Q.B.G. A.D. 2001
No. 2291 J.C.S.

IN THE QUEEN'S BENCH
JUDICIAL CENTRE OF SASKATOON

BETWEEN:

JOHN DAVID LUCAS

PLAINTIFF

- and -

BRIAN GEORGE DUECK, CAROL BUNKO-RUYS, SHEILA GAGNE, GREGORY WALEN, BARRY H. ROSSMANN, SONJA HANSEN, MATTHEW MIAZGA, W. RODRICK DONLEVY, TERRY R. HINZ, WILFRID K. TUCKER, RICHARD QUINNEY, DON MCKILLOP, UNKNOWN SASKATOON CITY POLICE OFFICER, BOARD OF POLICE COMMISSIONERS OF THE CITY OF SASKATOON, MINISTER OF JUSTICE OF SASKATCHEWAN, MINISTER OF SOCIAL SERVICES OF SASKATCHEWAN

DEFENDANTS

John Lucas	on his own behalf
Darryl Brown	for Carol Bunko-Ruys, Sheila Gagne, Sonja Hansen, Matthew Miazga, Terry Hinz, Wilfrid Tucker, Don McKillop, Richard Quinney and the Ministers of Justice and Social Services
Thomas Schonhoffer	for Gregory Walen, W. Rodrick Donlevy and Barry H. Rossmann
David Gerrand	for Brian Dueck, Barry H. Rossmann, Unknown City Police Officer and the Saskatoon Board of Police Commissioners

JUDGMENT SMITH J.

January 2, 2002

[1] The plaintiff has commenced an action against a number of persons and institutions alleging that they conspired in a malicious prosecution resulting in his wrongful conviction, in 1993, for criminal libel under section 300 of the *Criminal Code*. This conviction was upheld by the Saskatchewan Court of Appeal and ultimately, in 1998, by the Supreme Court of Canada. The defendants include a social worker and a Saskatoon City Policeman who, in the early to mid 1990's, were involved in the investigation of allegations of sexual abuse by their foster parents and members of the extended families of the foster parents of three children in foster care in Saskatchewan. Other defendants are the alleged supervisors of the social worker and the City policeman, a number of Crown prosecutors or former Crown prosecutors, the then Director of Public Prosecutions, the Minister of Justice and the Minister of Social Services, a lawyer in private practice who was engaged to prosecute the charge of criminal libel against the plaintiff, and three other lawyers in public or private practice who have represented others of the named defendants in related proceedings.

[2] The plaintiff alleges that his conviction for criminal libel was as a result of "a conspiracy between 1993 and 1998 to perpetrate a fraud on the Provincial Court of Saskatchewan, the Court of Queen's Bench for Saskatchewan and the Supreme Court of Canada by knowingly committing perjury, suborning evidence, interfering with witnesses, deliberately failing to make a full and complete disclosure and/or failing in their duty to report any of the foregoing." (Statement of Claim, paragraph 4)

[3] The defendants are separately represented, in three groups: employees of the Government of Saskatchewan including the social workers, Crown prosecutors and Ministers of Justice and Social Services in one group; individual Saskatoon City Policemen and the Board of Police Commissioners of the City of Saskatoon in a second group; and lawyers Greg Walen and Rod Donlevy in a third group. Both Mr. Gerrand (lawyer representing group #2) and Mr. Schonhoffer (representing the third group) believed themselves to be representing Mr. Rossmann, who is a solicitor employed by the City of Saskatoon. Each group of defendants has brought an application pursuant to Rule 173(a), (c) and (e) to strike the statement of claim on the grounds that it discloses no cause of action and that it is frivolous, vexatious and an abuse of the Court's process.

[4] The background for the plaintiff's action is summarized in the judgment of Cory J. in the decision of the Supreme Court of Canada upholding the plaintiff's conviction for criminal libel (*R. v. Lucas*, [1998] 1 S.C.R. 439). It is useful to reproduce that summary here.

> A police officer investigated allegations of sexual abuse made by three children, [M. 1] R. and his twin sisters [M. 2] R. and [K.] R. The children alleged that they had been sexually abused by their birth parents, their foster parents (Mr. and Mrs. K.), and several members of their foster parents' family. The children initially disclosed the abuse to their therapist, Mrs. Bunko-Ruys, and to Mr. and Mrs. T., who ran a special care foster home where the children had been placed after they were moved out of the home of Mr. and Mrs. K.
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> As a result of the investigation, criminal charges were laid against 16 people including the children's natural parents, their foster parents (Mr. and Mrs. K.) and members of the K.s' extended family. With the exception of Peter K., the father of the complainants' foster father, who pled guilty to charges of sexual assault, all of the charges against the K. family were either withdrawn or stayed. The children's natural parents were convicted but on appeal a new trial was ordered. See *R. v. R. (D.)*, [1996] 2 S.C.R. 291.
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> During the course of his investigation, the police officer was informed by Mr. and Mrs. T. that the children had been openly displaying inappropriate sexual behaviour. He was told that they were sexually active with each other and that the family dog had been subjected to sexual acts. Moreover, the police officer had been informed that [M. 1] had sexually assaulted his sisters on numerous occasions and that Mr. and Mrs. T., despite their efforts, were unable to stop him. The acts of sexual abuse were also recounted to the officer during the course of his interviews with the three children. However, as a result of his reliance upon the opinion of the children's therapist, the officer kept them together in the same special care

foster home. This, it was believed, would make the children easier to treat.

Mr. Lucas was active in a Saskatoon prisoners' rights group. He was contacted by four of the individuals whose charges had been stayed. They were seeking advice as to how to cope with the impact that these allegations were having on their lives even though the charges had been stayed. The individuals maintained that they were innocent and agreed to provide John Lucas with all of the information and documentation they possessed regarding the charges. This consisted of transcripts, reports prepared by the children's therapist and notes prepared by Mrs. T. which described, in vivid detail, the sexual activities of the three children.

On the basis of these documents, the appellants apparently understood that [M. 1] had raped, sodomized and tortured his sister [K.] and repeatedly participated in sexual activities with his other sister, [M. 2]. They concluded that the officer had knowledge of what was transpiring and that as a police officer, he had a duty to intervene. Consequently, they could not understand why he had not done so. Several complaints were made to the Police Commission, the Premier's office and the office of the Attorney General, but the appellants did not obtain their desired response.

As a result, on September 20, 1993, the appellants and a small group of others picketed outside the Provincial Court of Saskatchewan and the police headquarters where the officer worked. Mrs. Lucas was carrying a sign prepared by Mr. Lucas which read on one side: "Did [the police officer] just allow or help with the rape/sodomy of an 8 year old?" and on the other side: "If you admit it [officer] then you might get help with your touching problem." Mrs. Lucas was arrested and charged with defamatory libel under ss. 300 and 301 of the Code. Mr. Lucas was warned that if he continued to carry signs naming individuals, he too would be charged.

> The following day, Mr. Lucas again picketed in front of the Provincial Court and police headquarters. This time, he carried a sign which, on one side, read: "Did [the police officer] help/or take part in the rape & sodomy of an 8 year old. The T[] papers prove [the officer] allowed his witness to rape"; and on the other side: "The T[] papers prove [the officer] allowed the false arrest & detention of Mrs. Lucas, with a falsified information". Mr. Lucas was subsequently arrested and charged under ss. 300 and 301 of the Code.
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> At trial, the appellants argued that their freedom of expression as guaranteed by s. 2(b) of the Charter had been infringed. The trial judge agreed but concluded that s. 300 was saved by s. 1 of the Charter. He found both of the appellants guilty of defamatory libel under s. 300 and held that the appellants should have known that the statements on their placards were false. Mr. Lucas was sentenced to imprisonment for two years less a day, and Mrs. Lucas was sentenced to imprisonment for 22 months. The appellants appealed to the Court of Appeal. Their appeals against conviction were dismissed, but their appeals against sentence were allowed, and the sentences were reduced to 18 months and 12 months respectively.

[5] Recently, in 2000 and 2001, all three of the R. children, now adults, have recanted their allegations that they were sexually assaulted by their foster parents or members of the foster parents' extended family, but have confirmed that the two girls were subjected to on-going and brutal sexual abuse by their brother over many years, including the time that they were kept together in the same foster home after their initial allegations. The plaintiff, who had been arguing (indeed, persistently and publicly proclaiming) for years that the evidence to which he had access showed this to be the case, now feels vindicated. He has concluded that his conviction for criminal libel is now, for this reason, shown to have been wrongful and alleges that the defendants conspired to mislead the courts in order to obtain the conviction and to "shut him up" in relation to his very public criticism of the handling of the children's allegations.

[6] Paragraph 3 of the statement of claim makes this general allegation:

3. Irrefutable NEW EVIDENCE obtained within the last year, conclusively shows that all of the Defendants, or more than one, entered into a criminal conspiracy during the summer of 1993 to have the Plaintiff unlawfully charged and maliciously prosecuted under Sections 300 and 301 of the Criminal code [sic] for claiming that Defendant Dueck was responsible for allowing or taking part in the rape and sodomy of two eight year old girls;

   (a) The Plaintiff says and the facts are, that in 1998, the Supreme Court of Canada unanimously upheld the Plaintiff's Section 300 conviction regarding the above described September, 1993, Section 300, Criminal Code charge;

   (b) The Plaintiff says and the fact is, that the Plaintiff has taken extreme care regarding Rule 173 c., in the Rules of Court, but it should be noted that this lawsuit revolves around the now undisputed fact that Defendant Dueck and Defendant Bunko-Ruys, allowed [M. 2] R. and [K.] R. to be raped, sodomized and otherwise tortured, for a period of 43 months.

[7] Other paragraphs allege that "all of the Defendants or more than one of them" committed perjury, suborned evidence, interfered with witnesses, failed to make a full and complete disclosure or failed in their duty to report "the foregoing" (para. 4); did not have an honest belief in the guilt of the Plaintiff and conspired against him to avoid criticism "for allowing [[M. 1] R.] to rape, sodomize and torture [his sisters] (para. 5) or "for allowing the cover-up that followed their discovery that. . .Dueck and. . .Bunko-Ruys had allowed [[M. 1] R. to do the acts described.]" (para. 6); removed [M. 1] R. to an undisclosed location after the plaintiff attempted to subpoena him in 1993 and then falsely portrayed to the Court that [M. 1] R. was only a ten or eleven year old child with a "touching problem" although, in fact, he was at

the time 14 years old and the allegations against him were on going and much more serious (para. 7(a)).

[8] The various defendants raise a number of objections to the statement of claim. Counsel for the individual lawyers Walen, Rossmann and Donlevy argues that the plaintiff has failed to allege material facts sufficient to found either an allegation of conspiracy or the tort of abuse of statutory power in that there is a bare allegation of an agreement, but no facts from which an agreement can be inferred, (similarly re the allegations of perjury and lack of honest belief in the plaintiff's guilt) and there are no allegations of any overt acts which any of these defendants performed in pursuance of the conspiracy. He argues, further, that it appears that these defendants have been named in the present action solely on the basis of their action as lawyers representing the interests of various of the other parties. He cautions that the court should be extremely cautions in allowing lawyers, in their role as professional advisors, to be drawn into actions on this basis, for such actions impair the lawyers' ability to fully and vigorously represent their clients and is against the public interest in the absence of "convincing evidence that the lawyers either assumed a duty of care or were acting in bad faith".

[9] Counsel for the Government of Saskatchewan ministers and employees and counsel for the employees and departments of the City of Saskatoon similarly complain of the vague and unfocused allegations of perjury, suborning evidence and interfering with witnesses. No specific defendants are identified in the statement of claim as having committed such acts.

[10] All the defendants argue that in an action for conspiracy the statement of claim must describe the parties to the conspiracy, precisely state the purpose or object of the alleged conspiracy, and give particulars of the agreement, the overt acts committed by each conspirator and the damage sustained by the plaintiff as a result. The elements of the tort of conspiracy are set out in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452.

[11] All also argue that an action for malicious prosecution in relation to the plaintiff's 1993 conviction for criminal libel cannot succeed in light of the decision of the Supreme Court of Canada, ultimately upholding that conviction, in 1998. First, it is argued that a claim of malicious prosecution cannot succeed unless the prosecution complained of resulted in the plaintiff's acquittal (citing decisions of the Supreme Court of Canada in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 and *Proulx v. Quebec (Attorney General)*, [2001] S.C.J. No. 65 (S.C.C.)(QL). Second, it is argued that the

present action seeks to relitigate issues in relation to the plaintiff's conviction that were, in any case, fully canvassed and dealt with in the Supreme Court decision.

[12] The tests to be applied in determining whether a claim should be struck pursuant to Rule 173(a), (c) or (e) were addressed by the Saskatchewan Court of Appeal in *Sagon v. Royal Bank of Canada et al.* (1992), 105 Sask. R. 133. Re Rule 173(a), Sherstobitoff J.A. commented as follows:

> [16] In determining whether a claim should be struck as disclosing no reasonable cause of action, the test is whether, assuming the plaintiff proves everything alleged in his claim, there is nevertheless no reasonable chance of success, or to put it another way, no arguable case. The court should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the court is satisfied that the case is beyond doubt: **Marshall v. Saskatchewan, Government of, Petz and Adams** (1983), 20 Sask. R. 309 (C.A.); **The Attorney General of Canada v. Inuit Tapirisat**, [1980] 2 S.C.R. 735; 33 N.R. 304. The court may consider only the statement of claim, any particulars furnished pursuant to demand, and any document referred to in the claim upon which the plaintiff must rely to establish his case: **Balacko v. Eaton's of Canada Limited** (1967), 60 W.W.R. (N.S.) 22 (Sask. Q.B.); **Lackmanec v. Hoffman and Wall** (1982), 15 Sask. R. 1 (C.A.).

[13] Sherstobitoff J.A. also pointed out that Rule 173 permits amendment rather than striking out in appropriate cases (at para 17. p. 140.).

[14] Regarding sub-rule 173(c), he commented:

> [18] Striking out an entire claim on the ground that it is frivolous, vexatious or an abuse of process of the court is based on an entirely different footing. Instead of considering merely the adequacy of the pleadings to support a reasonable cause of action, it may involve an assessment of the merits of the claim, and the motives of the plaintiff in bringing it. Evidence other than the

pleadings is admissible. Success on such an application will normally result in dismissal of the action, with the result that the rule of res judicata will likely apply to any subsequent efforts to bring new actions based on the same facts. Odgers on **Pleadings and Practice**, 20th Ed. says at pp. 153-154:

> "If, in all the circumstances of the case, it is obvious that the claim or defence is devoid of all merit or cannot possibly succeed, an order may be made. But it is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. Its exercise would not be justified merely because the story told in the pleadings is highly improbable, and one which it is difficult to believe could be proved." (footnotes omitted)

[15] And finally, regarding sub-rule 173(e);

[19] Finally, a separate mention should be made of the power of the court to prevent abuse of its process, a power which is inherent as well as conferred under rule 173. Bullen and Leake defines the power as follows as pp. 148-149:

> "The term 'abuse of the process of the court' is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court by the stay or even dismissal of proceedings, 'although it should not be lightly done, yet it may often be required by the very essence of justice to be done'.

> "The term 'abuse of process' is often used interchangeably with the terms 'frivolous' or 'vexatious' either separately or more usually in conjunction." (footnotes omitted)

[16] Applying these principles in the instant case, a number of points can be made. The defendants' arguments in relation to sub-rule 173(a), that the statement of claim discloses no cause of action, all revolve around what might be described as the generality, lack of focus and lack of particulars of the allegations in the pleadings. These are not, of course, trivial complaints, for these faults make it difficult or impossible for the defendants to plead in response. The failure to define the role it is alleged that particular named defendants played in the alleged conspiracy is particularly troublesome, for it is not at all clear how some of the defendants could have been involved in any way with the 1993 prosecution of the plaintiff. It seems clear from the material filed by the plaintiff in response to these applications, and from his oral presentations, that some of the defendants (presumably this would include the two cabinet ministers, the police and social worker supervisors and the Board of Police Commissioners of the City of Saskatoon) are thought to be vicariously liable for the actions of their employees, or those whom they were responsible for supervising. This, however, is not alleged in the statement of claim.

[17] These faults, together with the general failure to plead sufficient material facts, such as an allegation of an agreement, to sustain the allegation of a conspiracy, would, in my view, be sufficient to make it impossible to allow the statement of claim to stand in its present form. However, it is to be remembered that the plaintiff is unrepresented in this action. In my view, the general nature of the allegations is clear, and it is possible that these defects could be remedied by amendment, or even by responses to demands by the defendants for particulars.

[18] Unfortunately for the plaintiff's case, the matter does not end there. I am satisfied after a careful reading of the statement of claim together with the material filed by the plaintiff on this application, coupled with attention to his oral arguments on the hearing of the application, that this claim cannot succeed in light of the decision of the Supreme Court of Canada in *R. v. Lucas*, above cited, which upheld the 1993 convictions of the plaintiff and his wife.

[19] The plaintiff clearly believes that evidence by the now adult R. children to the effect that the foster families were innocent of any sexual abuse of the children,

but that [M. 1] R. was subjecting his sisters to on-going and serious sexual abuse, will show that his concerns and complaints about the way the matter was handled, at the time, had considerable merit. It is clear that he was particularly outraged by the characterization of [M. 1]'s actions, in the investigative reports to which he gained access, as a "touching problem". He apparently felt that this ludicrously minimized [M. 1]'s alleged conduct and tended to discount the impact this should have had on the children's credibility. He also believed that it resulted in leaving [M. 1] in a position to continue the abuse. It is possible that these concerns will now be shown to have been well founded. While the posters and signs the plaintiff drafted and which were carried by his wife and himself were not merely intemperate, but made scandalous allegations against the investigating police officer, it is clear that they were motivated by these beliefs and these concerns, and a desire to bring these matters to the public attention. This was recognized by Cory J. in his outline of the facts leading to the criminal libel charges, quoted above.

[20] I am not persuaded that the effect of *Nelles* and *Proulx* is necessarily to require proof of an acquittal in order to sustain an allegation of malicious prosecution, where it is the position of the plaintiff, as in this case, if I understand it, that his conviction was obtained by fraud (withholding evidence from the Court, or misleading the Court, in relation to the facts disclosed to the investigating parties which would have pointed to the abuse of his sisters by [M. 1] R.). These cases do not address the possibility of a conviction subsequently shown to have been a *wrongful* conviction, or one obtained by fraud.

[21] Nonetheless, it is clear that in order to succeed in this action the plaintiff must establish that his conviction was wrongful. Many may feel concern about the prosecutorial use of s. 300 of the *Criminal Code* to suppress public criticism, by a citizen, of the official handling of matters of such grave public concern however ill considered and untempered such criticism may be. However, previous decisions in relation to the plaintiff's conviction, binding on this court – particularly that of the Supreme Court of Canada – make it clear both that this use of s. 300 of the *Criminal Code* is constitutional and that the factual basis for the conviction of Mr. Lucas was in no way dependent upon the truth or lack of truth of Mr. Lucas' beliefs about the sexual abuse of his sisters by [M. 1] R.

[22] The careful analysis of Cory J. in the Supreme Court judgment makes it clear that the plaintiff cannot succeed, on this basis, in establishing that his conviction was wrongful. The passages quoted, above, from the judgment of Cory J. show that he was well aware of the allegations that motivated the plaintiff and his wife to carry the impugned placards. The conviction was nonetheless upheld on the basis that the

objective meaning of the signs was, even in light of the facts believed by the plaintiff to be true, false and defamatory, and the accused knew the allegations on the placards to be false. This is clearly set out in the following passages from the judgment of Cory J.

> There are two aspects to the mens rea issue. First, did the appellants intend to defame the police officer? Secondly, did they know that the statements they published were false? With respect to the former, there can be no clearer indication of their intention to defame the police officer than the testimony of Mr. Lucas that their purpose in publishing the statements was "to have him thrown in jail", "to have him lose his pension, his job", and "to have him charged in court". Clearly then, their intention was to injure the reputation of the officer, and thus came within the definition of defamatory libel set out in s. 298. This conclusion is reinforced both by the inflammatory and provocative language used in the placards, and by the displaying of the placards in the locations which were calculated to have the most embarrassing and injurious effect on the officer.
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> The placards accused the police officer of actually physically assaulting a child by stating: "Did [the police officer] help/or take part in the rape & sodomy of an 8 year old". Further, one of the signs made by Mr. Lucas, but carried by his wife at her insistence, implied that the officer had a "touching problem", an obvious euphemism for a proclivity for sexual molestation. It stated: "If you admit it [officer] then you might get help with your touching problem."
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> There was evidence adduced at trial which proves beyond a reasonable doubt that they both knew that the objective meaning of the words on the placards Mr. Lucas made was false. Mr. Lucas testified that his wife had access to the pertinent documents, and that he and his wife had read them together and discussed them. Moreover, he testified that he and his wife were concerned about the police officer's tendency to refer to the children's sexual

> activities as a "touching problem". It is also apparent that the appellants knew that the officer did not have a "touching problem". In light of this, the evidence is clear and overwhelming that on a subjective standard, the appellants knew that the material on the placard prepared by Mr. Lucas and carried by Mrs. Lucas was false. Yet Mrs. Lucas insisted on carrying this placard. There was simply no evidence in the material the appellants read that the officer had a proclivity for sexual molestation, that is to say a "touching problem".
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> . . .
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> The appellants knew that the police officer had not committed the despicable acts implied by the signs. Mr. Lucas admitted that there were no accusations in the T. papers of sexual abuse by the officer and that they knew that the officer had not sexually assaulted anybody. Further, the appellants knew that the officer did not have a "touching problem" per se. Rather, they believed that he had inappropriately used the word "touching". There is ample evidence that the appellants had the requisite knowledge of falsity to uphold their conviction under s. 300.

[23] This conclusion both binding and unassailable. It is clear that even if the plaintiff now were successful in proving that the concerns that motivated his 1993 protest were well founded, it would not follow that his conviction was improper, for it was clearly based, not on a misconception by the Court of the facts surrounding these children, but on the falsity and the defamatory nature of the allegations against the police officer on the placards that were carried.

[24] In short, the plaintiff cannot succeed in this action unless he can establish that, in light of the evidence of the now adult R. children, his 1993 conviction for criminal libel was wrongful. The decision of the Supreme Court of Canada in *R. v. Lucas* makes it clear that the plaintiff cannot establish that, for the evidence of the R. children is irrelevant to the basis upon which his conviction was upheld.

[25] In addition to the other defects in the statement of claim already noted, I am satisfied that to allow this claim to continue would permit the plaintiff to relitigate issues already determined against him by the Supreme Court of Canada and would therefore constitute an abuse of the process of this Court.

[26] The statement of claim is struck and the action is dismissed with costs to the defendants represented on this application.

_____ J.