendant's application to strike the plaintiff's claim – on the ground that it is frivolous – is misconceived. Accordingly, it must be dismissed. Under the circumstances, I direct that there shall be no order for costs. Further, the dismissal is without prejudice to the defendant's right to bring further pre-trial motions, pursuant to Part 7 of *The King's Bench Rules*.

"R.W. Elson" J.
R.W. ELSON