

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
B.M.B.)
) **K. Souch, for the Plaintiff.**
Plaintiff)
)
– and –)
)
FALLONA, QUINLAN, et al.) **S. Metzler, for the Defendant, Quinlan,**
) **J. M. Banfill, for the Defendant, Fallona,**
Defendants) **and the remaining defendants.**
)
)
) **HEARD: January 13, 2011.**

2011 ONSC 1048 (CanLII)

ENDORSEMENT

McDERMID, J.:

[1] The plaintiff has commenced an action against the defendants claiming various heads of damages as a result of allegedly being sexually assaulted in or about 1977 by the defendant Fallona, a Roman Catholic priest. The particulars of the alleged sexual abuse are set out in paragraph 17 of the statement of claim.

[2] Counsel for the plaintiff moves pursuant to Rules 29.2, 30, 31, and 37. The Notice Of Motion requests an order:

1. “requiring the Defendant, Michael Fallona, to provide to the Plaintiff all medical documents with respect to his mental health dating back as far as possible until the present time;”
2. “requiring the Defendant, Christopher Quinlan, to provide to the Plaintiff his Affidavit of Documents including, but not limited to, his seminary file and personnel file with respect to his employment with the Diocese of London, as well as all medical documents with respect to his mental health dating back as far as possible until the present time;”

3. Costs on a substantial indemnity basis.

- [3] The defendant Quinlan is also a Roman Catholic priest and is sued on the ground that he was responsible for the conduct and supervision of Fallona, who was an associate pastor under his guidance at St. Vincent De Paul Church in Windsor, when it is alleged that the sexual assaults “occurred on premises which were owned or controlled by the Diocese, specifically the Church.”
- [4] The other defendants are: the Roman Catholic Episcopal Corporation of the Diocese of London in Ontario and Bishop Ronald Peter Fabbro.
- [5] The plaintiff has been examined for discovery; the defendants have not.
- [6] I shall deal first with the motion for the production of all medical records relating to the mental health of Fallona.
- [7] The motion is supported by the affidavit of Paul Ledroit, a partner in the firm of solicitors acting for the plaintiff. To it, he attaches as Exhibit E an excerpt from the fourth edition of the American Psychiatric Association's Diagnostic And Statistical Manual Of Mental Disorders, (DSM-IV-TR), dealing with Pedophilia.
- [8] Paragraph 16 of his affidavit states, “The Plaintiff claims that the Defendant, Fallona, sexually abused her over a period of time and that his behaviour satisfies the criteria for a diagnosis of Pedophilia.”
- [9] Counsel for Fallona has produced a decoded OHIP printout comprising 36 pages of Fallona's claim history for the period July 29, 2003 to July 29, 2010. It lists a veritable cornucopia of physical and mental conditions for which Fallona was seen. From the list of physicians shown on the summary, counsel for the plaintiff extracted the names of eight mental health professionals and by letter dated September 24, 2010 asked that their treatment records be provided together with treatment records for the period August 1, 2006 to October 18, 2006 from physicians who provided mental health services to Fallona at North York Hospital.
- [10] Mr. Banfill responded by letter dated September 30, 2010, the last paragraph of which reads as follows:
- If you care to advise me as to why these records are both relevant and necessary in the context of this litigation I will certainly reconsider my position, however, at present I am not inclined to accede to your request.
- [11] Mr. Banfill received no answer to his query and instead the plaintiff launched this motion.
- [12] Generally speaking a plaintiff is entitled to disclosure of documents “relevant to any matter in issue in the action that is or has been in the possession, control or power of a party to the action” pursuant to r. 30.02. Are Fallona's medical health records relevant to an issue

in this action? It is elemental that the pleadings define the issues. There is no allegation in the statement of claim, either directly or inferentially, that Fallona is or was a pedophile at the relevant time or indeed at any time. Therefore, in my opinion, there is nothing in the statement of claim that puts Fallona's mental health in issue as between the plaintiff and Fallona. What the plaintiff alleges is that Fallona committed one or more sexual assaults, a physical act, against her. For the purposes of her claim for damages arising from those sexual assaults, Fallona's mental health is not relevant. Moreover, his statement of defence does not put his mental health in issue.

[13] Mr. Ledroit seeks to put Fallona's mental health in issue, not in the statement of claim, but by his affidavit in support of this motion. Paragraph 25 of his affidavit states:

The Defendant, Fallona, engaged in a sexual relationship, or encounter, with another novitiate and was being sent for psychological counselling in regards to same. Attached as Exhibit I is a copy of the letter from Dr. Tillman.

[14] That statement is not said to be made upon information and belief. There is nothing in the material before me to support that bald and unqualified statement, including Exhibit I to Mr. Ledroit's affidavit.

[15] Exhibit I is a copy of a medical report from a Dr. Tillman to a Dr. Lawrence dated February 15, 1963 in relation to Fallona. In part, it reads as follows:

The above-named, (referring to Fallona), was referred to me because he was alleged to have been involved in some homosexual activity with another novitiate while both were attending the novitiate of the Basilian order in the Toronto area. The discovery of this alleged circumstance led to his immediate requested temporary withdrawal from the novitiate until his problem was further considered and psychiatric opinions were formed concerning him...

It was my opinion from seeing him that he did show evidence of an emotional illness which played a significant part in his alleged homosexual behaviour at the novitiate as well as in understanding various aspects of his behavioural adjustment in the past as well as in the present. I was of the opinion that he was not an active homosexual in the sense of the word as it is commonly used. I did not perceive him as being firmly organized as an individual who had definite obvious aggressive homosexual needs and as one who acted them out with the expressed desire of gratifying his narcissistic need. I was impressed that on the contrary within himself he had a poorly defined self-identity for what was there it was neither totally masculine nor feminine.

- [16] Paragraph 20 of Mr. Ledroit's affidavit states as a fact that in effect Fallona was engaged in homosexual activity, whereas Dr. Tillman's report refers only to "alleged homosexual behaviour" and opines that he "was not an active homosexual."
- [17] What the plaintiff is seeking to find in Fallona's medical records is something to bolster the plaintiff's claim that he sexually assaulted her. There is no extensive evidence as to Fallona's sexual orientation, other than allegations and Dr. Tillman's observations. Moreover, there is no evidence before me that homosexuality is a medical condition. In the material filed in support of the motion, counsel for the plaintiff engages in a great deal of innuendo and "guilt by association" to attempt to demonstrate that Fallona consorted with homosexuals and presumably therefore more probably than not is an abuser of young females and a pedophile. In my opinion, this is an unfounded, misguided and prohibited line of reasoning.
- [18] In this regard, the Supplementary Record dated January 7, 2010 contains an affidavit from Aaron Lealess, an associate with the plaintiff's law firm. It attaches as Exhibit A what purports to be "a true copy of the posting history for the Parish", which is a list of the pastors, co-pastors, and associate pastors for the parish between 1956 and the present. It is simply a table with headings for the Year, Pastor, Co-Pastor, and Associate Pastor on an otherwise blank page lacking a letterhead or signature. It points out that Quinlan and Fallona were both at the parish at the time of the alleged sexual abuse of the plaintiff and that a Deacon Roy and a [REDACTED] were associate pastors during Quinlan's tenure. Given the form in which it was presented, I attach little weight to Exhibit A.

[19] Paragraphs 6 to 10 of the affidavit read as follows:

6. I am informed by [REDACTED] and verily believe that Deacon Gary Roy was convicted for criminal sexual offenses. I am further informed by [REDACTED] and verily believe that he sent correspondence to Paul Ledroit of our office stating that Deacon Gary Roy was convicted for sexual abuse. I have read this correspondence and verily believe it to be true. Attached as Exhibit B is a copy of this correspondence.

7. I am informed by [REDACTED] and verily believe that Father Jim Hickey of Newfoundland was a frequent visitor to the Parish and would sleep overnight in the rectory of the parish as a guest of Chris Quinlan. I am further informed by [REDACTED] and verily believe that Hickey and Quinlan were classmates at St. Peter's seminary together and were the closest of friends, and I do verily believe this to be true. Attached as Exhibit B.

8. I am informed by [REDACTED] and verily believe that Jim Hickey was convicted of criminal sexual offenses. Attached as Exhibit B.

9. I am informed by [REDACTED] and verily believe that he is a victim of clergy sexual abuse.

10. I am informed by [REDACTED] [REDACTED] and verily believe that, of the three associate pastors who were employed at the parish during the tenure of Quinlan, one is a convicted sex offender (Roy), one is the defendant herein (Fallona) who is alleged to have committed acts of sexual abuse against the plaintiff, and the third ([REDACTED]) is a victim of clergy sexual abuse.

[20] Exhibit B to that affidavit is in fact an e-mail purportedly from a [REDACTED] to Paul Ledroit dated November 29, 2010. The subject is, "FYI" and the e-mail reads as follows:

Paul,

One bit of interesting news regarding St. Vincent de Paul Parish under the pastoral leadership of Fr. Chris Quinlan was that in addition to providing a home for Mike Fallona, it was also the home for Gary Roy (convicted abuser, now deceased) - as well as a frequent home away from home of Chris his closest friend and seminary classmate, Fr. Jim Hickey of Newfoundland - the most notorious of all convicted priest abusers and also now deceased... Hickey [REDACTED] and tried coming on to me [REDACTED] the number of times... He made me sick!

- [REDACTED]

[21] There is nothing in the e-mail from [REDACTED] [REDACTED] that is relevant to the issue of whether Fallona sexually assaulted the plaintiff.

[22] Having reviewed the material before me and the submissions of counsel, I am not satisfied on a balance of probabilities that Fallona's mental health records are relevant to an issue raised by the pleadings. Therefore the motion for their production fails.

[23] I turn then to deal with the second part of the motion which seeks production from the defendant Quinlan of the material noted above. There is no allegation in the statement of claim that Quinlan sexually abused the plaintiff. Rather, the basis of the claim against Quinlan set out in paragraphs 21 to 24 inclusive of the statement of claim in essence is as follows:

- a. He failed to inquire about Fallona's history and to conduct proper screening and background checks of Fallona.
- b. He was responsible for the conduct and supervision of Fallona at the relevant time.
- c. By incorporating paragraphs 26 to 30 and paragraphs 32 to 37 of the statement of claim, which contain particulars of the alleged negligence of the Diocese, the plaintiff alleges Quinlan failed in his duty of care to the plaintiff.

- d. He failed to act on a report from the plaintiff of the abuse shortly after it occurred and failed to offer her counselling or assistance.
- e. He breached his duty of care to the plaintiff and was thereby negligent.

[24] In my opinion, “medical documents with respect to his mental health” are not relevant to an issue raised by the pleadings. With respect to the plaintiff’s allegation that Quinlan failed to act on a report from her father about the alleged sexual abuse, her answer to question 516 on her examination for discovery on June 28, 2010 reads as follows:

Q. ... About paragraph 23, it was just your guess that your father might have spoken to father Quinlan?

A. Right.

[25] However, the fact that Quinlan may have received information about the alleged sexual assault upon the plaintiff from some other source and failed to act on it or that he passed it on to other defendants is relevant to issues raised in the pleadings. The plaintiff wishes to determine whether there is anything in Quinlan’s seminary or personnel file that indicates he did so or failed to do so.

[26] Through his counsel, Quinlan has provided a draft unsworn affidavit of documents that lists no specific documents under any of the schedules. Schedule C reads, “Not aware of, or able to determine at this time.” Ms. Metzler has provided an affidavit from Reverend John Sharp, Vicar General/Moderator of the defendant Episcopal Corporation. He deposes that if Quinlan’s actions or conduct are found to have caused or contributed to any damages proven by the plaintiff, “... The Diocese of London would be responsible. I understand the legal term is vicariously liable.” Paragraphs 4 and 5, the final two paragraphs of his affidavit, read as follows:

- 4. I have personally reviewed what is referred to as Father Quinlan’s personnel file within the records of the Diocese of London and can confirm that there is absolutely no mention whatsoever of the plaintiff (B. B.), otherwise known as (B. H.), back in 1977-78 or of Father Fallona, or of the alleged incidents described in the Statement of Claim involving the plaintiff and Father Fallona.
- 5. I have also personally reviewed Father Quinlan’s seminary records at St. Peter’s seminary and confirm there is absolutely no mention of Father Fallona or the Plaintiff in Father Quinlan’s records.

[27] Quinlan’s counsel has indicated that after his examination for discovery has been completed, she intends to move for a dismissal of the action against him. However, at this time he is still a party to the action. Notwithstanding the affidavit from Reverend Sharp, the plaintiff is entitled to satisfy herself about whether Quinlan’s seminary file and personnel file contain any information relevant to the issues in the action as defined by the pleadings,

namely whether there is information relating to the alleged sexual assault by Fallona upon her. In addition, she is entitled to receive a sworn Affidavit of Documents from him.

[28] Accordingly, an order shall go for the relief requested in paragraph 2 of the Notice of Motion, except for Quinlan's medical records, which shall be provided within 30 days. The motion for the relief sought in paragraph 1 of the Notice of Motion is dismissed.

[29] Counsel may make written submissions about costs within 30 days. At the end of that time, I shall fix costs based on the material before me.

"Justice D. R. McDermid"
Mr. Justice D. R. McDermid

Released: February 15, 2011.

**CITATION: B.M.B. v. FALLONA et al, 2011 ONSC 1048
COURT FILE NO.: 64687**

BETWEEN:

B.M.B.

Plaintiff

– and –

FALLONA, QUINLAN, et al.

Defendants

REASONS FOR ORDER

Released: February 15, 2011.

Mr. Justice D. R. McDermid