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COURT OF APPEAL FOR ONTARIO

CATZMAN, MOLDAVER and GOUDGE JJ.A.

B E T W E E N:	)	
	)	
DONALD WILLIAMS	)	Lorne M. Honickman
	)	for the appellant
Plaintiff (Appellant)	)	
	)	
- and -	)	
	)	
DEBBIE WHITE, LYNNE KANTAUTAS, THE DURHAM REGION POLICE SERVICES BOARD, THE CHILDREN'S AID SOCIETY OF DURHAM REGION, MARIA D'ASSISI, IRENE JOHNSON, LISA CAMERON, ATTORNEY GENERAL FOR ONTARIO	)	David R. Neill for the respondents Debbie White, Lynn Kantautas and The Durham Region Police Services Board
	)	
	)	Alexander D. Pettingill for the respondents Maria D'Assisi and The Children's Aid Society of Durham Region
Defendants (Respondents)	)	
	)	
	)	Joanne Ferguson for the respondent Irene Johnson
	)	
	)	William C. McDowell and Christine Lonsdale for the respondent Richard H. Parker
	)	
	)	Heard: May 13 and 14, 2004

On appeal from the judgment of Justice John A.B. Macdonald of the Superior Court of Justice, sitting without a jury, dated September 5, 2001.

CATZMAN J.A.:

The appeal

[1] Following investigation by a Children's Aid Society and by the police into alleged improper conduct involving the appellant's young daughter, he was charged with the commission of sexual offences against her. Seventeen months later, the charges against him were stayed. They were never recommenced and, by operation of the *Criminal Code*, were deemed after the passage of one year from the entry of the stay never to have been commenced.

[2] The appellant sued the child's grandmother, who had care and custody of his daughter, the Children's Aid Society and its employees and the Police Services Board and its investigating officers. His statement of claim asserted claims for wrongful arrest, false imprisonment, malicious prosecution, negligence, abuse of process, infringement of constitutional rights, false charges, defamation, conspiracy to injure, mental distress and loss of reputation. For these claims, he sought general, special, punitive, exemplary and aggravated damages totalling $15,500,000 plus interest and solicitor-client costs.

[3] After a 15-day trial, Macdonald J. dismissed all of the appellant's claims against all of the respondents, and assessed costs against him totalling over $235,000.

[4] In his appeal to this court from the dismissal of his action, the appellant puts the blame for the disposition of the action squarely on the shoulders of the lawyer who represented him before, and at, the trial. The principal basis of his appeal is an allegation of ineffective assistance of counsel. He advances only two other grounds of appeal against the trial judge's determination of the merits of the action. He seeks a new trial against all of the respondents.

[5] Notwithstanding Mr. Honickman's capable and thorough submissions on behalf of the appellant, I would dismiss the appeal for the reasons that follow.

The child, the complaint, the investigation and the charges

[6] The appellant's daughter, D.J., was born in June 1991. Her mother was Tara Johnson, who was then living with the appellant. The Catholic Children's Aid Society of Metropolitan Toronto ("Toronto C.A.S.") was involved at D.J.'s birth because she was born with cocaine in her system. She was placed in the care of her maternal grandmother, the respondent Irene Johnson ("the child's grandmother"), who also had custody of Tara Johnson's other child.

[7] A custody dispute ensued between the appellant and the child's grandmother. In March 1992, a Report of the Official Guardian was prepared that recommended that the child's grandmother have sole custody of D.J., subject to access by the appellant. The Report noted a number of concerns about the appellant: that he referred to his nine-month-old daughter as "it"; that he described her repeatedly as "sexy"; and that he would not hold her until she was washed and dressed in a pretty dress. There were continued

difficulties between the appellant and the child's grandmother about the appellant's exercise of his right of access.

[8] In the summer of 1993, the child's grandmother reported to the Toronto C.A.S. that D.J. had said words to the effect that daddy's teeth hurt her, while pointing to her crotch area. The Toronto C.A.S. reported this information to the York Regional Police. Constable Allison Cattanach was assigned to investigate. She attended at the Toronto C.A.S. for the purpose of interviewing D.J., but the child would not speak to her. The child's grandmother provided a statement to Cst. Cattanach in which she repeated what the child said to her. Cst. Cattanach also spoke briefly to the appellant, who denied the allegations. Cst. Cattanach then closed the investigation, marking it "no further action".

[9] On August 9, 1994, counsel for the child's grandmother wrote to the appellant's then solicitor, refusing the appellant's request for two weeks access. Two days later, the Durham Children's Aid Society ("Durham C.A.S.") received an anonymous telephone call from a male who alleged that the child's grandmother was engaging in excess discipline of the two children in her custody.

[10] Four days after the telephone call, the respondent Maria D'Assisi, a social worker employed by the Durham C.A.S., attended unannounced at the residence of the child's grandmother, who told her that the appellant had exercised access to D.J. about two weeks before and that, after the visit, D.J. had told Rose Hamilton, a relative by marriage and a close friend of the child's grandmother, that daddy had hurt her in her vaginal area.

[11] Ms. D'Assisi contacted the Durham Region Police, who assigned the respondent Detective Debbie White to investigate. Det. White interviewed Rose Hamilton, who recounted that, while she was assisting D.J. in her toileting, D.J. told her that her daddy hurt her down there and pointed to her vagina. When Ms. Hamilton asked D.J. to show her what her daddy did, D.J. lay on her back with her shorts to her ankles and, with her knees apart, made motions with her index finger in her vaginal area, indicating an in and out motion. According to Ms. Hamilton, D.J. told her that her daddy had done that while she was sleeping in her daddy's bed.

[12] Det. White spoke to a Crown attorney, who recommended further investigation. D.J. was sent to the Suspected Child Abuse and Neglect Unit at the Hospital for Sick Children for examination. The examination could neither confirm nor deny the suggested sexual abuse. Det. White interviewed D.J., who said that she knew the difference between the truth and a story and that she was telling the truth.

[13] In October 1994, Mr. Williams took a polygraph test performed by a police officer, whose opinion was that the results of the examination were inconclusive and that the appellant could not be eliminated as a suspect. Two days later, Det. White again spoke to the Crown attorney, who expressed the view that there was sufficient evidence for a charge.

[14] In October 1994, the appellant was charged with the commission of two offences against his daughter, sexual assault and touching her vagina for sexual purposes, over a period when D.J. was between twenty-three months and thirty-eight months of age.

[15] In the course of the appellant's preliminary hearing, a *voir dire* was held regarding the admissibility of D.J.'s out-of-court statements. The presiding judge ruled that the statements met the reliability but not the necessity test and were thus inadmissible. In March 1996, he stayed the charges against the appellant.

The present action

[16] In the spring of 1995, while the criminal charges against him were still pending, the appellant issued a statement of claim against the respondents, Debbie White and Lynne Kantautas (both police officers with the Durham Region Police), the Durham Region Police Services Board, the Durham C.A.S., Maria D'Assisi (the social worker with the Durham C.A.S.) and Irene Johnson (the child's grandmother). The pleading alleged a number of causes of action, set out above, and claimed very substantial sums of money. The criminal charges against the appellant were still pending when the action was initiated.

[17] The action did not proceed with any perceptible speed. In April 2000, after pleadings had been concluded and discoveries conducted, Mr. Williams retained Mr. Richard Parker to act on his behalf in the action.

[18] The nature of the relationship between Mr. Parker and the appellant was often contentious. As an example, in March 2001, before the trial began, the appellant sent a letter instructing Mr. Parker to summon two police officers as witnesses regarding the videotape of the polygraph test the appellant had taken. Mr. Parker replied by letter on the same day, advising that he did not intend to summon the officers, because he believed that opposing counsel would call them and he could then cross-examine them. The appellant replied six days later indicating his opinion that opposing counsel would not summon the two officers, as their evidence was favourable to him, and that Mr. Parker should summon them, unless there was confirmation that opposing counsel would be calling them.

[19] Another example occurred during a break in the trial. On June 28, 2001, Mr. Parker wrote the trial judge (at the latter's request), advising of the claims that were being pursued by the appellant. Mr. Parker indicated in that letter that he was prepared to withdraw the claim against Det. Kantautas. The next day, the appellant wrote Mr. Parker a letter expressing his shock and concern about the withdrawal of that claim. Mr. Parker replied by letter in which he explained that continuing the claim against Det. Kantautas could result in exposure to serious costs sanctions.

[20] The disharmony between the appellant and Mr. Parker continued in the courtroom. The trial judge had to tell the appellant more than once that he should deal with the court through his counsel. For example, the transcript of the proceedings on the second day of

the trial records the following exchange on the subject of the videotape of the appellant's polygraph examination:

> The Witness [the appellant]: Now, Mr. Parker, maybe you can put this in as evidence?
>
> Mr. Parker: Q. I don't know, does Your Honour – it's about a two-hour movie? A. Well, it's a copy of the tape.
>
> The Court: The issues will be made by your decision – by your lawyer, sir. The decisions will be made by your lawyer.
>
> Mr. Parker: Your Honour, if I might have it made an exhibit, along with the letter?
>
> The Court: What is the position of counsel? If it becomes an issue, I am going to need you also to provide me with a video recorder, because the mere fact it is evidence doesn't change anything unless I review it. Now, for what purpose am I to review it?
>
> Mr. Parker: Only to show this time is missing. I don't really know that you need to, frankly. You have my client's testimony. He's viewed it, he's timed it. I don't really know that it is necessary, frankly.
>
> The Court: Is there any issue about this going into evidence?
>
> [Counsel for the Police Services Board]: I don't have any objection…
>
> …
>
> The Court: I want you to make a video recorder available to me in case I find the need to look at it.
>
> Mr. Parker: Fine. I will, sir.

[21] On the fifth day of trial, a disagreement arose between Mr. Williams and his counsel about the scheduling of the evidence of the respondent Det. White in the absence of retired police Sgt. Robert Wood. Mr. Wood was said by the appellant to be an expert in the field of police investigations, whose evidence would support the appellant's position that the police investigation of the complaint against him had been negligent. The appellant wanted to have him present during Det. White's testimony, and sought to make submissions to that effect on his own behalf. The transcript records the following:

> The Court: I'd like to hear from you first, Mr. Parker. I can't say that I've ever encountered this where counsel is representing a client. There are issues in a courtroom which require a depth of knowledge and expertise and foresight

> which many individuals do not have. There are risks in self-representation. There are aspects of appearance of unfairness if both the client and the counsel are making submissions.
>
> Mr. Parker: I agree with you, your Honour.
>
> The Court: What's happening? I don't understand.
>
> Mr. Parker: My client approached me this morning about ten after nine and told me he was objecting to Detective White testifying out of turn. He did not want this to happen, and he wanted his expert here when she testified. I told him we had agreed upon this. He should have advised me sooner, and this was an issue – Mr. Neill raised this on the very first day…I'm embarrassed, terribly embarrassed, and that's why I'm loath to -
>
> The Court: I'm happy to have submissions made. It's a question of who makes them. Are you in a position to make the submissions on behalf of your client in this regard? I'm happy to listen to arguments of that type. It's simply a question of who speaks on behalf of the Plaintiff. There are risks in allowing a Plaintiff to address the court.
>
> Mr. Parker: I agree with you one hundred percent. I've advised my client about that as well. I told him I was not prepared to go back on my word, that I agreed to this and –
>
> The Court: Does that mean there's been some aspect of falling out between you and Mr. Williams?
>
> Mr. Parker: It would seem to be. If he wishes to press this, I think I should – I should be removed from the record. I'm not here to mislead the court. I'm an officer of this court. I don't mean to mislead. I have not misled the court. I'm embarrassed. I'm terribly embarrassed, and as an officer of this court, I don't know what to say. Frankly, I don't know what to say. I've never had this happen before. I'm speechless.

[22] The trial judge allowed Mr. Parker time to discuss the issue with the appellant and Mr. Parker made submissions on his client's behalf. Ultimately, Macdonald J. ruled against the appellant and permitted Det. White to be called at the scheduled time. Immediately after this ruling, there was this further exchange:

> Mr. Parker: Perhaps we could take a couple of more minutes while I determine my position with my client. I'm not sure that my position is tenable, so if I could have about –

> The Court: I take it some issue arises as a result of my ruling?
>
> Mr. Parker: That, and others, and if I could just have five minutes.
>
> The Court: Yes, you may.
>
> Mr. Williams: Hold on. He's misleading you. There's nothing wrong with the ruling. I never said that to you right now, Your Honour.
>
> The Court: There's a confusion then. I'll be glad to hear you and your counsel, but would you take five minutes to try and work this out between you. I don't think he's misleading me. I think he's confused and he needs to talk to you and that's why he asked for –
>
> Mr. Williams: I don't think he's confused at all.
>
> The Court: I think he is.
>
> Mr. Williams: There's a difficulty in following my instructions.
>
> The Court: I will adjourn for five minutes. Please speak with your counsel.

[23] The evidence in the present action concluded in June 2001. Closing arguments were heard in July. The trial judge indicated that he would deliver judgment on September 5, 2001. On that day, before he gave judgment, the trial judge recorded the following:

> Good morning. I want to address one preliminary matter before delivering my reasons for judgment. I received yesterday a package sent to me by the plaintiff Donald Williams. It was said to contain two recent Court of Appeal judgments relevant to the issues herein which have not been submitted by counsel.
>
> There is no indication on the face of this package that a copy of it or its contents were sent to counsel opposite or indeed to Mr. Parker. I attempted to reach Mr. Parker by telephone upon receipt in order to deliver this package into his hands, so that he might deal with it in a fashion more consistent with the way in which submissions were ordered and are usually made. But I was unable to do so. I therefore opened the package. It did not contain two Court of Appeal judgments. It contained newspaper articles referring to decisions of the Court of Appeal. Mr. Parker then telephoned me because I

> had left a message for him, and I explained what had transpired. I indicated to him that I would ignore not only what had been sent to me by Mr. Williams, but also the fact that he had taken steps inconsistent with both my directions respecting submissions and the way in which communications are to be address to the court. I therefore deliver the package to you, Mr. Parker. I have ignored both its contents and its delivery in the reasons which I will now deliver.

[24] He then proceeded to deliver judgment and dismissed the present action against all of the respondents.

The trial judge's reasons for judgment

[25] At the outset of his reasons, the trial judge noted that no evidence had been led at the trial to prove the criminal allegations against the appellant. He observed that, in assessing the credibility and reliability of the appellant's testimony, he regarded the appellant as innocent of the criminal charges and that he did not allow the criminal charges to create any disadvantage to the appellant. He addressed the tension between the appellant and Mr. Parker in these terms:

> As a result, I have made allowances for the stresses of this case which were apparent during trial, both in the giving of evidence and in general courtroom conduct. When I refer to general courtroom conduct, I'm referring, in particular, to Mr. Williams' difficulties when not testifying early in the trial. I attempted then to give him every opportunity to address his concerns with counsel. I state again that a trial is a fight. Mr. Williams was entitled to fight this case and to have the opportunity to work out issues with his counsel, and I take none of his conduct out of the witness box into account in my determination of any of the issues. I note that Mr. Williams has apologized which I think was unnecessary because he was entitled to play a vigorous role in the presentation of this case and in seeking redress for the making of such serious allegations against him, which failed in court.

[26] The trial judge then proceeded to make a number of findings of credibility. He found that:

(a) Rose Hamilton was a credible and reliable witness and that what D.J. said and demonstrated to Rose Hamilton was consistent with digital penetration of D.J.'s vagina and not consistent with toileting, cleanliness or child care issues;

(b) the evidence of Maria D'Assisi was credible and reliable, and that D.J. had alleged an act of digital penetration that was consistent with sexual abuse and inconsistent with toileting, cleanliness or child care issues;

(c) Det. White was a credible and reliable witness, and that the statements that D.J. made regarding her father's actions were consistent with sexual abuse and inconsistent with toileting, cleanliness or child care issues;

(d) the assertions of the child's grandmother, Irene Johnson, that D.J. complained to her without coaching were credible and reliable; and

(e) the opinions in the evidence of the appellant's expert, Sgt. Wood, were not reliable and should be rejected.

[27] He then dealt with the appellant's claims against each of the respondents as follows:

> Irene Johnson, the child's grandmother:
>
> The trial judge noted that Mr. Parker had abandoned all of the claims against the child's grandmother except the claim for defamation. He found that her sole reason for giving her statement to Ms. D'Assisi was, as D.J.'s custodial person and primary care giver, for the child's protection; that there was no malice in her reporting to Ms. D'Assisi; and that her assertions were based on reasonable grounds. He found further that the claim for defamation failed on two grounds: first, the protection provided in s. 72(7) of the *Child and Family Services Act*, R.S.O. 1990, c. C.11 ("*CFSA*"); and second, her report to the Durham C.A.S. was privileged because she was under a legal obligation to take steps to protect the infant in her care and the discharge of that duty by the report she made to Ms. D'Assisi.
>
> Maria D'Assisi and the Durham C.A.S.:
>
> The trial judge rejected the allegation that D'Assisi was biased or closed-minded. He found that the investigation and prosecution of the alleged criminal offences were entirely out of the hands of D'Assisi and the Durham C.A.S., and the appellant had failed to prove either negligence or the absence of good faith in the discharge of their statutory duties under the *CFSA*.

> Det. White, Det. Kantautas and the Police Services Board:
>
> The trial judge found that Det. White acted without bias or animosity towards the appellant; that she had an actual belief that he was guilty of the charges laid; that that belief was reasonable, appropriate and justified; that the appellant's brief imprisonment was lawful and proper; that Det. White's investigation was reasonably thorough and competent, and that she was not negligent in its conduct; that she did not intentionally inflict suffering on the appellant; that there was no breach of the appellant's rights under the *Charter*; that there was no impairment of his right to make full answer and defence; that an award of damages for breach of the *Charter* would be neither appropriate or just; and that the allegations in the information sworn against the appellant were privileged and not defamatory.

[28] The trial judge found that the evidence failed to establish any proper basis on which to assess general damages, and that there was no basis on which to award punitive or exemplary damages.

[29] The trial judge invited submissions from the parties with respect to costs. After receiving and considering these submissions, he awarded costs (including disbursements and G.S.T.) as follows:

- to Irene Johnson, the child's grandmother, against whom accusations of fraudulent conduct were made but not established, costs on a solicitor-and-client basis, which he fixed at $82,814.84;
- to Maria D'Assisi and the Durham C.A.S., on a party-and-party basis to the date of its offer to settle and on a solicitor-and-client basis after that date, which he fixed at $76,607.33; and
- to Det. White, Det. Kantautas and the Durham Region Police Services Board, on a party-and-party basis to the date of its offer to settle and on a solicitor-and-client basis after that date, which he fixed at $75,621.50.

[30] One week later, on September 12, 2001, the appellant, acting in person, served notice of appeal to this court from the judgment dismissing his action. The notice of appeal raised, for the first time, the issue of ineffective assistance of counsel.

The assessment of Mr. Parker's account

[31] Mr. Parker's firm rendered an account to the appellant after the trial had concluded but before the trial judge's reasons for judgment were given. The account was not paid and, in August 2001, Mr. Parker arranged for its assessment before an assessment officer. The assessment took place in December 2001. At the assessment, the appellant raised the issue of Mr. Parker's incompetence in the conduct of the trial. After the assessment

officer made some initial rulings, the appellant announced his intention to appeal and withdrew. The assessment continued in his absence.

[32] The assessment officer rendered his decision in January 2002. He assessed Mr. Parker's account and the costs of the assessment in the total sum of $50,139.96. He said the following about the appellant's allegations against Mr. Parker:

> Since the client elected not to participate in this assessment or to testify, there was nothing in the evidence before me to establish that the lack of success in the action was attributable to any lack of skill or competence on the part of his counsel, or that the value of the solicitor's services was diminished in any way by any such lack of skill or competence…
>
> While the client clearly must have been disappointed by the dismissal of his actions [*sic*] against all the defendants, there was nothing in the evidence at the assessment to suggest that the absence of a better result could be attributed in any way to any error or omission on the part of the solicitor. It appears that every reasonable effort was made to present the client's case for the judge's consideration, and to challenge the evidence of the witnesses for the defendants.
>
> According to the ancient aphorism, no counsel can make a silk purse out of a sow's ear. The solicitor did what he was retained to do, and in the absence of any evidence from the client, nothing has been established in the assessment to suggest that the solicitor should in some way be held responsible for the absence of some more favourable outcome.

[33] The appellant appealed from the decision of the assessment officer. The appeal did not proceed because Mr. Parker ultimately agreed not to enforce his account as part of the settlement of the solicitor's negligence action, to which I now turn.

The solicitor's negligence action

[34] In October 2001, a month after the trial judge's reasons were pronounced and after the delivery of the notice of appeal alleging ineffective assistance of counsel, the appellant commenced an action against Mr. Parker and his firm. The statement of claim was delivered by the appellant, acting in person. It made numerous allegations against Mr. Parker, including negligence, gross negligence, breach of duty, failure to follow instructions, undue pressure, breach of fiduciary duty, disregard of ethical and professional obligations, and intentional infliction of emotional distress, anxiety and financial harm. In his statement of claim, the appellant claimed general, punitive and exemplary damages of $1,500,000, interest and solicitor-and-client costs.

[35] The action proceeded through the pleadings stage and, in May 2002, proceeded to mandatory mediation. The appellant was represented by counsel at the mediation.

[36] In May 2002, he and Mr. Parker settled both Mr. Parker's account and the solicitor's negligence action. Under the terms of the settlement, the appellant agreed to pay Mr. Parker $3,000.00 and to execute a release of all claims against Mr. Parker, his firm and LPIC, and Mr. Parker agreed not to pursue collection of his account. The appellant executed the release in September 2002. It contained a denial of liability on the part of Mr. Parker, his firm and LPIC and it released the appellant's claims in this language:

> [I] HEREBY RELEASE, ACQUIT AND FOREVER DISCHARGE, *WITHOUT QUALIFICATION OR LIMITATION:*
>
> RICHARD PARKER, [LPIC and Mr. Parker's firm] from all manner of actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contract, complaints, claims and demands for damages, monies, losses, indemnity, costs, interest in loss, or injuries howsoever arising which hereto may have been or may hereafter be sustained by the Releasors, as a consequence of the following:
>
> (a) the retainer, on or about April, 2000, of Richard Parker and the law firm… to act on behalf of Donald Williams in regard to [the present action] from any and all actions, causes of actions, claims or demands of whatsoever nature, whether in contract or in tort or arising as a result of a fiduciary duty or by virtue of any statute or upon or by reason of any damage, loss or injury arising out of the matters that were pleaded in, or could have been pleaded in the [present] action.
>
> …
>
> AND FOR THE SAID CONSIDERATION it is agreed and understood that the Releasor will not make any claim or take any proceedings against any other person or corporation who might claim, in any manner or forum, contribution of indemnity in common law or in equity, or under the provisions of any statute or regulation….
>
> …
>
> AND IT IS HEREBY DECLARED that the terms of this settlement are fully understood, that the consideration stated herein is the sole consideration of this Release and that the said payment, or promise of payment, is accepted voluntarily

> for the purpose of making full and final compromise in settlement of all claims and proceedings against the Releasees, now or hereafter brought, for damages, loss or injury resulting from the matters set forth above and from the [present] action.

[37] In November 2002, Mr. Parker sent a letter to the appellant confirming that all legal accounts were paid and that there was a zero balance on the assessment proceedings.

[38] In January 2003, an order was made on consent dismissing the solicitor's negligence action without costs.

This appeal

[39] As noted, the principal basis of this appeal is the allegation of ineffective assistance of counsel. The appellant advances only two other grounds of appeal against the trial judge's determination of the merits of the action. He seeks a new trial against all of the respondents.

[40] On consent of counsel, two affidavits – one sworn by the appellant and another sworn by Mr. Parker – were admitted as further evidence on the argument of the appeal. Some of the facts recited are taken from these affidavits.

[41] I turn to the grounds of appeal that were argued before us.

1. *Ineffective assistance of counsel*

[42] This court encounters ineffective assistance of counsel as a ground for a new trial almost exclusively on appeals from conviction in criminal cases, where a new trial is sought on the basis that the ineffective assistance of counsel resulted in a miscarriage of justice. Recent years have seen a number of such appeals, some successful, others not, both in this court [1] and in the Supreme Court of Canada[2].

[43] In argument, we were referred to a number of cases where, by reason of their lawyer's neglect, judgment was given against parties for default in delivering a pleading[3] or for failure to attend at trial[4] and who thereafter successfully moved to restore the proceedings on the basis of their counsel's incompetence or negligence. Those cases are

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[1] *R. v. Joanisse* (1995), 102 C.C.C. (3d) 35 (appeal from conviction dismissed); *R. v. White* (1997), 114 C.C.C. (3d) 225 (appeal from conviction dismissed); *R. v. Porter* (1998), 37 M.V.R. (3d) 164 (appeal from conviction dismissed); *R. v. Falconer*, [1999] O.J. No. 583 (appeal from conviction dismissed); *R. v. L.(C.)* (1999), 138 C.C.C. (3d) 356 (appeal allowed and new trial ordered); *R. v. Logan* (1999), 139 C.C.C. (3d) 57 (appeal from conviction dismissed); *R. v. Duncan* (1999), 124 O.A.C. 296 (appeal from conviction dismissed); *R. v. Wells* (2001), 139 O.A.C. 356 (appeal from conviction dismissed); *R. v. P.(T.)* (2002), 165 C.C.C. (3d) 281 (appeal allowed and new trial ordered).

[2] *R. v. B. (G.D.)* (2000), 143 C.C.C. (3d) 289 (appeal from conviction dismissed).

[3] *Halton Community Credit Union Ltd. v. ICL Computers Ltd.* (1985), 1 C.P.C. (2d) 24 (Ont. C.A.); *Adams v. Fuda*, [1987] O.J. No. 1311 (QL) (Ont. H.C.).

[4] *Guerriero v. Paul* (1990), 73 O.R. (2d) 25 (Ont.H.C.); *Ben-Zvi v. Majestic Marble Import Ltd.* (2003), 42 C.P.C. (5th) 242 (Ont. S.C.J.).

different in quality from cases like the present one. It is understandable that the court would be less reluctant to reopen the proceedings in such cases, where the merits of the claim were never tested at a trial and the costs awarded to the successful litigant were comparatively modest.

[44] But the research of counsel has discovered only one civil case in this court that has touched upon the impact of incompetence of counsel during the course of the trial of a civil action: *Dominion Readers' Service Ltd. v. Brant* (1982), 41 O.R. (2d) 1.

[45] In that case, the defendant failed to appear on the adjourned date fixed for the continuation of the trial of an action against him. His counsel requested an adjournment on the ground that the defendant was on a prolonged vacation out of the country. The request for an adjournment was refused. The trial proceeded to its conclusion in the absence of the defendant, and judgment for a substantial amount was awarded against him. The defendant appealed. On the appeal, he put forward an affidavit deposing that his counsel never advised him of the adjourned fixed date and that, if he had been advised, he would have attended.

[46] The defendant's appeal was dismissed. This court held that the trial judge had properly exercised his discretion to refuse a further adjournment and that, even in the face of the defendant's affidavit, a new trial should not be ordered.

[47] The judgment of the court was rendered by Grange J.A. In his reasons, he acknowledged that the rights of the defendant had been seriously and adversely affected by the conduct of his counsel. But one of the competing rights that he identified, at p. 8, was that of the opposing litigant, who "would be forced into the trouble and expense and hazards of a new trial through absolutely no fault of its own". On the subject of incompetence of counsel, Grange J.A. said, at p. 9:

> Perhaps the failure of duty – if there was any – can be attributed to incompetence. Certainly the court tries to protect litigants from their incompetent solicitors, but the task becomes very difficult when the incompetence is in the trial process itself because the rights of others are inevitably and inextricably involved. The trial is, of course, the culmination of the litigation process, putting the whole machinery of the law into action to determine the rights of the parties. A new trial based entirely upon a solicitor's incompetence in a civil action should be rare indeed.

[48] To grant the relief the appellant seeks on this appeal would be to set aside a judgment rendered after a lengthy, contested trial and to direct that there should be a second trial against six defendants, represented by 3 sets of counsel, to retry issues that allegedly arose in the early to middle 1990s and that were tried and dismissed as unmeritorious in 2001.

[49] I do not place reliance on the proceedings relating to the assessment of Mr. Parker's account. It would certainly have been preferable if the appellant had stayed for the assessment instead of announcing an allegation of negligence and then departing. But that was a proceeding initiated by Mr. Parker, not the appellant, and the assessment officer's finding that Mr. Parker was not negligent has no influence on my decision on this appeal.

[50] However, I do regard as very significant the appellant's institution of the solicitor's negligence action in October 1991, one month after the delivery of notice of the present appeal against Mr. Parker and his firm, and the steps that followed. The action proceeded through pleadings to mandatory mediation, where the appellant was represented by counsel. By the time of the mandatory mediation, the assessment officer had released his reasons finding the appellant to owe Mr. Parker over $50,000 in legal fees. Four months after the assessment officer's decision, the appellant chose to settle both Mr. Parker's account and the solicitor's negligence action. By that settlement, the appellant reduced his indebtedness for legal fees to $3,000, executed a full release of all claims against Mr. Parker and consented to the dismissal, without costs, of the solicitor's negligence action.

[51] The absence of any case in Ontario that has set aside, on the basis of alleged ineffective assistance of counsel, a judgment rendered following a trial is hardly surprising. There are other remedies in place that a losing litigant may invoke to recover the loss claimed at trial if ineffective assistance can be established. Foremost among these is a party's right to bring action against the counsel whose conduct he impugns. The appellant exercised that very remedy in the present case.

[52] In argument, Mr. Honickman suggested that the appellant's primary objective was to be vindicated and to demonstrate that the present action had been lost not because his claim had been unmeritorious but because it was incompetently presented. If that was truly his objective, he had the perfect vehicle in which to accomplish it: an action against Mr. Parker for negligence. He brought such an action. He pursued it. He settled it. He agreed to dismiss it in exchange for a reduction in his liability for legal fees from over $50,000 to $3,000. He gave a release of all claims against his lawyer and his lawyer's law firm. He ought not now be allowed to force the respondents, on the very same basis as his suit against Mr. Parker, to undergo "the trouble and expense and hazards of a new trial through absolutely no fault of [their] own"[5].

[53] In my view, the appellant's principal ground of appeal founders on the application of the doctrine of abuse of process. That doctrine was considered recently by the Supreme Court of Canada in *City of Toronto v. CUPE*, [2003] 3 S.C.R. 77. Arbour J., speaking on behalf of the majority of the Court, said at para. 37:

> [T]he doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a

[5] *Dominion Readers' Service Ltd. v. Brant* (1982), 41 O.R.(2d) 1 at 8.

> way that would … bring the administration of justice into disrepute". … Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice [citations omitted].

[54] That language is applicable to the position the appellant takes in the present appeal. The institution, prosecution, settlement and consent dismissal of the solicitor's negligence action resulted in a considerable financial saving to the appellant. In my view, the principles to which Arbour J. refers in this extract disentitle the appellant from successfully asserting ineffective assistance of counsel as a ground for setting aside the judgment of the trial judge and directing a new trial.

[55] Like Grange J.A., I would not be prepared to close the door to the viability of ineffective assistance of counsel as a ground for a new trial in a civil action. But, also like Grange J.A., I would limit the availability of that ground of appeal to the rarest of cases, such as (and these are by way of example only) cases involving some overriding public interest or cases engaging the interests of vulnerable persons like children or persons under mental disability or cases in which one party to the litigation is somehow complicit in the failure of counsel opposite to attain a reasonable standard of representation. The present action is not such a case.

[56] I would reject the appellant's first ground of appeal.

2. *Failure to order a mistrial*

[57] In an alternative submission, Mr. Honickman submitted that, because of the clear breakdown in the solicitor-client relationship between the appellant and Mr. Parker, the trial judge should, on his own motion, have ordered a mistrial. In support, he relied upon *R. v. Downey*, [2002] O.J. No. 1524 (S.C.J.), where Hill J. noted, at para. 83, that the court entertains supervisory jurisdiction, apart from rules of court, as an aspect of its inherent jurisdiction to control its own process and to deal with officers of the court in matters affecting the administration of justice. I do not doubt the proposition stated by Hill J. in *Downey*. But it has, in my view, no application to the present case.

[58] I referred, in para. 21, to the disagreement that arose between the appellant and Mr. Parker concerning the scheduling of the evidence of Det. White in the absence of retired Sgt. Wood. The appellant wanted Sgt. Wood to be present during Det. White's testimony. The relevant portions of the exchange that followed appear in para. 21 and 22, above. The trial judge invited submissions from counsel on the question, and also permitted the appellant and Mr. Parker to meet privately to discuss it. After hearing

submissions, the trial judge made a ruling, following which the trial resumed and continued without apparent disagreement between the appellant and Mr. Parker.

[59] At no time during the trial did either the appellant or Mr. Parker move for a mistrial. The trial judge was entitled to assume, as from all outward appearances was the case, that any disagreement between client and counsel had been resolved. Significantly, as has been noted in para. 25, above, the trial judge made the following comments before delivering his reasons for judgment:

> As a result, I have made allowances for the stresses of this case which were apparent during trial, both in the giving of evidence and in general courtroom conduct. When I refer to general courtroom conduct, I'm referring, in particular, to Mr. Williams' difficulties when not testifying early in the trial. I attempted then to give him every opportunity to address his concerns with counsel. I state again that a trial is a fight. Mr. Williams was entitled to fight this case and to have the opportunity to work out issues with his counsel, and I take none of his conduct out of the witness box into account in my determination of any of the issues. I note that Mr. Williams has apologized which I think was unnecessary because he was entitled to play a vigorous role in the presentation of this case and in seeking redress for the making of such serious allegations against him, which failed in court.

[60] These remarks dispel any suggestion of prejudice to the appellant as a result of this incident. There was no request for a mistrial, there was nothing before the trial judge to mandate a mistrial and there was no prejudice to the appellant arising from the trial judge's failure to grant a mistrial on his own motion.

[61] I would reject this ground of appeal.

3. Dismissal of the claim for defamation

[62] Finally, the appellant submitted that the trial judge erred in dismissing the defamation claim against the child's grandmother on the ground that there was no malice on her part in reporting D.J.'s comments to the respondent D'Assisi of the Durham C.A.S. The suggested error was the trial judge's failure to refer to and analyze extensive evidence that would point to a finding of malice.

[63] The trial judge found that the sole reason for the statement given by the child's grandmother to the Durham C.A.S. was, in her capacity as D.J.'s custodial person and primary care giver, to protect D.J.

[64] The trial judge's specific findings that the child's grandmother did not act with malice and acted solely out of genuine concern for her granddaughter are findings of fact or of inferences from facts to which deference must be paid and with which an appellate

court can interfere only if the trial judge has made a palpable and overriding error: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235. In my assessment, the appellant has failed to demonstrate such an error, and his attack on the trial judge's failure to find malice cannot succeed.

[65] I would reject this ground of appeal.

Disposition of appeal and costs

[66] For the reasons given, I would dismiss the appeal.

[67] Mr. McDowell, acting on behalf of Mr. Parker, advised the court at the conclusion of argument that he was not asking for costs and should not be obliged to pay costs. I would therefore make no order as to the costs of Mr. Parker.

[68] The respondents Debbie White, Lynne Kantautas and the Durham Region Police Services Board are entitled to their costs, fixed in the sum of $15,000. The respondents Maria D'Assisi and the Children's Aid Society of Durham Region are entitled to their costs, fixed in the sum of $10,000. The respondent Irene Johnson is entitled to her costs, fixed in the sum of $10,000. All of these cost awards are on a partial indemnity basis and include disbursements and G.S.T.

Released: "AUG 23 2004"

MAC

Signed: "M.A. Catzman J.A."

"I agree M.J. Moldaver J.A."

"I agree S.T. Goudge J.A."