CV 03990

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

UMATHEVAN VISWALINGAM

PLAINTIFF

- and -

FORT SMITH HEALTH CENTRE BOARD OF MANAGEMENT, COLLEGE OF PHYSICIANS AND SURGEONS OF SASKATCHEWAN, J. STEWART MCMILLAN and ROBERT J. WEBB, DENNIS PATTERSON IN HIS CAPACITY AS MINISTER OF HEALTH OF THE GOVERNMENT OF THE NORTHWEST TERRITORIES and DON ELLIS and THE BOARD OF INQUIRY PURSUANT TO THE MEDICAL PROFESSION ACT OF THE NORTHWEST TERRITORIES

DEFENDANTS

Application To Strike Out The Statement Of Claim Pursuant to Rule 124A.

DISMISSED

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Application Heard: January 12, 1993
Reasons Filed:

Counsel for the Plaintiff: R.J. Garside

Counsel for the Defendant, College of Physicians and Surgeons of Saskatchewan: V.A. Schuler, Q.C.

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DEFENDANTS

REASONS FOR JUDGMENT

INTRODUCTION:

The defendant, College of Physicians and Surgeons of Saskatchewan (the "College"), applies to strike out the Statement of Claim, or parts of it, as it pertains to the College on the grounds:

(a) that the Plaintiff's claim against the College is in reality a claim in defamation and as such has not been plead with sufficient particularity;

(b) that the Statement of Claim does not disclose a cause of action against the College, pursuant to Rule 124A(1)(a); and

(c) that the Statement of Claim is embarrassing, frivolous or vexatious as it pertains to the College in that it seeks to plead by way of negligence what is in reality a plea of defamation, pursuant to Rule 124A(1)(b).

For the reasons that follow I dismiss the application.

GENERAL PRINCIPLES:

Rule 124A of the Supreme Court Rules states:

124A(1) The court may at any stage of proceedings order to be struck out or amended any pleading in the action, on the grounds that:

a) it discloses no cause of action or defence, as the case may be, or

b) it is scandalous, frivolous or vexatious, or

c) it may prejudice, embarrass or delay the fair trial of the action, or

> **d) it is otherwise an abuse of the process of the court,**
>
> **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).**

As a general rule, on a motion to strike a statement of claim, the courts assume that the plaintiff can prove the facts pleaded. And, if a suit depends on its facts, then it goes to trial.

The test in Canada governing the application of provisions such as Rule 124A was set out by the Supreme Court of Canada in **Hunt** v. **Carey Canada Inc.** (1990), 74 D.L.R. (4th) 321 at p. 336:

> **... assuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail because it contains a radical defect ranking with others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).**

Rule 19(24) of the British Columbia Rules, referred to in this extract, is similar in wording to Rule 124A.

Finally, the power to strike should not be exercised where there is a serious point of law to be considered which cannot be said to be clear: **Cerny** v. **Canadian Industries Ltd. et al**, [1972] 6 W.W.R. 88 (Alta. C.A.); **Birchard et al** v. **Law Society of Alberta et al** (1985), 65 A.R. 222 (C.A.).

With these general principles in mind I turn to a review of the Statement of Claim.

STATEMENT OF CLAIM:

The Statement of Claim, which has now been amended three times, encompasses a variety of claims against the various defendants. Part of the problem is that it fails to adequately set out with precision the types of claims made against the different defendants.

It should be noted that none of the other defendants appeared on this application. I was advised that all of the other defendants were given notice of this application but they chose to take no position on it. As will be seen the position of the defendants McMillan and Webb is bound up with the position of the College and it was acknowledged by the College that, even though they did not appear on this application, they are also beneficiaries of any success achieved by the College. It could be said in fact that the College's liability, if any, is a vicarious one due to its relationship with McMillan and Webb but that is not an issue of concern on this application.

The plaintiff is a medical doctor employed by the Fort Smith Health Centre. The Statement of Claim says that in January, 1992, the Centre's Board decided to retain the Alberta College of Physicians and Surgeons to conduct a peer review of medical services; that in April, 1992, the Board instead retained this defendant College to conduct a general

evaluation of medical services; and, that the College provided the services of the defendants McMillan and Webb to conduct the evaluation. The terms of reference for the evaluation were set out in the claim and include the following statement of "Purpose":

> **The Review Committee will conduct a comprehensive evaluation of medical services provided at the facility.**
>
> **This evaluation will be general in nature and will utilize the requirements of the Canadian Council on Health Facilities Accreditation and the standard requirements under a total Quality Assurance and Risk Management program. The Review Committee will evaluate medical services and ensure they are within acceptable medical and ethical standards of practice.**

The claim alleges that there was a representation made by the Centre's Board to the plaintiff that there would be no specific review of his practice. It does not allege that the College or McMillan and Webb were aware of this representation. It does, however, allege that a comprehensive evaluation was not done. Instead, in contravention of the terms of reference, the Centre's Board caused the College to specifically enquire into the plaintiff's practice.

The objectionable portions of the Statement of Claim, according to the College, are paragraphs 21 through 24:

> **21. The Defendant College, through the Defendant McMillan and the Defendant Webb, and the Defendant McMillan and the Defendant Webb owed a duty to the Plaintiff to conduct their review in accordance with the Terms of Reference and in a manner which fairly and accurately evaluated the medical services of the Fort Smith Health Centre and the Plaintiff.**
>
> **22. The Defendant College, the Defendant McMillan and the Defendant Webb each knew or ought to have known that their recommendations contained in any report prepared as a result of their review of medical services of the Fort Smith Health Centre would be relied upon by the Defendant Board and its successors and would effect the medical practitioners, including the Plaintiff, practising at the**

Fort Smith Health Centre.

23. The Defendant College, through the Defendant McMillan and the Defendant Webb, and the Defendant McMillan and the Defendant Webb breached their duty to the Plaintiff by, among other things, negligently or otherwise failing to follow the Terms of Reference provided to them by the Defendant Board, failing to conduct their review in accordance with the standards and guidelines called for in the Terms of Reference, and failing to allow the Plaintiff to fully respond to the allegations made against him.

24. As a result of the actions of the Defendant College, the Defendant McMillan and the Defendant Webb in preparing their report in breach of their duty to the Plaintiff, the Plaintiff's privileges to practice medicine at the Fort Smith Health Centre have been suspended and the Plaintiff's position and reputation as a medical practitioner in the Town of Fort Smith in the Northwest Territories have been damaged.

The claim alleges that as a result of the report prepared by McMillan and Webb the plaintiff's privileges have been suspended and investigative proceedings have been commenced by a Board of Inquiry established under the Medical Professions Act, R.S.N.W.T. 1988, c.M-9. The prayer for relief seeks a declaration that the evaluation report and its recommendations are "invalid and a nullity" and various other types of relief with respect to the steps taken to date or contemplated with respect to the plaintiff and his ability to practice medicine.

The prayer for relief also seeks damages:

j) general damages as against all of the Defendants in the amount of $250,000.00.

k) special damages in an amount to be proven at the trial of this action.

The College seeks to strike these claims as against it.

NATURE OF RELIEF SOUGHT:

The College seeks to strike out the claim on two grounds: (a) that it is really a claim in defamation that is not properly pleaded; and (b) that there is no cause of action.

With respect to the first ground, I am satisfied from reviewing the Statement of Claim that if indeed this is a claim in defamation then the pleading is bad. There is ample case law to the effect that a plaintiff must plead the exact words which are alleged to be defamatory. The result, however, in such a case, would be to grant leave to the plaintiff to once more amend his pleading.

It is obvious to me why the College argued that this was really a claim in defamation. As I said earlier, the problem lies in failing to particularize the claims being advanced against each of the defendants.

Surprisingly, it was only during argument by plaintiff's counsel that he conceded this was not a claim in defamation. He says this is a tort claim for breach of a duty of care. I say "surprisingly" because, being faced with this application for at least the past month, one would have thought that plaintiff's counsel would have communicated this fact to the College's counsel so that she would not have had to prepare for this issue and indeed make submissions on it at the hearing.

Once the nature of the claim was revealed, counsel then addressed the real issue: Did the College owe a duty of care to the plaintiff? If there is no such duty, the plaintiff has no cause of action and no amendment can rectify it.

DUTY OF CARE:

Counsel for the College argues that there was no duty of care on the part of the College to the plaintiff. There was no privity of contract; there was no quasi-contractual or fiduciary relationship; there was no undertaking of responsibility or assumption of risk by the College; and there was no reliance by the plaintiff. She further says that to expose the College to liability for the preparation of a report such as this would open up the floodgates to indeterminate liability. She asks why would any organization put itself into the position of advising someone else if they could be liable to third parties who may be affected by the use made of such advice by the contracting party, use over which they have no control. She says that the only duty on the College was to conduct its evaluation fairly and without malice.

Plaintiff's counsel argues that while the duty of care issue may be "novel" it is at least arguable and depends on facts to be established through the evidence. The claim at least sets up the argument that McMillan and Webb, and thereby the College, should have foreseen that if they failed to carry out their evaluation within the terms of reference then the plaintiff, as one of the Centre's physicians, would be harmed by it. The claim alleges that it was the failure to abide by the terms of reference that set in motion the

chain of events leading to the plaintiff's suspension and exposure to investigation and discipline.

Counsel for the College says, however, that if the evaluation went beyond the terms of reference then the College is only liable to the Centre's Board for breach of their contract. She provided numerous cases which established the principle that a defendant's breach of an obligation to a third party (in this case the co-defendant Health Centre Board) constitutes an actionable wrong to the plaintiff only if there is a voluntary assumption of responsibility by the defendant and a reliance on the defendant by the plaintiff or a situation where the plaintiff is the intended beneficiary of the obligation.

In all these cases the pertinent question was whether there was a sufficient relationship of proximity between the parties so as to create a duty of care. As will be seen, I have concluded that the scope of inquiry on this issue has been greatly expanded.

This is a claim for economic loss; there is no personal injury or property damage. In such a case mere foreseeability of loss is not by itself sufficient to create the proximity necessary to impose a duty of care. Proximity has been thought to be a function of the relationship of the parties. In particular, that relationship had to be highlighted by a reliance on the part of the plaintiff and knowledge on the part of the defendant of that reliance, if not by the plaintiff specifically then at least by a limited class of potential plaintiffs: **Haig** v. **Bamford et al** (1976), 72 D.L.R. (3d) 68 (S.C.C.); **B.D.C. Ltd.** v. **Hofstrand Farms Ltd.** (1986), 26 D.L.R. (4th) 1 (S.C.C.); **Kamahap Enterprises Ltd.** v.

Chu's Central Market Ltd. et al (1989), 1 C.C.L.T. (2d) 55 (B.C.C.A.).

These cases attempt to devise a framework to evaluate claims for pure economic losses. These claims, in a relatively short period of time, went from being excluded altogether to a situation of so fluid an analysis as to be almost unpredictable.

The analysis starts with the well-known statement from Anns v. London Borough of Merton, [1977] 2 All E.R. 492 at p. 498:

> **. . . the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise . . .**

This case formulated a general theory of tort liability which was adopted in Canada by Kamloops v. Nielsen (1984), 10 D.L.R. (4th) 641 (S.C.C.). While the Anns decision has been specifically over-ruled in England it is still the accepted starting point in Canada for any consideration of this type of claim.

The Anns formulation calls for a flexible, case-by-case analysis. If there is a relationship of proximity then a prima facie duty of care arises. Then, one looks for any factors that ought to limit that duty.

Recently the Supreme Court of Canada reviewed the rationale for this theory of liability in Canadian National Railway Co. v. Norsk Pacific Steamship Co. Ltd. et al (1992), 91 D.L.R. (4th) 289. While admittedly there is no clear-cut majority (since three judges concurred in one judgment dismissing the appeal, one judge concurred in the result but wrote a separate judgment, and three judges concurred in a dissenting judgment), the majority of four judges did re-affirm the flexible approach of Anns as adopted by the Kamloops decision.

The Norsk Pacific case involved a claim for relational economic loss as a result of damage to the property of a third party. There was no relationship contractual or otherwise between the plaintiff and the defendant. There was, however, a relationship between the negligent act of the defendant (causing damage to a government-owned bridge) and the loss to the plaintiff (inability to run its trains across the bridge). The "lead" judgment of McLachlin J., in my opinion, significantly expands the scope of liability by focusing proximity on the connection between the defendant's conduct and the plaintiff's loss as opposed to the relationship of the parties themselves.

At pages 369 to 371, McLachlin J. stated:

> **The matter may be put thus: before the law will impose liability there must be a connection between the defendant's conduct and plaintiff's loss which makes it just for the defendant to indemnify the plaintiff. In contract, the contractual relationship provides this link. In trust, it is the fiduciary obligation which establishes the necessary connection. In tort, the equivalent notion is proximity. Proximity may consist of various forms of closeness -- physical, circumstantial, causal or assumed -- which serve to identify the categories of cases in which liability lies.**
>
> **Viewed thus, the concept of proximity may be seen as an umbrella, covering a number of disparate circumstances in which the relationship between the parties**

is so close that it is just and reasonable to permit recovery in tort. The complexity and diversity of the circumstances in which tort liability may arise defy identification of a single criterion capable of serving as the universal hallmark of liability. The meaning of "proximity" is to be found rather in viewing the circumstances in which it has been found to exist and determining whether the case at issue is similar enough to justify a similar finding.

In summary, it is my view that the authorities suggest that pure economic loss is *prima facie* recoverable where, in addition to negligence and foreseeable loss, there is sufficient proximity between the negligent act and the loss. Proximity is the controlling concept which avoids the spectre of unlimited liability. Proximity may be established by a variety of factors, depending on the nature of the case. To date, sufficient proximity has been found in the case of negligent misstatements where there is an undertaking and correlative reliance *(Hedley Byrne)*; where there is a duty to warn *(Rivtow)*, and where a statute imposes a responsibility on a municipality toward the owners and occupiers of land *(Kamloops)*. But the categories are not closed. As more cases are decided, we can expect further definition on what factors give rise to liability for pure economic loss in particular categories of cases. In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. And they will insist on sufficient factors to avoid the imposition of indeterminate and unreasonable liability. The result will be a principled, yet flexible, approach to tort liability for pure economic loss. It will allow recovery where recovery is justified, while excluding indeterminate and inappropriate liability, and it will permit the coherent development of law in accordance with the approach initiated in England by *Hedley Byrne* and followed in Canada in *Rivtow, Kamloops* and *Hofstrand.*

. . .

Viewed in this way, proximity may be seen as paralleling the requirement in civil law that damages be direct and certain. Proximity, like the requirement of directness, posits a close link between the negligent act and the resultant loss. Distant losses which arise from collateral relationships do not qualify for recovery.

In many of the cases discussed above, the judiciary has focused upon the relationship between the tortfeasor and the plaintiff as an indication of proximity, a focus closely related to the foreseeability analysis inherent to all negligence actions. In the classic case of *Hedley Byrne*, the reliance analysis focuses upon the connection between the party who made the negligent misstatement and the injured party, i.e., is that plaintiff a party that the tortfeaser ought reasonably to have foreseen would rely on his or her statement? The judgments below focused on the relationship between the tortfeasor Norsk and the plaintiff C.N. both within and outside their discussion of proximity. A more comprehensive, and I submit objective, consideration of proximity requires that the court review all of the factors connecting the negligent act with the loss; this includes not only the relationship between the parties but all forms of proximity -- physical, circumstantial, causal or assumed indicators of closeness. While it is impossible to define comprehensively what will satisfy the requirements of proximity or

directness, precision may be found as types of relationship or situations are defined in which the necessary closeness between negligence and loss exist.

If the focus is on the connection between the act and the loss, and if one assumes proof of the facts alleged in the Statement of Claim, then it is at least arguable that there is a direct and foreseeable relationship between the alleged negligence in the preparation of the evaluation report and the loss of professional status suffered by the plaintiff. Indeed the only loss suffered is that of the plaintiff. It is also arguable that McMillan and Webb knew that their evaluation was outside of the terms of reference and should have known that it would have an adverse impact on the physicians, in this case, specifically the plaintiff, working at the Health Centre. If the evaluation went on to become a specific review of the plaintiff's practice, as alleged, then it can at least be argued that the breach, by the College, of its contractual terms with the Centre's Board had a direct and foreseeable impact on the plaintiff. Whether or not the report did go beyond the terms of reference is, of course, a question of fact to be determined by the evidence. But it is at least arguable that there is a "circumstantial and causal closeness" between the breach of the terms of reference and the resulting professional predicament facing the plaintiff.

Are there any policy factors that would preclude liability? In my view, one cannot conclude that to impose liability in this case would lead to the imposition of "indeterminate and unreasonable" liability. The plaintiff is part of a limited circle of parties who could be affected by the report. He was not unknown to the College, or more specifically, to McMillan and Webb during their evaluation. There is no question that the

College, in conducting this review, would open itself to claims at large by total strangers.

If someone within the known circle of parties who may be affected by the report suffers loss as a result of negligence, then there is an arguable case that as a matter of tort theory recovery should be available.

In saying all of this I am not saying that there is a duty of care. I think it is a highly questionable point. But, it is at least an arguable point and as such should be put to a trial.

I am influenced in this regard by the decision of Richard J. of this court in **Hearn Stratton Construction Ltd.** v. **Northwest Territories (Commissioner)**, [1992] N.W.T.R. 107. That case involved a claim by a contractor alleging negligence by the owner's inspector. Richard J. refused an application to strike the claim because in his view the law in this area is in a state of flux. Therefore, it was not plain and obvious that the claim could not succeed. The situation is the same in this case. There is a well-established principle of judicial comity between judges of the same court and I see no reason not to follow the approach of Richard J. in the **Hearn Stratton** case.

PRAYER FOR RELIEF:

I have given some thought to the claim for damages in the prayer for relief, specifically the claim for general damages against all defendants.

hearing of an application. These directions are there for a reason. I note as well that counsel for the College filed a comprehensive written brief and book of authorities over 2 weeks before the hearing.

Considering all of these circumstances, and the fact that success is divided to some extent, I have decided to exercise my discretion by not making the customary order for costs.

I order that the plaintiff is not to recover any costs for this application regardless of the outcome of the litigation as between these parties. With respect to costs payable to the College, I will leave that question for the discretion of the trial judge.

John Z. Vertes
J.S.C.

Counsel for the Plaintiff: R.J. Garside

Counsel for the Defendants,
College of Physicians and
Surgeons of Saskatchewan: V.A. Schuler, Q.C.

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Plaintiff

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FORT SMITH HEALTH CENTRE BOARD OF MANAGEMENT, COLLEGE OF PHYSICIANS AND SURGEONS OF SASKATCHEWAN, J. STEWART McMILLAN and ROBERT J. WEBB, DENNIS PATTERSON IN HIS CAPACITY AS MINISTER OF HEALTH OF THE GOVERNMENT OF THE NORTHWEST TERRITORIES and DON ELLIS and THE BOARD OF INQUIRY PURSUANT TO THE MEDICAL PROFESSION ACT OF THE NORTHWEST TERRITORIES

Defendants

REASON FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J.Z. VERTES

The Statement of Claim alleges that the plaintiff's position and reputation as a medical practitioner have been damaged. At the hearing of this application a question was raised as to whether damages for such a loss can be claimed outside of a defamation action (which we now know this is not). There is no specific reason why damages for loss of reputation may not be claimed in actions based on torts other than defamation. They may even be claimed, in certain circumstances, in breach of contract cases. See S.M. Waddams, **The Law of Damages** (1983), chapter 4; and **Vorvis** v. **Insurance Corp. of British Columbia** (1989), 58 D.L.R. (4th) 193 (S.C.C.).

The problem, however, is that the prayer for relief, specifically paragraph (j), is drafted using only the ambiguous term of "general damages". It is highly questionable whether general damages are recoverable in a pure economic loss tort claim. I know of no case where other than actual monetary loss was awarded. Nevertheless that is not to say that general damages could never be awarded in such a case.

In my opinion, however, the prayer for relief should be particularized. It should specify what types of damages are claimed as against each defendant and they should relate to the allegations of fact made against each defendant. The Statement of Claim encompasses several possible causes of action not all of them applicable to all defendants. Each defendant should be made aware of what potential damages they are exposed to on the basis of what type of claim.

To that end the plaintiff should specify the general damages claimed against each defendant. It can do so either by delivering particulars to the defendants or by once again amending the Statement of Claim. If the plaintiff wishes to amend, he has leave to do so. In either event, the amended claim or the notice of particulars will be delivered by the plaintiff to each defendant within 30 days of the date of these reasons.

CONCLUSION:

Subject to my directions with respect to the prayer for relief, this application is dismissed.

COSTS:

It is customary, if a defendant's application to strike is dismissed, to award costs to the plaintiff. As I noted above, however, the defendant had good cause to bring this application with respect to the question of defamation. There was, in addition, no cause for the plaintiff to wait until the hearing to advise the defendant that that question was not an issue.

Furthermore, plaintiff's counsel submitted several authorities for consideration only during his oral argument. Counsel for the College advised that she had not previously seen them. Practice Direction No. 17, issued by this court in 1978, requires that at least a list of authorities to be relied on be filed no later than 48 hours before the