

Superior Court of Justice
Judges' Chambers

Cour supérieure de justice
Cabinet des juges



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Pages: 26 including cover sheet

Date: August 8, 2011

Re: **Lobo v. Carleton University**

Decision by Justice Toscano Roccamo

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CITATION: *Lobo v. Carleton University*, 2011 ONSC 4680
COURT FILE NO.: 11-50693

ONTARIO

SUPERIOR COURT OF JUSTICE

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| B E T W E E N: |) | |
| |) | |
| RUTH LOBO AND JOHN MCLEOD |) | Albertos Polizogopoulos, for the Plaintiffs |
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| |) | |
| |) | |
| |) | |
| Plaintiffs |) | |
| |) | |
| - and - |) | |
| |) | |
| |) | |
| CARLETON UNIVERSITY, DR. |) | Richard G. Dearden/Ryan W.Kennedy, for |
| ROSEANNE RUNTE, DAVID STERRITT, |) | the Defendants |
| RYAN FLANNAGAN AND ALLAN |) | |
| BURNS |) | |
| |) | |
| Defendants |) | |
| |) | |
| |) | |
| |) | HEARD: July 12, 13, 2011 |

DECISION

Madam Justice Toscano Roccamo

Nature of Proceeding

[1] The Defendants, Carleton University (CU) et al. move to have the Statement of Claim of the Plaintiffs, Lobo and McLeod, struck out on the grounds that it discloses no reasonable cause of action; and/or is scandalous, frivolous or vexatious; and/or an abuse of the court process.

[2] The action arises out of CU's refusal to allow Carleton Lifeline (CLL) to display the Genocide Awareness Project (GAP) in the Tory Quad, an outdoor area on CU's campus.

[3] The Statement of Claim seeks a declaration that CU violated the rights of the Plaintiffs under sections 2, 9 and 15 of the *Canadian Charter of Rights and Freedoms (Charter)*. The Plaintiffs also seek a declaration that the Defendants breached several sections of CU's *Human Rights Policies and Procedures (HRPP)* and the *Student Rights and Responsibilities Policy (SRRP)*, and an order that the Defendants comply with these policies. The Statement of Claim further seeks general damages based on the following alleged of action: (i) breach of fiduciary duty; (ii) wrongful arrest; (iii) pain and suffering and damages to reputation; (iv) breach of contract; and (v) negligence.

Background

[4] The Plaintiffs are members of CLL, a pro-life group of Carleton students. The various causes of action arise because the CLL was not permitted to display the GAP in the Tory Quad. GAP is a travelling photo-mural exhibit that compares abortion to genocide using images of aborted unborn babies and genocide atrocities. CU did permit CLL to display GAP in Porter Hall, a location that did not enjoy the same exposure to outdoor pedestrian traffic and campus circulation.

[5] CLL rejected the Porter Hall location and attempted to display GAP in Tory Quad. The Plaintiffs were arrested by the Ottawa Police and were charged with two counts of trespassing under the *Trespass to Property Act (TPA)*, R.S.O. 1990, c. T. 21.

[6] CLL also attended CU campus to display the "Choice Chain", an exhibit involving individuals standing in public areas holding signs with images of first trimester aborted babies. The participants also hand out literature to those who approach them. CLL claims that the Director of Student Affairs sought to censor them by requiring Choice Chain to be conducted in designated contained areas and requiring CLL to provide CU with four days notice of Choice Chain.

[7] Lobo and McLeod are members of CLL. On behalf of CLL, they applied to use Tory Quad for GAP on or about July 2010. CLL was allegedly told that because GAP used material that was "disturbing and offensive to some", CU preferred if GAP was displayed in Porter Hall.

The defendant, David Sterritt (Sterritt) the Director of CU's Housing and Conference Services did not provide justification for this decision, satisfactory to CLL.

[8] On October 4, 2010 the Plaintiffs set up GAP in Tory Quad. They were intercepted by the defendant, Allan Burns, (Burns), the Director of Safety for CU, four special constables of CU's Department of University Safety and nine Ottawa Police officers. The Plaintiffs were arrested, handcuffed, loaded into paddy-wagons and charged with trespassing under the TPA.

[9] On October 7, 2010 CLL attended CU campus to display the Choice Chain. While displaying Choice Chain, they were approached by the defendant, Ryan Flannagan (Flannagan), Director of CU's Student Affairs, who advised them that their display could not be presented on campus. He failed to provide justification for this decision satisfactory to CLL, and threatened them with charges of non-academic misconduct.

[10] On November 18, 2010, Flannagan proposed an agreement with CLL that would allow a "Permitted Exhibit Zone" for Choice Chain. Flannagan is alleged to have advised the Plaintiffs that if they did not adhere to the agreement, they could be arrested.

Key Issues

The issues in this proceeding are:

- 1) Should the Statement of Claim be struck on the grounds that it discloses no reasonable cause of action or is scandalous, frivolous or vexatious and/or otherwise an abuse of process of the Court?
- 2) Should the claim as against the individual named Defendants be struck on the grounds that the Statement of Claim discloses no reasonable cause of action against them in their personal capacities?

Position of the Parties

Striking out a Pleading Generally

Carleton University et al

[11] After the hearing of this motion, the Supreme Court released its decision in *R. v. Imperial Tobacco Canada Ltd*, 2011 S.C.C. 42 refining the test to be met on a motion to strike. Chief Justice McLachlin wrote as follows at paras. 17, 19-24:

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: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. 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: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate; Hunt; Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.

...The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

This promotes two goods – efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost.

... Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow proceed.

...A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1995] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19 (27) of the Supreme Court Rules (now r. 9-5(2) of the Supreme Court Civil Rules). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of

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success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

... The judge on the motion to strike cannot consider what evidence adduced in the future might or might not show. To require the judge to do so would be to gut the motion to strike of its logic and ultimately render it useless.

This is not unfair to the claimant. The presumption that the facts pleaded are true operates in the claimant's favour. The claimant chooses what facts to plead, with a view to the cause of action it is asserting. If new developments raise new possibilities – as they sometimes do - the remedy is to amend the pleadings to plead new facts at that time.

[12] Rule 25.06(2) of the *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, r. 25.06(2), provides that conclusions of law may only be pleaded if the material facts supporting those conclusions are pleaded. Rules 25.11(b) and (c) allow a court to strike out all or part of the pleadings, with or without leave to amend, if the pleading is scandalous, frivolous or vexatious, or is an abuse of process of the Court. Rule 21.03(d) allows a defendant to move to have an action stayed or dismissed for the same reasons. A pleading completely absent of material facts will be declared frivolous. Portions of the pleading that are irrelevant, argumentative, inserted for colour or constitute bare allegations should be struck out as scandalous. The same applies to unfounded or inflammatory attacks or speculative, unsupported allegations of defamation: see *George v. Harris*, [2000] O.J. No. 1762 (S.C.), at para.20.

Plaintiffs/Respondents

[13] While the parties agree as to the test to apply on a motion to strike, the Plaintiffs respond that the Statement of Claim must be read generously, allowing for inadequacies due to drafting deficiencies: see *Lysko v. Braley* (2006), 79 O.R. (3d) 721, (C.A.), at para. 3 citing *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.). They also note that the Court should not dispose of matters of law that are not settled in jurisprudence: see *Transamerica Life Inc. v. ING Canada Inc.* (2003), 68 O.R. (3d) 457 (C.A.), at para. 39. They argue that no element of the Plaintiffs' Statement of Claim is so poorly advanced as to plainly and obviously disclose no cause of action.

[14] The Plaintiffs maintain that striking a pleading for being scandalous, frivolous or vexatious and/or an abuse of process must be reserved for the clearest of cases. When the case

only appears to lack evidence, it should be allowed to proceed: see *Sussman v. Ottawa Sun*, [1997] O.J. No. 181 (C.J.), at para. 20, citing *Temilini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.), at pp. 668-669.

[15] Should this Court find the Statement of Claim to be deficient, the Plaintiffs suggest that the appropriate remedy is to direct them to cure the deficiencies by an appropriate amendment noting that leave to amend should be denied in only the clearest of cases: see *South Holly Holdings Ltd. v. Toronto-Dominion Bank (c.o.b. TD Canada Trust)*, 2007 ONCA 456, at para. 6.

1. The Charter Arguments

Carleton University et al

[16] The Plaintiffs claim CU violated ss. 2, 9 and 15 of the *Charter* and seek \$25,000 in damages for these violations. CU asserts that CU is not subject to the *Charter*; that the *Charter* only applies to government under s. 32(1); and that it has no application between private parties in these proceedings. Moreover, CU argues that in order for the *Charter* to apply, an entity must truly be acting in a 'governmental' as opposed to a 'public' capacity: see *Godbout v. Longueuil (City of)*, [1997] 3 S.C.R. 844. CU relies on the Supreme Court's dicta in *Mckinney v. University of Guelph*, [1990] 3 S.C.R. 229, at pp. 232-233, in support of the proposition that, although universities are subject to limitations either by regulations or through their dependence on government funding, it does not follow that they are organs of the government. CU posits that the government has no legal power to control the universities; universities manage their own affairs. However, CU concedes that where, in specific activities, the decision is that of the government, or where the government partakes sufficiently in a decision to make it an act of government, the action may be subject to the *Charter*.

[17] CU maintains that it was not, by its conduct relevant to these proceedings, implementing a specific governmental policy or program, and that the *Charter* may apply only if, due to the degree of governmental control, the entity may properly be characterized as 'government'. Alternatively, an entity may be subject to the *Charter* in regards to a particular activity that may be ascribed to government, such as the implementation of a specific statutory scheme or a

government program. However, this requires investigation into the nature of the activity, not the nature of the entity: *Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624, at para. 44.

[18] CU relies on the dicta in *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451, where the Supreme Court did not find the requisite degree of control to trigger the application of the *Charter*, despite the provincial government having the power to appoint the majority of the Board of Governors; the University not being able to dispose of any land without the approval of the Lieutenant-Governor; and the University being unable to establish a new degree without the approval of the Minister for Education.

[19] In support of its position, CU refers me to the *Carleton University Act, 1952*, S.O. 1952, c.117, as amended by S.O. 1957, c.130 and S.O. 1968-69, c.145 (CUA) which provides the governing structure for CU. It is noted that neither the Board of Governors nor the Senate appointments require the approval of the Lieutenant-Governor or any provincial Minister. Under the CUA, the Board possesses all powers necessary to govern, conduct, manage and control the University and its work, affairs and business. The Board also has the power to appoint the Chancellor, President, deans of faculties, teaching staff and all other officers and employees. Academic governance of CU is vested in the Senate, which is comprised of faculty, students, alumni, representatives from the Board, and senior administration. It would appear that the Ontario government has no involvement in the appointment of the Senate.

[20] In short, CU maintains that the Plaintiffs fail to plead material facts establishing that CU was carrying out a government policy or program in its decision surrounding GAP and Choice Chain. In effect, CU argues that it was merely managing the use of its own property; there was no implementation of a statutory scheme or government program or policy as it relates to the Plaintiffs in this matter.

[21] Finally, CU argues that the Plaintiffs fail to plead any of the requirements set down in *Vancouver (City of) v. Ward*, [2010] 2 S.C.R. 28, that a claimant must meet to be awarded *Charter* damages.

Plaintiffs/Respondents

[22] The Plaintiffs posit that the *Charter* has been found to apply to Universities: see *Pridgen v. University of Calgary*, (2010), 325 D.L.R. (4th) 441 (Alta. Q. B.), leave to appeal granted; *R. v. Whatcott*, [2002] S.J. No. 599 (Q.B.). The Plaintiffs claim to have pleaded all the necessary elements, including that CU is subject to and bound by the *Charter*, that CU breached the *Charter*, and that the Plaintiffs suffered damages as a result of that breach in paragraphs 2 (a), 2(b) and 76 to 78 of the Statement of Claim.

[23] While the Plaintiffs echo the two-part test expressed in *McKinney* and *Eldridge*, that universities may be subject to *Charter* scrutiny if they are acting as an agent of the government and/or implementing a specific government policy or program, they argue that whether CU is bound by the *Charter* requires the Court to perform a factual analysis, which can only be conducted in the context of a trial: *Mandeville v. Manufacturers Life Insurance Co.*, [2002] O.J. No. 5386 (S.C.).

[24] The Plaintiffs invite this court to consider whether the objects and purposes of CU, as set out in the CUA, can be considered activities ascribed to government. The Plaintiffs argue that CU was acting as an agent of the Minister of Training, Colleges and Universities who, under the *Post-secondary Education Choice and Excellence Act* (PSECEA), S.O. 2000, c.36, is the sole person, unless authorization has been granted, able to grant degrees, and that the PSECEA limits the granting of degrees and the operation and maintenance of a University to the Minister, or to those who have obtained authorization.

[25] While conceding that the result in *Pridgen* is neither binding on this court, nor yet upheld by an appeal court, the Plaintiffs point out that in that case the disciplining of students and the placement of restrictions on freedom of expression was found to attract *Charter* scrutiny. The Plaintiffs allege that CU was acting as an agent of the government in operating and maintaining a university; a question of fact that must be determined at trial.

[26] The Plaintiffs attempt to distinguish *McKinney* on the basis that the question there was not whether the *Charter* applied to universities, but whether it applied to the mandatory

retirement provisions. Moreover, they note that despite finding the *Charter* did not apply, the Court did recognize that universities could attract *Charter* scrutiny: *McKinney at* para. 46.

[27] In addition, the Plaintiffs argue that in *Eldridge* the Court found that hospitals were merely the vehicles by which the legislature had chosen to provide medically necessary services under the *Hospital Insurance Act* R.S.B.C. 1979, c.180, as amended by R.S.B.C. 1996, c.204: there was a precisely-defined connection between a specific government policy and the hospital's impugned conduct.

[28] In the alternative, the Plaintiffs point to the fact that the application of the *Charter* to universities is unsettled law, and while novel, this claim is not scandalous, frivolous, vexatious or an abuse of process and therefore must be permitted to proceed: see *Transamerica*.

[29] Finally, the Plaintiffs agree that the test in *City of Vancouver* has four parts: the first and second steps require the claimant to establish a *Charter* breach and show that damages are just and appropriate. The third step allows the state to show damages are inappropriate or unjust, and the final step is the assessment of the quantum of damages. The Plaintiffs argue that they have properly pleaded the required elements and that they suffered damages as a result of the *Charter* breach at paragraphs 2(a), 2(b), 77 and 78 of the Statement of Claim. The question of whether the damages claimed are appropriate is an issue which they posit can only be determined at trial.

[30] A review of the case law cited by the parties makes it plain that the categories of instances in which universities may attract *Charter* scrutiny are by no means closed. Moreover, to the extent that *Pridgen* offers the reasoning pending appellate review that a university's exercise of policy or property management authority may result in an unconstitutional restriction on freedom of expression on campus, this is indeed an area where the law remains to be settled.

[31] On the other hand, this does not relieve the Plaintiffs of the requirement to plead material facts establishing a *Charter* breach, as dictated by the first two prongs of the four part test in *City of Vancouver*. The Supreme Court has pronounced in *Imperial Tobacco Canada Ltd.* that it is not enough to consider that evidence may be adduced at trial establishing a *Charter* breach. In my opinion, to do so would be to "gut the motion to strike of its logic and ultimately render it

useless": *Imperial Tobacco Canada Ltd.*, at para. 23. At a minimum, the Plaintiffs are required to plead the necessary facts establishing a clear nexus between the university and government, if it is alleged that the university acted as agent of government. Alternatively, it should be pleaded with specificity what government policy or specific program CU sought to advance by allocating the use of its premises in a manner that unduly restricted the Plaintiffs' freedom of expression. In arriving at the conclusion that the Plaintiffs have failed to do so at paragraphs 2(a), 2(b) and 76 to 78 of their claim, I am mindful of the Supreme Court's disposition in *Harrison* at pp. 463-464, where the court concluded that reference to four statutes by which "the university is fiscally accountable under these statutes does not establish government control or influence upon the core functions of the university and, in particular, upon the policy and contracts in issue in this case".

[32] The Plaintiffs' Statement of Claim does not plead the material facts to establish government control or influence. That is not to say that the deficiencies in the Claim may not be cured by leave to amend; however, the tenuous nexus related to me in argument would alone be insufficient.

[33] Accordingly, these paragraphs are struck with leave to amend within 30 days.

2. University Policies

Carleton University et al

[34] CU challenges the Plaintiffs' right to seek a declaration that CU has breached the HRPP and the SRRP, and an order requiring CU to comply with those policies. CU argues that a policy directive has no force of law and does not create an actionable wrong from which damages can flow: see *Tymkin v. Ewatski et al.*, 2009 MBCA 77.

[35] In this respect, CU is guided by the Supreme Court's decision in *R. v. Beaudry*, [2007] 1 S.C.R. 190, where Justice Charron held that administrative directives or policy statements do not have legal force, and therefore, in that case, a police practices manual did not create a binding rule. Before *Beaudry*, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, the Supreme Court previously emphasized the difference between

an administrative directive and a measure that has the force of law, where it considered the effect of a Guidelines Order authorized by the *Department of Environment Act*, R.S.C. 1985, c.F-15.

[36] Similarly, in *Byer v. Canada*, 2002 FCT 518, the Federal Court determined that a policy on claims and *ex gratia* payments was administrative in nature, and was not as such enforceable. Accordingly, there were no damages that flowed from the government's failure to comply with the policy.

[37] There is no doubt that *Byer* reiterated the court's reasoning in *Girard v. Canada*, [1994] F.C.J. No. 420, where the Federal Court held that the Courts should not intervene to enforce a policy that is essentially administrative in scope; and that a policy does not have the force of law because it lacks the essential features of a regulation.

Plaintiffs/Respondents

[38] The Plaintiffs counter by suggesting that they have not pleaded that the subject policies are laws or have legislative force. Instead, the Plaintiffs refer to the policies as having created contractual rights as express or implied terms of the contract between CU and the Plaintiffs. The Plaintiffs also rely on the policies to support their claim that CU has a duty of care to the Plaintiffs and that CU breached that duty. They posit that the standard of care may be deduced, in part, by the terms of CU's policies. The Plaintiffs plead that CU is bound by the HRPP and SRRP.

[39] I find that the provisions from the policies cited express internal administrative policies. In my opinion, alone they offer no binding legal force, effect or cause of action.

[40] If, in fact, the Plaintiffs seek to bolster claims advanced in contract and in tort, then paragraphs 1(a), 1(b), and 14 to 17 are apparently superfluous, or at a minimum, repetitive and should be coupled with or contained by the cause of action in negligence described at paragraphs 1(g), and 54 to 57 or the cause of action in contract at paragraphs 1(f) and 58 to 65. Accordingly, they shall be struck with leave to amend within 30 days.

3. Breach of Fiduciary Duty

Carleton University et al

[41] CU takes the position that the Defendants owe no fiduciary duty to all students to provide an environment free and open to discussion and debate of controversial ideas. CU similarly takes issue with the Plaintiffs claim that CLL had the reasonable expectation that CU would act in their best interests by fostering a free and open environment; that the Plaintiffs' grades and reputations have been damaged, and trust lost in CU's professors and administration by reason of any alleged breach of fiduciary duty.

[42] CU relies upon the Supreme Court's decision in *Alberta v. Elder Advocates of Albert Society*, 2011 SCC 24, in support of the proposition that it is a question of law whether CU owes the Plaintiffs a fiduciary duty, and that a fiduciary duty requires a mutual understanding that one party has relinquished its own self-interest and has agreed to act solely on behalf of the best interests of another party. CU argues further that, because the interests of a student body are diverse, a fiduciary duty to each and every student or diverse groups of students cannot exist. A fiduciary duty requires the fiduciary to act with absolute loyalty towards another party, the beneficiary, in managing the latter's affairs, an objective CU would be unable to fulfill given the competing views, goals and agendas advanced by different stakeholders and interest groups on campus.

[43] CU maintains that the Plaintiffs have failed to plead the elements of a fiduciary duty in cases not covered by an existing category: (1) an undertaking to act in the best interests of a beneficiary; (2) a duty owed to a defined person or class of persons who must be vulnerable; and (3) the alleged fiduciary's power stands to affect the legal or substantial practical interests of the beneficiary: *Elder Advocates* at paras. 30-34.

[44] In support of its position, CU refers me to *Gray et al. v. Alma Mater Society of British Columbia at al.*, (2003), C.C.L.R. (4th) 358, where Students for Life argued that their relationship with the Alma Mater Society (AMS) gave rise to a fiduciary obligation to protect and respect the Plaintiffs' rights of lawful and free expression. There, Students for Life further argued that the AMS had a fiduciary obligation to promote and foster, or at least permit, a free atmosphere of

open debate. However, the B.C. Supreme Court held that there was no fiduciary duty as the AMS had never implicitly or explicitly maintained that it had relinquished its own self-interest, or the interest of its other members, to act solely on behalf of the Students for Life.

Plaintiffs/Respondents

[45] In response, the Plaintiffs argue that the issue of whether a fiduciary duty exists is a question of fact that must be determined in each case: *Burke v. Cory* (1959), 19 D.L.R. (2d) 252. They observe that it is the nature of the relationship, and not the category of actor involved, that gives rise to a fiduciary duty: see *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at para. 30.

[46] The Plaintiffs do not take issue with the proposition that a fiduciary relationship exists where, given all the surrounding circumstances, one party could reasonably have expected that the other party in the relationship would act in the former's best interests.

[47] The Plaintiffs contend that discretion, influence, vulnerability and trust are factors to be considered: see *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377. Further, in regards to vulnerability, recent jurisprudence has noted that to attend university, students are compelled to adhere to the rules and practices of the university: see *Pridgen*, at para. 68.

[48] The Plaintiffs echo CU in referring to the same three steps from *Elder Advocates*, which identify a new fiduciary relationship. The Plaintiffs suggest that at paragraphs 1(c) and 48 to 53 they have pleaded the following facts to support a claim of breach of fiduciary duty: CU breached s. 4 of HRRP; CU breached ss. 2 and 3 of SRRP; both Plaintiffs were registered students paying tuition; CU's unilateral authority and discretion regarding the access and use of campus affected the Plaintiffs' legal and practical rights; CLL had a reasonable expectation of an environment free and open to the discussion and debate of controversial ideas; and CU breached their duties in stripping CLL of their freedom of expression, academic freedom, and freedom from discrimination.

[49] Finally, the Plaintiffs argue that it is an issue of mixed law and fact whether CU had a fiduciary duty to the Plaintiffs, and that such duty should be determined based on a complete and

proper evidentiary foundation and not at the pleadings stage. They posit that novel claims such as this one should not be struck at this stage, pointing to other case law where a claim for breach of fiduciary duty between a student and university was not struck at the pleadings stage: see *Mohl v. University of British Columbia*, (2006), 265 D.L.R. (4th) 109 (B.C.C.A.).

[50] In my opinion and taking all facts in the claim before me as true, the pleading of a breach of fiduciary duty fails to disclose a supportable cause of action. The Plaintiffs have not met all three requirements in *Elder Advocates* to establish a new fiduciary duty. The first two require CU to give up its own self-interest forsaking that of all others in favor of CLL.

[51] Further, even if the Plaintiffs had met the first and second requirements of *Elder Advocates* by pleading an exclusive undertaking to CLL as a defined class of vulnerable persons, I am not satisfied that a breach of such a duty could succeed at trial. It is alleged that CU offered CLL somewhere to display GAP, creating therein a free and open discussion. The fact that it was not the locale of choice does not ultimately suggest the substantiated practical interests of CLL have been undermined in favour of other unidentified interests. I do recognize, however, that with respect to the third requirement, the Plaintiffs have pleaded the manner in which their legal rights have allegedly been affected, and this concern alone is one that might well be met on a full record at trial.

[52] Nevertheless, I have concluded that the Plaintiffs have failed to meet the challenge in relation to the other requirements in *Elder Advocates* and cannot demonstrate any reasonable prospect of success with respect to a claim for breach of a fiduciary relationship. Accordingly, paragraphs 1(c) and 48 to 53 are struck without leave to amend.

4. Claim for Damage to Reputation

Carleton University et al

[53] CU posits that the Plaintiffs have established no reasonable cause of action in claiming that their university experience has been tarnished; that they have suffered a loss of trust in CU's professors and administration; and/or that by directing the Ottawa police to arrest the Plaintiffs,

CU has tarnished their reputations. CU asserts that a publication is defamatory only if it lowers one's reputation in the estimation of reasonable persons in the community, and that in order to recover for defamation, the Plaintiffs must show: (1) words used were defamatory; (2) the words referred to the Plaintiffs; and (3) they were published to a third person: Raymond E. Brown, *The Law of Defamation in Canada*, 2d ed (Scarborough: Carswell, 1994) vol.1 at 1-41-1-42. CU points out that the Plaintiffs have not pleaded any of the elements of defamation.

Plaintiffs/Respondents

[54] In response, the Plaintiffs state that they have not brought an action for defamation, but are claiming relief for damage to reputation. They refer me to case law suggesting that damage to reputation may be claimed in causes of action other than defamation: see *Nitsopoulos v. Wong* (2008), 298 D.L.R. (4th) 265 (Ont. S.C.). Indeed, the Supreme Court has noted that a claim for damage to reputation can be separate from defamation, and be brought within an action for negligence: see *Young v. Bella*, [2006] 1 S.C.R. 108.

[55] In my opinion, it is not plain and obvious or beyond a doubt that the Plaintiffs' claim discloses no reasonable cause of action for damage to reputation. However, it would appear that the allegations at paragraphs 1(e), 53 and 74 are better coupled with or contained by the claims in negligence or wrongful arrest, as opposed to part and parcel of a free standing cause of action. If the Plaintiffs seek to establish a separate and discreet cause of action for damage to reputation, the Plaintiffs have failed to plead the material facts in relation to this cause of action and these paragraphs shall be struck. The noted deficiencies, however, may be cured by inclusion of the subject paragraphs among allegations of negligence or wrongful arrest. To that extent, the Plaintiffs have leave to amend the claim within 30 days.

5. Wrongful Arrest

Carleton University et al

[56] The Defendants argue that they did not arrest the Plaintiffs, and that they admit as much in their claim which pleads that the Ottawa Police arrested and charged the Plaintiffs. Although the Plaintiffs allege that CU directed the Ottawa Police to make the arrest, CU maintains that for

the police to arrest someone, they are required to determine for themselves that reasonable and probable grounds exist. It is not reasonably foreseeable that police would take information supplied to them and make an arrest blindly on that information without first doing the job required of them by law: see *BMG Canada Inc. v. Antek Madison Plastics Recycling Corp.*, [2006] O.J. No. 4577 (C.A.), at para. 3. CU points out that it was Ottawa Police who handcuffed and detained the Plaintiffs. Accordingly, any cause of action lies against the Ottawa Police.

Plaintiffs/Respondents

[57] The Plaintiffs respond by reference to the law which suggests that private persons may be held liable for wrongful arrest: see John G. Fleming, *The Law of Torts*, 7d ed. (Sydney, Austl: Law Book Company, 1987), at p.29; and *Brady v. Bank of Nova Scotia*, [1992] O.J. No. 217 (C.J.). The Plaintiffs argue that the liability of CU depends on whether the detention was carried out at CU's direction, or was the result of an independent decision by the police: *The Law of Torts*. A defendant may be held liable where he directed an officer to make the arrest: *Brady*.

[58] I have concluded that the Plaintiffs have, at paragraphs 1(d), 28 to 31 and 66 to 75, pleaded the elements necessary to found a claim in wrongful arrest, including: (1) they were handcuffed, arrested and charged with trespass; and that (2) CU directed the Ottawa Police to arrest the Plaintiffs. Although CU cites *BMG* for the proposition that private persons cannot be held liable for wrongful arrest, the cryptic reasons in *BMG* did not expressly deal with the law as it pertains to wrongful arrest. The decision may also be distinguished on the grounds that in *BMG* the claimant alleged that a negligent investigation by *BMG Canada Inc.* caused him to be wrongly arrested, whereas in the case before me, it is expressly pleaded that CU directed police to make the arrest. Those facts taken as true cannot lead to a conclusion that it is plain and obvious the claim will not succeed.

6. Breach of Contract

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[59] CU maintains that a statement of policy in a university document, without more, does not give rise to an enforceable contractual right. To claim for breach of contract, CU asserts that the

Plaintiffs must show that the university breached an express or implied term of the contract to which the university became a party in accepting the student's enrolment: *Gauthier c. Sainte-Germain* (2010), 325 D.L.R. (4th) 558 (Ont. C.A.), at para. 48. CU argues that a plaintiff must plead specific facts to demonstrate the terms of the contract and how they were breached: see *Gauthier and Jaffer v. York University* (2010), 326 D.L.R. (4th) 148 (Ont. C.A.), at para. 45.

[60] CU invites me to distinguish between a pleading of an express term which is a pleading of fact, and an implied term which requires proper legal interpretation; the Court can only imply a term if there is a proper reason based on fact to do so. Therefore, facts must be pled that justify inference of the implied term: see *Aba-Alkhail v. University of Ottawa*, 2010 ONSC 2385, at para. 43. A bald statement alone that a particular matter constituted an implied term will be struck out: *Jaffer*.

[61] In *Aba-Alkhail* CU points out that the Plaintiff sought to have an implied term read into his contract with the University. He claimed it was an express or implied term that the University would comply with its Postgraduate and Appeal Policy. The court struck the cause of action for breach of contract, finding that for the term to be implied, it would be necessary to establish that the contracting parties intended the term to be part of their agreement. The court further found that the fact that the University had the policies was not, by itself, sufficient to support the implication that the University intended to be contractually liable for a policy breach.

[62] In *Gray* CU also points out that the Plaintiffs relied on two University policies as the basis for an implied term of contract. The B.C. Supreme Court rejected the notion that these policies contained express or implied terms of the contract. It was noted that, while academic freedom is fundamental in a university setting, it does not elevate a policy of academic freedom to the stature of a contractual term. Further, it was noted that it is not for an individual student to determine for the University how it ought to promote the principles of academic freedom.

[63] At paragraphs 1(f), and 58 to 65, the Plaintiffs advance a claim for breach of contract against the Defendants. At paragraph 58 and 63, the Plaintiffs simply assert that CU and the Plaintiffs are in a contractual relationship. The pleadings, however, are silent as to the source of CU's alleged promise to uphold freedom of expression on campus as a term of the contract. The

Plaintiffs no doubt intend the source to be the Strategic Plan in the promotional materials; however, it contains no promise that creates a legal obligation. If the source is intended to be the unidentified "internal policies" referenced at paragraph 64, *Gray* and *Aba-Alkhail* hold that policies, without more, do not create express or implied contractual terms. Further, the Plaintiffs do not plead any facts from which to infer that CU intended the policies to be implied terms of the enrolment contract.

[64] At paragraph 63 of the Statement of Claim, the Plaintiffs plead the basic enrolment contract, and then go on to list a series of promises described merely as express or implied terms. CU posits that these allegations should be struck, as they fail to identify which terms are express, and which are implied; the identification of the implied terms is essential as there must be a pleading of facts to justify the inference of an implied term. In short, a bald statement that a particular matter constitutes an implied term should be struck out as the Claim must identify the source and the facts supporting the existence of an implied term: see *Jaffer*.

Plaintiffs/Respondents

[65] The Plaintiffs respond by observing that the Supreme Court in *Bella* has recognized that the relationship between a student and a university may give rise to duties in both contract and tort. The Plaintiffs rely upon those cases where Courts have found that the terms of the contract are contained in university calendars, internal admission, withdrawal and appeal procedures, and academic policies: see *Yen v. Alberta (Advanced Education)*, 495 A.R. 380 (Q.B.). They argue that the Ontario Court of Appeal expressly rejected the suggestion that the terms of the contract are limited to the document described as the course calendar: see *Hickey-Button v. Loyalist College of Applied Arts and Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.), at para. 47. The Plaintiffs observe that more recently, it has been found that rights and legal obligations may exist in a school's brochure or catalogue, the application for admission, the letter of acceptance, tuition schedule, and any handbook distributed to students or parents on acceptance or at the start of the school year: see *Symonds v. All Canadian Hockey School Inc.*, [2009] O.J. No. 3688 (Ont. S.C.), at para. 19.

[66] At paragraphs 1(f), 58 to 65 of the Statement of Claim, the Plaintiffs contend that they have pleaded that: a contract exists between them and CU; the essential terms were CU's policies and promotional material; that CU breached the contract; and as a result of the breach, the Plaintiffs suffered damages.

[67] Though *Gray* does state that a policy alone is not enough to be a contractual term, it must be noted that in *Gray*, the dispute arose between the Alma Mater Society and a student, not between a University and a student. In *Gray*, the Court also supported its finding by relying on *Attaran v. University of British Columbia*, [1998] B.C.J. No. 115, where a student was protesting tuition fees, and claimed that the fee increase contravened the University's internal policies. There, the policies had not been distributed to students, and were for "administrators, faculty and staff only". The policy also stipulated that they were for internal guidance only and had no impact on the university's relationship with third parties, unless expressly part of the contract with those third parties.

[68] In *Aba-Alkhail* the two policies at issue were in relation to purely academic matters.

[69] In the case before me, the Plaintiffs are relying on ss. 5, 18 and 19 of the HRPP, which are not related to academics. Further, ss. 18 and 19 state that those who are not part of the university community must conduct themselves in a manner that is consistent with CU's policies, and failure to do so will be treated by CU as a potential breach of contract. The policy is silent in respect of students who are part of the University community and does not provide for liability on the part of CU in respect of any breach.

[70] However, the issue of whether CU's policies constitute part and parcel of the terms of the contract can only be determined at trial. The Court of Appeal for Ontario has found that a challenge against pleadings on the basis that they do not disclose a cause of action because the material provided to students are not binding upon a university is a "matter for argument at trial": *Hickey-Button*.

[71] Given that the Supreme Court has recognized in *Bella* that the relationship between a student and the university is a contractual one, and given the results in *Yen*, *Hickey-Button*, and

Symonds that a university's policies may arguably form part of express terms of the contract between the university and the student, it is not plain and obvious that a cause of action in contract does not exist.

[72] On the other hand, the Statement of Claim as presently drafted is seriously flawed for the reasons advanced by the Defendants. The Plaintiffs failed to specifically distinguish between express terms of the contract and the implied terms of the contract by laying out the material facts by which an inference might be made as to any implied term. Accordingly, paragraphs 1(f), 58 to 65 are struck with leave to amend within 30 days.

7. Negligence

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[73] CU takes issue with the allegations contained in the Statement of Claim to the effect that CU owed them a duty of care; and that CU was negligent in carrying out their duties when CU acted without justification, and failed to adhere to s. 4 of the HRPP and ss. 2 and 3 of the SRRP. CU posits that whether it owed the Plaintiffs a duty of care is a question of law, and that statements in CU's internal administrative policy do not create a duty of care.

[74] CU correctly points out that the following elements must be present for a cause of action of negligence: (1) the plaintiff must suffer damage; (2) the damage must be caused by the conduct of the defendant; (3) the defendant's conduct must be negligent; (4) there must be a duty recognized by law to avoid this damage; (5) the defendant's conduct must be the proximate cause of the loss; and (6) the plaintiff must not be guilty of contributory negligence: see Allan M. Linden & Bruce Feldthusen, *Canadian Tort Law*, 9th ed (Markham: LexisNexis, 2011), at p. 115.

[75] Moreover, the pleadings are required to plead facts that could give rise to the duty of care: see *Aba-Alkhail*, at para. 55. A claimant must plead specific facts that could demonstrate that the conduct constituted an intentional tort, or fell outside the broad margin of discretion enjoyed by the University and its professors: *Gauthier*.

[76] Accordingly, CU takes the position that the Plaintiffs have failed to plead the facts that give rise to the alleged duty of care: they have only pleaded that they are students at CU, that CU had two policies and that CU was negligent in failing to honor terms of the policies, as well as obligations purported to arise under the *Charter*.

Plaintiffs/Respondents

[77] The Plaintiffs essentially agree with CU's outline of the elements of negligence. They further argue that the existence of a duty of care is determined by two fundamental questions:

- a) Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the Defendant, carelessness on its part might cause damage to that person? And if so,
- b) Are there any considerations which ought to negate or limit:
 - a. The scope of the duty;
 - b. The class of persons to whom it is owed; and
 - c. The damages to which a breach of it might give rise?

McAlister (Donoghue) v. Stevenson, [1932] A.C. 562 (U.K.H.L.)

[78] The Plaintiffs argue that the duty of care arises from the relationship between them and CU, and not from the existence of CU's policies. They point to a close student to university relationship at paragraphs 3 to 9, 22, 28, 35, 44 and 74 of the Statement of Claim. Moreover, they note that the Supreme Court has already found that the relationship between university, its employees and students is sufficiently close to create duties: *Bella*. The Supreme Court has also recognized a standard of care as between a university (and employees) and students: *Bella*, at paras. 33-34.

[79] The Plaintiffs have also, at paragraphs 54 to 57 of the Statement of Claim, pleaded that CU owed them a duty of care to exercise prudence and due diligence in carrying out their duties, including but not limited to the implementation, administration and enforcement of CU's policies; that CU breached that duty of care by acting without justification, by failing to adhere to s. 4 of the HRPP, by failing to adhere to ss. 2 and 3 of the SRRP, and by handling the incident insensitively and aggressively resulting in excessive intimidation and embarrassment. The

Plaintiffs have pleaded that they suffered damage as a result, and that the damage was reasonably foreseeable.

[80] Again, as in the case of a number of claims they advance, the Plaintiffs invite me to consider that whether a duty of care exists in this case, is a triable issue which can only be decided in the face of a full factual record.

[81] I note that the Plaintiffs did not take issue with the Defendants' contention that a claim in negligence cannot be founded upon a breach of *Charter* rights.

[82] While I am unconvinced that it is plain and obvious a claim in negligence could not reasonably be advanced against CU, the claim in negligence as presently drafted reflects the same frailties that are noted in respect of the claim based on breach of contract: the pleadings fail to plead the material facts on the basis of which a duty of care is said to be owed. It is insufficient to allege a duty, and then to make conclusory statements that it was then breached. Therefore, paragraphs 1(g), and 54 to 57 are struck with leave to amend within 30 days.

8. Individual Defendants

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[83] Although CU accepts the pleading of vicarious liability at paragraph 79 of the Statement of Claim, based upon the employment relationship between CU and all named Defendants, CU challenges the joinder of individual named defendants at paragraphs 5 to 10 of the Statement of Claim, on the grounds that the Plaintiffs fail to plead any material facts regarding the actions and conduct of the individuals creating personal liability. CU argues that, absent fraud, deceit, dishonesty or want of authority, a finding of personal liability is rare. Officers and employees are protected from personal liability unless it can be shown their actions: (1) are themselves tortious; or (2) exhibit a separate identity or interest from that of the corporation: see *ScotiaMcLeod Inc. v. Peoples Jewellers Ltd.* (1995), 26 O.R. (3d) 481 (C.A.); *ADGA Systems International Ltd. v. Valcon Ltd. et al* (1999), 43 O.R. (3d) 101 (C.A.).

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[84] The Plaintiffs respond that they intend to advance a claim in negligence against the individual Defendants and that this has been properly pleaded.

[85] It is apparent that there are no material facts pleaded to support a claim that the individual Defendants were acting outside their capacity as employees of CU.

[86] Therefore, as presently drafted, paragraphs 6 to 10 cannot stand. That said, in the unlikely event that material facts may be pleaded alleging the manner by which they acted outside their capacity as employees of CU, there is some potential that all or some of the personal claims may succeed. Accordingly, these paragraphs are struck with leave to amend within 30 days.

Conclusion

[87] In the result, the allegations contained in the Statement of Claim in relation to the *Charter* breaches shall be struck with leave to amend within 30 day.

[88] The allegations in respect of breach of policy alone cannot stand; however, so long as these become part of the claims advanced for breach of contract or negligence, these allegations and the others sounding in contract or negligence shall be struck with leave to amend within 30 days.

[89] The allegations in respect of breach of fiduciary duty are struck without leave to amend.

[90] The allegations with respect to damage to reputation are struck if pleaded as a separate cause of action; however, leave to amend within 30 days is granted so as to contain them within the claims for wrongful arrest and/or in negligence.

[91] The Defendants' motion in respect of the claim for wrongful arrest is dismissed.

[92] Finally, the personal claims advanced in connection with the named Defendants are struck with leave to amend within 30 days.

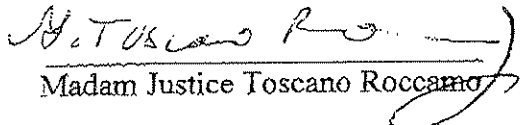
Costs

[93] The Defendants have provided me with a Costs Outline claiming partial indemnity costs, including fees and disbursement, of \$21,467.68. The Plaintiffs did not deliver a Costs Outline, but an incomplete Bill of Costs claiming partial indemnity costs, including fees and disbursements, of \$23,596.53.

[94] In the event that the parties are unable to agree on costs within 30 days of release of these Reasons, I will receive written submissions of no more than 5 pages in length from the Defendants with accompanying Bill of Costs within 10 days thereafter. The Plaintiffs may provide written submissions of the same length, a proper Bill of Costs and a complete Costs Outline within 7 days of delivery of the Defendants' submissions. The Defendants reply, if any, of no more than 2 pages in length will be delivered within 7 days of the Plaintiffs' submissions.

[95] In preparing submissions on costs the parties should, in addition to the factors contained in Rule 57 and any offers to settle, consider the divided success on this motion; the Plaintiffs' concession at the outset of the motion as to the need for some amendment of its pleading, described at the time of hearing as a "work in progress"; as well as the Plaintiffs' preparedness to abandon some of the personal claims advanced against the named Defendants.

[96] I thank counsel for their thorough canvass of the law pertaining to pleadings and able argument in respect of this novel claim.


Madam Justice Toscano Roccamo

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CITATION: *Lobo v. Carleton University*, 2011 ONSC 4680
COURT FILE NO.: 11-50693

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

RUTH LOBO AND JOHN MCLEOD

Plaintiffs

- and -

CARLETON UNIVERSITY, DR. ROSEANNE
RUNTE, DAVID STERRITT, RYAN
FLANNAGAN AND ALLAN BURNS

Defendants

REASONS FOR DECISION

Madam Justice Toscano Roccamo

RELEASED: August 5, 2011