SC CIV 95 040

CV 05247

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MICHAEL SPENRATH

Plaintiff

- and -

WAYNE CHARLES McKENZIE, CANADIAN BROADCASTING CORPORATION, COMMISSIONER OF THE NORTHWEST TERRITORIES and JOHN DOE

Defendants

Application to strike out Statement of Claim. Dismissed with costs.

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

Heard at Yellowknife, Northwest Territories
on November 2, 1995

Reasons filed: November 7, 1995

Counsel for the Plaintiff (Respondent):	Karan M. Shaner
Appearing on behalf of the Defendants McKenzie and Canadian Broadcasting Corporation (Applicants):	Constance E. O'Laughlin, Student-at-Law

No one appearing on behalf
of the other defendants.

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REASONS FOR JUDGMENT

The defendants, McKenzie and Canadian Broadcasting Corporation (the "applicants"), apply to strike out the Statement of Claim in this action.

The plaintiff (herein the "respondent") commenced this action seeking damages for personal injuries suffered in a motor vehicle accident. The respondent was a passenger in a vehicle owned by the applicant C.B.C. and driven by the applicant McKenzie. The applicants' Statement of Defence denies negligence and also pleads a statutory bar to the action. The applicants plead that the respondent accepted benefits and compensation pursuant to the *Government Employees Compensation Act*, R.S.C. 1985, c.G-5, and therefore is precluded from bringing this action.

The *Government Employees Compensation Act* establishes a workers' compensation scheme for employees of the federal government and Crown corporations. The C.B.C. as an employer is

covered by this legislation. If an employee is injured in an accident arising out of and in the course of employment, the employee is entitled to claim benefits under the Act. In such case, all rights of action against a negligent third party become subrogated rights of the employer. More significantly for this case, section 12 of the Act sets up a bar to any proceedings against the employer or a fellow employee. The bar does not depend on an acceptance of benefits by the employee, but merely the "entitlement" of the employee to benefits:

> 12. Where an accident happens to an employee in the course of his employment under such circumstances as entitle him or his dependants to compensation under this Act, neither the employee nor any dependant of the employee has any claim against Her Majesty, or any officer, servant or agent of Her Majesty, other than for compensation under this Act.

4 In this case neither the Statement of Claim nor the Statement of Defence contain an explicit statement that, at the time of the accident, the respondent was an employee of the applicant C.B.C. Nor is there any direct statement to this effect contained in the affidavits filed on behalf of the applicants. The only specific reference I can find is an indirect one to the C.B.C. being the respondent's employer contained in the affidavit filed by a legal assistant to the respondent's solicitor. The fact of employment was simply assumed in the application before me without the aid of direct or admissible evidence.

5 This application to strike the Statement of Claim is brought on the basis of Rule 124A of the Supreme Court Rules:

> 124A. (1) The court may at any stage of 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
>
> (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).

6 The applicants' Notice of Motion lists all four situations stipulated in subrule 124A(1) as the grounds supporting this application. At the hearing before me emphasis was placed on the ground that the action is an abuse of the process of the court. This may have been a tactical necessity since the applicants filed affidavit material and, of course, pursuant to subrule 124A(2), no evidence is admissible if the sole ground of the application is that the Statement of Claim discloses no cause of action.

In this case the cause of action is the alleged negligence of McKenzie as the driver of the vehicle in which the respondent was a passenger. The C.B.C. is alleged to be vicariously liable as the owner of the vehicle. So, on the face of the pleading, it cannot be said that the action is certain to fail. One must look to extrinsic evidence to support this application.

8 In my opinion, the grounds set out in subrule 124A(1) are not interchangeable ones. They overlap to some extent but they are distinct concepts. The term "abuse of process" is not simply another way of saying there is no cause of action. It is a term of great significance that connotes not merely a lack of a basis in law for the action but also improper motives or bad faith in bringing the action. The dismissal of a claim as an abuse of the court's process is a power that is sparingly exercised and only in exceptional cases: Sagon v. Royal Bank of Canada (1993), 105 Sask. R. 133 C.A.).

9 The affidavits filed in support of the application are sworn by a solicitor in the law firm representing the applicants. All of their contents are based on information and belief. They have appended as exhibits copies of letters suggesting the conclusion that the respondent has received compensation pursuant to the *Government Employees Compensation Act*. All of this is hearsay.

10 The affidavits filed in response to this application are no better. They too are based solely on information and belief and contain hearsay evidence raising questions about whether or not the respondent has received compensation for his injuries. So there is no admissible evidence either in support of or in opposition to this application. But, of course, the applicants carry the burden to produce proper evidence.

11 The order sought by the applicants is a "final" order. This is not some interlocutory application on an incidental matter. As such, affidavit evidence based on information and belief is not admissible. This is made plain by Rule 328:

> 328. (1) Subject to subrule (3) affidavits shall be confined to the statement of facts within the knowledge of the deponent.
>
> . . .
>
> (3) On interlocutory motions affidavits containing statements as to the belief of the deponent with the source and grounds thereof may be admitted.

12 The affidavits filed on behalf of the applicants contravene these rules. They are inadmissible to support a final order.

13 Furthermore, the fact that there is the need for additional evidence at all is another reason to deny the order sought here. Whether this action is barred by virtue of section 12 of the *Governmen*

Employees Compensation Act is something that must be pleaded and proved. The facts giving rise to this defence must be proved in evidence. And where there are facts in dispute then a Statement of Claim will not be struck out on a chambers application. Here there are facts in dispute and no admissible evidence by which to resolve them.

14 The best that can be said is that this application is premature. If the underlying facts are disputed, then the issue should be resolved at a trial. If the parties can agree on the facts, and a point of law is in dispute, then they have the option of stating the question of law as a matter for determination prior to a trial.

15 The application is dismissed. The respondent will have his costs of this application, on the basis of double column 4 of the tariff of costs, payable in any event of the cause.

J. Z. Vertes
J.S.C.

Heard at Yellowknife, Northwest Territories
on November 2, 1995

Reasons filed: November 7, 1995

Counsel for the Plaintiff (Respondent): Karan M. Shaner

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**Reasons for Judgment of the
Honourable Mr. Justice J. Z. Vertes**