

**CITATION:** Sparks v. Ontario, 2010 ONSC 4234  
**COURT FILE NO.:** 08-CV-349886PD3  
**DATE:** 20100728

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**RE:** Tyrone Sparks by his Litigation Guardian, Stephanie O'Brien and Stephanie O'Brien in her personal capacity and Tamia Chapman (Plaintiffs) and Her Majesty the Queen in Right of Ontario, Ministry of Community Safety and Correctional Services, Superintendent of Metropolitan Toronto East Detention Centre, Romeo Flowers, Sarah Strutzenberger, Robin Coursey, Kevin Trapp, Shane Ollerton, Julie Santos, John Lawson, Tom Angelidis, Mario Laforest and Barbara Boudreau (Defendants)

**BEFORE:** Justice Beth Allen

**COUNSEL:** *Deanna Gilbert*, for the Plaintiffs  
*Nazli Buhary*, for the Defendants

**HEARD:** July 12, 2010

**ENDORSEMENT**

**THE PARTIES**

[1] The defendants Ministry of Community Safety and Correctional Services ("the Ministry"), the Superintendent of Metropolitan Toronto East Detention Centre ("East Detention") and Sarah Strutzenberger, Robin Coursey, Kevin Trapp, Shane Ollerton, Julie Santos, John Lawson, Tom Angelidis, Mario La Forest and Barbara Boudreau ("the moving defendants") bring this motion to:

- a. dismiss the action on the basis they are statutorily immune from liability pursuant subsection 12(1) of the *Ministry of Correctional Services Act*, R.S.O. 1990, c. C-M, as amended ("the MCSA"); and
- b. to strike out the amended statement of claim as disclosing no reasonable cause of action pursuant to Rule 21.01(1)(b) of the *Rules of Civil Procedure*; or
- c. in the alternative, to strike the pleadings for non-compliance with the rules for drafting pleadings under Rule 25.06.

[2] The individually named defendants, except the defendant Romeo Flowers ("Flowers"), were at all material times employed as correctional officers at East Detention.

[3] The plaintiff Tyrone Sparks ("the plaintiff") seeks damages for injuries he sustained from an assault by Flowers ("the incident") while both were inmates at East Detention. Stephanie O'Brien claims as the plaintiff's litigation guardian and, with Tamia Chapman, also claims in her personal capacity under s. 61 of the *Family Law Act*, R.S.O. 1990 c. 6 as amended. Ms. O'Brien is the plaintiff's mother and Ms. Chapman, his sister.

[4] The incident arose from a confrontation that occurred on February 5, 2006. Flowers confronted the plaintiff in the common area about the facility giving the plaintiff a mattress that was once used by Flowers. On February 6 while again in the common area, Flowers assaulted the plaintiff. The plaintiff was rendered unconscious and sustained a traumatic brain injury. He remains in a long-term care facility without a memory of the incident, is partially blind, paralyzed and cognitively impaired.

## **THE LAW AND LEGAL PRINCIPLES**

### **Statutory Immunity**

[5] The moving defendants submit subsection 12(1) of the *MCSA* acts as a statutory bar to the plaintiff's claim against them. Subsection 12(1) provides:

**12.** (1) No action or other proceeding for damages shall be instituted against the Deputy Minister or any officer or employee of the Ministry or anyone acting under his or her authority for any act done in good faith in the execution or intended execution of his or her duty or for any alleged neglect or default in the execution in good faith of his or her duty or for any act of an inmate, parolee or probationer while under his or her custody and supervision.

[6] The purpose of that provision is to grant employees of the Ministry immunity from personal liability while in the good faith execution of their duties. The plaintiff pleads the moving defendants are liable for the injuries caused by Flowers because they failed in their duty to protect him while he was in the custody of East Detention. The plaintiff alleges the moving defendants knew or ought to have known harm could come to the plaintiff and they were reckless in not providing the necessary safeguards and security to protect him from harm.

[7] Bad faith on the part of the moving defendants must be established before the statutory immunity from liability is lifted. The plaintiff pleads bad faith on the part of the moving defendants in the administration of East Detention. He alleges the moving defendants were not in the good faith execution of their duties when they failed to properly supervise Flowers, an inmate known to them as a violent and danger person.

## **THE APPLICABLE RULES**

### **Rule 21.01(1)(b)**

[8] The principles developed to guide decisions on a motion under 21.01(1)(b), are well known:

- a. The court is required to accept as true the facts alleged in the pleadings, unless they are patently ridiculous or based on assumptions or speculative conclusions.
- b. Unless it is plain and obvious and beyond doubt the pleading discloses no reasonable cause of action and is certain to fail, a pleading will not be struck.

- c. The novelty of the cause of action or defence is not grounds for dismissing the claim.
- d. In assessing a claim or defence, the pleading must be read generously with allowances for inadequacies due to drafting deficiencies.
- e. If the cause of action is founded in law and there is some chance of success then the action should proceed.

[See for instance: *Hunter v. Carey Canada*, [1990] 2 S.C.R. 959 at pp. 975 and 980 (S.C.C.); *Khan v. The Attorney General of Canada*, [2009] CanLII 7090 (Ont. S.C.J.); *Operation Dismantle Inc. v. Canada*, [1985] 1 S.C.R. 441 (S.C.C.); *Toronto-Dominion Bank v. Deloitte Haskins & Sells* (1991), 5 O.R. (3d) 417 at 419 (Gen. Div.); and *Web Offset Publication Ltd v. Victory* (1999), 43 O.R. (3d) 802 at 803 (Ont. C.A.), leave to appeal ref'd [1999] S.C.C.A No. 460].

[9] Hence the test to strike a claim under Rule 21.01(1)(b) is a strict one posing a difficult burden for the defendant. It is crucial to the application of this rule that the facts alleged in the statement of claim, though they may be sparse, be accepted as true for the purpose of determining whether the claim discloses a reasonable cause of action. The Court of Appeal pushed the limit to say even a germ or a scintilla of a cause of action will suffice to maintain a claim. [*Jaffe v. Miller*, [1993] O.J. 1377, 13 O.R. (3d) 745 (Ont. C.A.), leave to appeal to the S.C.C. refused [1993] S.C.C.A., No. 389 (S.C.C.)].

[10] The Ontario Court of Appeal commented on the importance of that principle:

... in my view, at this stage of the proceedings, the facts alleged in the statement of claim should be taken as true for the purpose determining whether the claim discloses a reasonable cause of action. To do otherwise is effectively to conduct a summary judgment proceeding under Rule 20 without having the sworn evidence of the parties to this litigation as a basis for determining whether there is a genuine issue for trial.

[*Prete v. Ontario*, 1993 CarswellOnt, at 810 (Ont. C.A.), at para. 16.

### **Admission of Affidavit Evidence**

[11] Rule 21.01(2) provides that no evidence is admissible on a motion except on consent or with the leave of the court. Generally, no additional evidence beyond the facts as pleaded can be considered on a Rule 21.01(1)(b) motion. The plaintiff produced an affidavit from a partner in the plaintiff's counsel's law firm, Mr. Sloan Mandel, attesting to statements the plaintiff's mother's husband, Danny Chapman, told counsel pertaining to statements made to him by a corrections officer. This information came to the plaintiff's counsel through a letter from Mr. Chapman. However, the plaintiff has not produced the letter on the basis of litigation privilege.

[12] The plaintiff seeks to have the affidavit admitted without the letter in support, not pursuant to Rule 21.01(1)(b) but pursuant to Rule 25.11, to establish the claim is not frivolous, vexatious or an abuse of process. The latter Rule does not prevent the admission of evidence.

[13] The moving defendants argue they are not moving to strike the plaintiff's pleadings as frivolous, vexatious or an abuse of process so the affidavit should not be admitted. I agree. I also agree with the moving defendants' position that the evidentiary value of the affidavit is limited by the fact that the information is second hand hearsay and the letter itself has not been put before the court to substantiate the facts in the affidavit. I therefore will not allow the letter.

### **CASE AUTHORITIES ON BAD FAITH**

[14] The determination whether the amended statement of claim discloses a reasonable cause of action revolves around whether sufficient facts are pleaded to establish bad faith. That in turn depends on the interpretation of what constitutes bad faith. The path charted by the courts in grappling with how to define bad faith is not a smooth one.

[15] The moving defendants submit bad faith requires the element of intent. They cite case law to support the proposition that where good faith immunity is relied upon negligence in itself is not a ground for liability. Bad faith requires intent and hence more than negligent conduct. The moving defendants cite a decision that relied on a 1972 Court of Appeal decision in *Moffat v. Dufferin (County) Board of Education*, [1973] 1 O.R. 351 (Ont. C.A.) at 354, and held: "It appears if bona fides exists, neither the Crown nor its servants will be liable. Negligence is not enough for a finding of liability." [*Starline Entertainment Centre, et al. v. Ciccarelli, et al.* (1995), 25 O.R. (3d) 765, (Ont. C.A.), at paras. 41 and 54]. A pleading of bad faith amounts to an allegation of intent to deceive or to make someone believe that which is false. [*Rogers v. Fraught*, [2001] O.J. No. 850; 5 C.C.L.T. (3d) 1227 (Ont. S.C.J.), at para. 36]. The moving defendants argue the plaintiff's claim against them cannot stand because the facts alleged amount to no more than negligence.

[16] The moving defendants also submit the plaintiff has made no more than a bald allegation of bad faith without sufficient particulars from which the court might find or infer bad faith. They cite a decision by this court by Spence J. who held a claim of bad faith is a legal conclusion which is not alone sufficient. With a claim of bad faith, sufficient material facts must be pleaded as to intent to deceive:

Bad faith is a legal conclusion. It has been held to involve an allegation of intent to deceive or to make someone believe what is false. It has been said to be equivalent to an allegation of dishonesty. Where a plaintiff's claim includes an allegation of bad faith, the pleading must be supported by sufficient particulars that support a conclusion of bad faith. If it does not, the pleading should be struck.

[*Deep v. Ontario*, [2004] O.J. No. 2734 (Ont. S. C.J.), at para. 69].

[17] The moving defendants argue the plaintiff has not asserted facts to establish the plaintiff's injuries were caused by the intentional acts of the moving defendants and hence the claim should be struck.

[18] The plaintiff submits the case law cited by the moving defendants puts forward the classical view of bad faith which he says has been superseded by later decisions of the Supreme Court of Canada. LeBel, J., for the Supreme Court, looked at the interpretation of "good faith" in the context of a statutory immunity clause in the regulations that govern lawyers in Québec. The plaintiff in that case brought an action for damages against the employees of the Barreau du Québec, the regulatory body in that province, for failing to protect the public. The court enlarged on the concept of bad faith as follows:

These difficulties nevertheless show that the concept of bad faith can and must be given a broader meaning that encompasses serious carelessness or recklessness. Bad faith certainly includes intentional fault, a classic example of which is found in the conduct of the Attorney General of Québec that was examined in *Roncarelli v. Duplessis*, [1959] S.C.R. 121. However, recklessness implies a fundamental breakdown of orderly exercise of authority to the point that absence of good faith can be deduced and bad faith presumed. The act, in terms of how it is performed, is then inexplicable and incomprehensible, to the point that it can be regarded as an actual abuse of power having regard to the purposes for which it is meant to be exercised.

[*Finney v. Barreau du Québec*, [2004] 2 S.C.R.; 17, 2004 S.C.C. 36 (S.C.C.) at para. 39].

[19] The plaintiff relies on another Supreme Court of Canada decision which involves a dispute over amendments to a zoning by-law that resulted in financial loss to a developer. The court relied on the broader concept of bad faith expounded in *Finney, supra*. [*Enterprises Sibeca Inc. v. Frelighsburg (Municipality)*, [2004] 3 S.C.R. 304, 2004 S.C.C. 61 (S.C.C.), at paras. 25 and 26]. Deschamps, J., for the court, states:

Based on this interpretation, the concept of bad faith can encompass not only acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also to acts so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith.

[20] The plaintiff argues *Sibeca* also expands the evidentiary burden. The plaintiff points to the court's comment at paragraph 26 that the extension of bad faith is in a way, "no more than an admission in evidence of facts that amount to circumstantial

evidence of bad faith where a victim is unable to present direct evidence of it.” This is taken to mean the evidentiary threshold to establishing the facts of bad faith is not as

onerous as the classical concept, requiring only circumstantial evidence where direct evidence is not available.

[21] The plaintiff also cites a recent case by the Ontario Court of Appeal that considered whether a statutory immunity clause would operate to indemnify a company’s directors and officers for the financial consequences arising from their regulatory offences. A pre-condition to indemnification was that the individual have acted in good faith in the best interests of the corporation. The court referred to the passages quoted above from *Finney* and *Sibeca* and concluded, “Thus, inexplicable, apparently reckless, conduct may lead to the inference that the conduct was deliberate, intentional, and undertaken in bad faith.” [*Bennett v. Bennett Environment Inc.* 2009 ONCA 198 (Ont. C. A.), at para. 30].

### **Conclusion on Bad Faith**

[22] The moving defendants argue the Supreme Court cases in *Finney* and *Sibeca* can be distinguished from the case at bar on the basis that the statutory context of those cases is different. *Finney* is set in the framework of the professional code that governs the practice of lawyers in Québec in the context the rules of civil liability. *Sibeca* was decided pursuant to the rules of liability applicable to municipalities under the *Québec Civil Code*. The moving defendants submit the Québec courts’ expansion of bad faith was motivated by a broad interest to protect the public that does not exist in the case before this court.

[23] I however agree with the plaintiff’s position that the principle enunciated by the Supreme Court, though developed under Québec civil law, is capable of being incorporated by analogy into the context of the law in common law jurisdictions. That approach seems to have been taken by the Ontario Court of Appeal in *Bennett* which considered bad faith in the context of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. It may well be that cases like *Bennett* that have applied the newer concept of bad faith might be irreconcilable with the Ontario Superior Court’s decision in *Deep*. In any event, *Deep* does not refer to *Bennett* which may mean it was decided before *Bennett*. It is noteworthy however that the court in *Deep* comments on the expanded concept in *Finney* but does not appear to rule it out. Moreover, the *Deep* court was not faced with deciding between the two concepts as it concluded that even the expanded concept would not assist the plaintiff whose pleadings were devoid of factual content.

[24] Applying the newer concept of bad faith I therefore conclude that whether a reasonable cause of action in bad faith is disclosed should be governed by the following principles:

- a. reckless conduct can amount to bad faith;

- b. bad faith can be inferred by inexplicable conduct;
- c. bad faith can be presumed from a fundamental breakdown of the orderly exercise of authority;
- d. where a victim is unable to present direct evidence of bad faith, no more is required than the introduction of facts that amount to circumstantial evidence of bad faith.

[25] I find facts amounting to inexplicable and/or reckless conduct by the moving defendants are sufficiently particularized at paragraphs 13-27 of the amended statement of claim. These are summarized as follows:

- a. the moving defendants knew Flowers was a dangerous criminal;
- b. they knew that Flowers had threatened the plaintiff;
- c. they knew that the plaintiff was likely to be the subject of personal violence at the hands of Flowers;
- d. notwithstanding this knowledge, the moving defendants placed the plaintiff in the same cell block as Flowers rather than separating the two inmates;
- e. the moving defendants allowed Flowers and the plaintiff to both be released to a section or area of East Detention where security cameras, which were meant to protect the safety of inmates, were either not present or not functioning;
- f. they failed to ensure the presence of corrections officers or other staff to maintain and protect the safety of inmates in the area where the assault occurred; and
- g. the moving defendants failed to respond or intervene when the assault occurred.

[26] I find the amended statement of claim sufficiently pleads facts that if taken as true allow a reasonable inference that the plaintiff's injuries resulted from the moving defendants' reckless and inexplicable failure to provide protective safeguards against a known violent and dangerous inmate and to ensure functioning cameras and the presence of corrections officers for security and protection in the area of the incident.

[27] The moving defendants submit the plaintiff's allegations are not particularized in relation to individual corrections officers but rather are made against them as a group. They argue the individual corrections officers are put in a position of not knowing the particular claims against them, which prevents them from being able to raise a proper defence.

[28] The Court of Appeal has held if the plaintiff does not have knowledge of the facts that give rise to the conclusions underlying the claim, then it is inappropriate to make the allegations in the statement of claim. The court concluded the remedy that should be considered where pleadings are deficiently drafted is whether to strike the pleadings rather than whether to allow leave to amend. [*Region Plaza v. Hamilton-Wentworth*, 1990 CarswellOnt 701, 12 O.R. (3d) 750 (Ont. C.A.), at paras. 5 and 20].

[29] The plaintiff argues each of the moving defendants was employed by the Ministry at East Detention and acting within the scope of their duties at all material times. At the time of drafting the pleadings the plaintiff did not have knowledge of the particulars of allegations against specific corrections officer. With that in mind I have found the plaintiff has sufficiently set out the factual basis for a claim in bad faith against the moving defendants as a group. I find unlike the situation facing the Court of Appeal in *Region Plaza*, the plaintiff is not relying on discovery to establish the factual foundation of his bad faith allegations.

[30] The plaintiff argues, and I agree, this a case where it is appropriate that the particulars of the allegations against individual corrections officer be obtained through discovery. The severity

of the plaintiff's injuries has left him with a traumatic brain injury and no memory of the incident and hence no ability to know the identity of the corrections officers involved. At this point only the identities of the individuals who were working as corrections officers at the material time of the incident are available. There are instances where the circumstances might require awaiting discovery to obtain pertinent facts. I believe this is such a situation. I therefore conclude it would not be appropriate to strike the plaintiff's claim by reason of him not having pleaded the particulars of the individual correctional officers' involvement at this point.

### **Claims under the Charter of Rights**

[31] The plaintiff also claims the moving defendants are liable for violations of his rights under sections 7 and 24 (1) of the *Charter of Rights and Freedoms* ("the *Charter*") [*The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.), 1982, c. 11*].

[32] The plaintiff submits his right to security of the person has been infringed under s. 7 in a manner contrary to the principles of fundamental justice as a result of the actions and/or inactions of the moving defendants. The plaintiff also pleads and relies on subsection 24 (1) of the *Charter* in support of his claim he is entitled to damages and or alternatively a declaration that his *Charter* rights have been infringed.

[33] The courts have determined there must be evidence of "wilfulness or *male fides* in the creation of a risk or course of conduct that leads to damages". [*Hawley v. Bapoo*, [2007] CarswellOnt 4355 (Ont. C.A.) at para. 8]. The moving defendants submit the plaintiff has not pleaded facts sufficient to establish wilfulness or *male fides*.

[34] In his argument that the *Charter* pleadings should not be struck, the plaintiff seeks to rely on the affidavit of Mr. Mandel which as discussed above was based on the letter from Mr. Chapman about his conversation with a corrections officer about the malfunctioning camera at the site of the incident. For reasons set out earlier, I did not allow the affidavit. The plaintiff also asserts the amended statement of claim contains facts that go to the substance of the facts in the affidavit. That is, the pleadings contain facts that show the moving defendants wilfully created a risk by not repairing the malfunctioning cameras and/or by consciously allowing dangerous inmates to move around freely in an area not properly supervised, to the detriment of other inmates.

[35] The plaintiff relies on a decision by O'Marra, J. of this court that held:

Whether there has been wilfulness or *male fides* on the part of a purported malfeasor may require not only an assessment of the person's conduct or actions, but also his state of mind or knowledge. It was observed by Watt, J.A. in *Esse v. Bank of Montreal*, *supra*, at para. 46 that state of mind or knowledge is "a notoriously difficult fact for a party to prove" Often it is proven by circumstantial evidence and by drawing reasonable inferences. Frequently, proof of knowledge is much better left to the trial judge, who

has the benefit of hearing the evidence of the parties, than by a judge assessing the printed record on a motion.

[*Alexis v. Darnley*, [2009] CanLII 2896 (Ont.S.C.J.), at para. 56]

[36] The plaintiff submits the states of mind of the moving defendants is relevant to proving the pleading that they were warned of the malfunctioning cameras and deliberately decided to ignore the warnings. The plaintiff submits it may turn out to be the case that the moving defendants' evidence at trial will be that they knew of the malfunctioning cameras and did not bother to ensure they were repaired, which could exonerate them of an allegation of wilfulness if the judge or jury accepts that evidence. The plaintiff takes the position for this reason it is premature to strike the pleadings at this stage.

[37] I accept the plaintiff's position that it can be reasonably inferred from the substance of the pleadings that the moving defendants created a risk to inmates by choosing not to fix the malfunctioning cameras and/or knowingly allowed dangerous inmates to move freely among other inmates in common areas. I accept that the concern expressed in *Alexis, supra*, is applicable in that it would be difficult without a trial to obtain the facts that could prove the existence of the mental state of wilfulness and *male fides*. I find it would be premature and I will not strike the *Charter* pleadings at this point in the litigation.

## **DISPOSITION**

[38] I find it is not plain and obvious that the pleadings with respect to bad faith and the breaches of *Charter* rights disclose no reasonable cause of action and are certain to fail. I therefore dismiss the motion.

[39] It is not necessary for me to consider the moving defendants' alternative grounds for striking the pleadings under Rule 25.06.

## **COSTS**

[40] If the parties do not settle costs of this motion, they shall deliver brief written submissions (three pages or less, bound and tabbed) on costs and a costs outline within 30 days of this Order, with an additional 7 days for Reply, if any. Counsel shall promptly advise the court if they settle costs.

## **ORDER**

[41] Order accordingly.

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Allen J.

**Date:** July 28, 2010