# NOVA SCOTIA COURT OF APPEAL

**Citation:** D.C. v. Children's Aid Society of Cape Breton Victoria, 2009 NSCA 73

**Date:** 20090619
**Docket:** CA 301254
**Registry:** Halifax

**Between:**

D. C.

Appellant

v.

Children's Aid Society of Cape Breton Victoria

Respondent

**Restriction on publication:** **Pursuant to s. 94(1) Children and Family Services Act**

**Judges:** Roscoe, Bateman and Fichaud, JJ.A.

**Appeal Heard:** May 25, 2009, in Halifax, Nova Scotia

**Held:** Appeal is dismissed with costs to the respondent in the amount of $1,000 plus disbursements, per reasons for judgment of Roscoe, J.A.; Bateman and Fichaud, JJ.A. concurring.

**Counsel:** D.C., appellant In Person and William O'Neil, as agent for the appellant
Christopher Conohan, for the respondent

**Restriction on publication: Pursuant to s. 94(1) Children and Family Services Act.**

**PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 94(1) OF THE CHILDREN AND FAMILY SERVICES ACT APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.**

**SECTION 94(1) PROVIDES:**

> **94(1) No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or a relative of the child.**

**Editorial Notice**

Identifying information has been removed from the electronic version of the judgment.

**Reasons for judgment**:

[1] The appellant, D. C., commenced an action against the respondent Children's Aid Society claiming damages arising out of an apprehension of a newborn child born to L.L.A. The action was framed in negligence, malicious prosecution, abuse of position, breach of fiduciary duty and defamation of character. The respondent brought an application for summary judgment which was granted by Justice Richard Coughlan by decision reported as 2008 NSSC 196.

[2] The appellant submits on appeal that the chambers judge should have allowed his application to amend his statement of claim and erred in granting the respondent's motion for summary judgment. The respondent brought an application to strike the appeal on the basis that it was out of time.

The application to strike

[3] The order dismissing the appellant's action was issued on July 8, 2008. The notice of appeal was filed on September 3, 2008. In its factum filed on the application to strike the appeal, the respondent argued that since this was an interlocutory appeal, the notice of appeal should have been filed within 10 days of the date of the order in accordance with **Civil Procedure Rule** (1972) 62.02(1)(a). At the hearing of the appeal, counsel for the respondent conceded, based on **Van de Wiel v. Blaikie**, 2005 NSCA 14, that since the order under appeal had the effect of bringing proceedings to an end, it was not an interlocutory order. The time for filing a notice of appeal therefore was 30 days pursuant to **Rule** 62.02(2)(c). The notice of appeal therefore should have been filed before August 8, 2008.

[4] In response to the respondent's application to strike the appeal, the appellant submitted that the order dismissing the action was not forwarded to him by the court until sometime after August 7, 2008. His submissions are supported by copies of letters to both the Supreme Court in Sydney and the Registrar of the Court of Appeal, dated July 16, 2008 and August 7, 2008 seeking assistance in having the Sydney Prothonotary send him a copy of the court order. The respondent has not filed anything to rebut the assertions of the appellant that he did not receive the order until after August 7, 2008.

[5] The time for appealing an order starts to run from the date it is issued, not when it was received, therefore the appellant's notice of appeal is late. However, given the circumstances of this case, including the fact that the appellant is not represented by a lawyer, it is appropriate to extend the time for filing the notice of appeal to September 3, 2008. I would dismiss the respondent's application to strike the appeal.

Background

[6] A male child, born on March *, 2000 to L.L.A., was apprehended by the respondent Agency at birth. At a court hearing before Justice Darryl Wilson on April 7, 2000, the Agency acknowledged that the appellant was the child's father and that they had no concern with his parenting. Justice Wilson ordered that the child be placed in the care of the appellant under the supervision of the Agency. There is nothing on the record before us to indicate how long the child welfare proceeding continued or how the matter was finally determined.

[7] The appellant commenced this action against the Children's Aid Society on August 25, 2003. He claimed $5 million damages on the grounds of "negligence, malicious prosecution, abuse of position, abuse of process, failing fiduciary duty, defamation of character". He alleges that, as a result of the apprehension of his child and the denial of his access to the child for three weeks between the date of the apprehension and the first court appearance before Justice Wilson, he has suffered irreparable emotional harm. He claims that the Society failed to meet the applicable standard of care, to exercise good faith, to discharge its duty of care to him, to adequately investigate his parenting capability and to be fair and objective.

[8] The respondent filed its defence in September 2003.The parties exchanged lists of documents but had not held any discoveries when the appellant filed a notice of trial in September 2007. The respondent objected to the notice of trial because of outstanding disclosure issues.

[9] The appellant's common-law spouse, L.L.A., commenced a similar action against the Society, several of its employees and its lawyer. In a decision dated March 11 2008, reported at 2008 NSSC 73, the statement of claim was struck out as disclosing no reasonable cause of action, based principally on the decision of the

Supreme Court of Canada in **Syl Apps Secure Treatment Centre v. B.D.**, 2007 SCC 38, [2007] 3 SCR 83.

[10] On March 19, 2008 the appellant applied to amend his statement of claim. On April 6, 2008 the respondent applied for an order pursuant to **Civil Procedure Rule** (1972)14.25 to strike out the statement of claim. Both applications were heard by Justice Coughlan on June 3, 2008.

[11] With his application to amend the statement of claim, the appellant filed a proposed amended statement of claim adding 14 new paragraphs. These paragraphs provide detail of meetings held and decisions made by employees of the respondent prior to the child's apprehension.

[12] In the decision under appeal, the chambers judge determined the application to strike on the basis of the proposed amended statement of claim. In other words he assumed that the application to amend was successful before he considered whether the statement of claim disclosed a reasonable cause of action. He also assumed that the facts as pleaded in the proposed amended statement of claim were true.

[13] The chambers judge concluded that the statement of claim, even if it were amended as proposed, did not disclose a reasonable cause of action. With respect to the claim in negligence, he found that the **Syl Apps** case precluded the action against the Agency. The claim for breach of fiduciary duty was not viable because the Agency did not stand in fiduciary relationship with the appellant. As for defamation, the statement of claim was deficient because it neither specified any defamatory statements nor how, where and to whom they may have been published. There was no basis for the claim for malicious prosecution because the statement of claim did not set out any facts alleging proceedings initiated by the defendant which were terminated in favour of the plaintiff. The chambers judge assumed that the appellant's claim for abuse of position was a reference to the tort of misfeasance in public office. The allegations and statement of claim were found not to amount to claims of deliberate unlawful conduct in the exercise of its public duty. And finally, regarding the claim for abuse of process, the chambers judge found that the statement of claim lacked facts which, if proved, could support such a claim. The application to strike the statement of claim was therefore granted.

Issues:

[14] The appellant submits that the chambers judge erred in not allowing his amendment to the statement of claim and in his application and interpretation of the **Syl Apps** case. The appellant does not allege any error regarding the dismissal of the claims for breach of fiduciary duty, defamation, malicious prosecution, abuse of position or abuse of process and it is therefore not necessary to deal with those parts of the decision under appeal.

Analysis

[15] The appellant submits that the chambers judge erred in not granting his application to amend the statement of claim. As noted above, rather than consider the merits of the appellant's application to amend, the chambers judge assumed, for the purpose of the application to strike, that the amendments as proposed had in fact been made. In that respect, the judge said:

> [5] ... For the purpose of considering the application to strike, I assume [D.C.'s] application to amend has been granted and I will consider the statement of claim as [D.C.] applies to amend it.

[16] I see nothing wrong with the chambers judge proceeding in this manner. None of the 14 paragraphs in the proposed amended statement of claim make any difference to the determination of the application to strike because they merely add more particulars of the activities of the defendants alleged to be negligent, malicious or abusive. However, the additional particulars still do not state, for example, the basis upon which there is a fiduciary duty or the words claimed to be defamatory. No additional causes of action were proposed in the amended statement of claim. I would therefore dismiss this ground of appeal.

[17] The appellant also submits that the chambers judge erred in his interpretation and application of the **Syl Apps** case. He says the case does not apply to him because he has framed his action in negligence and the **Syl Apps** case deals with duty of care. The following statements from **Odhavji Estate v. Woodhouse,** 2003 SCC 69, explain that duty of care is one of the elements required to be proved in an action for negligence:

> [44] In order for an action in negligence to succeed, a plaintiff must be able to establish three things: (i) that the defendant owed the plaintiff a duty of care; (ii) that the defendant breached that duty of care; and (iii) that damages resulted from that breach. ...
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> [45] It is a well-established principle that a defendant is not liable in negligence unless the law exacts an obligation in the circumstances to take reasonable care. As Lord Esher concluded in **Le Lievre v. Gould**, [1893] 1 Q.B. 491 (C.A.), at p. 497, "[a] man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them." Duty may therefore be defined as an obligation, recognised by law, to take reasonable care to avoid conduct that entails an unreasonable risk of harm to others.

[18] In the **Syl Apps** case a 14-year-old child was apprehended by a Children's Aid Society and placed in foster care. While she was in foster care, she attempted suicide and as a result, was transferred to the pediatric psychiatric ward of a hospital. There were two further suicide attempts while she resided in treatment centers. She was found to be a child in need of protection and later ordered to be a permanent ward of the Crown. Her parents, grandparents and siblings later sued seeking damages for the negligence of the agency, social workers, doctors, hospitals and the treatment centers. The family claimed that the child was treated as if her parents had physically and sexually abused her. Some of the defendants brought an application to strike the statement of claim on the ground that it disclosed no reasonable cause of action.

[19] By the time the case reached the Supreme Court of Canada, the issue was whether the Syl Apps Secure Treatment Center and its employee, who was the child's social worker, owed a duty of care to the family of the child they had been ordered by the court to treat. The court concluded that there was no duty of care owed by the treatment center or its employee to the child's family and therefore there was no reasonable cause of action disclosed by the statement of claim.

[20] Abella, J. writing for the court, assessed the claim as instructed by **Anns v. Merton London Borough Council**, [1978] A.C. 728 (H.L.) and **Cooper v. Hobart**, [2001] 3 S.C.R. 537 and determined that although harm to the family was reasonably foreseeable, the court should not recognize the relationship of proximity. After citing relevant parts of the **Child and Family Services Act** of Ontario, which provide that the paramount purpose of the **Act** is to promote the

best interests of children, the court concluded that the legislation aims to protect and further the interests of the child not the child's parents. Justice Abella stated:

> [41] The deciding factor for me, as in **Cooper and Edwards**, is the potential for conflicting duties: imposing a duty of care on the relationship between the family of a child in care and that child's court-ordered service providers creates a genuine potential for "serious and significant" conflict with the service providers' transcendent statutory duty to promote the best interests, protection and well-being of the children in their care.
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> [42] When a child is placed in the care of the Children's Aid Society, or if Crown wardship is ordered, the Act gives the Children's Aid Society or Crown "the rights and responsibilities of a parent for the purpose of the child's care, custody and control" (s. 63(1)). This creates an inherently adversarial relationship between parents and the state.
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> [43] It is true that treating a child in need of protection can sometimes be done in a way that meets with the family's satisfaction in the long term. But it is not the family's satisfaction in the long term to which the statute gives primacy, it is the child's best interests. The fact that the interests of the parents and of the child may occasionally align does not diminish the concern that in many, if not most of the cases, conflict is inevitable.
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> [44] The primacy of the best interests of the child over parental rights in the child protection context is an axiomatic proposition in the jurisprudence. As Daley J.F.C. observed in **Children's Aid Society of Halifax v. S.F.** (1992), 110 N.S.R. (2d) 159 (Fam. Ct.):
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>> [Child welfare statutes] promot[e] the integrity of the family, but only in circumstances which will protect the child. When the child cannot be protected as outlined in the [Act] within the family, no matter how well meaning the family is, then, if its welfare requires it, the child is to be protected outside the family. [para. 5]

[21] At ¶ 49 the Court found that imposing a duty of care towards a child's family on a treatment centre and its employees in this context creates a potential conflict with their ability to effectively discharge their statutory duties and continued:

> [50] If a corresponding duty is also imposed with respect to the parents, service providers will be torn between the child's interests on the one hand, and parental

> expectations which may be unrealistic, unreasonable or unrealizable on the other. This tension creates the potential for a chilling effect on social workers, who may hesitate to act in pursuit of the child's best interests for fear that their approach could attract criticism - and litigation - from the family. They should not have to weigh what is best for the child on the scale with what would make the family happiest, finding themselves choosing between aggressive protection of the child and a lawsuit from the family.

[22] Other factors which reinforced its conclusion that there was no proximity were that the child welfare legislation provides various remedies for families seeking to challenge the way their child is treated and statutory immunity for child protection workers. Furthermore recognizing a duty of care in this context would create the possibility of parallel proceedings and relitigation of matters already determined in the child protection hearings. Finally:

> 64 Child protection work is difficult, painful and complex. Catering to a child's best interests in this context means catering to a vulnerable group at its most vulnerable. Those who do it, do so knowing that protecting the child's interests often means doing so at the expense of the rest of the family. Yet their statutory mandate is to treat the child's interests as paramount. They must be free to execute this mandate to the fullest extent possible. The result they seek is to restore the child, not the family. Where the duties to the child have been performed in accordance with the statute, there is no ancillary duty to accommodate the family's wish for a different result, a different result perhaps even the child protection worker had hoped for.

[23] For these reasons, the Supreme Court refused to recognize a new private law duty of care owed by the treatment centre and its employee to the family, and therefore the action was dismissed as it was plain and obvious that the statement of claim disclosed no reasonable cause of action.

[24] The **Syl Apps** case has been applied in subsequent cases to dismiss actions by parents whose children have been apprehended by child welfare agencies. See: **C.H.S. v. Alberta (Director of Child Welfare)**, 2008 ABQB 513; **Pearce v. Children's Aid Society of Toronto,** [2007] O.J. No. 4091 (Ont. Supt. Ct. J.); and **L.L.A. v. Children's Aid Society of Cape Breton-Victoria**, 2008 NSSC 73.

[25] In **C.H.S**., the mother of three children who were apprehended brought a claim of negligence against the agency for negligence due to its failure to file a

service care plan in accordance with the legislation. On the application by the defendant to strike the statement of claim, Thomas J. found that the reasoning of the Supreme Court in **Syl Apps** that formed the basis of dismissing the action against the treatment center was equally applicable to the Director of Child Welfare because the same policy considerations were engaged. The statement of claim was therefore struck.

[26] The same result was reached in both **Pearce** and **L.L.A.** The claims against the agency in those two cases are remarkably similar to the claims made by the appellant in this case.

[27] I agree with the chambers judge in this case, and the decisions in **C.H.S**., **Pearce** and **L.L.A.** that the principles defined by the Supreme Court in the **Syl Apps** case are equally applicable to child protection agencies as they are to third-party treatment centers. The **Children and Family Services Act** of Nova Scotia, stipulates that in all matters pursuant to the **Act** the paramount consideration is the best interest of the child and the chief function of the agency is to protect children from harm. To impose a duty of care on the Children's Aid Society to the child's family would create the potential for serious conflicting duties and inhibit its ability to discharge its statutory duties to protect the child. It would be unrealistic, unreasonable and unrealizable to create a duty of care to the parents. (see ¶ 50 **Syl Apps**) After a child is apprehended, the Agency and the parent are then involved in an inherently adversarial relationship. (see ¶ 42 **Syl Apps**) Although the **Children and Family Services Act** of Nova Scotia does not provide immunity to child protection workers, it does mandate safeguards and remedies for parents who challenge the apprehension and placement of their child. As well, the agency's activities are continually subject to close court supervision. There is therefore no reason to recognize a duty of care by the agency to the parents.

[28] Accordingly, the statement of claim in this case, even as proposed to be amended, disclosed no reasonable cause of action. The chambers decision discloses no error of law, and the appellant has not shown that any injustice results from the order striking out the statement of claim. The appeal should therefore be dismissed with costs to the respondent in the amount of $1,000.00 plus disbursements.

Roscoe, J.A.

Concurring:

Bateman, J.A.

Fichaud, J.A.