CITATION: *McIntosh v. Shore*, 2024 ONSC 1767
COURT FILE NO.: CV-23-692870 (Toronto)
DATE: 20240325

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
ADAN MCINTOSH	)	
	)	Self-represented
Plaintiff	)	
	)	
	)	
	)	
– and –	)	
	)	
SHARON SHORE, FAYE MCWATT AND GEOFFREY MORAWETZ	)	
	)	*Darrell Lee Kloeze* and *Wan Yao Chen*, for the Defendant (Moving Party), Sharon Shore
Defendants	)	
	)	
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MEW J.

REASONS FOR DECISION

(Motion in writing striking out the statement of claim)

[1] Adan McIntosh has sued the defendant, Sharon Shore, a judge of the Superior Court of Justice (Ontario), for allegedly disseminating "defamatory and unfounded remarks" about Mr. McIntosh to, and with the intention of influencing, her judicial colleagues.

[2] Mr. McIntosh also made other claims against Justice Shore, as well as against Faye McWatt and Geoffrey Morawetz who are, respectively, the Associate Chief Justice and Chief Justice of the Superior Court of Justice (Ontario). Those claims were dismissed by Corthorn J. pursuant to the court's general powers under Rule 2.1 of the *Rules of Civil Procedure* to stay or dismiss proceedings that are frivolous, vexatious, or otherwise an abuse of the process of the court (*McIntosh v. Shore*, 2023 ONSC 3124).

[3] Justice Shore now moves, pursuant to Rules 21.01(1)(a) and (b) and 25.11(c), for an order striking out the statement of claim against her and dismissing the action. Rule 21.01(1)(b) permits a party to move to strike out a pleading on the ground that it discloses no reasonable cause of action. No evidence is admissible on such a motion. Rule 21.01(3)(d) concerns actions that are frivolous, vexatious or abuse of process. Rule 25.11 deals with motions to strike or expunge all or part of a pleading.

[4] The motion record consists of the statement of claim, the endorsement of Corthorn J. dated 25 May 2023, and a pro forma statement of defence filed on behalf of the defendants "in order to prevent any improper noting in default", delivered without prejudice to the defendants' right to pursue the motion now before the court.

[5] Mr. McIntosh has filed a record consisting of a letter to him dated 3 February 2022 from Associate Chief Justice McWatt. While this document is not admissible as evidence in respect of the relief sought by the moving party under Rule 21.01(1)(b), it is admissible in respect of the other relief sought.

[6] The moving party submits that it is plain and obvious on the face of the pleading that the statement of claim does not disclose a reasonable cause of action against Justice Shore and should be struck out and, furthermore, that the plaintiff's action appears frivolous, vexatious and an abuse of process, and should be struck without leave to amend, and the action dismissed in its entirety.

[7] The claims against Justice Shore which have not already been dismissed are conveniently summarised by Justice Corthorn in her 25 May 2023 endorsement, at para. 12:

> Mr. McIntosh alleges that, on January 12, 2021, Justice Shore sent an email to 90 judges of this court in Toronto, including the Chief Justice and the Associate Chief Justice. Mr. McIntosh alleges the email contained "inappropriate, unfounded and defamatory remarks" about him (para. 10). The remarks were also included in a Case History Report for Mr. McIntosh's family litigation. Mr. McIntosh alleges Justice Shore sent the email, and included the remarks in the Case History Report, with the intention of influencing other judges before whom Mr. McIntosh might appear (paras. 10 and 29).

[8] The moving party asserts that there are two ways in which it is plain and obvious that the action against Justice Shore will not succeed:

a. The actions and words complained of by Mr. McIntosh were said or done while Justice Shore exercised her judicial office. She is thus protected from civil liability by the doctrine of judicial immunity.

b. The comments that Justice Shore are alleged to have made in a Case History Report are directly connected to judicial proceedings involving Mr. McIntosh's family law litigation and are, accordingly, covered by absolute privilege, and not actionable.

[9] The plaintiff argues in response that:

a. Judicial immunity is not available where a judge acts in bad faith or in the clear absence of all jurisdiction, the determination of which should be made on an evidentiary record.

b. Absolute privilege will not apply if the impugned words were not uttered for the purpose of judicial proceedings by someone exercising a duty to make statements in the course of proceedings, or where a statement is only remotely connected to a judicial proceeding.

Preliminary Issues

[10] In his factum, Mr. McIntosh states that he has filed a *Charter* application to determine the lawfulness of the Attorney General's representation of a judge of the Superior Court, and asserts that the present motion to strike should not proceed until his *Charter* motion has been heard.

[11] Not knowing that I would be the judge assigned to deal with this motion, Mr. McIntosh also challenges my earlier endorsement on the motion requisition in which I stated:

> The proposed motion by the defendant Sharon Shore seeks the dismissal of this action against her on the ground that it is frivolous, vexatious and otherwise an abuse of the process of the court, pursuant to Rules 21.01 and 25.11. The basis for the plaintiff's claim is set out in some detail in the endorsement of Corthorn J. dated 25 May 2023. In essence the plaintiff alleges that the defendant defamed him. The defendant is a Superior Court judge. As pleaded by the plaintiff, the alleged defamation arose during the course of her discharge of her judicial duties. The basis for the defendant's motion is that as a judge of the Superior Court, she enjoys judicial immunity and cannot be sued in a civil action for alleged acts done in her judicial capacity and, furthermore, that absolute privilege attaches to any comments made by her in her judicial capacity. The subject matter of the motion does not require evidence and is, accordingly, well suited to determination based on the written record and the submissions of the parties. The motion should be determined by a judge from outside the Toronto Region.

[12] The plaintiff disputes that he has pleaded that the alleged defamation occurred during the course of Justice Shore's discharge of her judicial duties. He describes this as "a complete fabrication without basis which specifically serves to benefit the defendants' counsel". He states that a motion to set aside what he characterises as this "finding", and to recuse me has been filed.

[13] If these other motions, as described by the plaintiff in his factum, have been filed, they have not been included in his record on this motion. I will not defer consideration of this motion on the basis of other motions that may or may not have been brought by the plaintiff, but which have not been placed before the court at this time.

[14] I do not read the allegations made by Mr. McIntosh against Justice Shore as suggesting that her words or actions were motivated by some purpose outside of her judicial role. However, and with the benefit of now having seen the submissions of the plaintiff made on this motion, I understand his position to be that a judge purporting to act in a judicial capacity may nevertheless be liable if she acts in bad faith, in clear absence of all jurisdiction, or where the impugned statements were made absent a duty to make such statements or where the statements were only remotely connected to a judicial proceeding. I have, accordingly, given full and careful consideration to these arguments advanced by the plaintiff. However, my assessment that this motion can appropriately be dealt with in writing remains unchanged.

The Allegations

[15] The surviving cause of action pleaded by Mr. McIntosh against Justice Shore lies in defamation, for which he claims nominal damages in the amount of $3.00.

[16] The plaintiff's allegations were summarised by Justice Corthorn in her 25 May 2023 endorsement. I have borrowed generously from that summary.

[17] The core allegation against Justice Shore is that she disseminated "defamatory and unfounded remarks" about Mr. McIntosh to, and with the intention of influencing, her judicial colleagues, and that these comments were reproduced in a Case History Report.

[18] In paragraph 3 of his statement of claim, Mr. McIntosh describes Justice Shore as having been a judge of the Superior Court since 2018, and a lawyer since 1998. He states that she "has, without jurisdiction, intentionally sought to influence every judge of the Superior of Toronto [*sic*] to rule against the Plaintiff in ongoing legal matters, by sending defamatory and unfounded remarks about the Plaintiff".

[19] Mr. McIntosh alleges that he appeared before Justice Shore on four occasions in 2020; on two of those occasions, Justice Shore dismissed Mr. McIntosh's matter (a motion and an application).

[20] At paragraph 10 of the statement of claim, Mr. McIntosh alleges:

> On the 12th January 2021, [Justice Shore] circulated an email to all Superior Court judges in Toronto…making inappropriate, unfounded and defamatory remarks against the Plaintiff. These comments were reproduced in a Case History Report…but this was not known to the Plaintiff at the time and he was not provided an opportunity to respond to the comments.

[21] Mr. McIntosh alleges that, approximately two weeks after disseminating the email and preparing the Case History Report, Justice Shore made an order for Mr. McIntosh's family litigation relating to the custody of his four children to proceed to an uncontested trial.

[22] Mr. McIntosh claims that he learned of the January 2021 email and the Case History Report nine months later, making the following allegations at paragraph 13 of his statement of claim:

> On 20th October 2021, the day of the uncontested trial…the Plaintiff received an email from the assistant of [Justice Shore] which contained a Case History Reports [*sic*] showing the inappropriate comments by [Justice Shore] and indicating that these comments had been distributed to all Toronto judges. These comments can not be repeated as it would risk undermining the impartially [*sic*] the adjudication of this matter.

[23] In paragraphs 24-28 of the statement of claim, under the heading "Legal Basis", Mr. McIntosh addresses the concept of judicial immunity. As noted by Justice Corthorn, paragraphs 24, 25 and 28 consist of argument, and lack any substantive allegations.

[24] To similar effect, Justice Corthorn observed that the majority of paragraphs 29 to 42 of the statement of claim also consist of argument, lacking substantive allegations.

[25] Mr. McIntosh acknowledges that case law is not usually provided in a statement of claim, but states, in paragraph 59 of his pleading, that he has done so due to the fear that the defendants will use their position within the court to undermine his proceeding and influence a judge to dismiss his claim under Rule 2.1.

[26] Paragraphs 31, 36, 37 and 39 of the statement of claim address the alleged dissemination of defamatory remarks, and the impact on Mr. McIntosh of the distribution of those remarks. I set out in full (as did Justice Corthorn in her decision) those paragraphs of the statement of claim:

> 31. [Justice Shore] did not have jurisdiction to communicate unfounded, defamatory and inappropriate comments about the Plaintiff to other judges which was done intentionally and with extreme prejudice. This was done with any evidence, notice and without giving the Plaintiff the opportunity to defend himself contrary to the principle of audi alteram partem. This alone is a want of jurisdiction.
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> …
>
> 36. Clearly [Justice Shore] knew that her attempts to influence other judges were not public, they were not made in a court room and were not made by advocates or litigants. The email was not part of this defendant's judicial duties and was not subject to any review.
>
> 37. If the Plaintiff did not have the right to audi alteram partem, then it was not a judicial proceeding and if it was not a judicial proceeding

> [Justice Shore] did not have jurisdiction to make any findings and certainly not distribute those findings to other judges but not the parties.
>
> …
>
> 39. Given there was not jurisdiction to make the comments, and this Defendant clearly knew this, then the Libel and Slander Act applies although it is not necessary to prove for the relief claimed. The comments were published approximately 90 judges and caused the Plaintiff the loss of judges with impartial minds. This was not simply an attempt to influence other judges but a successful endeavour to influence other judges.

Governing Principles

[27] Before addressing the principles which govern determination of an issue before trial pursuant to 21.01(1)(b), I will briefly address the other rules that the moving party relies on.

[28] The relief sought pursuant to Rule 21.01(3)(d) and Rule 25.11 both require a finding that what remains of the plaintiff's action is frivolous, vexatious or otherwise an abuse of the process of the court (Rule 25.11(b) also uses the term "scandalous").

[29] The moving party describes Mr. McIntosh as a "tenacious litigant" and points to a series of proceedings which he has instituted on his own behalf, as disclosed in his statement of claim. It is argued that in his current action against Justice Shore for defamation, he is attempting to relitigate issues which have already been decided by a court of competent jurisdiction and where other proper avenues of appeal or review have either been exhausted or have not been pursued.

[30] In my view, allowing for drafting deficiencies in the statement of claim, it is not apparent on the face of the pleading that Mr. McIntosh's claim is frivolous, vexatious, scandalous or otherwise an abuse of the court's process. [Emphasis added.] Mr. McIntosh claims that he was defamed by Justice Shore. Indeed, as Justice Corthorn has already held, at para. 62 of her decision, that claim made by Mr. McIntosh, as pleaded, is not patently frivolous, vexatious or abusive.

[31] Accordingly, the only basis I have considered in determining whether Mr. McIntosh's action should be allowed to proceed further, is Rule 21.01(1)(b). In that regard, it is well settled that the Rule, which permits the striking out of a pleading on the ground that it discloses no reasonable cause of action, may also be used to strike a pleading because there is an unanswerable defence to the claim. In such cases, the issue to be determined is whether, assuming the alleged facts to be true, the action is nevertheless certain to fail: *Guergis v. Novak* (2013), 116 O.R. (3d) 280, 2013 ONCA 449, at para. 35.

[32] On a Rule 21 motion, the allegations set out in the statement of claim are to be taken as true unless they are patently incapable of proof, bold conclusory statements of fact or allegations of legal conclusion unsupported by material facts: *Leroux v. Ontario*, 2023 ONCA 314, at para. 38; *Das v. George Weston Limited*, 2018 ONCA 1053, at para. 74.

[33] As noted by Justice Corthorn, large portions of the statement of claim consist of argument. They more closely represent what one would expect to see in a factum, rather than a pleading. That said, Mr. McIntosh's pleading clearly anticipates the defences of judicial immunity and absolute privilege now raised by Justice Shore. He raises, as exceptions to the application of those principles, that judicial immunity is unavailable where a judge is not acting judicially, knowing that she does not have jurisdiction. He also pleads that s. 142 of the *Courts of Justice Act*, R.S.O. 1990, Chap. C.43 (which provides that a person is not liable for any act done in good faith in accordance with an order or process of a court in Ontario) does not provide protection for an act done in bad faith. As Justice Corthorn pointed out, the reference to s. 142 of the *Courts of Justice Act* is misguided. It does not apply to the conduct of a presiding judge. Nevertheless, in his factum, Mr. McIntosh argues, by analogy, that a defamatory comment made in bad faith, even if made in, or in connection with, judicial proceedings, is not protected by absolute privilege.

Judicial Immunity

[34] Justice Shore argues that persons exercising judicial functions, whether in court proceedings or otherwise in the course of their judicial function, are exempt from all civil liability for anything done or said by them in their judicial capacity. This immunity is such that even if a judge's acts or words complained of are alleged to have been spoken in bad faith, maliciously, corruptly, or without reasonable or probable cause, they are not actionable.

[35] The content of what was written by Justice Shore is not pleaded, and thus not before the court for the purposes of this motion. The statement of claim simply alleges that Justice Shore sent an email to all Superior Court judges in Toronto, making what the plaintiff says were defamatory remarks against him, and then reproduced those comments in a Case History Report in connection with a family proceeding which was before the court.

[36] A requirement of the rules of pleading, as they pertain to defamation proceedings, is that particulars of the allegedly defamatory words must be pleaded: *Catalyst Capital Group Inc. v. Veritas Investment Research Corp.* (2017), 136 O.R. (3d) 23, 2017 ONCA 85, at para. 23. The Statement of Claim does not set out either the contents of the January 2021 email or the Case History Report. Mr. McIntosh alleges that the impugned remarks "cannot be repeated as it would risk undermining the impartiality [of] the adjudication of this matter." Unsurprisingly, the statement of claim also does not plead, as it should, the allegation that the words used were defamatory of Mr. McIntosh in their plain or ordinary meaning, or by innuendo. Corthorn J. was forgiving of these shortcomings, writing, at para. 61 of her endorsement:

> Mr. McIntosh is a self-represented litigant attempting to navigate the complexities of a claim based in defamation. Even in the absence of the particulars of the wording of the January 2021 email, the context within which the email was sent, and the manner in which the email was presented, Mr. McIntosh is to be given the benefit of the doubt.

[37] I will follow Justice Corthorn's lead, and set to one side the pleading's deficiencies for the purposes of considering this motion.

[38] Turning to the substantive issue of judicial immunity, in *Morier and Boily v. Rivard*, [1985] 2 S.C.R. 716, the Supreme Court of Canada addressed a claim that members of the Commission de police du Québec, who were entitled to the judicial immunity of Superior Court judges, could not invoke that immunity when they acted without jurisdiction and contravened the rules of natural justice by failing to comply with the provisions of the governing legislation and the *Charter of Rights and Freedoms*.

[39] At para. 90 of the decision in *Morier*, Chouinard J., writing for the majority of the Supreme Court of Canada, cited, with apparent approval, the following excerpts from *Halsbury's Laws of England*, 4th ed., vol. 1, 1973, at pp. 197 *et seq*.:

> **206. Persons protected**. Persons exercising judicial functions in a court are exempt from all civil liability whatsoever for anything done or said by them in their judicial capacity, nor can any action be brought against the Crown in respect of acts or omissions of persons discharging responsibilities of a judicial nature or in connection with the execution of judicial process.
>
> **210. Extent of protection**. Wherever protection of the exercise of judicial powers applies, it is so absolute that no allegation that the acts or words complained of were done or spoken mala fide, maliciously, corruptly, or without reasonable or probable cause suffices to found an action. The protection does not, however, extend to acts purely extra-judicial or alien to the judicial duty of the defendant; and, therefore, if the words complained of are not uttered in the course of judicial proceedings, the defendant is not protected.
>
> The protection extends to all judges, juries, advocates, parties and witnesses, for words spoken or written in the course of a judicial inquiry and having any reference thereto, however remote.

[40] At paras. 95 and 96 of *Morier*, reference was made to the judgment of Lord Denning M.R. in *Sirros v. Moore*, [1975] 1 Q.B. 118 (C.A.), a decision of the England & Wales Court of Appeal, at p. 136, said to have been frequently cited as the correct statement of the contemporary rule of immunity:

> Every judge of the courts of this land -- from the highest to the lowest -- should be protected to the same degree, and liable to the same degree. If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment," it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction -- in fact or in law -- but so long as he honestly believes it to be within his jurisdiction, he should not be liable. Once he honestly entertains this belief, nothing else will

> make him liable. He is not to be plagued with allegations of malice or ill-will or bias or anything of the kind. Actions based on such allegations have been struck out and will continue to be struck out. Nothing will make him liable except it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it.

[41] At the conclusion of an extensive discussion of the development of judicial immunity in England, the Court in *Morier* concluded, at para. 110, that the possibility that the members of the Commission had:

a. Exceeded their jurisdiction by doing or failing to do the actions mentioned in the statement of claim;

b. Contravened the rules of natural justice in that they had not informed the respondent of the facts alleged against him, or had not given him an opportunity to be heard; or,

c. Contravened the *Charter*,

were not allegations which may be used as the basis for an action in damages against a judge.

[42] Mr. McIntosh raises similar complaints to those raised by the claimant in *Morier*. He says that he did not know about the comments made by Justice Shore at the time that she made them and, thus, was not provided an opportunity to respond to the comments, infringing his right to a fair proceeding.

[43] The Supreme Court's decision in *Morier* was considered by the Federal Court of Appeal in *Taylor v. Canada (Attorney General)*, [2000] 3 F.C. 298, 2000 CanLII 17120 (FCA). At para. 41 of *Taylor*, the Court concluded that it could not be said that the Supreme Court of Canada in *Morier* had definitively decided whether a bad faith exception to judicial immunity is good law in Canada. However, the Federal Court of Appeal was inclined to accept the proposition that judicial immunity does not apply where it is shown that a judge *knowingly* acts beyond her jurisdiction. [Emphasis added.] The Federal Court of Appeal went on to conclude that if there is an exception to absolute immunity, it is a narrow one – stating, at para. 60: "It will be the rare case indeed where a plaintiff can show that a judge acted with the knowledge that he or she had no jurisdiction".

[44] Mr. McIntosh relies on a recent decision of the Federal Court of Australia: *Stradford (a pseudonym) v. Judge Vasta*, [2023] FCA 1020. The defendant judge, sitting in the Federal Circuit Court of Australia, who was hearing a matrimonial cause involving the applicant, ordered that the applicant be imprisoned for twelve months, purportedly for contempt of court. That order was subsequently set aside, but not before the applicant had spent seven days in police custody before his imprisonment was stayed pending an appeal. On the issue of whether the judge was entitled to judicial immunity, the Federal Court held that the protection afforded to inferior court judges at common law may be lost where it is found that the judge acted without, or in excess of jurisdiction. The Court held, at para. 368, that the gross and obvious irregularity of the procedure that had infected the judge's purported exercise of his contempt powers meant that he acted without, or in

excess of his jurisdiction in the requisite sense. That denial of procedural fairness could not possibly be characterised as a "narrow" or a "technical" breach. Rather, it constituted at the very least, quoting Lord Bridge in *In re McC (A Minor)*, [1985] 1 A.C. 528, [1984] 3 All E.R. 908 (H.L.), at p. 546 (A.C.), "a gross and obvious irregularity of procedure".

[45] I note that a *per saltum* appeal of the Federal Court's decision to the High Court of Australia is pending: [2024] HCASL 23.

[46] Mr. McIntosh also cites the decision of the U.S. Supreme Court in *Stump v. Sparkman*, 435 U.S. 349 (1978), the headnote to which records that: "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority, but, rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction'".

[47] Although not binding on me, both *Taylor* and *Stradford* address extreme cases, where it is patent that a judge knowingly acted without jurisdiction, or where the irregularity of procedure followed by the judge so infected the exercise of his powers that he acted in the clear absence of jurisdiction.

[48] When the hyperbole, legal arguments and bold conclusory statements are stripped away from Mr. McIntosh's pleaded allegations, they show neither a knowing want of jurisdiction by Justice Shore, or a clear absence of jurisdiction on her part.

[49] I start by addressing Mr. McIntosh's contention that whatever Justice Shore is alleged to have written raises a question of jurisdiction.

[50] As pleaded by Mr. McIntosh, in 2020 he had appeared before Justice Shore on four occasions. Then, on 28 January 2021, just over two weeks after circulating the impugned comments, Justice Shore made an order granting the mother of Mr. McIntosh's children an uncontested trial regarding the custody of the children. Clearly, therefore, Justice Shore had an ongoing involvement, in her judicial capacity, with Mr. McIntosh's family law litigation.

[51] The court has an express duty to actively manage family law cases: *Family Law Rules*, r. 2(5).

[52] Even if it is presumed that Justice Shore should not have sent the impugned email or had a corresponding note posted on the Case History Report, the worst that could reasonably be said is that she made an error of judgment in the exercise of her functions as a judge who was dealing with Mr. McIntosh's ongoing litigation. There is no other reasonable conclusion to be drawn from the pleaded allegations, once the rhetoric and legal commentary are put to one side.

[53] Even if it could be said that she acted improperly or in excess of her judicial authority, such conduct or errors cannot, on their face, reasonably be construed as a "clear absence of all jurisdiction" or a "gross and obvious irregularity of procedure".

[54] To the extent that there was any lack of procedural fairness, Mr. McIntosh may have (or had) a remedy elsewhere. He does not, however, have an actionable claim for defamation against

Justice Shore. Assuming the facts which he alleges to be true, his action is certain to fail because Justice Shore has an unanswerable defence of judicial immunity.

[55] It should be noted that many of the cases make a distinction between the common law immunity of Superior Court judges and that of "inferior" court judges (in other words, courts with statutorily defined jurisdiction, as opposed to courts, such as the Superior Court of Justice, having inherent jurisdiction: *Courts of Justice Act*, s. 11). To the extent that there may be any difference in application of principles of judicial immunity depending on the level of court the judge is a member of, Justice Shore, as a judge of a superior court, is entitled to the full benefit of the defence.

Absolute Privilege

[56] All communications made during the course of a judicial proceeding are protected by absolute privilege, which provides a complete defence to an action for defamation: *Fabian v. Margulies* (1985), 58 O.R. (2d) 380 (C.A.)

[57] The moving party argues that absolute privilege applies to the comments that Justice Shore made in the Case History Report while she was exercising her judicial office as a case management judge.

[58] Mr. McIntosh argues that whether statements are covered by absolute privilege is a matter of fact that needs to be determined on evidence. This misconstrues the nature of a Rule 21.01(1)(b) proceeding, which is grounded on an assumption that the alleged facts are true. Those facts, as pleaded, cannot, in my view, reasonably be construed as disconnecting the impugned comments from the judicial proceedings in connection with which they arose.

[59] Rather, the assertion by Mr. McIntosh that Justice Shore's comments should be seen as falling outside of a judicial proceeding is certain to fail. Not only is it patent from the pleaded circumstances, it is also an issue that has already been judicially determined in the very proceedings that the impugned communications arose in connection with.

[60] In *Kim v. McIntosh*, 2023 ONCA 356, Mr. McIntosh appealed, *inter alia*, any order made by any judge of the Superior Court of Justice in Toronto who may have seen or read Justice Shore's case note before he or she made an order in the family litigation between Mr. McIntosh and his former partner. The Court of Appeal concluded that Justice Shore's note was directly connected to the family litigation involving Mr. McIntosh, and was consistent with the case management function which she had undertaken.

[61] Given the existence of that finding, there is no realistic possibility that a court would come to a different conclusion when determining whether Justice Shore's comments arose during the course of a judicial proceeding for the purpose of determining a defence of absolute privilege.

Disposition

[62] For the foregoing reasons, I order that Mr. McIntosh's statement of claim is struck out pursuant to Rule 21.01(1)(b). Given the nature of the claim, and the defences available to Justice Shore, I see no basis upon which to give Mr. McIntosh leave to amend his pleading.

[63] I am presumptively of the view that the moving defendant is entitled to costs. The moving party should file with the court, within fifteen days of the release of these reasons, a costs summary and written submission, not exceeding three pages in length, in support of her claim for costs. Mr. McIntosh will then have fifteen days following receipt of the moving party's costs submission to file a responding submission, also not to exceed three pages in length.

Mew J.

Released: 25 March 2024

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COURT FILE NO.: CV-23-692870 (Toronto)
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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

ADAN MCINTOSH

Plaintiff

– and –

SHARON SHORE, FAYE MCWATT AND GEOFFREY MORAWETZ

Defendants

REASONS FOR DECISION

Mew J.

Released: 25 March 2024