

Claim Case Study:

Fowler v. Family and Children's Services of the Waterloo Region, 2024 ONCA 41

Background

The Appellant ("Fowler") was a foster parent who had a child placed in their care by the Family and Child Services of the Waterloo Region ("FCS"). The child later alleged sexual abuse, prompting an FCS investigation. Fowler claimed that the negligent investigation led to a breakdown of his family and the apprehension of one of his daughters, who were also appellants in this case.

In response to the negligent investigation and apprehension of his daughter, Fowler sued the FCS, as well as two of its employees, alleging:

- Breach of statutory duty,
- Breach of duty of care,
- Breach of fiduciary duty,
- Defamation

The FCS filed a motion to strike the pleadings on the grounds that Fowler failed to disclose a reasonable cause of action. FCS argued that child welfare agencies do not owe legal duties to foster families as alleged in the Statement of Claim. Additionally, FCS argued that the employees were protected under s. 15(6) of the *Child and Family Services Act*, R.S.O. 1990, c.C.11 ("CFSA").

The motion judge found that the Statement of Claim was vague, lacked particulars and failed to plead material facts. At the motion, Fowler attempted to attach written service agreements between Fowler and the FCS, however, the motion judge would not accept these documents as their existence was not properly pleaded in the Statement of Claim and could not be considered part of the claim. Ultimately, the motion judge granted the FCS's motion to strike. The motion judge also allowed Fowler to file a fresh as amended Statement of Claim in order to pursue an action for misfeasance in public office.

Fowler appealed this decision, alleging that the motion judge misinterpreted in their analysis of the Supreme Court of Canada's decision *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 ("Syl"). Fowler claimed that the motion

judge misapplied this Supreme Court decision by precluding foster parents from bringing actions for negligence and breach of fiduciary duty.

Issues Under Appeal

Fowler appealed the motion judge's decision, arguing that the judge erred on the following three grounds:

1. **Exclusion of Affidavit Evidence** – Fowler argued that the motion judge wrongfully refused to admit or consider affidavit evidence detailing the terms and conditions of the foster care agreement between Fowler and FCS.
2. **Dismissal of Claims** – Fowler argued that the motion judge incorrectly held that the statement of claim failed to establish a valid cause of action for negligence, breach of fiduciary duty, or breach of contract under Rule 21.01(1)(b).
3. **Improper Application of Section 15(6)** – Fowler argued that the motion judge improperly applied Section 15(6) of *CFSA* to bar the appellants' claims against the individual FCS employees.

Analysis

Issue 1: Exclusion of Affidavit Evidence

On motion, Fowler attempted to submit an affidavit which included agreements between himself and FCS as exhibits. However, the motion judge refused to admit these agreements citing the *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 21.01(2)(b) which confirms that "no evidence is admissible" on a motion under Rule 21.01(1)(b).

21.01 (1) A party may move before a judge,

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 **(1)**.

(2) No evidence is admissible on a motion,

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 **(2)**.

On appeal, Fowler alleged that the motion judge erred, arguing that the Statement of Claim identified him as a foster parent with the FCS and that foster families were required to enter into written agreements. Therefore, it was Fowler's position that the agreements were inherently part of the pleadings.

The appeal court found that Fowler's written agreements were not explicitly pleaded in the Statement of claim. The appeal on this ground was dismissed. The leading Court of Appeal case on the admissibility of documents under a Rule 21.01(1)(b) motion is *McCreight v. Canada (Attorney General)*, 2013 ONCA 483. This decision establishes that a motion judge may consider a document if it is "incorporated by reference into the pleading and forms an integral part of the plaintiff's claim" (para 32).

The agreements were not integral to the factual framework of the claim, nor did Fowler plead their existence, specific terms or alleged breach. The appeal court found that the motion judge correctly determined that the agreements were inadmissible.

Issue 2: Dismissal of Claims (negligence, breach of fiduciary duty, or breach of contract)

As referenced above, a motion under Rule 21.01(1)(b) to strike a pleading, may be granted when the pleading fails to disclose a reasonable cause of action. The motion judge found that the claims for negligence, breach of fiduciary duty and breach of contract were untenable.

As outlined in *Kang v. Sun Life Assurance Company of Canada*, 2013 ONCA 118, 303 O.A.C. 64, para 27, the standard of review for an appeal of a Rule 21.01(1)(b) is correctness (whether the lower court's ruling was right or wrong according to law).

The motion judge found that recognizing a duty of care for negligence or fiduciary duty between Fowler and the FCS, would put FCS in direct conflict with its paramount duty to act in the best interests of the child. It is well-established law that child protection agencies do not owe duties to third parties in the exercise of their mandate under the *CFSA*. In support, the motion judge referenced decisions *Syl and J.B. v. Ontario (Child and Youth Services)*, 2020 ONCA 198 (J.B.).

In *Syl*, the Plaintiff's, who were the biological family members of a child in foster care, claimed that the child welfare agency

negligently treated the child as a victim of abuse, resulting in the child's separation from the family. The Supreme Court held that no duty of care existed between the parties, reasoning that child welfare agencies must be able to act in the best interests of the children without the fear of liability to third parties.

This principle stems from the *CFSA*, which mandates that child welfare agencies prioritize the best interests of the children under their care. This duty takes precedence over any potential obligations or relationships to third parties. In the *Syl* case, the Supreme Court found no proximity in the relationship between the treatment facility and the parents.

Fowler argued that *Syl* did not address the duty to foster families and instead, focused on the relationship between biological parents. However, the appeal court referenced the case *J.B.* in further support of their position. Although *J.B.* also involved family members of a child in foster care, the court in that case confirmed that *Syl* established a categorical rule, precluding negligence claims against child welfare agencies.

The appeal court found that the ruling in *J.B.* was clear: Children's Aid Societies do not owe a duty of care in negligence to any third parties, as such a duty would conflict with their statutory responsibility to act in the best interests of the children in their care.

In addition to negligence, Fowler also argued that FCS owed him a fiduciary duty. A fiduciary duty requires one party to act in the best interests of the other. However, FCS's duty under the *CFSA* is to act in the best interests of the child, not the foster family. Given the potential conflict of interests between the child and foster family, FCS's fiduciary duty must be to the child alone. The appeal court agreed with the motion judge's conclusion that there was no reasonable cause of action based on breach of fiduciary duty in this case.

Fowler argued that this case was materially different, as this involved a principal-agent relationship. However, as previously noted, the agreements between Fowler and FCS were inadmissible due to lack of reference in the pleadings. In regard to the statutory and regulatory basis for a principal-agent relationship that might give rise to a duty of care, the appeal court accepted the motion judge's analysis:

To the extent that the service agreement between [Fowler] and FCS is evidence of proximity and any

duties owed by FCS to the plaintiff, in my view, those contractual obligations cannot be interpreted in a way that subordinates the agency's overarching duty to the best interests of a child.

Any statutory obligations toward foster parents under the CFSA cannot conflict with the Act's paramount purpose to promote the best interests, protection, and well-being of children.

Issue 3: Improper Application of Section 15(6)

Section 15(6) of the CFSA, at the time, read:

No action shall be instituted against an officer or employee of a society for an act done in good faith in the execution or intended execution of the person's duty or for an alleged neglect or default in the execution in good faith of the person's duty.

Fowler contended that the FCS employees should be held personally accountable for their actions in bad faith. FCS argued that the employees were shielded from civil liability under section 15(6). However, Fowler held the position that the employees did not act in good faith and were therefore, not protected under the above-noted section.

The motion judge found that the allegations of bad faith in the Statement of Claim were vague, and insufficient to overcome the statutory immunity granted by section 15(6). The appeal court found that there was no merit that the motion judge erred in their application.

Ultimately, the appeal court dismissed the appeal and awarded costs to the defendant.

Key Takeaways

- Protection under the CFSA
 - Child welfare agencies have legal protection under the CFSA, especially regarding their duty to act in the best interests of the child. This case reinforces that child welfare agencies do not owe duties of care to third parties, such as foster families, when carrying out their statutory mandate to protect children. This protection ensures that child welfare workers can act decisively in the best interests of children without fear of liability from third parties.

- Immunity for Employees Under Section 15(6)
 - The CFSA was amended, and this clause can now be found under section 37 of the CFSA.
 - This case highlights the immunity which shields CAS employees from personal liability when acting in good faith within the scope of their duties.
- Proper Pleading is Critical
 - This case highlights the importance of properly pleading claims in legal proceedings. In this case, Fowler's Statement of Claim was struck because it lacked sufficient detail and material fact. CAS should ensure that any legal challenges or actions taken against the society are thoroughly vetted.

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