COURT OF APPEAL FOR ONTARIO

CITATION: Biladeau v. Ontario (Attorney General), 2014 ONCA 848
DATE: 20141127
DOCKET: C57830

Juriansz, LaForme and Lauwers JJ.A.

BETWEEN

Bill Biladeau

Appellant

and

Ministry of the Attorney General

Respondent

Bill Biladeau, in person

Nadia Laeeque, for the respondent

Heard: September 19, 2014

On appeal from the order of Justice Morgan of the Superior Court of Justice, dated October 15, 2013.

H.S. LaForme J.A.:

I. INTRODUCTION

[1] The appellant, who has represented himself throughout these civil proceedings, commenced an action against "The Attorney General of Ontario"[1] alleging malicious prosecution and seeking damages for breach of *Charter* rights.

[1] Although the defendant is improperly named in the style of cause, this has not been made an issue in these proceedings.

Underlying this action is a criminal proceeding initiated against the appellant that ultimately terminated in his favour. At the appellant's criminal trial, Crown counsel (not counsel on this appeal) commented on the appellant's failure to testify. This appeal arises out of those comments.

[2] The defendant – Ministry of the Attorney General (MAG) – brought a motion to strike the appellant's statement of claim for failing to disclose a reasonable cause of action. On the first hearing of the motion, an adjournment was granted to allow the appellant to amend his claim. On the second hearing, the motion to strike the statement of claim was granted and the appellant's claims were dismissed. This second decision is the subject of this appeal.

[3] For the reasons that follow, I would allow the appeal and order that the appellant be given an opportunity to further amend his statement of claim in accordance with these reasons.

II. BACKGROUND

[4] In May 2007 the appellant was tried for sexual assault. He did not testify. The trial Crown began his closing address by cautioning the jury "not [to] get mesmerized by reasonable doubt" and that reasonable doubt is "not a speculative doubt conjured up by a timid juror to escape his or her duty". He then twice observed that the complainant's evidence stood uncontradicted. Finally, and most significantly, the trial Crown commented on the appellant's failure to

testify in reference to the appellant's belief in consent: "But he didn't testify, so he can't be asked directly what he thought at the time or what he construed or what he knew." The appellant was convicted.

[5] On December 9, 2008, this court overturned the appellant's conviction and ordered a new trial: *R. v. Biladeau*, 2008 ONCA 833, 93 O.R. (3d) 365 (the "conviction appeal"). Sharpe J.A., writing for this court, concluded at para. 35: "The comments of Crown counsel violated the appellant's statutory right under s. 4(6) of the *Canada Evidence Act*… [and] prejudiced the appellant's right to a fair trial". Ultimately, the Crown determined it would not proceed with a new trial.

[6] In August 2011 the appellant commenced an action against MAG. He claimed damages for malicious prosecution, breach of professional conduct, and alleged that the conduct of the prosecution had breached his right to a fair trial as guaranteed by the *Charter of Rights and Freedoms*.

[7] MAG brought a motion under rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to strike the appellant's claim for failing to disclose a reasonable cause of action. On the first hearing of the respondent's motion on October 19, 2012, the motion judge granted an adjournment to allow the appellant to amend his statement of claim. The motion judge advised the appellant that "he must plead facts from which an inference of malice may arise",

and that "[o]rdinarily, a reversible error in a Crown's closing argument would not be sufficient for that purpose."

[8] On October 15, 2013, the appellant's amended statement of claim was struck out and his action was dismissed. In his brief handwritten endorsement, the motion judge found that the amended claim still did not meet the test for malicious prosecution. Specifically, the motion judge found that the claim was deficient in pleading two essential ingredients of the tort of malicious prosecution: malice, and an absence of reasonable and probable grounds to initiate the prosecution.

[9] The motion judge noted: "[The appellant's claim] does not provide any material facts supporting the claim of malice; in fact, it does not even make mention of the Plaintiff's view that the prosecutor's actions in leading to the erroneous conviction were intentional." He also noted:

> The one fact that the claim now adds is that the prosecutor had over 10 years experience. The plaintiff says, in effect, that it goes without saying that his error to the jury must have been malicious. Such an experienced prosecutor, the plaintiff contends, could not have otherwise made such a mistake.

[10] The motion judge made no reference to the appellant's *Charter* damages claim.

[11] On this appeal, the appellant argues that the facts he pled support his allegations of malicious prosecution and breach of *Charter* rights. According to

the appellant, these facts describe the experience of the trial Crown, which in turn shows that any missteps were more likely to be deliberate than accidental. These facts therefore show Crown counsel's intention, facing evidence that favoured the defence, to obtain a guilty verdict through knowingly improperly commenting on the appellant's failure to testify or to avoid an acquittal by causing a mistrial.

[12] I agree with the appellant. Although the amended statement of claim suffers from drafting deficiencies – as one might expect from a self-represented litigant without any legal training – when read generously and having due allowance for the deficiencies, it is not plain and obvious that no reasonable causes of action are disclosed: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959, at p. 980. I expand below.

III. ISSUES

[13] From the appellant's notice of appeal and his oral submissions, I believe this appeal turns on the answers to two questions:

> (1) Were there sufficient facts pled to support a claim for malicious prosecution, keeping in mind the test applied on a rule 21 motion?
>
> (2) Did the motion judge consider the appellant's claim for *Charter* damages and, in any case, are the elements of the *Charter* damages claim similar to the elements of malicious prosecution?

[14] Finally, if this court concludes that additional facts are required in the appellant's pleadings, the appellant requests a further opportunity to amend his claim.

IV. ANALYSIS

[15] The motion judge in this case was ruling on a self-represented plaintiff's second attempt to plead the complex private law tort of malicious prosecution and the public law claim for *Charter* damages. The burden on the moving party under rule 21.01 is significant. To succeed, MAG must demonstrate that neither claim has a chance of succeeding; indeed, that the claims are certain to fail. Put another way: is it plain and obvious that no reasonable cause of action is disclosed? At this preliminary stage, the alleged facts are to be taken as true and the statement of claim is to be read as generously as possible with a view to accommodating any inadequacies in the allegations: see *Guergis v. Novak*, 2013 ONCA 449, at paras. 35-36.

[16] The motion judge was satisfied that MAG discharged its heavy burden. I respectfully disagree. I examine the motion judge's conclusions about malicious prosecution before addressing the appellant's *Charter* damages claim.

(i) Malicious Prosecution

[17] The tort of malicious prosecution has four elements, namely, that the proceedings must have been: (1) initiated by the defendant; (2) terminated in

favour of the plaintiff; (3) undertaken without reasonable and probable cause to commence or continue the prosecution; and (4) motivated by malice or a primary purpose other than that of carrying the law into effect: see *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at pp. 192-194; see also *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, at para. 3. Only the third and fourth elements are at issue in this appeal.

[18] The third element in a malicious prosecution claim is focused on the trial Crown's decision to initiate or continue with a criminal prosecution. This decision is one of the "core elements" of prosecutorial discretion, and is "beyond the legitimate reach of the court" unless a Crown prosecutor steps out of his or her role as "minister of justice": *Miazga*, at paras. 6-7.

[19] A description of the Crown's role as "minister of justice" that is often cited in our jurisprudence is found in *Boucher v. The Queen*, [1955] S.C.R. 16, at pp. 23-24:

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction, it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the

> dignity, the seriousness and the justness of judicial proceedings. [Emphasis added.]

[20] In *R. v. Trochym*, 2007 SCC 6, [2007] 1 S.C.R. 239, at para. 79, the Supreme Court added the following comment on the role of Crown counsel:

> Crown counsel are expected to present, fully and diligently, all the material facts that have evidentiary value, as well as all the proper inferences that may reasonably be drawn from those facts. However, it is not the Crown's function "to persuade a jury to convict other than by reason": *R. v. Proctor* (1992), 11 C.R. (4th) 200 (Man. C.A.), at para. 59. Rhetorical techniques that distort the fact-finding process, and misleading and highly prejudicial statements, have no place in a criminal prosecution. [Emphasis added.]

[21] The fourth element in a malicious prosecution claim – that the proceedings were motivated by malice – requires that the trial Crown commenced or continued the prosecution with a purpose inconsistent with his or her role as a "minister of justice": *Miazga*, at para. 89.

[22] The question before the motion judge, therefore, was whether there was a sufficient factual foundation in the pleadings to indicate that the Crown proceeded to prosecute the appellant without reasonable or probable cause for success, and that the Crown acted with malice in doing so. A perfect pleading is not required.

(a) Relevant pleadings in the amended claim

[23] The appellant's pleadings enumerate facts that I believe are considerably more important to the malice element of malicious prosecution than the motion judge appears to have appreciated. The following are excerpts from the appellant's amended statement of claim, the first two of which are critical comments and findings of Sharpe J.A. in his reasons for decision in the conviction appeal:

- "[The trial Crown's] reference to "timid juror" in the face of a clear warning from this court in [*R. v. Karthiresu* (2000), 129 O.A.C. 291], when read with the comment on the appellant's failure to testify, suggests that Crown counsel may well have been flirting with danger and deliberately testing the outer limits of what is permissible": p. 5 of Amended Statement of Claim, quoting para. 33 of conviction appeal.

- "[In my view], the comments in the case at bar cannot be excused as ambiguous or off-hand. Rather, they appear to have been part of a carefully structured closing address that pointedly drew the attention of the jury to the fact that the accused did not take the stand. If the Crown's closing address did not do so explicitly, it strongly implied that the jury could and should infer that the appellant's silence and his refusal to expose himself to cross-examination were indicia of his guilt": p. 5 of Amended Statement of Claim, quoting para. 31 of conviction appeal.

- "The Crown prosecutor had more than ten years' experience at the time of trial. The Prosecutor said to my lawyer at the time that he studied his closing that night which will show knowledge of

> the law and information": p. 5 of Amended Statement of Claim.

[24] I now turn to analyzing how the appellant's pleadings map onto the third and fourth elements of malicious prosecution.

(b) Third element – reasonable or probable grounds

[25] The motion judge observed that there was nothing in the conviction appeal "to suggest that the Crown had no grounds on which to proceed with the prosecution in the first place." The third element of the tort, however, requires that the Crown have reasonable or probable cause to both commence and *continue* the prosecution. It appears that the motion judge believed he only had to consider the Crown's cause to commence the prosecution.

[26] It is true that the appellant's pleadings make no reference to facts that support an allegation that the trial Crown had no reasonable cause to continue the prosecution.[2] However, the record in this case suggests that there are facts that the appellant could plead in support of this third element. For example, Sharpe J.A. makes several findings and observations in the conviction appeal on this issue, including:

- "The complainant's evidence that she experienced vaginal bleeding after the incident

[2] The motion judge who granted the appellant an adjournment to amend his statement of claim after the first hearing of the motion on October 19, 2012 only referenced the malice element in his brief endorsement. The endorsement was silent on the reasonable or probable grounds element of the tort.

> was not corroborated by the evidence of the nurse who treated her": para. 9 of conviction appeal.
>
> - "The complainant's evidence was challenged and the Crown's case was not overwhelming": para. 35 of conviction appeal.

[27] The trial transcript reveals that the presence of blood on the complainant's underwear was also not confirmed by the DNA expert, who testified she saw no blood when she examined the garment.

[28] In oral argument before this court the appellant alleged that the Crown "knew the case was lost" but persisted with the prosecution. He submitted that at this preliminary stage, an inference can be made that the Crown had no reasonable grounds to proceed with the prosecution for two reasons. First, he points out that the nurse and the DNA expert contradicted the complainant at trial. Second, he says that following his successful conviction appeal, the Crown dropped the case after the appellant rejected what the Crown allegedly described as the "deal of a lifetime."

[29] The appellant argues that the Crown's offers – and the eventual abandonment of the case – show that the Crown knew it had a weak case against him, particularly when combined with Sharpe J.A.'s comment that the Crown's case "was not overwhelming". These facts, he says, demonstrate that the Crown did not have reasonable or probable cause to commence or continue the prosecution.

[30] I agree with the appellant. In my view, had these facts been pleaded, had they been taken as being true, and had the claim been read as generously as possible with any inadequacies in the allegations being accommodated, I am satisfied that these facts would have been sufficient to survive the Crown's rule 21 motion in connection with the third element.

[31] Given the motion judge's apparent narrow view of the requirements of the third element, I would grant the appellant leave to further amend his statement of claim to conform to these reasons.

(c) Fourth element – malice

[32] In analyzing this final element of the tort, the motion judge was required to generously read the appellant's claim to determine whether it is plain and obvious that the appellant's allegation of malice would fail. In other words, is it plain and obvious that the pleaded facts fail to indicate that the trial Crown commenced or continued the prosecution of the appellant with a purpose inconsistent with his or her role as a "minister of justice"? Contrary to the opinion of the motion judge, in my view, it is not plain and obvious that the facts underpinning the appellant's allegations of malice are deficient in this regard.

[33] The motion judge found that the appellant's amended pleadings did not "meet the test". As mentioned above, in his view, "[the appellant's claim] does not provide any material facts supporting the claim of malice; in fact, it does not even

make mention of the Plaintiff's view that the prosecutor's actions in leading to the erroneous conviction were intentional." I disagree. Had the motion judge read the claim generously and accommodated the drafting deficiencies, he would have arrived at a different conclusion.

[34] By including Sharpe J.A.'s findings and comments from paras. 31 and 33 of the conviction appeal, set out above, a generous reading of the appellant's claim discloses that the appellant was attempting to demonstrate that the experienced trial Crown's actions were neither negligent nor mere mistakes; rather, these actions were wilful and intentional. That is to say, the more experience one has, the more likely one understands fully the relevant law. As the appellant writes in his notice of appeal: "The evidence shows [trial Crown's] intention to get a guilty verdict with his closing address to the jury and not follow the law."

[35] The appellant's pleadings allow for the inference to be made that the trial Crown may have been motivated by the improper purpose of getting a conviction at all costs, or that he may have been attempting to get a mistrial.

[36] The passages from Sharpe J.A.'s reasons contained in the appellant's claim illustrate that the trial Crown employed "misleading and highly prejudicial statements" and "[r]hetorical techniques that distort[ed] the fact-finding process": *Trochym*, at para. 79. A trial Crown – a minister of justice – who relies on such

dubious strategies may be motivated by an improper purpose. For example, it would be an improper purpose to use these strategies "to persuade a jury to convict other than by reason": *Trochym*, at para. 79. The appellant's pleadings read generously allow for this inference.

[37] I would allow this ground of appeal.

II. *Charter* Damages Claim

[38] The appellant's pleadings in support of his claim for *Charter* damages is limited to the fact that the trial Crown commented on his failure to testify at trial. His claim is that his s. 11 *Charter* right to a fair trial was breached and that as a result he suffered damages under s. 24(1) of the *Charter of Rights and Freedoms*. The motion judge made no mention of this issue in his reasons for decision in which he ordered the appellant's entire statement of claim struck out.

[39] Section 24(1) of the *Charter* authorizes a court to award constitutional damages to individuals for *Charter* infringements where "appropriate and just": *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, at para. 4. To determine what is "appropriate and just" in a given case, the court in *Ward* articulated a four-part approach. These four steps can be paraphrased as follows:

> First, determine that there has been a *Charter* breach.
>
> Second, determine whether damages are a just and appropriate remedy. In doing so, consider whether

> damages would fulfill any of the related functions: compensation for loss, vindication of the right, or the deterrence of future breaches.
>
> Third, determine whether the state has established that other countervailing considerations render damages inappropriate or unjust.
>
> Fourth, assess the quantum of the damages.

[40] In *Ward*, when addressing the requirement that damages be "appropriate and just", the court used malicious prosecution as an example, and at para. 43 stated: "When appropriate, private law thresholds and defences may offer guidance in determining whether s. 24(1) damages would be "appropriate and just"."

[41] Although authority on awarding *Charter* damages is relatively recent, it seems clear that when it comes to malicious prosecution, there is a high degree of overlap between the elements of the tort and a corresponding claim for *Charter* damages. The precise extent of the overlap is unclear; however, malice appears to be an integral component of both actions. Accordingly, the facts alleged by the appellant in regard to the tort of malicious prosecution appear to be equally applicable to the appellant's corresponding claim for *Charter* damages: see *Forrest v. Kirkland*, 2012 ONSC 429, 296 O.A.C. 244 (Div. Ct.) at para. 62; see also *Henry v. British Columbia (Attorney General)*, 2014 BCCA 15; 370 D.L.R. (4th) 742, leave to appeal to S.C.C. granted, 35745 (May 15, 2014).

[42] Therefore, the bar that the appellant will have to overcome for his *Charter* damages claim is at least as high as the bar he must surmount for a private law malicious prosecution action. However, as with his claim for malicious prosecution, the appellant is merely at the pleadings stage and is only required to plead facts sufficient to show that it is not plain and obvious that no reasonable cause of action is disclosed.

[43] As mentioned above, the appellant's pleadings referencing paras. 31 and 33 of the conviction appeal allow the inference to be drawn that the experienced trial Crown's actions were wilful and intentional, and carried out for an improper purpose. My reasons for allowing the appeal in regards to the malice requirement of malicious prosecution apply equally to the *Charter* damages claim. Further, in the absence of any explanation in his endorsement, it is difficult to discern why the motion judge struck this part of the appellant's claim.

[44] Although it may not be strictly necessary for the appellant to repeat the relevant facts under both claims, his pleadings should at least make it clear that he relies on the same facts to support both his malicious prosecution claim and his *Charter* damages claim. Accordingly, I would grant the appellant leave to amend his pleadings to accord with these reasons.

V. DISPOSITION

[45] For these reasons, I would allow the appeal and set aside the motion judge's order. I would order that the self-represented appellant be granted leave to further amend his amended statement of claim in accordance with these reasons. Lastly, as neither party sought costs on this appeal, I would order there be no costs awarded.

Released: HSL November 27, 2014

"H.S. LaForme J.A."
"I agree. R.G. Juriansz J.A."
"I agree. P. Lauwers J.A."