Negligent investigation, malicious prosecution and misfeasance in (abuse of) public office

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The decision of Justice Stephen Firestone of the Ontario Superior Court of Justice, in *Paul Alexander Robson v The Law Society of Upper Canada***(1)** released on September 14 2016, provides a helpful analysis of whether an action for negligent investigation, malicious prosecution and misfeasance in (abuse of) public office lies against a regulatory body and its investigatory staff.

Facts

Paul Alexander Robson, a lawyer called to the Bar in Ontario in 1983, had initially been found guilty of conduct unbecoming a lawyer, resulting in the revocation of his licence to practise law. Robson successfully appealed this decision and sought a significant cost award against the Law Society. His request for costs was dismissed. The Law Society Appeal Division stated, among other things, that:

> "*[W]e do not conclude that the Law Society's conduct was without reasonable justification, patently unreasonable, malicious, taken in bad faith, or for a collateral purpose. Our ultimate rejection of the Law Society's position does not mean that the proceedings against Mr Robson were 'unwarranted' in law.*"

Robson thereafter commenced an action against the Law Society, the director of professional regulation of the Law Society, a Law Society investigator and two Law Society discipline counsel (collectively, 'Law Society') for damages, including the costs he incurred in successfully appealing the Law Society's decision to revoke his licence to practise law. The Law Society promptly brought a motion to strike out Robson's amended statement of claim which included the allegations sounding in negligent investigation, malicious prosecution and misfeasance in (abuse of) public office and argued that Robson's action was an abuse of process.

Decision

Negligent investigation

The court found that it was "plain and obvious" that the cause of action grounded in the tort of negligent investigation did not disclose a tenable cause of action and struck out such allegations without leave to amend.

In short, absent bad faith, the Law Society is immune from a negligent suit. Section 9 of the Law Society Act (RSO 1990, c L8) provides:

> "*No action or other proceedings for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation, a by-law or a rule of practice and procedure, or for any neglect or default in the performance or exercise in good faith of any such duty or power.*"

The Ontario Court of Appeal in *Conway v The Law Society of Upper Canada***(2)** confirmed the principle that:

> "*Mere negligence in the good faith performance of the [Law Society's] duties or functions is not enough to establish liability. However, an absence of good faith or 'bad faith', involving malice or intent, is sufficient to ground a properly pleaded cause of action against the [Law Society].*"

The Supreme Court of Canada in *Edwards v Law Society of Upper Canada***(3)** agreed with the Ontario Court of Appeal's pronouncement in that case that imposing tort liability on the Law Society itself would, barring bad faith, be inconsistent with the "public interest" role of the Law Society. The Ontario Court of Appeal in *Edwards* had stated:

> "*It is also important to note that immunity to civil suit is codified in s. 9 of the Law Society Act. While it applies only to actions against officials of the Society and not the Law Society itself, the Legislature is presumed to know the law and must be taken to have recognized that the society itself has been traditionally immunized from civil actions by the common law...*
>
> *This jurisprudence clearly establishes a judicial immunity from negligence for the Law Society's discipline process, including the investigative function at the front end. The Law Society's disciplinary powers must respond to its statutory mandate and the requirements of due process, not to a private law duty of care...*
>
> *The public is well-served by refusing to fetter the investigative powers of the Law Society with the fear of civil liability.*"

The court struck out all allegations in Robson's amended statement of claim alleging negligent investigation without leave to amend.

Malicious prosecution

The court referenced the Ontario Divisional Court's decision in *Stoffman v Ontario Veterinary Association*,**(4)** which held that professional disciplinary bodies are not immune from malicious prosecution actions. The Ontario Divisional Court had stated as follows:

> "*In view of the clearly stated opinion of the Supreme Court that an action for malicious prosecution can lie even against the Attorney General and his agents, Crown Attorneys, there cannot be any policy reason why a professional disciplinary body should have absolute immunity from such suits. There should be no concern about courts second-guessing their judgments; only in cases where prosecutions are undertaken maliciously may an action lie.*"

The court then cited the four necessary elements of the tort of malicious prosecution as laid out in the Supreme Court of Canada's decision in *Miazga v Kvello Estate*:**(5)**

- The defendant initiated the proceeding.
- The proceeding was terminated in favour of the plaintiff.
- The defendant had no reasonable and probable cause to initiate the proceeding.
- The defendant acted with malice.

As the Law Society in *Robson* focused on malice, the court referenced what the Supreme Court of Canada had said in *Miazga* with respect to malice which requires intentional conduct on the part of the tortfeasor. As the Supreme Court of Canada stated:

> "*The malice element of the test for malicious prosecution considers a defendant prosecutor's mental state in respect of the prosecution at issue... However, even if the plaintiff should succeed in proving that the prosecutor did not have a subjective belief in the existence of the reasonable and probable cause, this does not suffice to prove malice, as the prosecutor's failure to fulfill his or her proper role may be the result of inexperience, incompetence, negligence, or even gross negligence, none of which is actionable... Malice requires a plaintiff to prove that the prosecutor willfully perverted or abused the office of the Attorney General or the process of criminal justice.*"

The court found that Robson had failed to plead the requisite full particulars regarding the circumstances and facts that would enable the trier of fact to infer malicious conduct. It found that Robson's pleading was vague and lacked specific allegations and particulars of the improper purpose and ulterior motive alleged and, as a consequence, struck out the paragraphs with leave to amend.

Misfeasance in (abuse of) public office

The court cited the essential elements of the tort of misfeasance in (abuse of) public office as outlined in the Ontario Court of Appeal's decision in *Conway,***(6)** which are as follows:

> "*The tort of misfeasance in public office has been variously described in the case law as the tort of abuse of public office or abuse of statutory power... Whatever the nomenclature, the essence of the tort is the deliberate and dishonest wrongful abuse of powers given to a public officer, coupled with the knowledge that the misconduct is likely to injure the plaintiff... Bad faith or dishonesty is an essential ingredient of the tort...*"

It determined that Robson's amended statement of claim did not plead the full particulars required of the specific acts or actions complained of and struck out the allegations of misfeasance in (abuse of) public office with leave to amend.

In response to the Law Society's arguments to strike out various allegations in his amended statement of claim, Robson argued that he was not in a position to offer particulars in his pleading relating to the two torts of malicious prosecution and misfeasance in (abuse of) public office. The court's response to this argument was that this was not a tenable or realistic position to take on a pleadings motion. In this regard, it stated that:

> "*Regarding the present causes of action grounded in alleged malice and bad faith conduct, particulars of the specific acts complained of, ie, 'who did what and when,' must be pled. Anything less is a bald allegation which will be found to be 'frivolous and vexatious.'*"

The court determined that it was appropriate, notwithstanding its ruling that the allegations regarding the tort of malicious prosecution and misfeasance in (abuse of) public office should be struck, that it should grant leave to Robson to amend his statement of claim. It reasoned, quoting *Conway*, that:

> "*The decision not to grant leave to amend should only be made in the clearest of cases, when it is plain and obvious that no tenable cause of action is possible on the facts as alleged.*"

Abuse of process

The court cited the Supreme Court of Canada's decision in *Toronto (City) v Canadian Union of Public Employees, Local 79***(7)**
regarding the doctrine of abuse of process as follows:

> *"The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute.* It is a flexible doctrine unencumbered by the specific requirements of concepts such as an issue estoppel... *[Emphasis added by Arbour J.]*

> *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be, in essence, an attempt to re-litigate a claim which the court has already determined...*
>
> *The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel...:*
>
> *The two policy grounds, namely, that there be an end to litigation and that no one should be twice as vexed by the same cause, have been cited as policies in the application of abuse of process by re-litigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice."*

Applying the applicable legal principles, the court found that Robson's action was not an attempt to re-litigate a claim that had already been determined at Robson's hearing before the Law Society Appeal Division and, as a consequence, it refused to dismiss the action on that basis.

Comment

The court granted Robson leave to serve and file a fresh as amended statement of claim within 60 days of September 14 2016. It remains to be seen whether the Law Society will bring a similar motion once it is served with the fresh as amended statement of claim. It stands to reason, however, that a self-regulated organisation such as the Law Society will take whatever steps required to prevent any lawsuit against it or any of its employees, to send a clear message that the Law Society will vigorously oppose any actions by disgruntled lawyers.

For further information on this topic please contact Norm Emblem, Jessie Lamont or Jana Pauk at Dentons Canada LLP by telephone (+1 416 863 4511) or email (norm.emblem@dentons.com, jessie.lamont@dentons.com or jana.pauk@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) 2016 ONSC 5579.

(2) 2016 ONCA 72.

(3) 2001 3 SCR 562.

(4) 1990 CanLII 6925.

(5) 2009 SCC 51.

(6) 2016 ONCA 72.

(7) 2003 SCC 63.

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