November 25th, 2009

The public and private duties of opposing counsel

By Alice Woolley

Cases Considered:

F.N. v. McGechie, 2009 ABQB 625

Alberta courts have consistently held that misconduct by counsel in the course of litigation will not normally be the basis for liability to the opposing party in that litigation. While sometimes duties to opposing parties exist – as, for example, in the tort of malicious prosecution – the Alberta Court of Appeal in *German v. Major* (1985), 62 A.R. 2 (C.A.) made it clear that the duties of the lawyer to the court and to the public do not automatically translate into duties to opposing parties.

In *German v. Major* a prosecutor was sued for malicious prosecution and because he allegedly failed to investigate, failed to act fairly and failed to take care (*German* at para. 46). The Court held that the action for malicious prosecution was not established on the facts (*German* at para. 37) and that the action in negligence could not succeed. While the prosecutor undoubtedly had duties to investigate, act fairly and take care, those duties were public, not private. Justice Kerans observed that:

> [t]he trial-as-a-contest of which I speak requires, in our tradition, a champion. The loyalty of counsel to a client traditionally has no bounds save to be honest and respectful. It would be a remarkable alteration in the adversary system for counsel for one party in litigation to be accountable to the other party for the conduct in good faith of the litigation. The duty of counsel is to represent his client's interests; the law should not impose a conflicting duty upon him (at para. 57).

This position has been followed in subsequent cases. In *Martel v. Andrews*, 2005 ABCA 63, the Court (citing *German v. Major*) held that a lawyer who files a false affidavit does not act wrongfully unless he or she has knowledge that the affidavit is false and that, in any event, the filing of a false affidavit would at most violate "a public duty…owed as an officer of the court to the court and not a private duty owed to the opposite side in the lawsuit" (*Martel* at para. 15). In *ESA Holdings Ltd. v. Shea Nerland Calnan LLP*, 2007 ABQB 78, the Court held that no claim could be made against a lawyer for presenting false evidence. This was in part because in the

circumstances the plaintiff's allegations constituted an abuse of process. But it was also because the defendant lawyer owed no duty to the plaintiff in this respect:

> The principles set out in these cases make it clear that a duty is not owed by the Defendant Solicitors to the Plaintiff… Any duty owed is to the Court and to the governing body of the legal profession and not to the Plaintiff. The Statement of Claim as it relates to any allegation of a breach of duty does not disclose a cause of action. (*ESA Holdings* at para. 17).

Finally, in a recent decision, *Hanson v. Hanson*, 2009 ABCA 222, the Court of Appeal rejected an attempt by a husband to file a third party notice on the lawyers who had provided independent legal advice to his wife when she signed a prenuptial agreement. The Court said that while there are some circumstances in which a lawyer may be liable to a non-client, such duties are imposed very restrictively, and should not be imposed in this case. If the lawyers failed to give proper legal advice to the wife, the violation of duty would be to her, not her prospective husband (*Hanson* at paras. 15-16).

Despite this significant body of authority, a recent decision by Master Wacowich refused to strike an action brought against a lawyer who had acted for the former wife of the Plaintiff. The Plaintiff alleged, *inter alia*, that the Defendant lawyer had "counseled and assisted Ms. C. in purporting (sic) lies, innuendo and other misrepresentations against the Plaintiff in breach of his duties and obligations as a lawyer" (*F.N.* at para. 12). Master Wacowich struck out most of the remainder of the Plaintiff's claim, but sustained this paragraph because it alleged that the Defendant had "actively participated in putting forward perjured evidence" (*F.N.* at para. 20). This meant, Wacowich asserted, that the facts were distinct from those in *Martel v. Spitz*, and were sufficient to allow the claim to proceed.

With respect, this decision does not provide sufficient consideration of the body of cases noted above, of which *Martel* is only one, and which set out a much broader proposition about the limits on the liability of counsel. It does not discuss or distinguish the reasons offered in those cases for limiting the liability of counsel in this respect. As those cases explain, there is a risk of improperly tempering the duty of resolute advocacy if lawyers risk civil liability for how they conducted a case and, in particular, for the way their clients have behaved in the conduct of a case. This is not to suggest that there are no counter-vailing concerns. Particularly for lawyers acting for the Crown, where the duty of resolute advocacy is qualified, it may be appropriate to contemplate civil liability not only for malicious prosecution but also for intentional violations of constitutional rights, such as through deliberately introducing coerced and perjured testimony (a case of this type was just heard by the United States Supreme Court; see commentary at Legal Ethics Forum). It is, however, to suggest that the decision to allow the case to proceed here needed to take account of this line of authority before the Court ruled as it did. It needed to be explained why those cases were wrongly decided or inapplicable here.

It is not obvious from the facts as presented that this case warrants overturning this long line of authority on this point. The lawyer in question was not a crown prosecutor, and unquestionably

owed the mother a duty of resolute advocacy. Further, and more specifically, the allegations against the lawyer appear to be ones properly raised directly in the action respecting the parentage and maintenance of the two children from a common-law relationship. If the mother's evidence was false and improperly introduced, then the true relevance of that claim is to the resolution of the substantive dispute between the couple, not to any liability of the lawyer. It is in the context of that action that any wrong to the Plaintiff with respect to the Defendant's conduct should be resolved. The decision does not indicate why this action is, in substance, different from that struck in *ESA Holdings* as an abuse of process. In this case the main matter may have settled, or not yet been concluded, but that does not, I would argue, make the allegations any less properly addressed within that action, rather than in a separate civil claim. Further, as Master Wacowich notes, a number of allegations made by the Plaintiff do not disclose a cause of action, or are only minimally pled; the entire Statement of Claim seems dubious at best and vexatious at worst.

Master Wacowich states that he reached his decision "not to strike the Statement of Claim reluctantly" (para. 32). In my view such reluctance was warranted, and should have led to a different result.