Indexed as:
McNabb v. Ontario (Attorney General)

Between
John David McNabb and Dwayne Commandant, plaintiffs, and The Attorney General as representative of Her Majesty the Queen in Right of Ontario, Lowell Hunking, Robert Daniel Mulligan and Gwen Boniface as Commissioner of The Ontario Provincial Police Force, defendants

[2000] O.J. No. 3248

50 O.R. (3d) 402

[2000] O.T.C. 567

99 A.C.W.S. (3d) 358

Court File No. 99-CV-172249CM

Ontario Superior Court of Justice

Chapnik J.

Heard: August 10, 2000.
Judgment: September 1, 2000.

(34 paras.)

Counsel:

Paul Hartley Starkman, for the plaintiffs.
Sara Blake, for the defendants.

CHAPNIK J.:--

Background

1 On or about June 21, 1998 the historic Wahta United Church owned by the Wahta Mohawk Nation and the United Church of Canada, was destroyed by fire. On or about June 25, 1998 the plaintiffs who lived on the native reserve, were arrested and charged with arson. They were released on bail about four days later. On January 8, 1999 the Honourable Justice Bice

dismissed the charges against the plaintiffs on the grounds that there was no evidence for a "prima facie" case against them.

2 The plaintiffs commenced this action on June 29, 1999 alleging negligence, malicious prosecution, bad faith, breach of statutory duties, abuse of process and breaches of sections 7 and 8 of the Canadian Charter of Rights and Freedoms. They claim millions of dollars in damages and punitive damages as against the Attorney General as representative of Her Majesty the Queen in right of Ontario, Lowell Hunking (the prosecutor), Robert Daniel Mulligan (the investigating officer) and Gwen Boniface as Commissioner of the Ontario Provincial Police Force.

Issues

3 The defendants move for an order pursuant to Rule 21 striking out the statement of claim and dismissing the action or in the alternative, an order amending the title of proceedings:

a) to change the name of the defendant "The Attorney General as Representative of Her Majesty the Queen in right of Ontario" to read "Attorney General for Ontario"; and
b) to delete the name of the defendant "Gwen Boniface as Commissioner of the Ontario Provincial Police Force".

Discussion - Particularity

4 Does the statement of claim disclose a reasonable cause of action? Is it scandalous?

5 The test to be applied on a motion to strike under Rule 21.01(1)(b) is well established. Those allegations that are capable of being proved must be taken as true and it must be "plain and obvious" that the material facts in the statement of claim disclose no reasonable cause of action. See, for example, Operation Dismantle Inc. v. The Queen (1985), 18 D.L.R. (4th) 481 at 486-487, 490-491 (S.C.C.). However, where fraud or malice is alleged, the pleading must contain full particulars. Rule 25.06(8), Osborne v. Ontario (Attorney General), [1996] O.J. No. 2678 at para. 10, appeal dismissed [1998] O.J. No. 4457 (C.A.).

6 The defendants argue that the majority of the allegations are not capable of proof because they state conclusions, assumptions and speculation and because the particulars given do not support the allegations in the pleadings. Moreover, a claim based in malicious prosecution must set out material facts establishing inter alia that the proceeding was instituted and continued in the absence of reasonable and probable cause and that the proceeding was actuated by malice or a primary purpose other than that of carrying the law into effect. Nelles v. The Queen in right of Ontario (1989),

60 D.L.R. (4th) 609 at 639 (S.C.C.). According to the defence, the statement of claim does not contain the particulars necessary to demonstrate these elements.

7 I have carefully reviewed both the pleadings and the plaintiffs' response to the defendants' demand for particulars and I am satisfied that the plaintiffs have provided the defendants with sufficient particulars necessary to support a cause of action for malicious prosecution. A summary of the details of the allegations includes the following:

1) Mulligan and the OPP attended at Mark Commandant's home under false pretences;
2) David McNabb was prohibited from making a phone call to a lawyer of his choosing;
3) The OPP and Mulligan directed and conducted an illegal search and seizure of David McNabb's truck;
4) Mark Commandant was never given an opportunity to give a statement to the OPP and was never interviewed either during the fire or after or during his detention in jail;
5) Mulligan prepared a false statement which Dahlia Sahnatien refused to sign;
6) Dahlia Sahnatien's statement was recorded by videotape, at which time she stated that the plaintiffs were innocent and this evidence was ignored by the defendants;
7) The OPP and Mulligan based their arrest on hearsay evidence (double and triple) from seven individuals;
8) The OPP and Mulligan never interviewed potential witnesses who might have assisted in their investigation;
9) The OPP and Mulligan never considered arresting anyone other than the plaintiffs;
10) The judge presiding at the criminal trial stated that there was no evidence for a prima facie case against the defendants.

8 The allegations of abuse of process, abuse of statutory powers and acting in bad faith and in breach of statutory duties essentially constitute allegations of malice and are subsumed in the allegation of malicious prosecution. I am satisfied that the essential ingredients are sufficiently pleaded to maintain the action at this stage of the proceedings. In any event, such causes of action should not be dismissed on a Rule 21 motion. Nash v. Ontario (1995), 27 O.R. (3d) 1 at 6 (C.A.).

9 On a motion to strike out a pleading, the court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof. Toronto Dominion Bank v. Deloitte, Haskins & Sells (1991), 5 O.R. (3d) 417 at 419 (Gen. Div). In general, the actions of defendants are not immune from suit when their conduct is based on malice or moral turpitude relating to a criminal investigation and prosecution, including causes of action other than malicious prosecution. See Prete v. Ontario (1993), 16 O.R. (3d) 161 (C.A.); leave to appeal to the Supreme Court of Canada refused April 28, 1994, [1994] S.C.C.A. No. 46; Milgaard v. Kujawa [1994] 9 W.W.R. 305 (Sask. C.A.); leave to appeal to the Supreme Court of Canada refused February 2, 1995, [1994] S.C.C.A. No. 458.

10 The plaintiffs' claim does not appear to be based solely on assumption or speculation. Moreover, nothing can be scandalous which is relevant. Re Erinco Homes Limited (1977), 3 C.P.C. 227 (Ont. Master). It is noted that the statement of defence contains only bald denials of the allegations made by the plaintiffs. That may well be because the defendant did not have the plaintiffs' response to the request for particulars when it was filed. Nevertheless, the defendants have not established that the plaintiffs' claim asserts facts which are irrelevant. The pleading is neither scandalous, nor vexatious as contemplated by R. 25.11.

11 Finally, the plaintiffs are not estopped from raising claims based on a breach of their Charter rights by reason of the fact that such claims were not previously asserted or addressed. I cannot find any estoppel based upon their failure to claim a Charter breach in the bail or criminal proceedings. As well, the finding of the trial judge in the criminal trial that there was no evidence to establish a prima facie case was not disputed by the defendants and must be taken as true at this juncture.

12 In all of the circumstances, I find that the facts as pleaded disclose a reasonable cause of action with some chance of success. It is not plain and obvious that the action cannot succeed. Even given the higher test of material fact to support allegations of malice, in my view, sufficient particulars have been provided to the defendants to support a cause of action for malicious prosecution. The defendants' motion to strike out the statement of claim is therefore dismissed.

Limitation Period

13 The defendants argue that the allegations of wrongful imprisonment, gross negligence and negligence are out of time. Section 7(1) of the Public Authorities Protection Act, R.S.O. 1990, c. P.38 states:

> No action, prosecution or other proceeding lies or shall be instituted against any person for an act done in pursuance or execution or intended execution of any statutory or other public duty or authority, or in respect of any alleged neglect or default in the execution of any such duty or authority, unless it is commenced within six months next after the cause of action arose, or, in case of continuance of injury or damage, within six months after the ceasing thereof.

14 The charges were laid and the plaintiffs were arrested on June 25, 1998. The plaintiffs were acquitted on January 8, 1999. This action was commenced by Notice of Action dated June 29, 1999. The issues in dispute surrounding the application of section 7(1) to the peculiar facts and circumstances here involve firstly, the question of whether the police officer was acting in execution of a statutory or other public duty or authority at the relevant time and secondly, when the cause of action arose.

15 By reason of section 42 of the Police Services Act, R.S.O. 1990, c. P.15, the duties of a police officer include the laying of charges and participating in prosecutions. The defendants' position is that, in the conduct of the investigation and arrest of the plaintiffs, officer Mulligan and the OPP were acting in the execution of their statutory duties. No negligence is alleged against the Crown Attorney.

16 The plaintiffs contend that the constable acted outside the scope of his statutory authority in the conduct of the investigation and prosecution of the case. According to the plaintiffs, it is not within the purview of the said defendants' statutory duties to "act under false pretences, attempt to manufacture evidence, conduct an illegal search and seizure, deny the plaintiffs the lawyer of their choosing, ignore evidence from a witness ... and fail to obtain a statement from the accused ..." (see paragraph 36 of the respondents' factum). This rendition, however, mixes the claims based on malice and alleged Charter breaches, with those based on negligence. The particular allegation in the pleadings to which the defendants take objection is paragraph 11 which reads:

> In addition, Mulligan and the OPP were grossly negligent, or in the alternative, negligent in their investigation of the evidence surrounding the fire at the Wahta Church. Said Defendants owed a duty to the Plaintiffs to conduct their investigation and prosecution in a reasonable, professional and competent manner. Mulligan and the OPP breached said duties for several reasons, including, but not limited to the following:

(a) they ignored the evidence of key witnesses including the evidence of Dahlia Sahnatien and Jimmy Costello;

(b) They relied on double and triple hearsay evidence;
(c) They relied on hunches and suspicions unsupported by reasonable and credible evidence;
(d) They failed to consider that the Plaintiffs lacked a motive and opportunity to commit the alleged offence;
(e) They failed to confirm the source of hearsay statements prior to laying charges; and
(f) They failed to properly interview witnesses.

17 The Court of Appeal in Al's Steak House and Tavern Inc. v. Deloitte & Touche, [1997] O.J. No. 3046, specifically held that s. 7 of the Public Authorities Protection Act applies to a claim based on negligence.

18 I am satisfied that in performing the acts of commission and omission complained of in paragraph 11 of the statement of claim, constable Mulligan was acting pursuant to his statutory duty; and that he is entitled to the benefit of s. 7 of the Public Authorities Protection Act.

19 The remaining issue here is whether the limitation period prescribed by s. 7(1) bars the plaintiffs' claims based on negligence and wrongful imprisonment. It is the defendants' contention that the cause of action arose on the date the charges were laid and the plaintiffs arrested. The plaintiffs argue that the cause of action arose on the date the charges were dismissed against them and that this was a case of "a continuance of injury or damage" within the meaning of the statute.

20 There is substantial authority to the effect that the continuance of the injury or damage means the continuance of the act which caused the damage. Cases which have adopted this approach include: Freeborn v. Leeming, [1926] 1 K.B. 160 (C.A.); Ihnat v. Jenkins (1972), 29 D.L.R. (3d) 137 (Ont. C.A.) and, more recently, Nicely v. Waterloo Regional Police (Chief of Police) (1991), 2 O.R. (3d) 612 (Div. Ct.); Alkasabi v. Ontario, [1994] O.J. No. 1503 (Gen. Div); and Darroch v. Toronto (Metropolitan) Police Services Board, [1996] O.J. No. 4379 (Gen. Div.).

21 In Darroch, the assault and battery allegedly perpetrated on the plaintiff occurred on a specific date and was the sole cause of the alleged injuries. Accordingly, it could not be said that the act was continuing. In the case of Pringle v. London (City) Police Force, [1995] O.J. No. 2024 (Gen. Div.), the court held that the limitation period in s. 7(1) of the Public Authorities Protection Act commenced with the laying of the charges of sexual assault and indecent exposure and not when the plaintiff was acquitted of the charges. Leitch J. found that the situation was not a case of

continuing damage. Moreover, the plaintiff was out of time even if the latter date had been adopted.

22 In the case at bar, if the negligent acts complained of are viewed as continuing throughout the prosecution of the plaintiffs and the relevant date is found to be the date of the acquittal, then the action, in this respect, is not statute-barred. On a Rule 21 motion to strike out parts of a statement of claim in Al's Steak House and Tavern, supra dealing with alleged negligence of National Revenue investigators, Rosenberg J.A. in his outline of the facts noted the date of acquittal and the date the civil action was launched. No mention was made in obiter of the date the charges were laid. In that case, the claim based on negligence was clearly statute-barred even if the date the cause of action arose had been established as the date of acquittal although no finding was made in that regard.

23 In paragraph 11 of the statement of claim, and otherwise in the pleading, the plaintiffs refer to the investigation and prosecution of the plaintiffs - the allegations of negligence form part of a continuum which spans both elements. In light of that as well as the finding of the trial judge that the Crown had not established a prima facie case against the plaintiffs, I find that the acts complained of continued to the date of the acquittal. Thus, the cause of action for this proceeding arose on January 8, 1999 when the charges were dismissed. As noted, this action was commenced on June 29, 1999 within the six month limitation period. Accordingly, the allegations of negligence and gross negligence in paragraph 11 of the statement of claim can stand.

24 With respect to the plaintiffs' claim of wrongful imprisonment, the Divisional Court in Nicely v. Waterloo Regional Police (Chief of Police) (1991), 79 D.L.R. (4th) 14 considered whether a cause of action arose for false arrest when the Crown withdrew the charges or whether it arose when the acts complained of took place. The court acknowledged the dismissal of the charge may be evidence of the contention that there lacked reasonable and probable cause at the time of the arrest or imprisonment. Nevertheless, the cause of action was found to have arisen at the time of the arrest. Applying the law as set forth in Nicely, the plaintiffs' cause of action for wrongful imprisonment against Constable Mulligan arose on the date of the arrest, June 25, 1998 and the claim in that regard is statute-barred pursuant to s. 7(1). An order shall be issued striking out the words "including but not limited to wrongful imprisonment" in paragraph 12 of the statement of claim.

Legal Capacity to be Sued

25 The moving parties claim that the defendant "Gwen Boniface as Commissioner of the Ontario Provincial Police Force" does not have the legal capacity to be sued.

26 The defendant Commissioner of the OPP was appointed by the Lieutenant Governor in Council pursuant to section 17 of the Police Services Act. She has responsibility for the general control and administration of the OPP and the employees connected with it. She is required to report to the Solicitor General on the affairs of the OPP. Pursuant to section 18 of that Act, commissioned officers of the OPP are named by the Lieutenant Governor in Council. The OPP is a department of the Ontario government.

27 Section 50(1) of the Police Services Act deals with the liability of the Crown for torts committed by members of the OPP. It states as follows:

> The board, or the Crown in right of Ontario, as the case may be, is liable in respect of torts committed by members of the police force in the course of their employment.

28 Section 48(1) of the Police Act, R.S.O. 1980, c. 381, which specifically made the Commissioner vicariously liable for torts committed by members of the OPP, was repealed in 1990.

29 A government department cannot be sued in its own name unless its constituting statute makes it liable to a suit, expressly or by necessary implication. See McNamara v. North Bay Psychiatric Hospital (1994), 16 O.R. (3d) 633 (C.A.); and Westlake v. Ontario (1971), 21 D.L.R. (3d) 129 at 134-135 (Ont. H.C.), appeal dismissed (1972), 26 D.L.R. (3d) 273 (Ont. C.A.), appeal dismissed (1973), 33 D.L.R. (3d) 256 (S.C.C.).

30 The OPP's constituting statute, the Police Services Act, does not expressly nor by necessary implication make the OPP or its Commissioner liable to suit. On the contrary, the Police Services Act expressly states that the Board or the Crown in right of Ontario are liable in respect of torts committed by OPP officers in the course of their employment. Accordingly, I agree with counsel for the defendants that "Gwen Boniface as Commissioner of the Ontario Provincial Police Force", does not have the legal capacity to be sued and must be deleted from the style of cause.

31 The parties agree and it is well settled law that the Crown is not liable for torts committed by a Crown Attorney who is an agent of the Attorney General pursuant to the Crown Attorneys Act, R.S.O. 1990, c. C.49, s. 10. Accordingly, the style of cause must be amended to change the name of the defendant "the Attorney General as Representative of Her Majesty the Queen in right of Ontario", to read "the Attorney General for Ontario".

32 Since this action is not against the Crown, no notice need be given pursuant to s. 7 of the Proceedings Against the Crown Act, R.S.O. 1990, c. P.27.

Conclusion

33 The defendants' motion to strike out the statement of claim is dismissed. The motion to specifically strike out paragraph 11 of the claim, based on a limitations argument, is also dismissed. The allegation of wrongful imprisonment in paragraph 12 of the pleading is struck out as being out of time. The claim against "Gwen Boniface as Commissioner of the Ontario Provincial Police Force" is struck out. Finally, the name of the defendant "the Attorney General as Representative of Her Majesty the Queen in right of Ontario" is amended to read "the Attorney General for Ontario".

34 Costs are awarded to the plaintiffs in the cause.

CHAPNIK J.

cp/s/qlfwb/qlhcs