CITATION: Bolyantu et al. v. The Attorney General of Canada, 2011 ONSC 2397
COURT FILE NO.: 05-CV-5233 CM
DATE: 20110502

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DONNA BOLYANTU, STEVEN BOLYANTU, DAVID BOLYANTU AND TYLER DUPUIS, MINOR BY HIS LITIGATION GUARDIAN LORI DUPUIS AND DANTE SMITH, MINOR BY HIS LITIGATION GUARDIAN NATASHA SMITH	Dana Mejalli, for the Plaintiffs/Responding Parties
Plaintiffs/Responding Parties	
– and –	
THE ATTORNEY GENERAL OF CANADA, JANE DOE(S) and JOHN DOE(S)	Christopher Parke, for the Defendants/Moving Parties
Defendants/Moving Parties	
	HEARD: March 28, 2011

REASONS ON MOTION

BONDY J.:

A. THE MOTION

[1] This is a motion by the defendant, party the Attorney General of Canada ("Canada"), for an order pursuant to rule 21.01(1)(b) striking out the statement of claim because it discloses no reasonable cause of action, and for an order dismissing the action. Mr. Parke, who represents Canada, also argues that the court has inherent jurisdiction to dismiss an action for failing to disclose a reasonable cause of action at any stage of the proceedings and regardless of the state of the pleadings (paragraph 23 of the moving party's submissions). The moving party also claims costs and such further relief as the court deems just.

B. PRELIMINARY RULING

[2] The responding parties' materials included an affidavit of Mr. Monforton, one of the responding parties' lawyers. To be clear, Mr. Monforton was not the lawyer who argued the motion, it was Ms. Mejalli.

[3] Mr. Parke objected to the court considering the affidavit for purposes of the motion. It was his position that evidence is prohibited on a motion under rule 21.01(1)(b). The court agreed. Rule 21.01(2) specifically provides that "no evidence is admissible on a motion ... under clause (1)(b)". Accordingly, I ruled that I would not consider Mr. Monforton's affidavit in reaching my conclusion.

C. BACKGROUND

[4] For purposes of analysis under this rule all the facts pleaded in the statement of claim are deemed to have been proven. According to the responding parties' statement of claim the facts as pleaded are as follows.

[5] Mr. Brian Bolyantu was a 22 year old Windsor resident. He was shot and killed in March, 2003. In May, 2005, Mr. Jack Pharr was convicted of second-degree murder in the death of Mr. Bolyantu.

[6] According to the statement of claim Mr. Pharr used a 22 caliber handgun he had smuggled into Canada to shoot and kill Mr. Bolyantu. The statement of claim alleges that Mr. Pharr's criminal record did not come to light at a border inspection because an officer with the Canada Border Services Agency ("CBSA"), (formerly, Canada Customs and Revenue Agency, and Citizenship and Immigration Canada) misspelled his name.

[7] The parties agree that Mr. Pharr's group was sent for secondary immigration inspection. The parties agree that a CBSA officer misspelled Mr. Pharr's name when searching the Field Operational Support System database. There is also consensus that the CBSA officer tried a second time to search Mr. Pharr's name but again misspelled it. The moving party however argued that "because of its typing error, Canada had no idea that it was admitting a prohibited traveler" (paragraph 17 moving party's submissions). As a result, it is their position that their actions were not actionable.

[8] Canada further acknowledges that in September, 2001, Mr. Pharr, who is an American citizen, had been deported from Canada on the basis of then recent criminal convictions for crimes committed in Canada. Those crimes included causing a disturbance and possession of a weapon.

[9] The moving party also concedes that Mr. Pharr had been prohibited from entering Canada as a result of those convictions.

[10] It is the responding parties' position that, had the CBSA officer correctly entered Mr. Pharr's name on either of the two occasions that name was input into the computer system, his criminal record would have been revealed. They argue that, as a result, CBSA would have the authority to conduct a proper search of Mr. Pharr's person. It is the respondent's position

that it follows that had the CBSA officer correctly entered Mr. Pharr's name, he either would not have been allowed to enter the country, and/or an appropriate search of Mr. Pharr would have been conducted, and the 22 caliber handgun used to shoot Mr. Bolyantu would have been discovered. The responding parties allege that the actions or omissions of the particular CBSA officers constitute negligence and breach of duty.

[11] The respondents are members of Mr. Brian Bolyantu's family. The responding parties' relationship to Mr. Bolyantu are as follows:

Donna Bolyantu is his mother;

Steven Bolyantu is his brother;

David Bolyantu is his brother;

Tyler Dupuis is his child; and

Dante Dupuis is his child.

[12] The responding party is advancing claims under the *Family Law Act,* R.S.O. 1990, c. F.3 claim for loss of care, guidance, and companionship and are also asking for general damages for, among other things, loss of support, care, comfort and guidance, as well as psychological and emotional trauma, mental anguish, and nervous shock. resulting from Mr. Bolyantu's wrongful death.

D. THE QUESTIONS

[13] Broadly speaking there are two questions. They are as follows:

a) Does the responding parties' statement of claim disclose a reasonable cause of action?

b) Did the moving party delay in bringing the motion, and, if so, what are the consequences of that delay?

E. THE PARTIES' POSITIONS

1) The Moving Parties' Position

a) Reasonable Cause of Action

[14] The essence of the grounds for the moving party's motion is that the statement of claim fails to disclose a reasonable cause of action. According to Mr. Parke the foundation of the respondent's action is based in "sympathy" rather than "law". A summary of the moving party's position regarding this issue is as follows:

Issue (i) – Is the Cause of Action for Wrongful Death?

[15] The moving party argues that the claimants seek civil damages for the unlawful death of Mr. Bolyantu, a family member. Canada argues that damages are not available for wrongful death.

Issue (ii) – Was There a Private Law Duty of Care?

[16] The moving party argues that there is no private law duty of care owed by the defendant to Mr. Bolyantu.

Issue (iii) – Are Damages Under the Family Law Act Available?

[17] The moving party argues that damages under the *Family Law Act* are dependent upon or a derivative of the possibility of Mr. Bolyantu succeeding in a claim in negligence against the Crown if he were alive. They argue that it follows that if Mr. Bolyantu did not have a cause of action, any claim under the *Family Law Act* must fail.

b) Delay

Issue (iv) – Did the Moving party delay in bringing the motion and if so was the delay sufficient to be fatal to the motion?

[18] The moving party acknowledges delay but argued that in this case that delay was necessary in order to ascertain whether or not the statement of claim disclosed a reasonable cause of action, and also argues that delay does not operate as a bar to such a motion. The moving party cites *Fleet Street Financial Corp.'s v. Levinson*, [2003] O.J. No. 441 (S.C.J.).

2) The Responding Parties' Position

[19] The essence of the Responding party's position is as follows;

a) Reasonable Cause of Action

[20] The Responding parties make several arguments. The first is that Canada is responsible in law for the actions of crown agencies including CBSA and its officers, agents and employees.

[21] Proximity is recognized in a situation where the moving party's act foreseeably causes physical harm to the responding party or parties. By way of example, the responding party argues that government authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute that maintenance in a non-negligent manner. The responding party argues that this situation is similar.

The responding parties argue that any time it is plainly foreseeable that carelessness by the moving party could cause injury to the public a *prima facie* duty of care to the public exists.

The responding parties argue that based upon the wording of the statement of claim the cause of action is not for unlawful wrongful death as alleged by the moving party. The responding parties maintain that the cause of action is for damages for nervous shock and mental and

physical pain and suffering. They take the position that this cause of action arises from the wrongful death which resulted from the negligent implementation of a government directive. The responding parties maintain that the courts have identified both nervous shock and negligent implementation of government directive as legitimate causes of action.

The responding parties argue that it is not "beyond doubt" that the statement of claim discloses no reasonable cause of action.

b) Delay

[22] The responding parties argue that the moving party's delay in bringing the motion should be fatal to the motion. The responding party notes that the statement of claim was issued in July, 2005, and that the statement of defence was delivered the next month. Since then examinations for discovery of six individuals and also a mediation session have been held. Significant steps have been taken in this matter since its inception.

c) Punitive Damages

[23] Finally, the responding parties conceded in argument that there is no underlying cause of action to support the claim for punitive damages in the amount of $1,000.000.00 which appears at paragraph 4 (a) of the statement of claim.

F. ANALYSIS

[24] The applicable principles are laid down in such leading authorities as *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980, 990-991; *R.D. and Belanger and Associates Ltd v. Stadium Corp. of Ontario Ltd.* (1992),5 O.R. (3rd)778 at 780-783 (C.A.).

[25] Fundamental to an analysis is the assumption that the facts as alleged in the pleadings must be taken as correct. The question for the Court to decide is whether the plaintiff's action could not possibly succeed because clearly, and beyond all doubt, no reasonable cause of action has been shown. The court must be satisfied that it is "plain and obvious" that the action cannot succeed.

[26] Counsel agreed that this is a "novel" case. Counsel also agreed that the fact that a case is novel is not a bar to its proceeding to trial.

[27] Though the responding parties' case may not be easily proven, that is not sufficient reason for the court to exercise its jurisdiction under rule 21.01 (1)(b). The threshold for sustaining a pleading under rule 21.01 (1)(b) is not a high one.

[28] As said, there are two groups of issues. The first is whether the statement of claim discloses a reasonable cause of action, and the second is whether the moving party's delay is fatal to this motion.

a) Does the Statement of Claim Disclose a Reasonable Cause of Action

[29] There is agreement on most of the essential facts. The parties agree that:

i. Mr. Pharr illegally entered Canada.

ii. Mr. Pharr had been previously deported in 2001 when he was convicted of carrying a concealed weapon and causing a disturbance.

iii. Mr. Pharr shot and killed Mr. Bolyantu with a 22 caliber hand gun in March, 2003.

iv. Earlier on the night that Mr. Pharr shot and killed Mr. Bolyantu he had entered Canada.

v. When Mr. Pharr entered Canada that night a CBSA officer misspelled Mr. Pharr's name twice when entering it into the computer.

vi. Had a CBSA officer spelled Mr. Pharr's name correctly his previous deportation would have resulted in him being denied entry to Canada.

[30] However, there is an essential fact that the parties do not agree on. The responding parties claim that Mr. Parr had the gun with him when he crossed the border. The moving party states in its statement of defence that it has "no knowledge of how Mr. Pharr came into possession of the firearm, whether he entered Canada with it, or of the events that led to the murder." This difference is, however, of no consequence because an analysis under rule 21.01 requires the court to consider the assertions in the statement of claim to be correct.

[31] The moving party cited the decision of the Supreme Court of Canada in *Hunt, supra* where Wilson J. set out the "Plain and obvious" analysis required to grant such an order. The moving party relies in particular upon:

> 30 While this Court has had a somewhat limited opportunity to consider how the rules regarding the striking out of the statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the Court in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, stated at p. 740:
>
> > As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this the Court should, of course, dismiss the action or strike out any claim made by the responding party only in the plain and obvious cases where the Court is satisfied that "the case is beyond doubt": Ross v. Scottish Union and National Insurance Co.

[32] The test of "beyond doubt" is a very high standard. The parties agree that this is the test.

[33] I consider that the responding party's may encounter some degree in difficulty in proving at least some of the claims made. However as I have noted, that is not the test.

[34] Again then, the specific issues raised by the moving party are as follows:

Issue (i) – Is the Cause of Action for Wrongful Death?

[35] The moving party's argument regarding wrongful death is at first blush compelling. They point out that damages of death are not available at common law. Mr. Parke relies upon *Monaghan v. Horn*, 7 S.C.R. 409.

[36] The responding parties however take the position that their cause of action is based on damages for nervous shock and mental and physical pain and suffering "*arising out of*" the wrongful death, rather than the wrongful death itself (paragraph 8 of the responding party's factum). That position is consistent with the very clear language of the statement of claim which appears at Tab 2 of the moving party's motion record.

[37] Paragraph 9 of the moving party's submissions demonstrates an understanding of that difference. There, the moving party states:

> "Each family member claims general, special and punitive damages for their shock, pain and suffering *arising from* the wrongful death of Mr. Bolyantu and also "pursuant to the provisions of the FLA." (*My Emphasis*)

[38] The court concludes that the moving parties' language is consistent with an interpretation of the statement of claim that goes beyond a simple claim for damages for "wrongful death."

[39] Accordingly, the court rejects this argument.

Issue (ii) – Was There a Private Law Duty of Care?

[40] By virtue of section 5(1) of the *Canada Border Services Agency Act*, S.C. 2005, c. 38, "the Agency is responsible for providing integrated border services that support... public safety priorities...." Mr. Parke concedes that this language creates a "duty to administer" the *Act*, but does not create a "private law duty of care."

[41] Mr. Parke argued that "Mr. Bolyantu was an unknown member of the public at large," and accordingly that there was no duty to him. Although that is often the case where the defendants are public officials, the responding parties maintain that there are exceptions.

[42] In support of his position Mr. Parke relies upon *Attis v. Canada (Minister of Health)*, 2008 CarswellOnt 5661, 93 O.R. (3d) 35. He directed the court's attention to paragraph 59 of that case. There the court found that:

> [T]he legislative scheme reveals that no duty is placed on health Canada, and all the obligations are on the industry, I conclude that the statute signals an intention that the government's duty is owed to the public as a whole, not to the individual consumer.

[43] The *Attis* case is potentially distinguishable for several reasons. For example, in *Attis* individuals who suffered harm could look to industry for compensation. In other words, the law already provided a remedy for the negligence pleaded in that case. That was one of the specific considerations enunciated by the Supreme Court in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 at the second stage of the Anns test which is more fully discussed below (*Anns v. Merton London Borough Council*, [1977] 2 All E.R. 492, (U.K. H.L.).

[44] In support of their position, the responding parties argue that proximity is recognized in a situation where it is foreseeable that the moving parties' acts will cause physical harm to an individual. The responding party argues that, as an example, where government authorities have undertaken a policy of road maintenance they have been held to owe a duty of care to execute that maintenance in a non-negligent manner. In this case, Canada had exercised its discretion to perform secondary inspection. Ms. Mejalli argued that, by analogy, once that discretion had been exercised the moving party had a duty of care to execute that secondary inspection in a non-negligent manner. She argued that by virtue of the exercise of its authority under section 5(1) of the *Canada Border Services Agency Act*, the moving party was the only person or institution that could have prevented Mr. Pharr from entering the country with his handgun.

[45] There was consensus between counsel that the case could be described as novel. Consistent with that conclusion, the moving party's submissions assert that this case is not analogous to cases in which a regulatory duty of care has been recognized (paragraph 36 moving party's submissions).

[46] There was consensus that the novelty of the case is not fatal.

[47] Both counsel directed the court's attention to the principles enunciated in *Anns v. Merton*, *supra* as adopted by the Supreme Court of Canada. The leading Supreme Court of Canada cases in that regard include *Kamloops (City of) v. Nielson*, [1984] 2 S.C.R. 2 and more recently *Cooper*, *supra*. Those cases provide assistance in ascertaining whether a duty of care should be imposed in novel situations.

The analysis has two stages which are set out at paragraph 30 of the *Cooper*, *supra*, case. At the first stage of the *Anns* test, two questions arise:

> 1) Was the harm that occurred the reasonably foreseeable consequence of the defendants act? and
>
> 2) Are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here?

[48] The court goes on to describe the second stage of the test:

> [I]f foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations

> outside the relationship of the parties that may negative the imposition of a duty of care.

Stage I of the test

[49] Mr. Parke maintains that "foreseeability and proximity form the core issue in this case" (paragraph 42 moving party submissions). There he rhetorically asks if

> "on March 24, 2003 at 1 am, would the immigration official's misidentification of a US citizen, entering Canada, pose a reasonably foreseeable threat to Mr. Bolyantu?"

[50] The responding parties' reply to that rhetorical question appears at paragraph 44 of their factum. There they state:

> "It is the plaintiff's position that there existed a consequence, reasonably foreseeable to the defendants, of allowing Pharr to enter into Canada on March 24, 2003 as a criminally inadmissible person in subject of a Deportation Order. The Plaintiffs submit that allowing Pharr into Canada, when he had been convicted for carrying a concealed weapon and causing a disturbance, could foreseeably result in danger to a finite group of persons - those to whom Pharr came into contact while in Windsor. Indeed, the reason Pharr was deported from Canada was to protect and ensure the safety of Canadian citizens and residents."

[51] I agree with the responding parties' position.

[52] The very reason for which Mr. Pharr had been excluded from Canada was the fact that he had been caught carrying a concealed weapon in an area in close proximity to the border crossing, the downtown Windsor area. It is hard to imagine any reason for that deportation other than the duty for that agency to "provide integrated border services that support...public safety priorities" pursuant to section 5(1) of the *Canada Border Services Agency Act*."

[53] Accordingly I conclude that it is not "plain and obvious that the responding parties will be unable to prove foreseeability at trial

[54] Mr. Parke argues at paragraph 48 of his submissions that even if foreseeability can be argued, the responding parties would have to show proximity. He maintains that proximity must necessarily be demonstrated by showing "that Canada was in such a close and direct relationship with him that it would be just to impose a duty of care towards him." Mr. Parke's argument mimics the language at paragraph 42 of the *Cooper* case. I find that to be an oversimplification. That statement was made in the context of the particular facts of that case. In Cooper it was found that it would be impossible for the registrar to have a duty to individual investors because of potential conflict with the registrar's overarching duty to the public. That is not the situation in the present case. In this case there is no such conflict.

[55] To be clear, an individual's simple presence in Canada would not be enough to establish proximity. For example, had Mr. Pharr imported the gun, sold to a third party, who then

transported to British Columbia where it was used in a crime two years later, there would obviously be no proximity. If it were otherwise, then as Mr. Parke argued, liability would be unlimited by time, geography, classes of persons, etc. I agree.

[56] In this case, however, the defendant had direct control over the risk that ultimately killed Mr. Bolyantu. The defendant had previously deported Mr. Pharr for carrying concealed weapons in the downtown Windsor area. That action by the defendant was clearly the function of the duty to provide integrated border services that support public safety priorities (i.e. keeping people who carry concealed weapons out of Canada, and in this case the downtown Windsor area). That agency was the only thing that stood between Mr. Bolyantu and Mr. Pharr. That relationship arguably contains elements of proximity.

[57] The responding parties attempted to define the group of individuals for which proximity would exist at paragraph 44 of their factum. The group suggested is "those to whom Pharr came into contact while in Windsor."

[58] The issue of proximity raises two further questions.

[59] The first is whether difficulty defining a group which has proximity is a bar to an action. The answer is no. Were that the case novel situations would never get to court. As a result the law would stagnate. In the instant case, Mr. Pharr was initially deported for carrying a concealed weapon in the downtown Windsor area. When Mr. Pharr returned with his handgun he shot Mr. Bolyantu in the downtown Windsor area. The similarities in these situations suggest that it may be reasonably possible to establish that there was a particular group with proximity to CBSA in the circumstances. The similarities further suggest that that group is capable of definition. That task is, however, beyond the scope of the court's duties in this particular motion. That said, the responding parties need only show that the position is arguable to succeed in its defence of this motion.

[60] The second is whether the failure of the responding parties' pleadings to precisely state the group which they assert had proximity, and which they assert Mr. Bolyantu belonged, should be fatal to their case. Again, the answer is no. A more appropriate vehicle for the applicant to obtain that information would have been a demand for particulars. In any event, the responding parties could simply move to amend their pleadings.

[61] Accordingly I conclude that it is not "plain and obvious that the responding parties will be unable to prove proximity at trial

[62] The moving party argues that in *Attis*, *supra*, the court found no private law duty of care to protect the safety of women in Health Canada's role regulating breast implants. Mr. Parke takes the position that there is no difference between the *Attis* case and the present case. Counsel for the respondents pointed out that in the *Attis* case there are a number of other organizations involved that could shoulder the blame. Arguably, that is an "already existing remedy" anticipated by the Supreme Court in the *Cooper* case. In other words, it may be open to the plaintiffs' to distinguish *Attis* on a full evidentiary record.

[63] In summary, I conclude that the responding parties have demonstrated an arguable position with respect to foreseeability and proximity. Foreseeability and proximity are at

their highest questions of mixed fact and law. Where, as here, some of the facts are disputed, the determination of those facts and any related question of law should be determined by the trial judge.

Stage II of the test

[64] In the *Cooper* case, the Supreme Court gives several examples of such policy considerations. The example which most closely approximates Mr. Parke's argument is "Will the recognition of the duty of care create the spectre of unlimited liability to an unlimited class?" He argued both that liability was unlimited and that the class was unlimited. He also took the position that CBSA would become an "insurer."

[65] Mr. Parke argued that policy concerns dictate that the courts not recognize a duty of care in this instance. His primary argument in that regard appears at paragraph 61 of his submissions. There Mr. Parke asserts that "in-depth screening of all travelers, and all ports, would likely be required to satisfy the duty and would likely need to include random personal searches for weapons." During the motion, he also argued that border crossing areas would become like airport screening areas. Any individual crossing would be required to go through a thorough personal examination.

[66] I court disagree.

[67] For example, at paragraph 46 of his submissions, Mr. Parke indicates that "The relative numbers of deportees attempting entry, over the course of a week/month/year, is small." He also asserts that, "The relative number of times that there is an administrative error is likely small as well." Counsel for the respondents pointed out that Mr. Parke's two positions are inconsistent. Again, I agree. In the instant case the respondents do not suggest that all travelers would undergo the rigorous inspections or searches suggested by the applicant. Those rigorous inspections would be limited to those individuals who were required to undergo a secondary inspection and/or those identified as prior deportees by an appropriate computer search.

[68] Mr. Parke also argued that liability would be "unlimited" and that the CBSA would become an "insurer." With respect, I disagree. The fact situation in the current case is very narrow. Mr. Pharr had been deported for carrying a concealed weapon. The defendant failed to use the resources at its disposal properly in order to re-identify Mr. Pharr when he re-entered the country. It seems to me that it is open to the plaintiff to plead that had the defendants used those resources properly, they arguably would have found a concealed weapon Mr. Pharr was carrying on the second occasion and thereby averted the death of Mr. Bolyantu.

[69] As a result, I find that it is not "plain and obvious" that the responding parties lack an arguable position with respect to the primary public policy considerations raised by Mr. Parke.

Issue (iii) – Are Damages Under the Family Law Act Available?

[70] The moving party argues that damages under the Family Law Act are dependent upon, or a derivative of Mr. Bolyantu succeeding in a claim in negligence against the crown if he were alive.

[71] They argue that it follows that if Mr. Bolyantu did not have a cause of action, any claim under the *Family Law Act* must fail. The thrust of their argument is that Mr. Bolyantu would not have recovered in negligence had he lived to bring the action, because the CBSA did not owe him a private law duty of care.

[72] I have found that there is an arguable position with respect to the existence of a private law duty of care in these circumstances. It follows that this argument by the moving party must also fail.

b) Is the Moving Parties' Delay Fatal to This Motion?

[73] Rule 21.02 provides that *"a motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the Court in awarding costs."*

[74] There has been significant delay in the instant case. The statement of claim was issued in July 2005. The moving party could have brought the motion then. Almost six years have passed in the interim. During that time significant steps have been taken in the action including without limitation, the discovery of six separate individuals and mediation.

[75] Mr. Parke took the position that he had deliberately delayed bringing this motion until discoveries and mediation were completed. He told the court that he hoped those processes would "shine light" on the responding parties' case.

[76] Mr. Parke argued that the court's consideration of effect delay should be limited to costs. He relies upon *Fleet Street Financial Corp. v. Levinson* (2003), 31 C.P.C. (5th) 145 (S.C.J.) at paragraph 24 of his submissions. In that case the court held that the rule does not restrict the court to taking the delay into account only on the question of costs. There the Court cited an extensive line of cases all of which have come to the same conclusion. In some of those cases the motion was dismissed for reasons such as having been brought on the eve of trial, or delay of five to six months in bringing the motion. That case goes on to explain that the purpose of the rule is to reduce unnecessary cost and delay in civil litigation facilitating early and fair settlements. That is not the case here. As I said, in this case the moving party delayed bringing the motion until after significant expenditure had been made by the parties to the action. Discoveries of six individuals have already been held as has the mediation session.

[77] Similarly, in *Colonna v. Bell Canada* (1993), 15 C.P.C. (3d) 65 (O.C.J.) a motion under this rule was dismissed for 18 months delay in bringing it from the time that the motion could have been brought. Here, the delay was about six years.

[78] The moving party makes two main arguments regarding delay.

[79] First, Mr. Parke argues that delay does not operate as a bar to such a motion. The moving party cites *Fleet Street Financial Corp.'s v. Levinson, supra.* (paragraph 24 of the moving party's submissions) I agree that delay in itself does not *automatically* bar such a motion.

Delay and the consequences of that delay are factors to be considered but not in themselves determinative. I agree further that there may be cases where a motion will be granted notwithstanding delay, where the granting of the motion will result in the claim being dismissed or the question of liability being finally determined.

[80] Second, Mr. Parke asserts that delay should be ignored in each and every case where the granting of the motion will result in the claim being dismissed or the question of liability has been finally determined. I consider this submission to be an oversimplification. In this case, if the responding parties' statement of claim is struck, the matter is at an end. It follows that according to the moving party's argument the matter would automatically be at an end. It further follows that Mr. Parke argues that the court should not even consider the question of delay in this case. I disagree. Were that assertion correct, rule 21.02 would have no meaning. "Delay" would not be part of the test. The test would be restricted to a single question of whether or not a successful motion would result in the claim being dismissed, or the question of liability being finally determined.

[81] In this case the court finds two factors to be determinative.

[82] The first is the shear length of delay of six years.

[83] The second is that significant steps (i.e. discoveries of six individuals in the mediation session) that took place during that six-year delay. The very purpose of the rule has been frustrated. I reiterate that a primary purpose of the rule is to avoid various steps in litigation. Moreover, Park's has acknowledged that he deliberately took these steps in litigation, even though he has always felt that the plaintiffs' statement of claim fails to disclose a reasonable cause of action.

[84] If Mr. Parke truly felt from the beginning that the statement of claim failed to disclose a reasonable cause of action, he had two expeditious and economical remedies. He could have made a demand for particulars, or he could have brought this motion in a timely fashion. Were he correct, that would have ended the matter. There would have been no discoveries, and there would have been no mediation. There would have been no six-year delay. Mr. Parke elected not to do so. Instead, he elected to allow the litigation to continue. Said another way, he elected to defeat a primary purpose of the rule.

[85] Simply put, Mr. Parke should not have it both ways.

G. SUMMERY AND CONCLUSION

[86] As I noted earlier, the responding parties concede that there is no underlying cause of action to support the claim for punitive damages in the amount of $1,000,000.00, which appears at paragraph 4 (a) of the statement of claim. Accordingly, the court strikes that paragraph.

[87] The remainder of the moving party's motion is however dismissed.

[88] For all the reasons above I find that it is not plain and obvious that the responding parties' pleadings fail to disclose a reasonable cause of action. Counsel agreed that this is a "novel"

case. Counsel also agreed that the fact that a case is novel is not a bar to its proceeding to trial.

[89] Though the responding parties' case may not be easily proven, that is not sufficient reason for the court to exercise its jurisdiction under rule 21.01 (1)(b). The threshold for sustaining a pleading under rule 21.01 (1)(b) is not a high one.

[90] The moving party's motion also fails for delay.

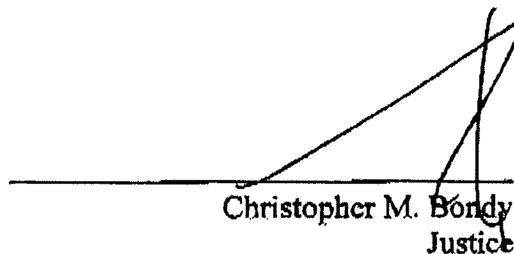
H. COSTS

[91] At the conclusion of the motion I asked counsel to address the issue of costs. I directed that each counsel assume that they *won the motion on all issues*, and asked that they come up with an "all in" amount.

[92] Counsel agreed that if either party won on all issues, reasonable costs of the motion should be assessed at $6,000.00, all inclusive.

[93] The responding parties, were successful but *not on all issues*. The responding parties conceded without argument, that there is no underlying cause of action to support the claim for punitive damages at paragraph 4 (a) of the statement of claim.

[94] Given all of the foregoing I conclude that costs in the amount of $4,500.00 payable by the moving party to the responding party to be reasonable in this case. The moving party shall have 60 days to pay.



Christopher M. Bondy
Justice

Released: May 2, 2011

CITATION: Bolyantu et al. v. The Attorney General of Canada, 2011 ONSC 2397
COURT FILE NO.: 05-CV-5233 CM

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DONNA BOLYANTU, STEVEN BOLYANTU, DAVID BOLYANTU AND TYLER DUPUIS, MINOR BY HIS LITIGATION GUARDIAN LORI DUPUIS AND DANTE SMITH, MINOR BY HIS LITIGATION GUARDIAN NATASHA SMITH

Plaintiffs/Responding Parties

– and –

THE ATTORNEY GENERAL OF CANADA, JANE DOE(S) and JOHN DOE(S)

Defendants/Moving Parties

REASONS ON MOTION

Bondy J.

Released: May 2, 2011