Focus CIVIL LITIGATION

Negotiated agreements and malicious prosecutions

Court of Appeal confirms when motions for summary judgment should be granted

Jennifer Hunter

Although it arises from the police liability context, the recent Court of Appeal decision in *Romanic v. Johnson* [2013] ONCA 23, is relevant to any action for malicious prosecution. The decision confirms that motions for summary judgment should be granted in appropriate circumstances and it speaks to the burden each party must meet on such a motion, specifically in cases where the underlying charges were withdrawn as a result of a negotiated agreement.

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To succeed in an action for malicious prosecution, a plaintiff must satisfy four elements, one of which is that the underlying charges were terminated in his or her favour. Judicial interpretation of this element has been important for determining which actions can continue beyond discovery, or even the pleadings stage. If the facts and evidence are such that the plaintiff cannot plead or prove that the charges were disposed of favourably, the defendant can move for an early dismissal of the action.

Although clear in cases of an acquittal or guilty plea, whether the charges were terminated in favour of the plaintiff has been more difficult in cases where the previous proceeding was terminated as a result of a negotiated agreement. In such cases, the question for the civil court, and for counsel representing the parties, has been whether negotiated "settlements" can be said to have ended the criminal proceeding in the plaintiff's "favour."

Historically, the courts have uniformly held that charges could not be said to be "terminated in favour of the plaintiff" where the plaintiff entered into a compromise in exchange for the withdrawal of those charges. On this basis, the courts have applied a straightforward application of the law to the facts: where a compromise or *quid pro quo* bargain was shown, the malicious prosecution action was dismissed. However, in 2007, the Court of Appeal released its decision in *Ferri v. Ontario* [2007] O.J. No. 397 and for the first time held that, in cases of a negotiated settlement, a consideration of "terminated in favour of the plaintiff" requires the court to examine the circumstances and underlying reasons surrounding the agreement. If the circumstances indicate that the defendant was acting outside the scope of the duties of their office, the agreement is questionable and the action should proceed to trial.

Following *Ferri*, it was thought that this new, contextual approach to the analysis could make it more difficult for defendants in malicious prosecution actions to successfully move for an early dismissal where the underlying charges were withdrawn as a result of a negotiated agreement. The Court of Appeal, however, has recently confirmed that early dismissal is appropriate in cases where the motions judge properly considers the circumstances of the agreement and the plaintiff fails to introduce evidence that the agreement was anything other than a *bona fide*, good faith resolution agreement.

In *Romanic v. Johnson*, the Court of Appeal upheld Justice Kenneth L. Campbell's decision dismissing the plaintiff's action on a motion for summary judgment. The plaintiff had been an employee of the defendant police service when he was charged with criminal offences alleged to have been committed in connection with his duties as a police officer. The plaintiff and the Crown eventually entered into a negotiated resolution agreement under which the Crown agreed to withdraw the criminal charges if the plaintiff resigned from his employment as a police officer, which he did. The plaintiff subsequently commenced an action for malicious prosecution. On the motion for summary judgment, the police service argued that, in light of the *quid pro quo* of the negotiated agreement, the criminal charges had not been terminated in the plaintiff's favour. In response, the plaintiff relied on *Ferri* and argued that the circumstances of the agreement raised an issue requiring a trial. Justice Campbell rejected the plaintiff's argument and dismissed the action.

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On appeal, the Court noted Justice Campbell's finding that there was no evidence suggesting the resolution agreement was entered into to avoid court scrutiny of a police investigation or a civil action for malicious prosecution. There was also no evidence that the Crown abandoned the prosecution because it had no reasonable prospect of conviction, and there was no suggestion that the Crown abused its position of power in order to secure the plaintiff's agreement. In this respect, the court noted that both parties were represented by skilled, experienced counsel. Ultimately, the Court upheld the dismissal of the action because the plaintiff had failed to prove that the criminal charges were terminated in his favour.

In light of *Romanic*, it is clear that, where criminal charges have been terminated as a result of a negotiated agreement, a motion to dismiss an action for malicious prosecution can and will be successful. On such a motion, as a result of *Ferri*, the motion judge must consider the underlying reasons for the agreement, but the plaintiff bears the burden of producing evidence to suggest that it is anything but a *bona fide*, good faith resolution. To the extent the defendant can produce evidence of the Crown's reasons for entering into the agreement, or show that the parties were represented by counsel, its position on the motion will be strengthened.

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Lipson: Fallout from cases remains to be seen

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torically, it was difficult to certify a class-action claim for negligent misrepresentation because proof of actual reliance could not be proven as a common issue. However, courts are now certifying actions on the basis that a general, rather than a specific reliance, may be sufficient to make out such a claim. The rationale for such holdings has been that even without direct reliance — in entering, for example, a tax-saving scheme — plaintiffs relied on legal advisors as the "architects of the scheme" to ensure that their pledges would qualify as valid charitable donations. The effect is to potentially lower the threshold for establishing a negligent misrepresentation claim.

In other cases, class-action plaintiffs' have gotten around the challenges posed by misrepresentation claims by framing their claims in negligence. For example in *Lipson*, the representative plaintiff claimed that absent a negligent opinion, the tax-savings program would not have been marketed at all. Whether framed as negligence *simpliciter* or negligent misrepresentation, the essence of these claims seems to be that had the advisor performed her duty to her client, the plaintiff wouldn't have suffered any losses. In which case, shouldn't the cause of action against the solicitor belong to the client, and the client alone?

The fallout from these cases remains to be seen. But the immediate consequence of cases such as *Lipson* will likely be more class proceedings by third parties with tenuous connections to professional advisors — an expensive endeavour for defendants, and a development that professional liability insurers are likely monitoring with great concern.

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