Conspiracies Involving Wrongful Collusion

Using Unlawful Conduct to Cause Harm or Legal Conduct Predominantly Intended to Cause Harm

Helpful Guide to Understanding the Tort of Unlawful Conduct Conspiracy and Tort of Predominant Purpose Conspiracy

In Canada, there are two types of tortious conspiracy that may give rise to legal proceedings. The first type involves two or more people agreeing, or knowingly engaging in concerted behaviour, to use unlawful means with direct harm to a plaintiff. The second type involves two or more people agreeing, or knowingly engaging in concerted behaviour, to use lawful or unlawful means and the predominant purpose is to cause harm to a plaintiff. Such was well stated in ***Alford v. Canada***, 1997 CanLII 868 at paragraph 37 where it was said:

> [37] There are two types of actionable conspiracy in Canada: (1) Where the predominant purpose of the defendants' conduct is to injure the plaintiffs, whether the means used by the defendants are lawful or unlawful; and (2) where the defendants conduct is unlawful and is directed towards the plaintiffs (alone or together with others) and the defendant should have known that injury to the plaintiffs is likely to and does result. (See *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, 1983 CanLII 23 (SCC), [1983] 1 S.C.R. 452 at 471-472). To be complete, the tort of conspiracy requires not only a conspiratorial agreement, but also proof that overt acts have caused damage to the plaintiffs. (See *Thompson v. Coquitlam (District) (1979)*, 1979 CanLII 665 (BC SC), 15 B.C.L.R. 59 at 63).

In the first form, the conspiracy is where two or more persons combine for the **predominate purpose of causing injury** to another. In this form of conspiracy, the unlawfulness is in the purpose of the scheme; accordingly, lawful acts become unlawful due to the intent to cause unjust injury to another person. This form of conspiracy remains somewhat controversial as acting in efforts to improve one's own interests, is generally legitimate.

In the second form, being the tort of **conspiracy to injure by unlawful means**, oftentimes the bringing of a conspiracy legal action can be redundant and unnecessary such as in circumstances where the unlawful means exercised by the conspirators was in itself tortious. In such circumstances, upon proving the tortious unlawful means, known as a 'nominate tort', proving the elements of conspiracy often becomes unnecessary; yet in some circumstances, pleading conspiracy, and seeking to prove same, may be a worthy task. In this respect, the Supreme Court of Canada refused to strike claims for conspiracy where other torts were pleaded; see: ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959.

Required Elements

The elements of each type of conspiracy were well described in ***Dale v. Toronto Real Estate Boar***d, 2012 ONSC 512 as:

> [48] There are two types of civil conspiracy. First, there is a conspiracy where the predominant purpose of the defendants is to cause injury to the plaintiffs, regardless of whether the means employed are lawful or unlawful. Second, there is a conspiracy where the conduct of the defendants is unlawful, is directed toward the plaintiff alone, and the defendants should have known that, in the circumstances, injury to the plaintiff was likely to result.

> [49] More particularly, the elements of "predominant purpose conspiracy" require the plaintiff to establish that: (1) the defendants acted in combination, that is, in concert, by agreement or common design; (2) the predominant purpose of the defendants was to intentionally harm the plaintiff; and (3) the defendants' conduct caused harm to the plaintiff. The elements of "unlawful means conspiracy" require the plaintiff to establish that: (1) the defendants acted in combination, again that is, in concert, by agreement or common design; (2) the defendants committed some unlawful act such as a crime, a tort, or breached some statute; (3) the defendants conduct was directed towards the plaintiffs; (4) the defendants knew or ought to have known that injury to the plaintiffs was likely to occur from their unlawful act; and (5) the defendants' unlawful conduct in furtherance of their conspiracy caused harm to the plaintiff.

The above cases, seeking to clarify the principles of tortious civil conspiracy follow the Supreme Court viewpoints expressed in the case of ***Cement LaFarge v. B.C. Lightweight Aggregate***, [1983] 1 S.C.R. 452 wherein the two types were articulated as:

> The law concerning the tort of conspiracy is far from clear with respect to conduct of the defendants which is itself unlawful. The tort of conspiracy to injure is complete, as we have seen from *Lonrho*, supra, and the included reference to *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] A.C. 435, where the predominant purpose of the conspiracy is to injure the plaintiff and damage in fact results. Thus the concerted action to give effect to the intent completes the tort, and if an unlawful object is necessary (assuming damages have been suffered by the plaintiff), it is but the object to injure the plaintiff. As Lord Cave said in *Sorrell v. Smith*, [1925] A.C. 700, at p. 712:
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> > A combination of two or more persons wilfully to injure a man in his trade is unlawful and, if it results in damage to him, is actionable.
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> The conspiracy to commit an unlawful act in the criminal law is, in this respect, differently structured. The question which must now be considered is whether the scope of the tort of conspiracy in this country extends beyond situations in which the defendants' predominant purpose is to cause injury to the plaintiff, and includes cases in which this intention to injure is absent but the conduct of the defendants is by itself unlawful, and in fact causes damage to the plaintiff. The causative problems common to the second and third submissions of the appellants will be discussed mainly in connection with the latter. Statements made in a number of English cases decided prior to *Lonrho*, supra, appeared to endorse this latter aspect of the tort and led the learned author of *Salmond on Torts*, supra, at p. 379 to conclude:

A second form of actionable conspiracy exists when two or more combine to injure a third person by unlawful means—e.g. the commission of a crime or tort, or the infringement of a guaranteed constitutional right . . . . In such a case it is irrelevant that the object of the conspirators in using those means may be legitimate. Combinations of this kind must be contrasted with what might be called "*Quinn v. Leathem* conspiracies," where the means are legitimate but the object is not. . . . Hence a conspiracy may be actionable if either the end or the means, or both, are unlawful.

Lord Diplock declined to accept this analysis, however, observing in his judgment in *Lonrho*, supra, at pp. 189 and 464, that:

> ... in none of the judgments in decided cases in civil actions for damages for conspiracy does it appear that the mind of the author of the judgment was directed to a case where the damage-causing acts although neither done for the purpose of injuring the plaintiff nor actionable at his suit if they had been done by one person alone, were nevertheless a contravention of some penal law.

As a result, Lord Diplock concluded that the House of Lords had an "unfettered choice" in defining the scope of the tort of conspiracy, and elected to limit the civil action to acts done in combination for the predominant purpose of injuring the interests of the plaintiff.

Jointly Liable

An important consideration in any conspiracy action involves the doctrine of joint liability. This is especially important where certain conspirators may be better financially positioned to pay compensation as a joint tortfeasor despite merely watching from the sidelines while the wrongful acts being performed by other conspirators. In this respect, the law treats each conspirator as jointly liable regardless the level of involvement in the actual wrongs, even if the wrongs performed in furtherance of the conspiracy were unbeknownst to all conspirators;

so long as any conspirators act wrongfully towards the purpose of the conspiracy, all conspirators remain as jointly liable as joint tortfeasors. This principle was described well in ***Bains v. Hofs***, 1992 CanLII 264 at page 9:

> In The Law of Torts, 7th ed. (The Law Book Company Ltd.,) c. 11, p. 229, Fleming discusses the concept of joint tortfeasors:
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> > "A tort is imputed to several persons as joint tortfeasors in three instances, viz. agency, vicarious liability, and concerted action...The critical element of the third is that those participating in the commission of the tort must have acted in furtherance of a common design. There must be 'concerted action to a common end', not merely 'a coincidence of separate acts which by their conjoined effect cause damage' (The Koursk (1924) P. 140 at 156). Broadly speaking, this means a conspiracy with all participants acting in furtherance of the wrong, though it is probably not necessary that they should realise that they are committing a tort. All persons acting in pursuance of a common end, being thus identified with each other, are accordingly responsible for the entire result and so it was laid down in 1612 that 'all coming to do an unlawful act, and of one party, the act is the act of all the same party being present' (Heydon's Case, 77 E.R. 1150 at 1151)."
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> It is the question of concerted action that arises in the case at bar. On this issue, the learned author continues on to say at p. 230:
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> > "While the requisite degree of participation has not been precisely defined in modern decisions, there is a cogent support both in principle and ancient authority for the suggestion that it may well correspond with the description attached by the criminal law to principles in the first and second degree. This would include, besides the actual perpetrator, anyone who 'aids and abets', whether or not he actively intervenes. Knowingly assisting, encouraging or merely being present as a conspirator at the commission of the wrong would suffice."

Thus, one who knowingly assists or encourages another to commit a tort, or one who is merely present as a conspirator in the wrong that is done, is, in law, a joint tortfeasor. This principle, imposes joint liability upon all conspirators even for those wrongful acts peformed subsequently by any of the conspirators even if such is without knowledge or participation to all conspirators as was stated in ***Claiborne Industries Ltd. v. National Bank of Canada***, 1989 CanLII 183 at page 21:

> In summary, as applied to the facts before this court, it must be determined whether the Bank joined forces with Black in a common design to commit unlawful acts and whether damage to the plaintiffs was foreseeable and occurred. If so, the conspirators will each be responsible for those unlawful acts of the others that are probable consequences of the original design. Finally, to extricate itself from an ongoing conspiracy, definite steps must be taken by a party to absolve itself of continuing acts in the direction of the common design.

Required Within Pleadings

In certain circumstances, the particulars of a conspiracy are without need of excessive detail; and yet in other circumstances, very detailed particulars are required. Of course, as is plain and obvious, persons entering into collusion with one another would avoid sitting down to write out an express agreement and detailing about an injurious plan. Additionally, conspirators, although conspiring, may fail to appreciate that such an improper arrangement is occurring - which fails to negate liability. As stated by the Court of Appeal in the matter of ***Alleslev-Krofchak v. Valcom Limited***, 2010 ONCA 557, the detailing of the particulars of a conspiracy can be implied from details within the overall pleading including the presumption of agreement arising from a "pattern of conduct" that demonstrates persons acting in concert or collusion:

> [35] The statement of claim also pled conspiracy, even if obliquely, by alleging a pattern of conduct by the three appellants to remove AK as the SPM#1. The claim asserted that the defamatory statements they made about her were for the purpose of interfering with her economic relations. This is, in essence, what the trial judge ultimately found: an agreement between the appellants to defame AK in order to achieve their goal of getting rid of her.
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> [36] Finally, Valcom itself put the breach of the Valcom/ARINC subcontract in issue by arguing, in its statement of defence, that the contract entitled Valcom to deal with AK as it did. Accordingly, it was open to the trial judge, in rejecting this argument, to find that Valcom breached the contract and to use that in her analysis of unlawful means.
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> [37] All these issues were canvassed by both sides in the evidence called at trial. Counsel for the appellants essentially acknowledged as much in her closing submissions. In this court, appellants' counsel (different from trial counsel) did not point to any prejudice said to arise from any pleading deficiency.
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> [38] Most importantly, the trial judge was alive to the weaknesses in the pleadings. However, because the matters now raised by the appellants were the subject of evidence called by both sides, she exercised her discretion to deal with them "in an effort to secure the just determination of the real matters in dispute in this litigation." This was a four week trial involving a significant amount of detailed evidence on these matters. The trial judge was best placed to determine whether any deficiencies in the respondents' pleading made it unfair for her consider them in addressing the unlawful means question. In all the circumstances, I see no basis to interfere with her exercise of discretion.

The sufficiency of conspiracy pleadings was also addressed within the case of ***Beaver Lumber Inc. v. Hamer***, 2004 CanLII 17180 wherein it was stated that:

> 31 A claim for conspiracy is sustainable where the following particulars are pleaded:

> (a) the parties to the conspiracy, and their relationship to one another;

> (b) the agreement between the parties;

> (c) the purpose or objects of the conspiracy stated precisely;

> (d) the overt acts done in pursuance and furtherance of the conspiracy stated with clarity and precision; and

> (e) the injury and damages occasioned to the plaintiff.

> (See Bullen, Leake and Jacobs, *Precedents of Pleadings*, 12th Ed. (1975) p. 341; also cited in *Bank of America v. Mutual Trust Co.*, [1992] O.J. No. 2662 (Ont. Master), at 3.)

32 The court is entitled to draw an inference that the defendants acted in concert in relation to an allegation of conspiracy where some information is provided with respect to the conspiracy. Specifics of various aspects of the conspiracy may not be available to the plaintiff until examinations for discovery. Defendants ought to know whether or not their actions constituted conspiracy, thereby allowing them to plead that they were not engaged in a conspiracy. It may therefore be premature to strike a claim for conspiracy at the pleading stage. (See *Acronym (Cayman) Inc. v. Ontario Lottery Corp.*, [1997] O.J. No. 2702 (Ont. Gen. Div.), at 4.)

33 Furthermore, Madam Justice Wilson in *Hunt v. T & N plc*, [1990] S.C.J. No. 93 (S.C.C.) at pp 18 noted that:

> . . . the requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century.

Avoiding Redundant Litigation Concerns

Defendants may argue that pleading conspiracy where unlawful means is alleged and involves underlying torts (sometimes referred to as nominate torts), the pleading of the underlying tort is sufficient and pleading of conspiracy becomes redundant and unnecessary; however, in ***Hunt v. Carey***, [1990] 2 S.C.R. 959 as recently cited and followed by the Ontario Court of Appeal in ***McHale v. Lewis***, 2018 ONCA 1048 that:

> [18] In *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, the court held that there were good reasons to allow a conspiracy claim to go to trial along with other related tort actions. At p. 989 Wilson J. observed that a conspiracy may give rise to harm of a magnitude that is greater than that of tortfeasors acting alone.

> [19] Finally the issue of whether there was any redundancy in the claims successfully made should be left to the trial judge.

> [20] In Hunt the court noted further at pp. 991-92:

> > It seems to me totally inappropriate on a motion to strike out a statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

Summary Comment

The tort of conspiracy consists of two forms; the conspiracy to injure by unlawful means as well as the conspiracy to injure as predominant purpose. In a conspiracy to injure as predominate purpose, the conduct causing injury may be entirely lawful; however, it is, essentially the plotting to purposely and intentionally cause harm by the use of an otherwise lawful activity that makes the conduct tortious.

The tortfeasors within a conspiracy are all jointly and severally liable for the conduct of all tortfeasors if the outcome is a foreseeable result of the original plot.

Additionally, and logically whereas written evidence of a conspiratory plot is unlikely to exist, the acting in collusion or engaging in concert may be sufficient to establish a presumption of a conspiracy agreement or intentions.