SUPREME COURT OF YUKON

Citation: *Ross (Guardian Ad Litem)* v. *Equinox Outdoor Learning Centre and Spirited Adventures Ltd.,* 2014 YKSC 15

Date: 20140318
S.C. No. 12-A0043
Registry: Whitehorse

Between:

SOPHIA ROSS by her Guardian Ad Litem LISA ROSS

Plaintiff

And

EQUINOX OUTDOOR LEARNING CENTRE and

SPIRITED ADVENTURES LTD.

Defendants

And

LISA ROSS and PAT ROSS

Third Parties

Before: Mr. Justice L. F. Gower

Appearances:

James R. Tucker — Counsel for Sophia Ross
Shelley L. Miller, Q.C. — Counsel for Spirited Adventures Ltd.

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is the child plaintiff's application to strike the third-party notice filed by the defendant, Spirited Adventures Ltd. ("Spirited"), claiming contribution and indemnity against the plaintiff's parents, Lisa and Pat Ross ("the parents"). The plaintiff's counsel

relies upon Rule 20(26) of the Yukon *Rules of Court*, and submits that the third-party claim fails to disclose a reasonable cause of action against the parents.

BACKGROUND

[2] Acting as litigation guardian, the plaintiff's mother, Lisa Ross, instructed counsel to commence this action by filing the statement of claim on June 20, 2012. The plaintiff, who was 11 years old at the time, was a registered participant in an outdoor adventure camp operated jointly by Spirited and the other defendant, Equinox Outdoor Learning Centre, over the period from June 20-24, 2011. On June 23, 2011, the plaintiff was getting ready to participate in a group horseback ride, when her horse moved suddenly and she fell off. The horse subsequently stepped on her right inner thigh, resulting in an open wound. The plaintiff claims that her injuries were due to the negligence of the defendants and their employees.

[3] Spirited filed its statement of defence on June 19, 2013. It claims that the plaintiff was specifically instructed not to scream or make loud noises while on a horse, because it could cause the horse to react by jumping, bucking, running or backing up. Despite these instructions, Spirited has pleaded that, when the plaintiff's horse was reacting to an insect sting by kicking himself, the plaintiff began to scream loudly, hysterically and continuously, and to pull on the reins. This, says Spirited, ultimately caused the horse to rear up, and the plaintiff fell to the ground, where she continued screaming. Indeed, Spirited claims that the plaintiff screamed continuously from that point on, until she was eventually transferred into an ambulance. Spirited claims that the fall was due solely to the plaintiff's own negligence. Alternatively, Spirited claims that the fall was caused or contributed to by the negligence of the parents by:

a) failing to properly instruct the plaintiff to strictly follow Spirited's instructions on horseback riding;

b) failing to instruct the plaintiff to avoid screaming in order to avoid frightening horses; and/or

c) failing to inform the defendants that the plaintiff had a propensity to scream loudly and uncontrollably when startled, when they knew or ought to have known that such propensity would put the plaintiff and others at risk of injury.

[4] Spirited also filed the third-party notice on June 19, 2013, seeking contribution and indemnity from the parents on essentially the same grounds alleged in the statement of defence.

[5] Examinations for discovery were scheduled to take place on July 15, 2013, but did not go ahead because the plaintiff's counsel apparently took the position that the third-party notice placed the parents in a position of conflict with the plaintiff.

[6] The application to strike the third-party claim was filed October 31, 2013.

[7] The application was heard on February 13, 2014, and was dismissed with written reasons to follow. These are my reasons.

ANALYSIS

[8] The purpose and function of third-party proceedings was discussed by McLachlan J.A., as she then was, in *McNaughton v. Baker et al.*, [1988] 25 B.C.L.R. (2d) 17 (BCCA), at para. 14:

> "Third party pleadings function as a special type of statement of claim. Indeed, the claim they embody could be brought by separate action. But to avoid a multiplicity of proceedings, the rules permit the claim to be made in the action which has been commenced against the defendant. The object of

> permitting third party proceedings to be tried with the main action is to provide a single procedure for the resolution of related questions, issues or remedies, in order to avoid multiple actions and inconsistent findings, to provide a mechanism for the third party to defend the plaintiff's claim, and to ensure the third party claim is decided before a defendant is called upon to pay the full amount of any judgment. The avoidance of a multiplicity of proceedings is fundamental to our rules of civil procedure…."

[9] The rule governing the striking of pleadings is Rule 20. Specifically, sub-rules 20(26)(a) and (29) read:

> "(26) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be
>
> …
>
> (29) No evidence is admissible on an application under subrule (26)(a)."

[10] As I stated in *McClements v. Pike*, 2012 YKSC 84, at para. 4, an application to strike pleadings on the basis that they disclose no reasonable claim proceeds on the basis that all the facts alleged are true. The test for striking the pleading is that it should only be done in plain and obvious cases, where it is absolutely beyond doubt that the claim is doomed to fail. In *Dana Naye Ventures v. Canada (Attorney General)*, 2011 YKSC 20, Veale J., at para. 10, summarized the law on an application to strike pleadings, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. Although he was referring there to a statement of claim, his comments are equally applicable to a third-party notice:

> "1. it is only in plain and obvious cases where the case is absolutely beyond doubt that a claim should be struck out;

2. the mere fact that a case is weak or not likely to succeed are not grounds for striking it out;

3. if the action involves serious questions of law or if facts are to be known before rights are definitely decided, the rule should not be applied;

4. a statement of claim may be amended;

5. the allegations in the statement of claim are accepted as true for the purpose of the application;

6. the statement of claim should be struck out only if the action is certain to fail because it contains a radical defect;

7. if there is a chance that the plaintiff might succeed, the plaintiff "should not be driven from the judgment seat"."

[11] Notwithstanding sub-rule 20(29), the chambers record on this application was replete with evidence which was not objected to by the plaintiff's counsel. This evidence included affidavits from each of the parents, the principal of Spirited, and transcripts of cross- examination on the respective affidavits of the parents and the principal. In addition, the written outline submitted by Spirited's counsel contained numerous paragraphs (8 through 20) making references to this evidence, again without any objection from the plaintiff's counsel. However, as I read sub-rule 20(29), none of this evidence should have been admitted or otherwise referred to on the application. Accordingly, I have disregarded it entirely in formulating these reasons. See also: *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92, at para. 37.

[12] Thus, the pleadings in the third-party notice at bar are very significant for two reasons:

1) they are presumed to be true or capable of being proven true; and

2) no evidence is admissible on this application.

[13] Given the importance of the alleged facts, it seems appropriate to set them out verbatim:

> "The facts upon which this defendant relies are:
>
> 1. Allowing the plaintiff Sophia Ross to be entered into a horse riding program when they [the parents] knew, or should have known, that she had a propensity to scream loudly and uncontrollably when adversely affected by unexpected situations which would put the plaintiff, the defendant, the defendant's employees, the horses, the instructors and other students at risk of injury, loss or damage due to her uncontrolled or uncontrollable behaviour;
> 2. Failing to properly educate and instruct Sophia to control her behaviour when something frightened her in order to avoid exacerbating the circumstances such as, in this instance, frightening the horse and causing it to adversely react to get away from her; [and]
> 3. Failing to instruct Sophia to strictly follow the instructions of the instructor when riding a horse in the horse program offered by the defendant…"

[14] If Spirited is to have a reasonable chance of success at proving negligence by the parents, it will first have to establish a 'parental duty of care'. It appears that the plaintiff's principal argument on this application is that the facts pled in the third-party notice, even if proven true, are incapable of establishing this parental duty of care. Several authorities were referred to by the parties as to the circumstances giving rise to such a duty.

[15] The earliest case submitted is *Streifel v. Strotz et al.* (1958,) 11 D.L.R. (2d) 667 (BCSC). In that case, the plaintiff's automobile was stolen by three boys, two of age 14 and one of age 15. The car was damaged during a chase by police officers. The plaintiff sought to recover damages from the three boys, and in the case of two of the boys, also from their respective fathers. In the case of the third boy, the plaintiff sued the mother.

The plaintiff alleged negligent supervision and instruction by the parents. Whittaker J. held at para. 7 (Q.L.):

> "… In order to succeed in his claim against the parents the plaintiff must show that the boys had a propensity to steal; that this propensity was known to the parents; that the parents should reasonably have anticipated that the boys might steal a car; and that there was some reasonable step the parents could have taken to prevent this particular theft, which they negligently failed to take."

[16] The next case chronologically is *Lelarge v. Blakney* (1978), 92 D.L.R. (3d) 440 (NBCA). There, Hughes C.J.N.B., at paras. 13 and 14 (Q.L.), quoted from other passages in *Streifel* and stated:

> "13 The parental duty of care is a duty personally imposed upon the parent irrespective of the wrongdoing or the liability of a child. The duty is to supervise and control the activities of the child and in doing so to use reasonable care to prevent foreseeable damage to others. The extent of the duty varies with the age of the child. The degree of supervision and control required of a young child may be very different from that required of a child approaching the age of majority. As the age of the child increases and the expectation that he will conform to adult standards of behaviour also increases, the parental duty to supervise and control his activities tends to diminish. The law on the subject was discussed in *Streifel* v. *Strotz et al*. (1958), 11 D.L.R.(2d) 667, where the parents of 3 boys aged 14 and 15 years were sought to be made liable to the owner of a car which the boys had stolen. Whittaker, J., said at p. 668:
>
> > "The common law rule is that a father is not liable in damages for the torts of his child. *Moon* v. *Towers* (1860), 8 C.B. (N.S.) 611, 141 E.R. 1306.
> >
> > There are certain exceptions to the rule. They are thus stated by Boyd C. in *Thibodeau* v. *Cheff* (1911), 24 O.L.R. 214 at p. 218: "Upon this rule exceptions are engrafted, that where the father has knowledge of the wrongdoing and consents to it, where he directs it, where he sanctions it, where he ratifies it, or participates in the

> fruits of it, he becomes in effect a party to it, and as such is liable to the injured person."
>
> And at p. 221: "It may safely be laid down that the father is liable for the conduct of his young child, if he knows of the child's frequent wrongdoing in a particular direction and, by his attitude or his inaction (when he is able to restrain or confine the child), he indicates his willingness that the misconduct should be repeated.""
>
> See also *Carmarthenshire County Council* v. *Lewis*, [1955] A.C. 549 (H.L.).
>
> 14 It is apparent therefore that some special circumstances must be proven before liability can be imposed upon the parent for the tortious actions of his child. …"

[17] In *McKitka v. Kelly*, 1987 CarswellBC 2585 (Co. Ct.), Drost J. quoted from Lelarge with approval, and stated at para. 10:

> "The parent/child relationship does not of itself impose liability upon a parent for the torts of an infant child. The Plaintiff, to succeed, must establish negligence on the part of the parent…"

[18] In *Newton v. Newton*, 2002 BCSC 789 (rev'd 2003 BCCA 389), Burnyeat J., of the British Columbia Supreme Court, commented on this issue at para. 20 as follows:

> "20 Parents are required to supervise their children but will not be vicariously liable merely because of the parental relationship: *Arnold* v. *Teno* [1978] 2 S.C.R. 287; *Hatfield* v. *Pearson* (1956), 6 D.L.R. (2d) 593 (B.C.C.A.); *Moon* v. *Towers* (1860) 151 E.R. 1306; *Segstro* v. *McLean*, [1990] B.C.J. No. 2477 (B.C.S.C.). The potential liability is personal and not vicarious."

[19] *Childs v. Desormeaux*, 2006 SCC 18, was a 'host liability' case. However, at para. 36, McLachlan C.J.C., speaking for the Court, noted that a positive duty of care has been held to exist in "paternalistic relationships of supervision and control", such as those

involving a parent and child. She continued, quoting from *Bain v. Calgary Board of Education* (1993), 146 A.R. 321 (Q.B.):

> "…The duty in these cases rests on the special vulnerability of the plaintiffs and the formal position of power of the defendants. The law recognizes that the autonomy of some persons may be permissibly violated or restricted, but, in turn, requires that those with power exercise it in light of special duties. In the words of Virtue J. in *Bain*, in the context of a teacher-student relationship, "[t]hat right of control carries with it a corresponding duty to take care for the safety of, and to properly supervise the student, whether he or she is a child, an adolescent or an adult." (para. 38).

[20] Finally, in a case from this Court, *W. E.* v. *F.E. et al.*, 2008 YKSC 40, Deputy Justice Richard was deciding a matter of historical sexual assault involving multiple defendants. The plaintiff also sued the Yukon Government because one of the alleged perpetrators sexually assaulted the plaintiff while he was in the care and control of the Yukon Director of Child Welfare. At para. 65, Richard J. applied a case from the British Columbia Supreme Court, which in turn cited *Thibodeau v. Cheff*, the 1911 decision referred to in *Streifel*:

> "In support of its submission that YTG is liable for the tort of the child F.E., the plaintiff cites the case of *Segstro* v. *McLean* [1990] B.C.J. No. 2477, and the following passages in particular:
>
> > "...because parents are in a position to govern the child's behaviour they have a corresponding duty to use reasonable care to prevent foreseeable harm to others by proper supervision. Liability may arise for negligence in the exercise of that control should injury or loss occur (*Smith* v. *Leurs* (1945) 70 C.L.R. 256). Such liability is not strict.
> >
> > ...
> >
> > Where it can be demonstrated that a child has a propensity to act destructively (*Thibodeau* v. *Cheff* (1911) 24 O.L.R. 214 (Div. Ct. App.)) then the duty to supervise

> (and to take other reasonable steps to avoid foreseeable loss) is heightened. At p. 221 the learned Judge stated that a parent is exposed to liability:
>
> > "... if he the [parent] knows of a child's frequent wrongdoing in a particular direction and, by his inaction (when he is able to restrain and confine the child), he indicates his willingness that the misconduct should be repeated."
> >
> > Special circumstances must be proved, however, and the parent is not accountable for every action of a child.
> >
> > To succeed a plaintiff must show (1) that the defendant child had a dangerous propensity; (2) that the parents knew of the propensity; (3) that the parents could reasonably anticipate another occurrence; (4) that reasonable steps could have been taken to avoid a recurrence, and (5) that the parents failed to take such steps. (*Streifl* v. *Strotz et al* (1958) 11 D.L.R. (2d) 667 (B.C.S.C.))."

[21] Accordingly, for Spirited to succeed in establishing a parental duty of care, the facts alleged in the third-party notice must be capable of showing that:

a) the plaintiff child had a dangerous propensity;

b) the parents knew of the propensity;

c) the parents could reasonably anticipate another occurrence;

d) reasonable steps could have been taken to avoid such a recurrence; and

e) the parents failed to take such steps.

[22] I am satisfied that the facts pled in the third-party notice, either directly or by necessary implication, are arguably capable of establishing a parental duty of care. At the very least, the plaintiff's counsel has not satisfied me that it is "absolutely beyond doubt"

that the third party claim is "certain to fail": *Hunt* v. *Carey*, at paras. 28 and 33. Thus, the plaintiff's primary argument is defeated.

[23] In what appeared to be an alternative argument, the plaintiff's counsel further submitted that the claim advanced in the third-party notice sought to impose a duty of care upon the parents that requires "a standard of perfection and ignores the realities of life and the human condition." I reject this argument because it goes to the issue of the standard of care, which is a matter to be determined at trial. The distinction between the duty and the standard of care was noted in *Newton*, cited above, at para. 20:

> "…Parents have a parental duty of care to supervise and control the activities of a child and, if they do so to an acceptable standard, then they are also using reasonable care to prevent foreseeable damage to others."

[24] The third argument of the plaintiff's counsel was that the effect of the third-party notice was to place the mother, who was then the litigation guardian, in a conflict of interest. Counsel further submitted that, as a result, the plaintiff may fear that:

> "… by advancing her claim for personal injuries against Spirited, she may ultimately cause her parents to pay damages when there is no legal basis for damages to be claimed from them."

I reject this argument as well. Firstly, as for the alleged conflict of interest, that has since largely been resolved by virtue of the fact that, on March 5, 2014, the plaintiff's maternal grandfather consented to act as her litigation guardian, presumably in the place of the plaintiff's mother. While that does not entirely resolve the potential for some conflict between the interests of the plaintiff and her parents, that is not the test to be applied on this application to strike the third-party notice. Indeed, the plaintiff's counsel conceded that there are other examples of tort precedents, in my view not surprisingly, where the

parents of infant children have been third-partied by defendants. Secondly, the suggestion by the plaintiff's counsel that there is "no legal basis" for Spirited to claim damages against the parents seems to have been premised on the correctness of his argument that there was no basis for a parental duty of care. However, I have concluded that there is such a basis.

[25] The final three-fold argument advanced by the plaintiff's counsel is that the third party notice: (1) has caused "significant delay" in these proceedings, presumably because of the adjournment of the examinations for discovery; (2) will "eliminate the ability" of the parents to assist the plaintiff in this litigation; and (3) will have "a chilling effect" on the plaintiff seeking damages for her personal injuries, as she is the daughter of the third parties.

[26] I reject this argument as well. None of these points go to the test for striking a third-party claim. On the contrary, where the facts alleged in the third-party notice raise the possibility of a claim against the third parties for which the plaintiff may not be responsible, the third-party claim should be allowed to stand: *Laidar Holdings Ltd. v. Lindt & Sprungli (Canada) Inc.*, 2012 BCCA 22, at para. 1. Further, I see no reason to conclude that the parents' ability to assist the plaintiff will be 'eliminated' by the third-party claim. Finally, to accede to the plaintiff's argument here would be tantamount to granting summary judgment for the third parties, when I have already concluded that Spirited has an arguable claim against them.

CONCLUSION

[27] As stated, for these reasons, this application is dismissed.

[28] Costs were awarded at the hearing of the application in favour of Spirited, in the cause. Counsel were to attempt to agree on the amount, failing which they were directed to set the matter down before the Registrar.

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Gower J.