SCC File No. 38687

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

ATTORNEY GENERAL OF ONTARIO

APPELLANT
(Appellant)

- and –

JAMIE CLARK, DONALD BELANGER and STEVEN WATTS

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(Respondents)

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INTERVENERS

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(Pursuant to the Order of The Hon. Nicholas Kasirer, dated June 19, 2020)

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1. There is a common and predictable theme that permeates the submissions of the various Attorneys General intervening in this appeal. Each claim, with only linguistic and stylistic variance distinguishing their substantive positions, that should this Court affirm the Ontario Court of Appeal, trial courts will be overwhelmed as the litigation floodgates disintegrate and give way under the weight of misfeasance claims launched against Crown prosecutors for any manner of decisions they make. The interveners, borrowing from the Appellant's playbook, suggest that Crown prosecutors will be so chilled and fearful of the thought of being called to account that their ability to make independent, objective, and discretionary decisions will forever be compromised. None of these arguments are surprising. They are misguided, and are the same arguments advanced by the some of the same parties in *Henry*[1]. For example, the Manitoba Attorney General, intervening in *Henry* argued that[2]:

> 3. Permitting damages for prosecutorial misconduct on a standard other than malice would be harmful to the administration of justice. It would expose prosecutors to many more civil actions for damages, resulting in the re-litigation and rehashing of many decisions made during criminal trials. Not only would this undermine the important objective of finality in the criminal process, it would divert Crown Attorneys from the exercise of their prosecutorial duties to defend civil claims and have a chilling effect on their independent decision-making.

Now the interveners argue that the floodgates will open for claims of misfeasance in public office, even if there is a malice requirement. The Attorneys General have "cried wolf" too often for these *in terrorem* arguments to carry any weight.

2. What is surprising about the Attorneys General arguments is that none of them, who have carriage of criminal prosecutions throughout this country, grapple with the key question: why should it be that Crown prosecutors who engage in bad faith conduct or make malicious decisions for reasons unconnected to the good faith discharge of their ministerial role are not held accountable for damages they cause? The same Crown prosecutors are responsible when they deliberately breach *Charter* rights and when they prosecute accused persons maliciously. Extending existing liability to third parties directly affected by bad faith or malicious decisions

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[1] *Henry v. British Columbia (Attorney General)* 2015 SCC 24

[2] https://www.scc-csc.ca/WebDocuments-DocumentsWeb/35745/FM070_Intervener_Attorney-General-of-Manitoba.pdf

unconnected to the good faith discharge of the role of the Crown does not, as these interveners argue, detract from the truth seeking function of the criminal trial, nor does it adversely affect the rights of the criminal accused. The criminal accused is not entitled to an unfair trial. He or she is not entitled to a prosecutor making bad faith decisions in the conduct of the trial that injure another party, even though they might improperly inure to the benefit of the accused[3].

3. Similarly, the suggestion that holding Crown prosecutors civilly accountable for bad faith decisions will adversely affect trial management, court efficiency, and the conduct of trials within a reasonable period of time is adversarial rhetoric, rather than a legitimate policy concern. There is a logical disconnect between allowing a claim for misfeasance in public office to proceed against a prosecutor and the suggestion that this will adversely affect the legitimate good faith conduct of a criminal trial. The Respondents' cause of action, and similar claims supported by an evidentiary foundation, will serve to prevent the criminal trial process from being manipulated, highjacked, distorted or otherwise compromised by rogue prosecutors acting outside their proper role as Crown counsel. Such prosecutorial misconduct is rare. The vast majority of prosecutors will have nothing to worry about, nothing to fear and will not be chilled in the pursuance of their duties. But those rare prosecutors who might otherwise act in bad faith should be chilled, deterred and be on notice that they cannot so act with impunity.[4] The Respondents' cause of action promotes good faith and responsible prosecutorial conduct – a goal that the Attorneys General should be supporting rather than seeking to thwart.

4. Concerns about frivolous lawsuits, which it is said will divert Crown prosecutors from carrying out their duties are unpersuasive. The cost of litigation, adverse costs consequences and the ability to weed out claims through summary judgment motions provide disincentives to pursuing claims that are devoid of merit. The concern that some misguided plaintiffs pursue

[3] The absence of interveners such as the Criminal Lawyers' Association, the Canadian Civil Liberties Association or the British Columbia Civil Liberties Association making arguments that the fair trial rights of the accused would be compromised were acts of misfeasance of Crown prosecutors subject to civil liability is telling.

[4] In this regard, although the policy of Attorney Generals is to exempt all of their agents from personal liability, they need not do so for bad faith decisions.

unmeritorious claims is not a principled basis to deny a genuine plaintiff a remedy for tortious conduct. Nor can it be principled to provide offending defendants with immunity. As pointed out in the Respondent's factum, if there is a legitimate concern about such frivolous claims being advanced, each province could follow Ontario's lead and enact legislation requiring that plaintiffs seek leave of the court before advancing such a claim[5].

The Attorney General of British Columbia has raised a new issue that was not raised by the parties and ought not be considered – Absolute Privilege

5. The Attorney General of British Columbia has suggested that "absolute privilege" in relation to statements made by Crown prosecutors in court operates as a complete bar to the Respondent's claim proceeding (para 16 and following of its factum). The Appellant did not raise this issue and, accordingly, it is not properly raised by an intervener[6]. In any event, absolute privilege has no bearing on the Respondents' claim. Their claim is based on the improper actions and inaction of the prosecutor defendants, not on what they said in the courtroom. Absolute privilege, a doctrine which originates form the law of defamation, does not apply to omissions or silence.[7] The case relied upon by the Attorney General of British Columbia makes it clear that absolute privilege is only available to counsel "who is not malicious and is acting *bona fide."*[8] The Attorney General is improperly conflating absolute privilege with absolute immunity. If the defence is available here, it can be pleaded in a statement of defence and it is irrelevant to the issues in this appeal.

The Crown Attorney Association interveners have improperly raised a new issue that was not raised by the parties – police officers are not "members of the public" for the purpose of the tort

6. The Crown Attorney interevners suggest that although there is no duty of care requirement for the tort of misfeasance in public office, a public official to be liable must nonetheless "breach

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[5] https://www.scc-csc.ca/WebDocuments-DocumentsWeb/38687/FM020_Respondents_Jamie-Clark-et-al.pdf, para 15 referencing the *Crown Liability and Proceedings Act* S.O. 2019, c 7 Sch 7.

[6] In the June 19, 2020 Endorsement of Kasirer J. permitting intervention, he noted that "The interveners are not entitled to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties."

[7] *Amato v. Welsh* 2013 ONCA 258 at para 71 to 73

[8] *Hamouth v. Edwards & Angell* 2005 BCCA 172 at para 37

a duty that he or she owed" to the plaintiff. Although the Crown owes a duty of good faith decision making to the public, they argue that because the Respondents were involved in investigating the underlying crime that was being prosecuted, they are not members of the "public" for the purpose of the tort, but instead were state actors for the purpose of s.32 of the *Charter*. This issue was not raised by the Appellant and, accordingly, is not properly raised by an intervener.

7. The Crown Attorney interveners also misapprehend this Court's decision in *Odavji Estate v. Woodhouse*[9]. The elements of the tort are deliberate malicious disregard of official public duty "coupled with knowledge that the misconduct is likely to injure the plaintiff" (para 23). The latter element of the tort reflects the fact that there must be damages – there can be no tort without corresponding damages[10]. The former element reflects the fact that the defendant must hold a public office which he or she is entrusted to discharge. Once a prosecution is underway, police have no control over it. They are not subsumed by the public office of the prosecutor. Instead, they are members of the public, just as witnesses and complainants are. Although they may have an interest in the outcome of the case, they are not one and one with the prosecution. Should a prosecutor commit a misfeasance during the conduct of a trial or an appeal that causes injury and damages to the police officer, an action to be compensated for those damages ought to be available.

Conclusion

8. Although there is much to disagree with in the Attorneys General interveners' factums, the New Brunswick Attorney General candidly acknowledges that "[b]ased on past decisions of this Court, it is not surprising that the Ontario Court of Appeal allowed a claim of misfeasance to proceed against a Crown prosecutor on a malice threshold."[11] That is so because the pleadings in the case at bar clearly support the claim that the Crown prosecutors were acting maliciously when they engaged in conduct that they knew would cause damages to the Respondents. Crown prosecutors should not be immune from being held responsible in these circumstances, any more than any other person who holds a public office. Once a public officer acts maliciously in the discharge of a public duty, the rationale for civil liability immunity evaporates. While a rare

[9] *Odavji Estate v. Woodhouse* 2003 SCC 69
[10] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19
[11] Factum of the Attorney General of New Brunswick, para 8 (footnotes omitted).

occurrence, recognizing the tort of misfeasance in public office fosters, rather than frustrates, confidence in the administration of criminal justice.

DATED AT TORONTO THIS 11th DAY OF AUGUST, 2020

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