On appeal from a decision of Senior Master Clearwater on May 4, 2023.

Date: 20240531
Docket: CI 19-01-23904
(Winnipeg Centre)
Indexed as: Grant v. The Government of Manitoba et al.
Cited as: 2024 MBKB 77

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

MARK GRANT,	)	
	)	Lawrence Greenspon
plaintiff,	)	Jadden Howell
	)	Glenn Morison,
- and -	)	support person for the plaintiff
	)	(all parties appeared by video)
	)	
THE ATTORNEY GENERAL OF MANITOBA,	)	Devin A. Johnston
THE GOVERNMENT OF MANITOBA, CITY OF	)	Tristan P. Sandulak
WINNIPEG,	)	for Provincial Defendants
	)	
defendants.	)	Brandon Barnes Trickett
	)	Tom Nichini, Articling Student
	)	for City of Winnipeg
	)	
	)	JUDGMENT DELIVERED:
	)	May 31, 2024

HARRIS J.

INTRODUCTION

[1] In 2007, Mark Grant (Mr. Grant or the plaintiff) was arrested and charged with the 1984 murder of Candace Derksen. He was tried and convicted in 2011, based largely on what he alleges was faulty and unreliable DNA evidence. On

appeal to the Court of Appeal, a new trial was ordered (***R. v. Grant (M.E.)***, 2013 MBCA 95). An appeal by the Provincial Defendants to the Supreme Court of Canada was unsuccessful (***R. v. Grant***, 2015 SCC 9, [2015] 1 S.C.R. 475). Mr. Grant was ultimately acquitted in 2017 (***R. v. Grant***, 2017 MBQB 176), and in 2019, commenced this claim for malicious prosecution against the Provincial Defendants.

[2] The Provincial Defendants moved unsuccessfully before the Senior Master (now Senior Associate Judge) to strike the claim for disclosing no reasonable cause of action or as being an abuse of process. They now appeal that decision.

[3] The Provincial Defendants say that even if the plaintiff succeeds in proving everything in his pleading that he would be capable of proving, the claim does not establish the third and fourth elements of the tort of malicious prosecution:

> 3. That there was an objective absence of reasonable and probable grounds for the commencement, or continuation, of the proceeding, as it relates to the Crown prosecutors; and
> 4. That there was malice, which requires proof that the prosecutor wilfully perverted or abused the Office of the Attorney General or the process of criminal justice.

[4] Alternatively, the Provincial Defendants say that the claim is an abuse of the court process by way of a collateral attack on decisions made by the courts during the plaintiff's criminal proceedings.

[5] In ***Payne v. R. Litz & Sons Co. Ltd.***, 2013 MBQB 121, 292 Man. R. (2d) 201, Mainella J. (as he then was) set out the standard of review with respect to appeals from the Master (now Associate Judge) as follows:

> [8] The appeal of a decision of a master is a fresh hearing. While the decision and reasons of the master should be carefully considered, no deference is owed even on findings of fact or in the exercise of discretion. There are no limitations on the authority of a motions court judge in exercising an independent discretion. See Queen's Bench Rule 62.01(13), and *ABI Biotechnology Inc. v. Apotex Inc. et al.*, 2008 MBCA 146, 231 Man. R. (2d) 259 at para. 4 (C.A.).

King's Bench Rule 25.11

[6] Rule 25.11(1) of the Manitoba, ***Court of King's Bench Rules***, M.R. 553/88, provides that a court may strike out or expunge all of a pleading, with or without leave to amend, on the ground that the pleading fails to disclose a reasonable cause of action, or is an abuse of the process of the court.

[7] A pleading will only be struck if it is plain and obvious, assuming the facts to be true, that the pleading does not disclose a reasonable cause of action (***R. v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 17). A pleading is to be read generously so as to not unfairly deny a party the benefit of the pleading (***Balanyk v. University of Toronto***, 1999 ONSC 14918 at para. 30).

[8] In ***O'Farrell et al v Attorney General of Canada et al***, 2016 ONSC 6342, the court noted (at para. 33):

> … "a germ or scintilla" of a cause of action will be sufficient. (emphasis in original)

[9] In ***Grant v. Winnipeg Regional Health Authority et al***., 2015 MBCA 44, 319 Man. R. (2d) 67, Mainella J.A. echoed this cautious approach:

> [36] The remedy of striking out a pleading, however, is to be used sparingly. It is reserved only for the "clearest of cases" (*Ellett and Kyte v. Qualico Securities (Winnipeg) Ltd. et al.* (1990), 1990 CanLII 11333 (MB CA), 64 Man.R. (2d) 318 at para. 6 (C.A.)). A claim or defence, or part thereof, should not be struck out unless the moving party demonstrates that it is "plain and obvious" that the cause of action or defence, as pleaded, is certain to fail (*Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para. 15, [2003] 3 S.C.R. 263).
>
> [37] On a motion to strike, the claim or defence should be read generously notwithstanding any imprecision in the language used in it. Factors such as the novelty of a claim or defence, the length or complexity of the issues raised by it, or the likelihood that the opposing party has a strong position that will likely defeat the claim or defence are not reasons alone to strike out the pleading (*Hunt* at p. 980). If a claim or defence has a reasonable prospect of success, it should not be struck out (*Imperial Tobacco Canada Ltd.* at para. 17; *Driskell v. Dangerfield et al*., 2008 MBCA 60 at paras. 11-13, 228 Man.R. (2d) 116).
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> [38] Caution before too quickly striking a claim for not disclosing a reasonable cause of action is particularly important when the relief sought includes a remedy pursuant to s. 24(1) of the *Charter* for the alleged violation of constitutional rights by the state. In *Henry v. British Columbia (Attorney General)*, 2015 SCC 24, Moldaver J. stated (at para. 35):
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> > *Charter d*amages are a powerful tool that can provide a meaningful response to rights violations. They also represent an evolving area of the law that must be allowed to "develop incrementally": *Ward*, at para. 21. When defining the circumstances in which a *Charter* damages award would be appropriate and just, courts must therefore be careful not to stifle the emergence and development of this important remedy.

[10] A motion to strike for failing to disclose a cause of action is based on the pleadings – no evidence is admissible aside from the pleadings *(**R. v. Basaraba; Basaraba v. Rutley***, 2006 MBCA 27, 201 Man. R. (2d) 302 at para. 26).

[11] However, the court may consider evidence beyond the pleadings to determine whether a claim is an abuse of the process of the court. (***Rebillard v. Manitoba (A.G.) et al.***, 2014 MBQB 181 at para. 32) Both parties referred extensively to the judgments of the Court of Appeal ordering a new trial and of Simonsen J. (as she then was) who acquitted Mr. Grant at his second trial.

[12] In ***5976511 Manitoba Ltd. et al. v. Taylor McCaffrey LLP et al***., 2020 MBQB 7, Grammond J. considered how the courts have interpreted the doctrine of abuse of process:

> [9] In *Nygård International Partnership v. Canadian Broadcasting Corporation et al.*, 2011 MBQB 124, the court stated:
>
> > [16] Abuse of process has been succinctly described in the oft-quoted passage by Arbour J. in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77:
> >
> > > 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings 'unfair to the point that they are contrary to the interest of justice'…, and as 'oppressive treatment'… [citations omitted]
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> [10] In *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, the court stated:
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> > [40] The doctrine of abuse of process is characterized by its flexibility. …abuse of process is unencumbered by specific requirements. …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…
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> [11] In *Vitacea Company Ltd. et al. v. The Winning Combination Inc. et al.*, 2016 MBQB 180, the court stated:
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> > [87] … An abuse of process may arise when a legal process is used for an ulterior motive, other than that for which it was intended. When properly invoked, an allegation of abuse of process is meant to provide protection against harassment or

> the perversion of the legal process for the purposes of accomplishing an improper result. See *Re Moss* (1999), 1999 CanLII 14182 (MB QB), 137 Man.R. (2d) 199 at para. 35 (C.A.).… A particular or unique emphasis and focus of an abuse of process claim is on the court's integrity and its interest in maintaining confidence in the administration of justice.
>
> [emphasis added]

Malicious Prosecution

[13] There are four elements that a plaintiff must allege and prove in a claim for malicious prosecution. The first two elements of the tort - (1) that the prosecution was initiated by the defendant; and (2) was terminated in favour of the plaintiff – are conceded. It is the third and fourth elements which are at issue in this litigation. The Provincial Defendants submit that, viewed through the lens of ***Miazga v. Kvello Estate***, 2009 SCC 51, [2009] 3 S.C.R. 339, the plaintiff's pleadings fall short of adequately addressing the third and fourth elements.

[14] The third element of the tort requires Mr. Grant to allege and prove that the Provincial Defendants lacked objective reasonable grounds for the commencement, or the continuation, of the prosecution. The focus of the analysis is on the prosecutor's professional assessment of the strength of the case, not on the prosecutor's personal views (***Miazga*** at paras. 63 to 67). Thus, the plaintiff should succeed at the third stage upon showing an absence of objective grounds, even though the prosecutor believed they existed (***Miazga*** at para. 71). The plaintiff must establish that the Crown did not objectively have reasonable probable grounds to employ the criminal law process on the basis of facts known to it at a relevant time (***Miazga*** at para. 75). But the Crown cannot simply rely

on the fact that it had reasonable and probable grounds to initiate the prosecution. It has an ongoing responsibility to evaluate the prosecution in the light of changing evidence (***Alexander v. Halley***, 2009 MBQB 228, 244 Man. R. (2d) 101 at para. 80).

[15] In ***Newton v. Ontario (Provincial Police)***, [2001] O.J. No 3471 (S.C.J.), Low, J. said that, "[i]f there existed exculpatory evidence, it may possibly be inferred that there was objectively an absence of reasonable and probable cause" (see also ***Skandarajah v. Canada (Attorney General)***, 2001 CarswellOnt 3902, [2001] O.J. No 4282 (S.C.J.)). Moreover, the Crown can only reject exculpatory evidence which they have good reason to believe is unreliable (***Chartier v. Att. Gen. (Que.)***, 1979 SCC 17, [1979] 2 S.C.R. 474 at p. 499).

[16] The fourth element of the tort is proof of malice, which is described as a deliberate and improper use of the Office of the Attorney General or Crown attorney; a use inconsistent with the status of "minister of justice" (***Miazga*** at para. 78).

[17] Proof of the absence of reasonable and probable grounds is not sufficient to establish malice as absence of subjective reasonable probable grounds may be the result of inexperience, incompetence, negligence or even gross negligence, none of which are actionable (***Miazga*** at para. 80). Malice requires proof that the prosecutor wilfully perverted or abused the Office of the Attorney General in the process of criminal justice. In ***Nelles v. Ontario***, 1989 SCC 77, [1989] 2 S.C.R.

170, Lamer J. (as he then was) described the high threshold for malice as follows (at pages 193-194):

> The required element of malice is, for all intents, the equivalent of "improper purpose". It has according to Fleming, a "wider meaning than spite, ill-will or a spirit of vengeance, and includes any other improper purpose, such as to gain a private collateral advantage" Fleming, op.cit., at p. 609. To succeed in an action for malicious prosecution against the Attorney General or Crown Attorney, the plaintiff would have to prove both the absence of reasonable and probable cause in commencing the prosecution, and malice in the form of a deliberate and improper use of the office of the Attorney General or Crown Attorney, a use inconsistent with the status of "minister of justice". In my view this burden on the plaintiff amounts to a requirement that the Attorney General or Crown Attorney perpetrated a fraud on the process of criminal justice and in doing so has perverted or abused his office and the process of criminal justice.
>
> [emphasis added]

[18] Iacobucci and Binnie JJ. reinforced this language in ***Proulx v. Quebec (Attorney General)***, 2001 SCC 66, [2001] 3 S.C.R. 9 and added (at para. 35):

> ….. As such, a suit for malicious prosecution must be based on more than recklessness or gross negligence. Rather, it requires evidence that reveals a willful and intentional effort on the Crown's part to abuse or distort its proper role within the criminal justice system. ….

[19] It is important not to conflate the third and fourth elements of the tort:

> …in cases of malicious prosecution, we are dealing with allegations of misuse and abuse of the criminal process and the office of the crown attorney. We are not dealing with merely second guessing the crown attorney's adjudgment in the prosecution of a case, but rather the deliberate and malicious use of the office for ends that are improper and inconsistent with traditional prosecutorial function. (*Nelles* at pp. 196-7)

[20] While malice cannot simply be inferred from a finding of absence of belief in reasonable probable grounds alone, evidence of the lack of *subjective* belief in

reasonable probable grounds may assist in proving that the prosecution was driven by an improper purpose (***Miazga*** at para. 86).

ANALYSIS

[21] Mr. Grant's claim is that the Provincial Defendants initiated and/or continued its prosecution of him for murder when they objectively lacked reasonable and probable grounds to do so. As the Provincial Defendants were provided with evidence which called into question the reliability and veracity of their DNA evidence and their DNA expert, they did not re-evaluate the basis for their reasonable and probable grounds. For example, Mr. Grant alleges, *inter alia*, that prior to the appeal to the Court of Appeal, the Provincial Defendants were in possession of information that their DNA expert and his evidence was unreliable and that there was evidence of "either a purposeful or negligent tampering of evidence by [the Provincial Defendants' DNA expert]". He says that despite the fact that the Provincial Defendants were aware that the only evidence that tied Mr. Grant to the crime was based on flawed science, they nonetheless continued the prosecution through the Court of Appeal, the Supreme Court of Canada, and a second trial where he was ultimately acquitted.

[22] On appeal to the Court of Appeal, Mr. Grant argued that having regard to serious issues with the DNA evidence and the DNA expert, the jury's verdict was unreasonable. Monnin JA, for the court, acknowledged that Mr. Grant's "…arguments dealing with the reliability of Dr. Chahal's evidence and the reasonableness (or lack thereof) of a conviction grounded on that evidence cause

me some unease with respect to the verdict, that unease, however, is not enough to establish an unreasonable verdict…" (***R. v. Grant (M.E.)*** at para. 19). While the court ordered a new trial on other grounds, this may be taken as a clear signal of judicial concern about the DNA evidence. Despite this and additional evidence demonstrating "the weaknesses and potential malfeasance by Molecular World…[t]he evidence overwhelmingly demonstrated that the only piece of evidence tying Mark Grant to the crime was based on flawed science", Mr. Grant says the Provincial Defendants asked the Supreme Court of Canada to overturn the decision of the Court of Appeal ordering a new trial. While this decision may be defensible as Crown discretion, it may well be, as Mr. Grant alleges, a refusal by the Provincial Defendants to re-evaluate evidence that gave the Court of Appeal "some unease" and was further undermined by new evidence.

[23] At the end of his second trial, Mr. Grant was acquitted by Simonsen J. who rejected the DNA evidence proffered by the Provincial Defendants and concluded, based on the evidence that she did accept, that the totality of the evidence fell short of proof beyond a reasonable doubt. The fact that Simonsen J. determined that Dr. Chahal (the Provincial Defendants' DNA expert) and his evidence met the threshold for admissibility does not assist the Provincial Defendants as, at the end of the day, Simonsen J. concluded the expert evidence was seriously flawed and placed no weight on it. Amongst her criticisms of the DNA evidence, Simonsen J. referred to the "data and conclusions of Molecular World are seriously flawed"; that "The STR testing data is…wholly unreliable" and that the Crown agreed that

it should "be given no weight due to reliability concerns". (see ***R. v. Grant***, 2017 MBQB 176 at paras. 274-275)

[24] The Provincial Defendants submit the fact that Mr. Grant was acquitted after a thorough analysis of all the evidence presented at trial by both parties underscores that there were indeed reasonable and probable grounds to proceed to the re-trial.

[25] This is not necessarily so. First, Mr. Grant was acquitted after the trial judge rejected the very evidence that Mr. Grant had been telling the Provincial Defendants all along was flawed and unreliable. Second, this result addresses the second element of the tort – that the prosecution was terminated in favour of the plaintiff.

[26] I am satisfied that Mr. Grant has adequately pled that based on all of the information that the Provincial Defendants possessed as they continued the prosecution, they did not objectively have reasonable and probable grounds to continue the prosecution once they were presented with evidence which called into question the validity and reliability of the DNA evidence of Molecular World, and that they failed in their duty to continue to assess their case as weaknesses with its DNA expert and his evidence were revealed. It is not plain and obvious that Mr. Grant's claim has no chance of success. Furthermore, having regard to the comments of Monnin J.A. and Simonsen J. regarding the DNA evidence, I do not accept that his claim is a collateral attack on decisions of the courts or is any other way an abuse of process as described in the cases above. There are

reasonable grounds to conclude that those decisions support the foundation of his claim.

[27] However, I agree with the Provincial Defendants that Mr. Grant's claim that the Provincial Defendants did not have objective reasonable and probable grounds to *commence* the prosecution is an abuse of process as it is a collateral attack on the decision of the Provincial Court Judge who found that there was sufficient evidence for Mr. Grant to be tried on the charge of murder. That decision established that objectively, the Provincial Defendants had reasonable and probable grounds to commence the prosecution and it is not open to review by this court in these proceedings.

[28] The Provincial Defendants argue that Mr. Grant's pleading is short on material facts regarding the allegation of malice. Mr. Grant pleads that the improper purpose was "to close an outstanding cold case and/or to defend themselves against a claim, such as this one, for *inter alia*, wrongful imprisonment and/or to protect their own reputations". Proof of any of these may well be proof that the Provincial Defendants wilfully perverted or abused the Office of the Attorney General in the process of criminal justice.

[29] I turn now to Mr. Grant's claims as set out in paragraph 62.a. of the Statement of Claim to clarify which allegations are and are not supported by the facts or the law or are an abuse of the court's process:

> **i. and iii.**: As noted above, the claim of no reasonable and probable grounds to *initiate* the prosecution and no credible evidence to suggest he

was involved in the murder of Candace Derksen is an abuse of process and part of this subparagraph will be struck;

ii. and vii.: The words "or ought to have known" and "inadvertently" are words that are appropriate for the tort of negligence, not malicious prosecution. Those words will be struck;

iv., v., vi., ix., xi., xii. and xiii.: These subparagraphs directly address a core issue – the alleged failure to continually evaluate the prosecution in light of evidence that the DNA evidence and DNA expert were demonstrably unreliable;

viii.: The allegation that the Provincial Defendants actively sought to have exculpatory evidence excluded "for the purpose of getting a conviction" is inconsistent with the role of the prosecutor and addresses the element of malice;

x.: The allegation that the Provincial Defendants refused to assist Mr. Grant in seeking an appeal knowing of the flaws in the DNA evidence does not address either the third or fourth element of the tort and should be struck;

xiv.: This allegation about calling an unreliable witness does not address either the third or the fourth element of the tort and should be struck;

xv.: Mr. Grant alleges malice. The particulars are found in paragraph 64 of the claim where he alleges that the Provincial Defendants continued the prosecution for the purpose of closing an outstanding cold case and/or to protect themselves against a claim such as this one and/or to protect their

own reputations. Any of those reasons would be an improper purpose, and improper use of the office of the Provincial Defendants.

Charter Damages

[30] Mr. Grant relies on the facts pled in his claim for malicious prosecution in claiming that the Provincial Defendants violated his section 7 and 9 rights under the ***Charter of Rights***. He seeks s. 24(1) damages for those breaches.

[31] The Provincial Defendants say that one cannot simply layer a claim for ***Charter*** damages on top of a private civil law claim for damages and rely upon the same facts as the basis for the ***Charter*** claim. In support of its position, the Provincial Defendants rely on the decision of Master Bolton in ***Stevens v. Provincial Remand Centre et al.***, 1995 CanLII 16438 (MB KB), 104 Man. R. (2d) 226. With respect, that decision does not assist the Provincial Defendants. In her brief reasons, the Master struck the whole of the claim essentially saying that the claim was an attack on the "system" (presumably the remand system), without identifying any specific acts or failures to act by the defendants. The plaintiff sought to have the claim salvaged under the ***Charter***. The Master simply said that a claim for ***Charter*** remedies must follow the same rules of pleadings as any other claim; she did not say that a plaintiff could not rely on the same facts in seeking different damages.

[32] In this case, Mr. Grant specifically relies on the facts that he has already alleged in support of his claim for ***Charter*** damages. I see nothing improper with

that. Either the facts entitled him to ***Charter*** damages or they do not; that is a decision for the trial judge.

[33] As success was divided, there will be no order as to costs.

_____ J.