Court of Queen's Bench of Alberta

Citation: Nette v. Stiles, 2009 ABQB 422

Date: 20090709
Docket: 0803 08204
Registry: Edmonton

Between:

Sandra Gay Nette and David Nette

Plaintiffs

- and -

Gregory John Stiles, 402294 Alberta Ltd., Lydia Jean Saunders, Shera Brandley, 860058 Alberta Ltd., a partnership operating under the trade name, The Spa At Life Stiles, Alberta College and Association of Chiropractors and Her Majesty the Queen In Right of Alberta (Minister of Health and Wellness)

Defendants

Brought under the *Class Proceedings Act*

Reasons for Judgment
of the
Honourable Mr. Justice R. Paul Belzil

Part 1. The Action

[1] The Plaintiffs Sandra Gay Nette and David Nette have filed an Amended Statement of Claim (ASOC) under the *Class Proceedings Act* respecting claims against a number of parties, including Her Majesty the Queen in Right of Alberta (Minister of Health and Wellness), involved in legislating, regulating and delivering chiropractic in the Province of Alberta. Sandra Nette alleges that she was severely injured as a result of cervical manipulations performed by Gregory John Stiles. The action has been discontinued against 402294 Alberta Ltd., Lydia Jean Saunders,

Shera Brandley, and 860058 Alberta Ltd., a partnership operating under the trade name, The Spa At Life Stiles.

Part 2. Rule 129(1)(a) Application of the Minister

[2] The Minister applies for an order striking out all allegations in the ASOC against it pursuant to Rule 129(1)(a) on the basis that they do not disclose a cause of action.

[3] I heard this application in my capacity as case management judge.

[4] There is no disagreement between counsel as to the principles applicable to an application under Rule 129(1)(a).

[5] The Alberta Court of Appeal in ***Tottrup v. Alberta (Minister of Environmental Protection)***, 2000 ABCA 121 dealt with this issue, and paras. 6 to 9 of the majority judgment read as follows:

> Principles on motions to strike
>
> 6 Rule 129 is designed to protect litigants from various forms of abuse of process. Litigants should be shielded from exposure to litigation which is doomed to fail. Rule 129 reads:
>
> > 129 (1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that
> >
> > (a) it discloses no cause of action or defence, as the case may be, or
> >
> > and may order the action to be stayed or dismissed or judgment to be entered accordingly.
> >
> > (2) No evidence shall be admissible on an application under clause (a) of subrule (1).
>
> 7 Under Rule 129 (1)(a) neither the plaintiff nor the defendant is entitled to rely on affidavit evidence. If a plaintiff has not alleged facts capable of supporting a cause of action, then a defendant ought not be put to the time, expense and consequences of further litigation. Conversely, if it is not plain and obvious that no cause of action exists, an application to strike must fail.
>
> 8 The principles governing an application to strike a statement of claim for failure to disclose a cause of action are relatively settled. In brief, the Court must assume that the allegations of fact made by the plaintiff are true. The Court then determines whether those facts disclose a cause of action in law. The test set out by the Supreme Court in Hunt v.

> Carey Canada Inc., [1990] 2 S.C.R. 959 at 980 is whether it is " . . . plain and obvious' that the plaintiff's statement of claim discloses no reasonable cause of action." Caution is required before concluding that the plaintiff has no chance of success. The plaintiff is entitled to a broad reading of the pleadings. . . .
>
> 9 Although the pleadings should be liberally interpreted, the Court has a duty to apply the Rule as it is intended. If the alleged facts, examined in light of the existing law, do not disclose a cause of action the claim should be struck. Needless litigation should be avoided.

[6] As the class proceeding certification application has not yet been heard, the viability of the claims must be considered on the basis of the pleadings relating to the named Plaintiffs. ***Williams v. Canada (Attorney General)***, 2009 ONCA 378 at para. 8.

Part 3. Statutory Framework

[7] The class period defined in the ASOC encompasses two statutory regimes: the *Chiropractic Profession Act* (*CPA)*, S.A. 1984, c. C-9.1, as amended, was replaced by the *Health Professions Act* (*HPA*), R.S.A. 2000, c. H-7, which was made applicable to chiropractors effective March 1, 2007.

A. Defining Chiropractic for Regulatory Purposes

[8] Under the *CPA* and *HPA*, chiropractic is broadly defined. Neither definition excludes cervical manipulations.

B. Paying Chiropractic Benefits

[9] Throughout the class period the *Alberta Health Care Insurance Act* (*AHCIA*), R.S.A. 2000, c. A-20, as amended, provided that the Minister shall administer and operate a plan to provide benefits.

[10] The *AHCIA* requires that the Minister pay for health services as defined, which definition includes chiropractic services.

[11] By regulation, the Minister is authorized to determine a list of benefits which are covered and the amount to be paid for each service.

C. Regulating Chiropractic

[12] The *CPA* required the College, not the Minister, to regulate and govern the profession of chiropractic. The Minister had no statutory authority to regulate or govern the profession of chiropractic.

[13] Under s. 3 of the *HPA* the College is required and authorized to govern and regulate the profession of chiropractic. The *HPA* authorizes the Minister to set fees for chiropractic services, approve regulations, and requires that the Minister table reports received from the College in the Legislature.

[14] Neither the *CPA* or *HPA* authorize the Minister to perform any other role in the regulation of chiropractic or the supervision of delivery of chiropractic services.

Part 4. Summary of Pleadings Involving the Minister

[15] The ASOC is a lengthy and complex pleading. Allegations against the Minister are diverse, and disbursed throughout the ASOC. The central theme of these allegations against the Minister is that he owed the Plaintiffs private law duties of care. The allegations can be summarized and categorized as follows:

- The Minister is responsible for the delivery of health care services and safeguarding the quality and safety of health care services, including chiropractic services.

- The Minister knew or ought to have known that cervical manipulations involve significant risk.

- The Minister is responsible for administering public health services, including chiropractic.

- The Minister breached his duty of care by paying claims for chiropractic.

- The Minister failed to take action after receiving complaints about the safety of cervical manipulations.

- The Minister failed to request additional information respecting the safety of chiropractic.

- The Minister failed to monitor chiropractic procedures and document problems associated with them.

- The Minister made public representations that he was overseeing the health care system.

- The Minister made representations to the public that chiropractic was safe.

- The Minister's duties included guarding against the personal and economic losses of individual citizens.

[16] In the course of argument, counsel for the Plaintiffs conceded that the allegation against the Minister in para. 272 is a pleading error, and that the claims against the Minister in paras. 299 and 300, for negligence, assault and battery and breach of contract, are also pleading errors.

A) Pleadings Alleging That the Minister Owes a Duty of Care

Cooper-Anns Analysis - Stage One

[17] It has long been recognized respecting governmental actors that there is a legal distinction between duties owed to the public at large, which are not actionable, and private law duties of care which are actionable.

[18] In ***Cooper v. Hobart***, 2001 SCC 79, the Supreme Court of Canada affirmed that the analysis of the House of Lords in ***Anns v. London Borough of Merton*** , [1977] 2 All E.R. 492 is to be applied in determining whether a party owes a duty of care.

[19] At paras. 22 and 23, the Court noted that duties of care are extended to those who might suffer foreseeable harm; however, foreseeability is limited by the concept of proximity.

[20] At paras. 30 and 31, the contemporary ***Anns*** analysis is summarized:

> 30 In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. . . .
>
> 31 On the first branch of the Anns test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity

> is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.

[21] At para. 33, the Court cited its earlier decision in ***Hercules Management Ltd. v. Ernst & Young***, [1997] 2 S.C.R. 165 in defining the term proximity:

> The label "proximity", as it was used by Lord Wilberforce in ***Anns****, supra,* was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs.

[22] In ***Cooper***, at paras. 41 and 42, the Court held that in determining whether a duty of care exists, the first consideration is whether a recognized duty of care can be found, and, secondly, whether a novel duty of care should be recognized.

[23] In the subsequent case of ***Finney v. Barreau du Québec***, [2004] 2 S.C.R. 17, the Supreme Court of Canada accepted that a relationship of proximity may arise from interation between the parties.

(i) <u>Does a Pre-Existing Cagegory of Negligence Create a Private Law Duty of Care?</u>

a) <u>Negligent Misrepresentation</u>

[24] In ***Queen v. Cognos Inc.***, [1993] 1 S.C.R. 87, at para. 34 the Supreme Court of Canada held that five requirements must be established in order to find liability for negligent misrepresentation.

[25] The first is that there must be a duty of care based on a "special relationship" between the representor and representee.

[26] There is no allegation in the ASOC that Sandra Nette received any specific information or representation regarding chiropractic from the Minister, with the exception of receiving some publicly available information about which chiropractic services were eligible for payment.

[27] Reference in the ASOC is also made to the Minister making unparticularized public statements from time to time about chiropractic.

[28] I do not accept that the ASOC alleges any form of special relationship between Sandra Nette and the Minister. She requested, and was provided, information available to any member of the public.

[29] It is not pled that the Minister made any representations to her personally respecting the safety of chiropractic treatment, including cervical manipulations.

[30] In ***Drady v. Canada (Minister of Health)***, 2008 ONCA 659, leave to appeal dismissed, [2008] S.C.C.A., No. 492, the Ontario Court of Appeal struck out claims against the Government of Canada on the basis that it approved TMJ implants for use in Canada.

[31] The Court noted at paras. 53 and 54 that the pleadings in that case did not and could not allege any specific representations made to the plaintiff.

[32] In ***R. v. Premakumaran***, 2006 FCA 213, leave to appeal dismissed, [2006] S.C.C.A. No. 342, claims against the Federal Crown were struck out on the basis that employment information obtained by an immigrant did not create a special relationship of proximity, and the following passage appears at para. 24:

> In this case, however, no duty of care arises. As the Motions Judge correctly found, no special relationship of proximity and reliance is present on the facts of this case. There were no personal, specific representations of fact made to these particular appellants upon which they could reasonably have relied. The printed documentation and information given to them was merely general material for them to use in making an application for immigrant status. As the Motions Judge observed, it is not correct to say that someone "who picks up a brochure or reads a poster at the High Commission is a 'neighbour'" and is owed a duty as a result. More is required. The information given to the appellants contained no guarantees of work, nor of guaranteed success in the licensing procedure, nor that any particular assistance would be forthcoming. . . .

[33] Given the absence of any pleading alleging a “special” relationship of proximity between Sandra Nette and the Minister, it is plain and obvious that claims based on alleged negligent misrepresentation could not succeed and therefore must be struck out.

b) Duty of Care Owed to the Health Care System

[34] The Plaintiffs acknowledge that the effect of the *CPA* and *HPA* is that actual regulation of chiropractic is devolved to the College. The Minister is given an oversight role only. Specifically, the Minister receives an annual report from the College, which is tabled in the Legislature, and, as well, the Minister appoints citizens to sit on the Council of the College.

[35] The Plaintiffs argue that the Minister has not adequately fulfilled this oversight role.

[36] The Plaintiffs pled in the ASOC that the Minister received warnings from a number of sources of the dangers of cervical manipulations and failed to act.

[37] The Ontario Court of Appeal in ***Eliopoulos v. Her Majesty the Queen in Right of Ontario et al***, 82 O.R. (3d) 321 held that the Minister does not owe a private law duty of care to the health system.

[38] It necessarily follows, therefore, that Ministerial oversight cannot create a private law duty of care.

[39] Moreover, the decision of the Legislature to devolve to the College the authority to regulate chiropractic, leaving the Minister with only a supervisory role, is a policy decision with social, political and economic overtones not susceptible to judicial intervention: ***Sagharian (Guardian ad litem of) v. Ontario (Minister of Education)***, 2008 ONCA 411 at paras. 39 to 41.
[40] In the result, all allegations in the ASOC that the Minister owes a private law duty of care respecting the health care system, including carrying out his statutory role, could not succeed and therefore must be struck out.

c) Liability for Legislating

[41] Paragraphs 62, 66, 71, 73 and 86 to 88 of the ASOC reference enactment of legislation and regulations thereunder and allege Ministerial liability arising from it. Paragraph 73 alleges that regulations were made and maintained in bad faith.

[42] Under Canadian law there is no liability for legislative acts, even if bad faith is alleged.

[43] In ***Wells v. Newfoundland***, [1999] 3 S.C.R. 199, the Supreme Court of Canada affirmed this principle and stated the following at para. 59:

> . . . This is fatal to the respondent's argument on bad faith, as legislative decision making is not subject to any known duty of fairness. Legislatures are subject to constitutional requirements for valid law-making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate. . . .

[44] In ***Welbridge Holdings Ltd. v. Greater Winnipeg (Municipality)***, [1971] S.C.R. 957, it was established that a government cannot be sued for the consequences of a legislation. Legislative policy decisions are not reviewable by courts. The Plaintiffs could not succeed on these allegations; therefore, these allegations in the ASOC must be struck out.

d) Liability Arising from Payment of Claims

[45] Paragraphs 86 to 88, 118 and 119, and 121(f) allege Ministerial liability arising from payments for chiropractic services made by the Minister.

[46] As noted, under current or prior related legislation, the Minister does not provide or perform health services. Throughout the class period, the Minister was required by the *AHICA* to pay for health services as defined. Throughout the class period, the term "health services" included chiropractic services; therefore, the Minister, by virtue of legislative mandate, was required to pay for them.

[47] Given that no legal liability attaches to legislation, by extension, no legal liability can arise by virtue of payments made pursuant to legislation. This part of the claim could not succeed and therefore these paragraphs in the ASOC must be struck out.

ii. Should a Novel Duty of Care be Recognized?

(a) Did Legislation Create a Duty of Care?

[48] ***Cooper v. Hobart***, at para. 43, held that a relationship of proximate foreseeability must arise from the governing statute.

[49] The Ontario Court of Appeal in ***Eliopoulos*** considered the issue of whether analogous Ontario health legislation equivalent to Alberta health legislation gave rise to private law duties of care.

[50] In rejecting the argument, the Court made the following comments in para. 17:

> In my view, these important and extensive statutory provisions create discretionary powers that are not capable of creating a private law duty. The discretionary powers created by the HPPA are to be exercised, if the Minister chooses to [page331] exercise them, in the general public interest. They are not aimed at or geared to the protection of the private interests of specific individuals. From the statement of purpose in s. 2 and by implication from the overall scheme of the HPPA, no doubt there is a general public law duty that requires the Minister to endeavour to promote, safeguard and protect the health of Ontario residents and prevent the spread of infectious diseases. However, a general public law duty of that nature does not give rise to a private law duty sufficient to ground an action in negligence. I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals. Although Mitchell (Litigation Administrator of) v. Ontario (2004), 71 O.R. (3d) 571, [2004] O.J. No. 3084 (Div. Ct.) was concerned with a different statute, I agree with and adopt Swinton J.'s analysis at paras. 28 and 30 as applicable to the present case:
>
> > [T]he governing statutes make it clear that the Minister has a wide discretion to make policy decisions with respect to the funding of hospitals. The legislative framework gives the Minister the power to act in the public interest, and in

> exercising her powers, she must balance a myriad of competing interests. The terms of the legislation make it clear that her duty is to the public as a whole, not to a particular individual.
>
> . . . . .
>
> [A] consideration of the statutory framework makes it clear that the requisite proximity in the relationship between the plaintiffs and the defendant has not been established so as to give rise to a private law duty of care. The overall scheme of the relevant Acts confers a mandate on the Minister of Health to act in the broader public interest and does not create a duty of care to a particular patient.

[51] In ***Edwards v. Law Society of Upper Canada***, 2001 SCC 80, the Supreme Court of Canada dealt with the issue of whether the Law Society of Upper Canada owed a private law duty of care to each member of the public who deposits money into a solicitor's trust account.

[52] In rejecting the position that a private law duty of care was owed, the Court made the following comment at para. 14:

> The Law Society Act is geared for the protection of clients and thereby the public as a whole, it does not mean that the Law Society owes a private law duty of care to a member of the public who deposits money into a solicitor's trust account. Decisions made by the Law Society require the exercise of legislatively delegated discretion and involve pursuing a myriad of objectives consistent with public rather than private law duties.

[53] In ***Odhavji Estate v. Woodhouse***, 2003 SCC 69, the Supreme Court of Canada at para. 70 noted that the lack of any direct involvement of the Province in the day-to-day conduct of police officers weakened the nexus between the Province and the plaintiffs.

[54] This is analogous to the tenuous nexus between the Plaintiffs in this case and the Minister as alleged in the ASOC.

[55] On a plain reading of the pre-existing and current Alberta legislation, it cannot be inferred that there was any legislative intent to create private law duties of care with respect to each individual resident of the province. Accordingly, any allegation in the ASOC that legislation or regulations made thereunder created duties of care could not succeed and must be struck out.

iii. Was there an Actual Relationship of Proximity Between the Plaintiffs and the Minister?

[56] As noted in the ***Finney*** decision, a course of dealings between parties may create a relationship of proximity.

[57] In ***Finney***, a duty of care was imposed on the Barreau du Québec on the basis that it failed to act in good faith. The Barreau failed to take action against a lawyer notwithstanding that the plaintiff had made numerous complaints about the lawyer's misconduct, and notwithstanding that the lawyer had a prior disciplinary record.

[58] The ASOC does not plead that there was an actual factual relationship between Sandra Nette and the Minister.

[59] It is pled that Sandra Nette contacted the Minister's office and obtained some publicly available information respecting chiropractic. I do not accept that any relationship of proximity was created as a result of Sandra Nette requesting and receiving information which is available to all members of the public. This is not analogous to the factual situation in ***Finney***.

[60] The course of dealings between Sandra Nette and the Minister did not create a relationship of proximity. Accordingly, any allegations in the ASOC that an actual relationship of proximity existed could not succeed and therefore must be struck out.

Conclusion From Stage One Analysis

[61] The pleadings do not allege a proximate relationship between the Plaintiffs and the Minister sufficient to create private law duties of care.

Cooper-Anns Analysis - Stage Two

[62] In ***Cooper v. Hobart***, the Court affirmed that residual policy concerns ought to be considered at the second stage of the analysis, and the following passage appears at para. 37:

> This brings us to the second stage of the Anns test. As the majority of this Court held in Norsk, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in Hercules Managements, supra, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

[63] If I am wrong in having decided that there is no proximate relationship between the Minister and the Plaintiffs, I have concluded that the imposition of a duty of care on the Minister would be negatived by residual policy considerations.

a) Immunity of Legislative Policy From Judicial Intervention

[64] Imposing a duty of care on the Minister would have a chilling effect on the Minister's ability to carry out the functions of his office, including the drafting and implementation of policy. In making decisions about health issues, including chiropractic issues, the Minister must be free to consider the needs of the public at large.

b) Potential for Indeterminate Liability

[65] Imposition of a duty of care would raise the spectre of indeterminate liability and would have the effect of making the Crown an insurer for chiropractic services. There is nothing in the current or prior legislation which evidences any legislative intent to assume such liability, which would create a significant indeterminate exposure for the public purse.

[66] In ***Attis v. Canada (Minister of Health)***, 2008 ONCA 660, leave to appeal dismissed, [2008] S.C.C.A. No. 491, the Ontario Court of Appeal at para. 74 highlighted concerns about the potential for indeterminate liability in the following terms:

> . . . Indeterminate liability, in my view, is the most relevant policy consideration because the imposition of a duty of care in this case may result in the government becoming the virtual insurer of medical devices. The appellants argue that indeterminate liability is not a concern because the number of affected consumers in this proceeding is relatively contained. However, Health Canada's responsibilities extend far beyond the regulation of the specific devices at issue in this case to the regulation of thousands of other devices. In addition, potential liability could extend from medical devices to other products regulated under the FDA, such as food, drugs and cosmetics, as well as to many other regulatory regimes. It follows that the imposition of liability on the public purse would place an indeterminate strain on available resources. Accordingly, in my view, the prospect of indeterminate liability weighs against the imposition of liability in this case.

c) Availability of Other Remedies

[67] Another issue to be considered at the second stage of the analysis is whether the Plaintiffs have alternative remedies.

[68] The Plaintiffs have sued both Gregory John Stiles and the College, thus it cannot be argued that the Plaintiffs will be left with no other possible remedies if the claims against the Minister are struck out.

Conclusion From Stage Two Analysis

[69] In the result, stage two policy considerations overwhelmingly negative the imposition of any duty of care on the Minister.

B) Pleadings Alleging Intentional Torts

[70] In addition to claims against the Minister founded on an alleged duty of care, it is pled in paras. 138, 249 and 263 that the Minister acted in bad faith, abdicated his responsibility, abused his office, and abused the public trust.

[71] There is no tort of bad faith, abdication of responsibility, or abuse of public trust.

[72] There is a recognized intentional tort of abuse of public office; however, the allegations in support of this claim are unparticularized allegations made in connection with other pleadings relating to alleged private law duties of care owed by the Minister, which I have concluded do not exist.

[73] As noted, there is no allegation in the ASOC of any particular nexus between the Minister and Sandra Nette contrasted to any other member of the public.

[74] The Ontario Court of Appeal in ***Williams v. Canada (Attorney General)***, at para. 38, held that unparticularized assertions of bad faith could not save pleadings which were attacked on the basis that they did not disclose a cause of action against the Crown.

[75] The unparticularized pleading of a tort of abuse of public office, is analogous to an unparticularized allegation of bad faith and, for the same reason, cannot be saved.

[76] Accordingly, these allegations against the Minister could not succeed and therefore paras. 138, 249 and 263 of the ASOC must be struck out.

Part 5. Conclusion and Order

[77] On a generous reading of the ASOC, it is plain and obvious that no cause of action exists against the Minister. The Minister is entitled to an order striking out all allegations against him. Costs may be spoken to.

Heard on the 22nd day of June, 2009.
Dated at the City of Edmonton, Alberta this 9th day of July, 2009.

R. Paul Belzil
J.C.Q.B.A.

Appearances:

P. Daryl Wilson, Q.C.
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for the Plaintiffs

Richard C. Secord (Did not participate in the Application)
and Karin E. Buss
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for the Defendant Gregory John Stiles

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