COURT OF APPEAL FOR ONTARIO

CITATION: McHale v. Lewis, 2018 ONCA 1048
DATE: 20181219
DOCKET: C63989

Lauwers, Hourigan and Pardu JJ.A.

BETWEEN

Gary McHale, Randy Fleming, Doug Fleming, Jacob Van Halteren

Plaintiffs (Appellants/
Respondents by way of cross-appeal)

and

O.P.P. Commissioner Chris Lewis, Sergeant Ben Gutenberg, Inspector Phil Carter, Superintendent John Cain, and Her Majesty the Queen in right of Ontario

Defendants (Respondents/
Appellants by way of cross-appeal)

AND BETWEEN

Ted Harlson, ~~Christian~~ Christine McHale, Gary McHale, Hetty Van Halteren, Jacob Van Halteren

Plaintiffs (Appellants)

and

~~O.P.P. Commissioner Chris Lewis, Superintendent John Cain, Sergeant Brad Moore, Inspector Phil Carter and~~ Her Majesty the Queen in right of Ontario

Defendant (Respondent)

AND BETWEEN

Stuart Laughton, Ted Harlson, Gary McHale, Randy Fleming, Jacob Van Halteren, Doug Fleming

Plaintiffs (Appellants/
Respondents by way of cross-appeal)

and

~~O.P.P. Commissioner Chris Lewis, Sergeant Brad Moore, Inspector Phil Carter and~~ Her Majesty the Queen in right of Ontario

Defendant (Respondent/
Appellant by way of cross-appeal)

AND BETWEEN

Randy Fleming

Plaintiff (Appellant/
Respondent by way of cross-appeal)

and

Ken Decloet, Jeffrey Gray, Steven Lorch, Brad Moore, Phil Carter, John Cain, Chris Lewis and Her Majesty the Queen in right of Ontario

Defendants (Respondents/
Appellants by way of cross-appeal)

Gary McHale, on his own behalf and on behalf of the plaintiffs

S. Mathai and N. Ghobrial, for the respondents/appellants by way of cross-appeal

Heard: November 6, 2018

On appeal from the orders of Justice David A. Broad of the Superior Court of Justice, dated February 13, 2017, with reasons reported at 2017 ONSC 969.

Pardu J.A.:

A. BACKGROUND

[1] The plaintiffs and the defendants in four separate actions[1] appeal from the decision of a motion judge. The plaintiffs appeal from the motion judge's decision to strike their pleadings alleging conspiracy on the part of the defendants, without granting them leave to amend their statements of claim. The defendants appeal from the motion judge's refusal to strike the claims for false arrest in two of the actions. In both those actions the statements of claim were issued after the expiry of the presumptive limitation period running from the date of the arrest.

[2] Each of the four actions has in common an allegation that a plaintiff was falsely arrested for walking on a public street while engaged in peaceful expressive activity. The plaintiffs allege that these arrests were acts in furtherance of a broad, overarching conspiracy amongst senior police officers and others to deliberately violate their *Charter* rights, shut down their expressive activity and falsely arrest them.

B. ALLEGATIONS OF CONSPIRACY

(1) Decision of the motion judge

[3] The motion judge observed that the pleadings failed to claim damages for conspiracy, although it was apparent from the statements of claim that the plaintiffs

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[1] The styles of cause as expressed in the orders appealed from are set out in Appendix A.

sought a finding that the defendants were liable for the tort of conspiracy. He held that “allowing the pleading of an alleged conspiracy or conspiracies would expand the complexity and expense of the litigation while providing little or no probative value and should therefore be struck under Rule 25.11 (see *Javitz v. BMO Nesbitt Burns Inc.* (2011), 105 O.R. (3d) 279 (S.C.J.)).”

(2) Argument on appeal

[4] The defendants argue that the statements of claim are missing an essential element, a claim that the conspiracy caused damage and a claim for those damages, and were therefore properly struck. They argue that the motion judge was correct to refuse leave to amend because the conspiracy claims are redundant of the claims for false arrest, malicious prosecution and related *Charter* violations.

[5] The plaintiffs argue that even if the statement of claim was deficient in failing to include a claim for damages resulting from the conspiracy, this could be readily corrected with an amendment for which leave should have been granted, especially since all of the other elements of conspiracy were pleaded. Further the plaintiffs say that their claims in conspiracy allege agreements which go far beyond the false arrest and malicious prosecution and are therefore not redundant.

(3) Analysis

[6] The motion judge summarized the principles governing the decision whether to grant leave to amend a pleading from *Aristocrat Restaurants Ltd. (c.o.b. Tony's East) v. Ontario*, [2003] O.J. No. 5331 (S.C.):

(a) the approach that amendments should be presumptively approved unless they would occasion prejudice that cannot be compensated by costs or an adjournment, they are shown to be scandalous, frivolous, vexatious, or an abuse of the court's process, or they disclose no reasonable cause of action, is relevant to the issue of whether, on a motion to strike a pleading, a court should exercise its discretion to grant leave to amend;

(b) leave to amend should properly be given where a pleading can be put right or improved by amendment and no injustice is done thereby;

(c) depending on the circumstances of the case, striking out a pleading without granting leave to amend often does little to advance the ends of justice;

(d) in disposing of a motion to strike when a recognized cause of action has been improperly pleaded, but can be put right without non-compensable prejudice to the defendants, the preferred route is to

afford the plaintiff the opportunity, upon appropriate terms, to plead the cause properly within the action before the court; and

(e) the foregoing approach makes practical sense and is in keeping with the objectives set out in rule 1.04, namely that the rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

[7] No one takes issue with this articulation of the principles on this appeal.

[8] However, the motion judge's reliance on Rule 25.11 and *Javitz* was misplaced in this case. In *Javitz* customers of an investment dealer sued the dealer for damages arising from fraud committed by an employee of the dealer. The suing customers pleaded that the employee had perpetrated massive frauds in relation to other customers over many years. The suing customers wanted to plead and introduce this similar fact evidence to support their allegation that the investment dealer had been negligent in its supervision of the employee.

[9] Pepall J. (as she then was) held at para. 25:

> In my view, these portions of the pleading should be struck on a number of grounds. These allegations will greatly expand the breadth, complexity and expense of the litigation in circumstances where the corresponding probative value is minimal.

[10] What is key to the decision in *Javitz* is that the similar facts pleaded were collateral to the wrongdoing underlying the customers' actions. In these

circumstances proportionality was properly a factor in the application of Rule 25.11.

[11] Here one of the wrongs complained of by the plaintiffs is the tort of conspiracy. Pleading the very cause of action asserted and the factual underpinnings of that cause of action is not a collateral matter and in itself cannot be a pleading that "may prejudice or delay the fair trial of the action" within the meaning of Rule 25.11.

[12] I also do not accept the argument on appeal that leave to amend was properly refused in application of the "merger doctrine."

[13] This principle holds that where two or more persons conspire to commit a tort, and the tort is committed, the allegation of conspiracy adds nothing to the claim. A plaintiff is not entitled to be compensated twice for the same harm where the damages from both the conspiracy and the tort are the same: *Jevco Insurance Co. v. Pacific Assessment Centre Inc.*, 2015 ONSC 7751, 128 O.R. (3d) 518 (Div. Ct.).

[14] Here the claims in conspiracy are not redundant of the claims for false arrest but go beyond the actions of the individual arresting officers at the time of the arrests, which gave rise to the claims of false arrest and associated *Charter* violations. The pleadings target a broader group of participants in the alleged conspiracy and assert that the facts establishing the existence of this conspiracy

arose before and after the arrest. The statement of claim in CV-14-50 pleads that after the initial arrest on the trespassing charge senior officers repeatedly threatened to arrest the plaintiffs if they walked on a public street and further pleads that even after the charges arising out of this arrest were withdrawn, and even after the OPP learned that the place where the plaintiff was arrested for trespassing was a public street, senior officers continued to threaten to arrest the plaintiffs if they attempted to use the public road.

[15] The statement of claim in action CV-14-50 pleads that the conspiracy was for the "improper and unlawful purpose of limiting or curtailing the Plaintiffs' *Charter* rights of freedom of expression; freedom of peaceful assembly and freedom of association as guaranteed by s. 2 of the *Charter*." The plaintiffs allege that one of the purposes of the conspiracy was to target non-natives for arrest, in violation of s. 15 of the *Charter*.

[16] Further, as will be seen below, if the defendant is successful at trial in its *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B defence on a claim for damages for false arrest in actions CV-16-16 and CV-14-146, it is not clear that a claim based on a tort of conspiracy would also be statute barred. Moreover, if the claims based on false arrest are statute barred, the claim in damages for conspiracy may not be redundant.

[17] The existence of a conspiracy may be a factor affecting the assessment of damages for the violation of rights guaranteed by the *Charter*. As pointed out in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at para. 47, compensation will usually be the most important object of an award for violation of a *Charte*r right, but there may be cases where "vindication or deterrence play a major and even exclusive role." Where it is proven that government actors conspired together to violate *Charter* rights, that conduct may increase the weight given to deterrence in the assessment of damages. This may also be a factor in the assessment of punitive damages.

[18] In *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, the court held that there were good reasons to allow a conspiracy claim to go to trial along with other related tort actions. At p. 989 Wilson J. observed that a conspiracy may give rise to harm of a magnitude that is greater than that of tortfeasors acting alone.

[19] Finally the issue of whether there was any redundancy in the claims successfully made should be left to the trial judge.

[20] In *Hunt* the court noted further at pp. 991-92:

> It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of

> counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

[21] I agree with the observations of Molloy J. in *Jevco*:

> [52] Accordingly, in my view, the law supports permitting the conspiracy claim to be pleaded along with other nominate torts and applying the doctrine of merger only at the end of the trial when it is known if the plaintiff has been fully successful on the nominate torts and whether there is anything added by the conspiracy claim. Further, in the interests of paring down out-of-control interlocutory proceedings and introducing consistency in the law, as a practical matter it is preferable not to resolve these types of claims at the pleadings stage.

[22] Rule 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, provides that “at any stage of an action the court shall grant leave to amend a pleading on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment.” The defendants will suffer no prejudice if, at this stage, before a statement of defence has been delivered, the plaintiffs are permitted to quantify the damages claimed for conspiracy.

[23] I would set aside paragraph 4 in the orders below in each action, grant leave to the plaintiffs to amend their statements of claim to quantify the damages claimed

for the tort of conspiracy and indicate whether both compensatory and punitive damages are claimed for the tort of conspiracy.

C. ARE ANY OF THE ACTIONS STATUTE BARRED?

(1) Decision of the motion judge

[24] The defendants argued before the motion judge that he should dismiss three of the actions for false arrest on the ground that the limitation period had expired. The motion judge refused to do so on the ground that the defendants had not yet delivered a statement of defence, relying on *Tran v. University of Western Ontario*, 2016 ONCA 978, 410 D.L.R. (4th) 527, at para. 20, and *Metropolitan Toronto Condominium Corporation No. 1352 v. Newport Beach Development Inc.*, 2012 ONCA 850, 113 O.R. (3d) 673, at para. 116:

> The rules call for a limitation defence to be pleaded in the statement of defence. A plaintiff is entitled to reply to a statement of defence and put before the court further facts, for example, on the question of the discoverability of the claim. Only in the rarest of cases – and this is not one of them – should this court entertain a defendant's motion to strike a claim based on the limitation defence where the defendant has yet to deliver a statement of defence.

[25] The motion judge observed that it remained an open question whether discoverability could ever be raised in response to a *Limitations Act, 2002* defence to a claim for damages for false arrest and concluded that this was not one of those "rarest of cases" justifying departure from the normal rule that a limitation defence

must be pleaded before a court will entertain a motion to strike an action as statute barred.

(2) Limitation arguments on appeal

[26] The defendants argue in their cross-appeal that the claims for false arrest in actions CV-14-146 and CV-16-16 should have been dismissed because they were statute barred and that these are cases where this is apparent from the statements of claim, justifying an exception to the general rule that actions should not be struck as out of time before a statement of defence has been delivered. They argue that in both these actions the claims of false arrest and associated *Charter* breaches were discoverable on the date of the arrest and, accordingly, the limitation period began to run on the date of the arrest.

(3) Analysis

[27] In CV-14-146 the plaintiffs plead that on August 26, 2012 they were arrested "to prevent a breach of the peace" as they attempted to walk on a public street. They say that they were handcuffed, searched and had their belongings taken from them, and that they were placed in a prisoner wagon and taken to an OPP detachment where they were released a few hours later. No charges were laid.

[28] The plaintiffs plead that they were falsely arrested and that numerous *Charter* rights were violated, including rights to freedom of expression, freedom of peaceful assembly and freedom of association, as well as the rights not to be

subjected to arbitrary detention or discrimination on account of race. The plaintiffs allege that the defendants conspired to target them for false arrest, knowing that the arrest would be unlawful and violate their *Charter* rights.

[29] The statement of claim was not issued until three days past the two-year limitation period stipulated by the *Limitations Act, 2002* with the extension provided by s. 7(2) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27.

[30] In CV-16-16 the plaintiff claims that he was walking on a public street on September 9, 2012 when police ordered him off the road and arrested him for obstruct justice. Again, the plaintiff says that he was handcuffed, searched, removed of his belongings and placed in a prisoner wagon, taken to the OPP detachment and released a few hours later. The charge was dropped on February 3, 2014, the same day the trial court was to hear a motion for *Charter* relief in relation to the charges. The plaintiff pleads that the arrest was false, and violated his *Charter* rights. He also pleads that officers knowingly conspired to falsely arrest him and violate his *Charter* rights. He alleged abuse of process on the part of the Crown prosecutor. He also advanced a claim of malicious prosecution which the motion judge struck with leave to amend, a decision not challenged on appeal.

[31] The statement of claim was issued on February 1, 2016, nearly three and a half years after the arrest.

[32] The defendants initially appealed from the motion judge's refusal to strike out the claims for false arrest, false imprisonment and associated *Charter* breaches in action CV-14-50 as being statute barred, but now acknowledge that as a result of this court's decision in *Winmill v. Woodstock (Police Services Board)*, 2017 ONCA 962, 138 O.R. (3d) 641, leave to appeal refused, [2018] S.C.C.A. No. 39, rendered after the motion judge's decision, CV-14-50 is not statute barred.

[33] In *Winmill*, on June 1, 2014, Mr. Winmill was involved in a physical confrontation with police officers in his home. The police charged him with assaulting an officer and resisting arrest. He was acquitted of those charges on February 17, 2016, then in June 2016, two years and one day after the physical confrontation, he sued for damages for battery, abuse of authority, negligence, and later added allegations of negligent investigation. The defendants moved to strike the claim for battery, but not the negligent investigation claim, as statute barred. The motion judge granted the motion and struck out the claim for battery.

[34] On appeal, MacPherson J.A., writing for the majority of the court, referred to the discoverability principles set forth in s. 5(1) of the *Limitations Act, 2002*:

> 5(1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it;

[35] He indicated that there was no issue with respect to the first three factors. The plaintiff "knew that he had been injured on June 1, 2014, that the injury was caused by physical blows to his body, and that at least some of the respondents administered those blows." He concluded however, applying s. 5(1)(a)(iv), that "having regard to the nature of the injury, loss or damage" the plaintiff did not know that "a proceeding would be an appropriate means to seek to remedy" the alleged battery until he was acquitted of the criminal charges.

[36] The parties acknowledged that the discoverability date for the negligent investigation claim was the date of acquittal. The negligent investigation claim which was proceeding to trial dealt with virtually the same parties and events as the battery claim. As the tort claim of battery and the charges of assaulting a police officer and resisting arrest were "mirror images of each other" this court held that it made sense for the plaintiff to postpone deciding whether to sue the police until the criminal charges were resolved.

[37] Accordingly, MacPherson J.A. concluded that the discoverability date for the battery claim was the same as the discoverability date for the negligent

investigation claim, the date of the acquittal, and that the battery claim was not statute barred.

[38] Before this court, the defendants argue that CV-16-16 can be distinguished from *Winmill* because the obstruct justice charge that was laid is not the "mirror image" of the false arrest claim.

[39] The defendants submit that there is no basis to delay discoverability beyond the date of arrest in CV-14-146 because there was no charge laid in that case.

[40] Here the motion judge was correct to conclude that this was not one of those rare cases where the claims should have been struck as statute barred before a statement of defence was delivered. In the absence of a pleading from the plaintiffs responding to a defence based on the *Limitations Act, 2002* it is not known at this stage to what extent the plaintiffs will rely on discoverability beyond the date of the arrests to delay the start of the limitation period. The motion judge did not have the benefit of pleadings to structure consideration of *Limitations Act, 2002* issues.

[41] This is a sufficient basis to uphold the motion judge's decision to reject the defendant's motion as premature.

[42] The defendants submit that *Kolosov v. Lowe's Companies Inc.*, 2016 ONCA 973, 34 C.C.L.T. (4th) 177, makes it clear that the limitation period for false arrest and related *Charter* breaches always begins on the date of arrest. In *Kolosov* the plaintiffs were admittedly in possession of fraudulently obtained goods; the

arresting officer testified that he had reasonable and probable grounds to believe the plaintiffs had committed an offence and the motion judge found that that belief was objectively reasonable. This court held that the plaintiffs offered no authority to support the proposition that the limitation period did not run until they had received full disclosure of the charge against them. It is difficult to see in the circumstances of that case that the contents of disclosure could have had any impact on the existence or non-existence of reasonable and probable grounds for arrest, given that the plaintiffs admitted they were in possession of fraudulently obtained goods. It appears that the plaintiffs did not invoke s. 5(1)(a)(iv) of the *Limitations Act, 2002*; an analysis of the full impact of that section in relation to discoverability of claims for false arrest should in the present case be left for a fuller factual record.

[43] The causes of action for false arrest and associated *Charter* violations are inextricably intertwined with the claims for damages for conspiracy, which are not alleged to be statute barred. The defendants fairly indicate that they are not seeking to strike the conspiracy claims as it is not obvious when the plaintiffs learned of the alleged conspiracy. Given that claims for damages for conspiracy may be pleaded, it may be that the best place to address the limitation defences is at trial, with the benefit of pleadings and a full factual record. There may be *Charter* violations established independently of the false arrest, and it is not clear how delayed discoverability might affect those claims. Here the obstruct justice

charges and the false arrest alleged in CV-16-16 arise out of the same events, and it may be that a trial will be necessary to determine whether discoverability is delayed, as occurred in *Winmill*.

[44] Even in CV-14-146, little judicial economy would be achieved by striking the claims for false arrest after the close of pleadings but before trial if the conspiracy claims are going to trial, given that these claims are based on overlapping factual allegations.

[45] Accordingly, I would dismiss the appeal by the defendants from the motion judge's refusal to strike the claims for false arrest, false imprisonment and associated *Charter* breaches in CV-14-146 and CV-16-16 as statute barred, and dismiss the appeal from the refusal to strike the action in CV-14-50 as abandoned.

[46] The parties have agreed to the amount of costs that should follow the result in the appeal by the plaintiffs and the cross-appeal by the defendants. I would award $2,000.00 to the plaintiff Gary McHale on the appeal and $1,000.00 to him on the cross-appeal.

"G. Pardu J.A."
"I agree P. Lauwers J.A."
"I agree C.W. Hourigan J.A."

Released: December 19, 2018
"P.L."

Appendix A

	Plaintiff(s)	Defendant(s)
CV-14-50	Gary McHale, Randy Fleming, Doug Fleming, Jacob Van Halteren	O.P.P. Commissioner Chris Lewis, Sergeant Ben Gutenberg, Inspector Phil Carter, Superintendent John Cain, and Her Majesty the Queen in right of Ontario
CV-14-145	Ted Harlson, ~~Christian~~ Christine McHale, Gary McHale, Hetty Van Halteren, Jacob Van Halteren	~~O.P.P. Commissioner Chris Lewis, Superintendent John Cain, Sergeant Brad Moore, Inspector Phil Carter and~~ Her Majesty the Queen in right of Ontario
CV-14-146	Stuart Laughton, Ted Harlson, Gary McHale, Randy Fleming, Jacob Van Halteren, Doug Fleming	~~O.P.P. Commissioner Chris Lewis, Sergeant Brad Moore, Inspector Phil Carter and~~ Her Majesty the Queen in right of Ontario
CV-16-16	Randy Fleming	Ken Decloet, Jeffrey Gray, Steven Lorch, Brad Moore, Phil Carter, John Cain, Chris Lewis and Her Majesty the Queen in right of Ontario