2008 CarswellOnt 7721
Ontario Superior Court of Justice

Marosszkey v. Arche Daybreak

2008 CarswellOnt 7721, 173 A.C.W.S. (3d) 422

MAROSSZEKY et. al. v. L'ARCHE DAYBREAK

C. Boswell J.

Judgment: December 17, 2008
Docket: CV-06-78363-00

Counsel: Ms G. Nardella for Defendant / Moving Party
Mr. J. Lea for Plaintiff

Subject: Civil Practice and Procedure; Torts

Table of Authorities

Cases considered by *C. Boswell J.*:

Andersen Consulting Ltd. v. Canada (Attorney General) (2001), 2001 CarswellOnt 3139, 13 C.P.C. (5th) 251, 150 O.A.C. 177 (Ont. C.A.) — referred to

Hunt v. T & N plc (1990), 1990 CarswellBC 216, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.)* [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.)* 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 4 C.C.L.T. (2d) 1 (S.C.C.) — referred to

Jack v. Canada (Attorney General) (2004), 2004 CarswellOnt 3255 (Ont. S.C.J.) — referred to

Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd. (1991), 3 O.R. (3d) 684, 1991 CarswellOnt 895 (Ont. Gen. Div.) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 21 — considered

R. 25.06 — referred to

R. 25.06(1) — referred to

R. 25.11 — considered

R. 26 — referred to

R. 26.01 — considered

***C. Boswell J.*:**

Introduction

1 In July 1993, Luke Marosszkey, age 5, injured himself while visiting a property owned by the Defendant. He fell from a stationary bike and caught his fingers in the bicycle spokes, severing two of them. He sues for damages, as do his parents.

2 The Plaintiffs' claim was commenced in January 2006. A Defence and Counterclaim was filed in March 2006. Discoveries were conducted in August 2007.

3 During discoveries, the Defendant's lawyer asked Matthew Marosszeky, Luke's father, about what other injuries his children had suffered while in his care prior to Luke's injury. In addition, counsel also asked whether other individuals had ever suffered injuries while in Mr. Marosszeky's care. The Plaintiffs' counsel objected to these questions and Mr. Marosszeky refused to answer them.

4 Several months ago I heard a motion to compel answers to the questions refused during Mr. Marosszeky's discovery. I found that the refusals, save for one unrelated to this motion, were reasonable and I did not compel Mr. Marosszeky to answer them. The scope of questioning on a discovery is governed, for the most part, by relevancy and the general rule is that questions having a semblance of relevance must be answered. Relevance is determined having regard to the issues raised in the pleadings. I expressed the view that the questions asked by the Defendant's lawyer about previous injuries suffered by parties in Mr. Marosszeky's care were not relevant in view of the way the pleadings were drafted.

5 The Defendant now moves to amend its Defence and Counterclaim in order to broaden the allegations against the adult Plaintiffs. The Defendant's intentions are transparent: it wants to question Mr. Marosszeky about prior injuries suffered by his children and third parties while in his care.

6 The Plaintiffs resist the motion. They argue, in effect, that the impugned questions originally put to Mr. Marosszeky on discovery were nothing more than a "fishing expedition". The amendments, it is argued, do not amount to more than bare allegations, intended to provide some justification for the continuation of the fishing trip.

The Issues

7 Motions for leave to amend pleadings are governed by Rule 26 of the Rules of Civil Procedure. Rule 26.01 contains mandatory language, so that leave requests are presumptively granted unless prejudice would result from the amendments that could not be cured with an adjournment and/or a costs order.

8 It is not for the court, at the pleadings stage, to make inquiries about the merits of the amendments, in the sense of weighing evidence, interpreting documents or making findings of fact. That said, even though Rule 26.01 dictates a prejudice-based analysis, the court remains entitled to make at least a basic inquiry to determine if the amendments are tenable in law. [1] Where amendments are shown to be scandalous, frivolous, vexatious or an abuse of process, or where they disclose no reasonable cause of action, they should not be permitted. [2]

9 The motion accordingly raises the following issues:

(i) Whether there is any prejudice created by the proposed amendments that could not be compensated for with costs or an adjournment;

(ii) Whether the proposed amendments are frivolous, vexatious or untenable in law.

10 It is necessary, before addressing the specific issues raised, to review the requested amendments.

The Amendments

11 The proposed amendments are all found in the Defendant's Counterclaim. The Counterclaim is for contribution and indemnity for any amounts found owing to the Plaintiff, Luke Marosszeky.

12 The Defendant alleges that Luke's parents were negligent in the manner they supervised him. It is alleged that Matthew Marosszeky and Patricia Murphy (the "Parents") failed to supervise Luke while he was at the Defendant's property and further that they failed to take any precautions to prevent an accident occurring.

13 The Defendant proposes to add six paragraphs to the particulars of the negligence alleged against the Parents. A draft Amended Statement of Defendant and Counterclaim was filed by the Defendant. In summary, the proposed amended provisions, being subparagraphs (d) to (i) of paragraph 9, are as follows:

> d) It was more likely that Luke would be injured in Matthew's Marosszeky's care because Matthew's children had been injured while in his care in the past;
>
> e) The Parents knew or ought to have known that Luke required extra supervision because of his age and/or mental capacity;
>
> f) Matthew Marosszeky knew or ought to have known that children were prone to sustaining injuries when not properly supervised;
>
> g) Matthew Marosszeky has permitted other persons to be injured in the past, while in his care;
>
> h) Patricia Murphy was aware, or ought to have been aware, about Matthew Marosszkey's past experience with respect to caring for others;
>
> i) Patricia Murphy has, in the past, failed to properly supervise children in her care, or has allowed her children to be supervised by other incompetent individuals.

14 The Plaintiffs do not take issue with the amendments proposed at paragraphs (e) and (f) and leave is accordingly granted for those amendments to be made.

15 The Plaintiffs do oppose leave with respect to paragraphs (d), (g), (h) and (i).

Analysis

(i) Do the proposed amendments create non-compensable prejudice?

16 The Plaintiffs have not argued this motion on the basis that they will suffer non-compensable prejudice should the amendments be made. They have not, accordingly, produced any evidence of actual prejudice that they would suffer.

17 I am satisfied that the proposed amendments would not cause prejudice that could not be compensated for in costs.

(ii) Are the proposed amendments frivolous, vexatious or untenable in law?

18 At the pleadings stage, the court is concerned with the viability of the claim and not whether a party may ultimately be able to make out its claim or defence. An amendment should not be allowed where it would merely invite, and not be capable of withstanding, a motion to strike, either under Rule 21 or Rule 25.11.

19 Motions to strike under Rule 21 are determined on the assumption that the facts as stated in the statement of claim can be proved. The question is then asked, "is it 'plain and obvious' that the Plaintiff's' claim discloses no reasonable cause of action?" [3]

20 Motions to strike under Rule 25.11 are determined on the basis of an inquiry as to whether the claim is frivolous, vexatious or an abuse of process. An untenable claim — one that is clearly impossible of success at law — is a frivolous or vexatious claim and an abuse of the court's process. [4]

21 The facts contained in the proposed amendments are ones that the Plaintiffs characterized as mere assertions without any evidentiary foundation. I believe that what the Plaintiffs are really saying is that the allegations are false. I am not, however, the trier of fact at this stage. It may be that the Defendant is not able to support its allegations and the result may be an unsuccessful outcome and an award of costs. At this stage, however, it is not for me to weigh evidence or make findings of fact or credibility.

22 If I assume that the facts as set out in the proposed amendments are true, it is not plain and obvious to me that the counterclaim for contribution can not succeed. It is not an untenable claim in law and it is not one that I would characterize as frivolous or vexatious.

23 The Plaintiffs further argued, however, that the proposed amendments are untenable in law for three other reasons:

(1) The Defendant improperly states a conclusion of law by using the word "negligence" in paragraph 9(h). I believe that this complaint can easily be rectified by removal of the word "negligent" from that paragraph, which can be done without altering the meaning of the paragraph.

(2) The content of paragraph 9(d) is not intelligible because it is illogical. I agree that, as a matter of logic, it simply does not follow that Luke was more likely to be injured in his father's care merely because he had previously been injured while in his father's care. This defect can be cured simply by deletion of that portion of paragraph 9(d) following the word "care" at the end of the first line.

(3) The Plaintiffs argued that the proposed amendments do not contain sufficient material facts to comply with Rule 25.06. Pursuant to Rule 25.06(1), every pleading must set out a concise statement of the material facts on which a party relies for the claim or defence, but not the evidence by which the facts are to be proved. The appropriate remedy for a failure to meet the minimum level of material fact disclosure is to strike the pleading. [5]

The proposed amendments are, in my view, additional material facts pleaded in an effort to particularize the alleged negligence on the part of the Parents. The Plaintiffs' argue that there are not sufficient material facts set out to support the Defendant's allegations. I believe the Plaintiffs are confusing material facts with evidence. A party is not required to set out evidence in its pleading and in fact is prohibited from doing so. The Defendant's allegation is that the Parents were negligent and should at least contribute to any damages awarded to Luke. The material facts in support of the allegation of negligence are set out in proposed paragraphs (a) though (j) of paragraph 9 of the Counterclaim. I am satisfied that the proposed pleading meets the minimum level of material fact disclosure required by Rule 25.06(1).

Conclusion

24 The Defendant shall have leave to amend its Defence and Counterclaim in accordance with the draft amended pleading filed, with the following changes:

(i) Paragraph 9(d) shall be deleted, save for the first line, ending in the word "care";

(ii) Paragraph 9(h) shall be amended by deletion of the word "negligent" in the third line.

25 I am satisfied that there will be no prejudice caused to the Plaintiffs that can not be compensated for in costs. There will be additional costs occasioned as a result of the amendment. The Plaintiffs will have to file an amended Defence to Counterclaim. In addition, further discoveries will be required. The Defendant is to be responsible for the

Plaintiffs' substantial indemnity costs incurred in filing additional responding pleadings and in participating in additional discoveries necessitated by the amendment. If the parties can not agree on the costs to be paid by the Defendant, then they may arrange an appointment before me to speak to those costs. Such an appointment shall be arranged by a telephone conference call to be scheduled through the judicial secretaries in Newmarket.

26 Finally, the Defendant has been successful on this motion and is entitled to its partial indemnity costs, which I fix at $2,000.00 and which shall be payable by the Plaintiffs within 30 days.

Footnotes

1 *Jack v. Canada (Attorney General)*, [2004] O.J. No. 3294 (Ont. S.C.J.) at para. 24.

2 *Andersen Consulting Ltd. v. Canada (Attorney General)*, [2001] O.J. No. 3576, 150 O.A.C. 177 (Ont. C.A.) at para.'s 35-37

3 *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), para. 33

4 *Jack v. Canada (Attorney General)*, *supra, note 1*, at para. 25

5 See *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Ont. Gen. Div.) at para. 32

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