Federal Court  Cour fédérale

Date: 20140122

Docket: T-1481-12

Citation: 2014 FC 75

Winnipeg, Manitoba, January 22, 2014

PRESENT: The Honourable Mr. Justice Mosley

Docket: T-1481-12

BETWEEN:

CHERYL ANNE SWARATH, CAROL LOVERNE, SHELDON JEROME MARIO RAI SWARATH AND JODY WILLIAM BAXMEYER OPERATING AS NORTHREGENTRX AND NORTHREGENTRX

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF THE GOVERNMENT OF CANADA, HEALTH CANADA AND THE ATTORNEY GENERAL OF CANADA

Defendants

REASONS FOR ORDER AND ORDER

[1] This is a motion to strike the plaintiffs' statement of claim without leave to amend.

[2] The plaintiffs began marketing and distributing natural health products in early 2005. They carried on business under the name NorthRegentRx. NorthRegentRx held a license, issued by Health Canada, to sell such products.

[3] In 2006, the plaintiffs' primary product was "Libidus", described as a natural health product intended to increase blood circulation and address symptoms of erectile dysfunction and enhance sexual performance. Health Canada issued a direction to the plaintiffs on August 4, 2006 under the *Natural Health Products Regulations*, SOR/2003-196 to stop the sale of Libidus in Canada and to recall all of the product that had been distributed to retail outlets. The ground apparently cited for the issuance of the direction was that Libidus contained undisclosed acetildenafil, an analogue of sildenafil (Viagra), a controlled substance. Other similar substances or adulterants were later said by Health Canada to be found in the product.

[4] The plaintiffs complied with the direction and stopped selling Libidus. Over the course of the ensuing six years, they attempted to persuade Health Canada that its analysis was incorrect by, among other things, submitting independent laboratory analyses that contradicted the Health Canada findings. Health Canada did not accept the plaintiffs' analyses and declined to revoke the direction and issue a license. There is no indication in the record that the plaintiffs sought relief from those decisions by way of a notice of application seeking judicial review. The exchange of correspondence with Health Canada is not part of the record before the Court.

[5] On August 2, 2012, the plaintiffs filed a Statement of Claim against the defendants for general damages in the amount of $77,144,036.00, punitive damages of $25,000,000.00,

pre and post-judgment interest, and for an Order directing the defendant, Health Canada, to issue a license to the plaintiffs permitting them to market and distribute Libidus in Canada. The plaintiffs alleged gross negligence, arbitrariness, bad faith and malice on the part of Health Canada employees, and a conspiracy between the defendants and the pharmaceutical industry to suppress the distribution of Libidus.

[6] The defendants filed this motion to strike on September 28, 2012, under Rule 221 of the *Federal Courts Rules*. The matter was then adjourned several times, on each occasion but one at the request of the plaintiffs, before being set down for hearing peremptorily on January 20, 2014. Due to those adjournments and a change of plaintiffs' counsel in October 2013, the responding motion materials were not filed until January 16, 2014. Pursuant to Rule 8 of the *Federal Courts Rules*, the time to file and serve those materials is extended.

[7] The defendants seek an Order striking the claim in its entirety for failing to disclose a reasonable cause of action. In particular, the defendants submit that the claim is deficient in that:

> a) it appears to advance a tort claim based solely upon alleged breach of statute, a tort not known at law;
>
> b) the tort claim is framed as one of direct liability against the Crown, not vicarious liability on the part of the Crown for an identifiable Crown servant;
>
> c) none of the causes of action in tort asserted in the claim are sufficiently or adequately pleaded; and,
>
> d) the circumstances of this case do not give rise to an actionable private law duty of care.

[8] The Court may, at any time on motion, order under Rule 221(1)(a) that a pleading be struck, with or without leave to amend, on the ground that it does not disclose a reasonable cause of action. The parties are agreed that the test for motions to strike is that set out by the Supreme Court of Canada in *Knight v Imperial Tobacco Canada Ltd*, 2011 SCC 42, [2011] 3 SCR 45 at para 17:

> [17] […] A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action […]. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial [Citations removed].

[9] There are a number of evident deficiencies with the pleadings that counsel for the plaintiffs submits could be cured by amendment. As stated by the Federal Court of Appeal in *Simon v Canada*, 2011 FCA 6 at para 8, any defect in the statement must be one that is not curable by amendment in order for a pleading to be struck without leave to amend.

[10] Potential tort liability for the Federal Crown on the alleged facts could arise from sections 3(b)(i) and 10 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50. That liability is vicarious and dependent upon a tort committed by a servant of the Crown. With the exception of a reference to the employees of Health Canada at paragraph 17, the claim is framed as one of direct liability against the Crown. As argued by the defendants, absent an alleged tort committed by an identified Crown servant for

which tort the Crown is vicariously liable, the claim does not disclose a reasonable cause of action.

[11] Moreover, the allegations of misfeasance in public office, at paragraph 31 of the claim, fail in any way to identify the responsible officials. The plaintiffs are required, under Rule 174, to plead material facts. The identities of the individuals who are alleged to have engaged in misfeasance are material facts that must be pleaded. The claim refers to six years of correspondence with Health Canada in an effort to have the direction set aside. This presumably put the plaintiffs in possession of the names of the individuals or groups that were dealing with the matter, or at least their job positions, branches or offices. Identification of at least that level of particularity would have been sufficient: *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184. However, particulars of that nature do not appear in the claim.

[12] Further, the pleading does not adequately describe the other parties to the conspiracy alleged at paragraph 21, other than a vague reference to the "pharmaceutical industry and/or other persons unknown". It does not allege the agreement between the defendants to conspire, the purpose or objects of the conspiracy, and the overt acts which are alleged to have been done by each of the alleged conspirators in furtherance of the conspiracy: *Key Property Management Inc v Middlesex Condominium Corp No 134*, 1991 CarswellOnt 451 at para 10 citing Bullen, Leake and Jacob's *Precedents of Pleadings*, 12th ed (London: Sweet & Maxwell, 1975) at p 341.

[13] The claim includes allegations at paragraphs 26 and 32 that the defendants breached their statutory duty to comply with the legislation and regulations governing drug usage

and natural health products. The defendants contend that these allegations appear to assert a claim based upon alleged breach of statute and/or regulation, a tort unknown in Canada. However, proof of statutory breach, causative of damages, may be evidence of negligence if a tort committed by Crown servants could be established: *R v Saskatchewan Wheat Pool*, [1983] 1 SCR 205 at para 42. Moreover, intentional breach of a statute may amount to misfeasance in office if it can be established that the official concerned deliberately acted unlawfully with knowledge that his or her actions would harm the plaintiff: *Odhavji v Woodhouse* 2003 SCC 69 at para 23; [2003] 3 S.C.R. 263 at p. 281. Be that as it may, those elements of the tort are not alleged in the pleading.

[14] Apart from these deficiencies, which could be cured by amendment, the greater difficulty for the plaintiffs is the defendants' argument that no private law duty of care arises in the circumstances alleged. The claim does not appear to fall within any category of cases in which a duty of care has been previously recognized.

[15] The parties agree that the test for determining whether there is a duty of care in a novel situation is that set out by the Supreme Court of Canada in *Cooper v Hobart*, 2001 SCC 79 [*Cooper*] adopting the test enunciated by the House of Lords in *Anns v Merton London Borough Council* (1977), [1978] AC 728 [*Anns*].

[16] *Cooper* concerned an action by an investor who claimed that the Registrar of Mortgage Brokers was negligent in failing to properly oversee the conduct of a registered mortgage broker licensed by the regulator. The Supreme Court held that the Registrar did not owe a private law duty of care to the members of the investing public.

[17] As described at para 30 of *Cooper*, the *Anns/Cooper* test is composed of two stages:

> [30] […] At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of the word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the Ann's test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of the duty of care. […]

[18] Thus in applying the two-part test it must be first determined whether a *prima facie* duty of care exists. To make that determination, the court must consider whether there was reasonable foreseeability of the harm, as well as a relationship of proximity. Proximity is generally established by reference to previously recognized or analogous categories of negligence. In a novel case, the issues of foreseeability and proximity must be freshly considered. In my view, this is a novel case in that it concerns a claim that the Crown is liable for making a decision in the interest of maintaining public health.

[19] In *Cooper*, at paragraph 43, the Supreme Court of Canada specifically instructed that the factors giving rise to proximity, if they existed, must arise from the statute under which the Registrar was appointed, as that statute was the only source of his duties. On the question of proximity, the Court concluded at paragraph 50:

> [50] […] even though the Registrar might reasonably have foreseen that losses to investors […] would result if he was careless in carrying out his duties under the Act, there was insufficient proximity between the Registrar and the investors to ground a *prima facie* duty of care.

[20] In this matter, the Crown concedes, for the purposes of this motion, that it is reasonably foreseeable that tortious conduct on the part of its employees could damage the plaintiffs' economic interests. However, it denies the existence of any relationship that would

establish proximity between the parties. The duties imposed under the statutes and regulations governing the actions of Health Canada and its employees, the defendants argue, are public law duties owed to the public at large, and not to the private economic interests of the manufacturers or distributors of natural health products: *Department of Health Act*, SC 1996, c 8 s 4; *Food and Drugs Act*, RSC, 1985, c F-27, s 30(1); *Natural Health Products Regulations*, above, s 17.

[21] This matter is distinguishable from the cases in which a government agency has been found to be negligent in carrying out inspections. See for example, *Ingles v Tutkaluk Construction Ltd.*, [2000] 1 SCR 298, 2000 SCC 12, where a municipality was determined to be liable for negligent inspection of renovation work carried out by a contractor. In this case, a policy decision was made to inspect construction even if it had commenced prior to the issuance of a building permit. Once the city chose to implement this decision, and exercised its power to enter upon the premises to inspect the renovations at the appellant's home, it owed a duty of care to all who it was reasonable to conclude might be injured by the negligent exercise of that power. That is not analogous to the exercise of a duty to protect consumers of a product licensed for sale by the government body, as in this case.

[22] The legislative scheme in the present matter is also distinguishable from that considered by the New Brunswick Court of Appeal in *Adams v Borrel et al.*, 2008 NBCA 62, cited by the plaintiffs. In that case, the federal government had a statutory obligation under the *Plant Protection Act*, SC 1990, c 22 s 2 to protect plant life and the agricultural sector of the economy by preventing the spread of pests. On that basis, the Court of Appeal found a prima facie duty of care owed to potato farmers in the province. Similarly, the Ontario

Court of Appeal upheld a finding of a prima facie duty of care on the part of Canada in *Sauer v Canada (Attorney General) et al.*, 2007 ONCA 454 where Canada had publicly assumed a duty to ensure the safety of cattle feed. In neither case, was the question of Canada's duty to the broader public at issue.

[23] In my view, the case at bar is analogous to those decisions in which it was found that the Crown owes a duty to the public at large but no private law duty to the manufacturers, distributors or retailers of regulated products.

[24] In *Attis v Canada (Health)*, 2008 ONCA 660 the Ontario Court of Appeal upheld the dismissal of a proposed class proceeding with respect to alleged negligence in relation to the government's regulation of breast implants. The motion judge, applying the *Anns/Cooper* analysis, had found that the claim disclosed no cause of action because the underlying legislative and regulatory scheme did not support the plaintiff's argument that the Crown owed them a private law duty of care. The Court of Appeal agreed with that conclusion. Referring to the powers and obligations under s 4 of the *Department of Health Act*, above, the Court stated at paragraph 54:

> [54] […] since Cooper held that a relationship of proximity between a plaintiff and a government must be found in the governing statute, I begin with the legislative framework. As I have already noted, the umbrella statute of the Department of Health Act, at s. 4, provides that the Minister's obligations are to the people of Canada for the promotion of their health and the prevention of risk generally. Thus, under the statute, the Minister's duty is to the people of Canada as a whole, not to individual residents.

[25] A similar conclusion was reached by the British Columbia Court of Appeal in *Los Angeles Salad Company Inc v Canadian Food Inspection Agency*, 2013 BCCA 34 (leave to appeal to SCC refused, 35293 (August 15, 2013) [*Los Angeles Salad*], a case that

involved allegedly negligent acts committed by employees of the Crown engaged in food inspection. As a result of an inspection by the Canadian Food Inspection Agency (CFIA) and a finding that carrots imported by the plaintiffs might be infected with bacteria, the carrots were recalled and destroyed. The carrots were subsequently determined to not be infected. The importers sued the Crown alleging negligence on the part of the CFIA. In striking the claim, the motion judge concluded that the CFIA owed the carrot importers no duty of care. The Court of Appeal upheld that decision finding, at paragraph 55:

> [55] […] the clear purpose of the relevant legislative scheme is to protect the health of Canadians by preventing the sale of contaminated food in Canada. To recognize a private duty of care to food sellers would conflict with that purpose. It would put food inspectors in the untenable position of having to balance the paramount interests of the public with private interests of food sellers and would thereby have a chilling effect on the proper performance of their duties. Thus, the statutory scheme excludes the possibility of sufficient factual proximity to make it just and reasonable to impose a *prima facie* duty of care in the circumstances of this case […]

[26] In this instance, as in *Attis*, the statutory analysis begins with the *Department of Health Act*. Section 4 of that statute grants the Minister of Health powers, duties and functions for the administration of the Acts, and such orders and regulations of the Government of Canada assigned to her department for, among other things, the promotion and preservation of the well-being of the people of Canada, protection against risks to health and the spreading of diseases, and investigation and research into public health. Subsection 30(1) of the *Food and Drugs Act* provides for the making of regulations respecting any food, drug, cosmetics or devices. The *Natural Health Products Regulations* apply to the sale and distribution of natural health products, including the product at issue in these proceedings.

[27] The plaintiffs' argument that the Minister is obliged to issue a product license to them under s 7 of the *Natural Health Products Regulations* upon application ignores the legislative and regulatory framework within which that provision operates. In particular, it ignores the powers granted the Minister in s 17 of the Regulations to direct a licensee, manufacturer, importer and distributor to stop their sale of a natural health product.

[28] The clear purpose of the relevant legislative and regulatory scheme in this matter is to protect the health of Canadians by preventing the sale of contaminated natural health products in Canada. To recognize a private duty of care to the importers and distributors of those products would conflict with that purpose. I am unable to agree with the argument of the plaintiffs that the duty to promote and preserve the health of the people of Canada encompasses a duty to the distributors of products such as Libidus.

[29] I find, therefore, that there is no proximity in the relationship of the parties that would make it reasonable to impose a duty of care on the defendants to ensure that their examination of the products and administration of the regulatory scheme does not result in economic damage to the plaintiffs.

[30] In considering the second stage of the *Anns/Cooper* test, the concern, as stated in *Los Angeles Salad*, above, at paragraph 63, is that the duty of care claimed may be so broad that its limits are indeterminable and therefore, as a matter of policy, imposition of the duty should be negated. The plaintiffs argue that this policy concern is not a relevant consideration in this case as the numbers of those involved in the import, distribution and sale of the product are limited. While that may be true in this particular case, the residual

policy concern extends to the precedential value of the application of a finding of a duty of care to other claims of a similar nature.

[31] The plaintiffs contend that if the claim is struck without leave to amend they will be denied "their right to a day in court". While access to justice is an important value in our society, it does not mean that every case should be litigated.

[32] For the foregoing reasons, I am satisfied that the claim should be struck in its entirety without leave to amend.

[33] The defendants have requested costs and submitted a Bill of Costs for fees and disbursements totalling $2,591.82. The amount of fees claimed is in accordance with the Tariff and the disbursements appear to be reasonable. In the circumstances, however, I think it appropriate to exercise my discretion not to award costs against the plaintiffs.

ORDER

THIS COURT ORDERS that:

1. The defendants' motion is granted;
2. The Statement of Claim herein is struck in its entirety without leave to amend; and
3. The parties shall bear their own costs.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	CHERYL ANNE SWARATH ET AL v HER MAJESTY THE QUEEN IN RIGHT OF THE GOVERNMENT OF CANADA ET AL

PLACE OF HEARING: WINNIPEG, MANITOBA

DATE OF HEARING: JANUARY 20, 2014

REASONS FOR ORDER AND ORDER: MOSLEY J.

DATED: JANUARY 22, 2014

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