Citation: Grant v Manitoba (AG), 2025 MBCA 7
Date: 20250124
Docket: AI24-30-10109

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

MARK GRANT	)	***J. M. Mann*** *and* ***T. P. Sandulak*** *for the Applicants*
(Plaintiff) Respondent	)	
- and -	)	***L. Greenspon*** *and* ***T. Hill*** *for the Respondent (via teleconference)*
THE ATTORNEY GENERAL OF MANITOBA and THE GOVERNMENT OF MANITOBA	)	***B. Barnes Trickett*** *and* ***T. Nichini*** *for City of Winnipeg*
(Defendants) Applicants	)	
- and -	)	*Chambers motion heard:* ***October 17, 2024***
CITY OF WINNIPEG	)	
(Defendant)	)	*Decision pronounced:* ***January 24, 2025***

MONNIN JA

Introduction

[1] The defendants, the Attorney General of Manitoba and the Government of Manitoba (the Provincial defendants), seek leave under section 25.2 of *The Court of Appeal Act*, CCSM c C240 [the *CA Act*], to appeal an interlocutory decision of a Court of King's Bench judge dismissing their motion under the MB, *King's Bench Rules*, Man Reg 553/88, r 25.11 [the *KB Rules*], to strike the plaintiff's amended amended statement of claim for

failing to disclose a reasonable cause of action and as being an abuse of process.

Criminal Proceedings

[2] The plaintiff was charged in the death of a thirteen-year-old girl who was last seen on November 30, 1984, walking home from school. On January 17, 1985, her frozen body was found inside a shed on nearby industrial property. The cause of death was hypothermia resulting from exposure.

[3] Despite a police investigation that lasted many years, there was no arrest or charges laid until May 16, 2007. After receiving reports from more contemporary DNA testing that became available, the plaintiff was arrested and charged with first degree murder, primarily on the strength of the DNA information obtained by the police.

[4] After a preliminary inquiry in the Provincial Court, the matter proceeded to trial in early 2011, before a judge and jury, where the plaintiff was convicted of second degree murder (the first trial). DNA evidence was presented by the Crown at that trial, as was defence expert evidence. The trial judge refused to allow the introduction of evidence that an unknown third party suspect may have been responsible.

[5] The plaintiff appealed to this Court, challenging the DNA evidence. In addition, he sought to introduce fresh evidence of another DNA expert, attacking the reliability of the Crown's DNA evidence. The panel of this Court hearing the appeal expressed the view that, while they had some concerns with the DNA evidence, it did not make the conviction unreasonable and there was

"evidence . . . [upon] which a properly instructed jury could [reasonably] convict (*R v Grant (ME*), 2013 MBCA 95 at para 19). The panel did, however, overturn the conviction on a different issue. It held that the trial judge had applied the wrong test for the introduction of evidence of an unknown third party suspect; namely, the evidence sought to be introduced by the plaintiff relating to another young girl who was abducted and found tied-up in a similar manner to the victim while the plaintiff was in custody. It ordered a new trial. The Crown obtained leave from the Supreme Court of Canada on the third party suspect evidence issue. The Supreme Court agreed with this Court and upheld the order for a new trial (see *R v Grant*, 2015 SCC 9).

[6] In 2017, the second trial proceeded before a judge alone (the second trial). The Crown called similar DNA evidence as at the first trial. The defence called the evidence that it had sought to introduce as fresh evidence before this Court, which challenged the Crown's DNA evidence directly. The second trial judge raised concerns with the Crown's DNA evidence, stating that, "[t]he DNA testing results and conclusions are fraught with difficulty" (*R v Grant*, 2017 MBQB 176 at para 308). In her view, the totality of the evidence fell short of the criminal standard of proof beyond a reasonable doubt and, therefore, she acquitted the plaintiff. No appeal was taken from her decision.

Civil Proceedings in the Court of King's Bench

[7] In October 2019, the plaintiff initiated a civil action seeking damages against the Winnipeg Police Service, including a number of individual police officers involved in the investigation, and the Provincial defendants, initially naming the many Crown attorneys as well who had been

involved in the prosecution. Over time, the actions against the individual defendants were discontinued, leaving the Provincial defendants and the defendant, the City of Winnipeg, who are alleged to be vicariously liable for the actions of their employees. The statement of claim alleges negligence by the police in its investigation and malicious prosecution by the Crown prosecutors.

[8] The Provincial defendants brought a motion under r 25.11 of the *KB Rules* to strike the statement of claim as to the Provincial defendants on the grounds that it disclosed no reasonable cause of action against them and was an abuse of process. The matter proceeded before the Senior Associate Judge, who delivered a judgment in September 2023, dismissing the motion, save for striking one paragraph of the statement of claim that alleged systemic bias without any particulars. In all other aspects, she allowed the matter to proceed (see *Grant v The Attorney General of Manitoba*, 2023 MBKB 137).

[9] The Provincial defendants appealed her decision to a judge of the Court of King's Bench (the appeal judge). The appeal judge agreed with the Senior Associate Judge's conclusions, save in one minor respect relating to the initiation of the proceedings, which the appeal judge construed as a collateral attack on the Provincial Court's decision in the preliminary inquiry (see *Grant v The Government of Manitoba*, 2024 MBKB 77). The appeal judge was satisfied that the plaintiff had directly pled that the Provincial defendants 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" and failed "to continue to assess their case as weaknesses with [the] DNA expert and his evidence were revealed" (*ibid* at para 26). He concluded that it was not plain

and obvious that the plaintiff's claim had no chance of success, nor did he consider the comments of this Court and of the second trial judge regarding the DNA evidence as meaning that the plaintiff's arguments were collateral attacks on previous decisions or an abuse of process. As to the requirement for the plaintiff to plead malice on the part of the prosecutors, his view was that the allegation that the prosecutors were pursuing the claim for an improper purpose; namely, "to close an outstanding cold case and/or to defend themselves against a claim . . . and/or to protect their own reputations" (*ibid* at para 28), could meet that requirement.

Section 25.2 of the *CA Act*

[10] It is not contested that the decision of the appeal judge is an interlocutory one; namely, that it does not decide the subject matter between the parties or any substantive right (see *Paulpillai Estate v Yusuf*, 2020 ONCA 655 at para 16, cited by Steel JA in *Nguyen v Winnipeg (City of)*, 2022 MBCA 33 at para 15). As such, it requires leave of a judge of this Court pursuant to section 25.2 of the *CA Act*.

[11] The test for granting leave to appeal for interlocutory decisions was discussed by Pfuetzner JA in *Knight v Daraden Investments Ltd*, 2022 MBCA 69, to the effect that in order for leave to be granted, I must be satisfied that a) the proposed appeal has arguable merit, bearing in mind the standard of review, and b) it must be of significant importance such as to warrant the attention of a full panel of this Court (see para 22). Additionally, leave may still be granted if the interests of justice require it.

[12] To assess whether the appeal has arguable merit, I may consider a number of factors, including whether or not the appeal is prima facie destined

to fail given the standard of review that may be applied and whether it would unduly or disproportionately delay or add to the cost of the proceedings. As to the second criterion of the test, whether it is of sufficient importance, I may also consider whether it raises a novel or unsettled point of law, whether the resolution would likely affect the determination of disputes between others (aside from the parties in the proceedings) and how significant it would be to the course or the outcome of the proceedings.

Standard of Review and Tests Applied on a Motion to Strike

[13] As set out above, one of the considerations on what are arguable grounds of appeal must take into account the standard of review that will likely be applied by a panel on an appeal of the matters at issue. Whether a pleading discloses a reasonable cause of action is a matter of judicial discretion that is entitled to significant deference on appeal unless the decision is so clearly wrong as to amount to an injustice (see *Dennis v The Attorney General of Canada*, 2020 MBCA 118 at para 4; *Grant v Winnipeg Regional Health Authority*, 2015 MBCA 44 at para 39 [*Grant v WRHA*]). However, there may be discrete issues that raise an extricable point of law with the standard of review then being correctness. In *Grant v WRHA*, it was a Charter issue. In this case, the Provincial defendants argue that the existence of reasonable and probable cause in an objective sense is a question of law (see *Nelles v Ontario*, [1989] 2 SCR 170 at 193, 1989 CanLII 77 (SCC) [*Nelles*]).

[14] As to the test to be applied on the motion to strike, under r 25.11 of the *KB Rules*, it was discussed in *Grant v WRHA*, and the following considerations arise (see paras 35-38):

- It is to be used sparingly and reserved only for the clearest of cases;
- Pleadings should not be struck unless the moving party demonstrates that it is "plain and obvious" (*ibid* at para 36) that the cause of action or defence as pleaded is certain to fail;
- The claim or defence should be read generously notwithstanding any imprecision in the language used;
- The novelty of the claim or defence, the length or complexity of the issues raised 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; and
- If a claim or defence has a reasonable prospect of success, it should not be struck out.

Malicious Prosecution

[15] As set out in the leading Supreme Court cases of *Miazga v Kvello Estate*, 2009 SCC 51 at para 3 and *Nelles* at 192-93, the tort of malicious prosecution requires four elements:

a) that a prosecution was initiated by the defendant;

b) that it was terminated in the plaintiff's favour;

c) that the prosecution was undertaken (or continued) without reasonable and probable cause; and

d) the undertaking of the prosecution was motivated by malice or was for a primary purpose other than that of carrying the law into effect.

[16] The Provincial defendants concede that the plaintiff has properly pled the first two elements of the tort and that the dispute is with respect to the issues of reasonable and probable cause and malice (see c and d above).

Reasonable and Probable Cause

[17] The Provincial defendants agree that, as a general principle, the facts and the pleadings must be taken as true. However, they argue that there is an exception where the facts alleged are "manifestly incapable of being proven" (*R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 22). They argue that the significant allegations in the plaintiff's pleadings regarding lack of reasonable and probable cause are incapable of proof, as they are inconsistent with findings made by this Court and are an abuse of process.

[18] In the Provincial defendants' submission, the fact that a unanimous panel of this Court did not reject the Crown's DNA evidence submitted at the first trial of the plaintiff and found that it was sufficient to base a reasonable verdict means that it was therefore, as a matter of law, objectively sufficient to support the conviction, and by extension, the decision to prosecute. They argue that the plaintiff seeks to re-litigate a legal issue already decided by this Court, which is an abuse of process. As well, the decision to order a new trial, both at the Court of Appeal and the Supreme Court levels, suggests that, objectively, the appellate courts did not view the evidence presented by the Crown as being incapable of supporting a conviction.

[19] The plaintiff responds by saying that the focus should be on what is alleged in its statement of claim; namely, that the prosecution "knew or ought to have known that the evidence they were relying on was faulty and/or negligently handled and/or manipulated". As such, the argument of the Provincial defendants fails to take into consideration the fact that ultimately, the jury's conviction of the plaintiff and the retrial led to the plaintiff's acquittal because of issues with the DNA evidence, nor does it consider the fact that exculpatory similar fact evidence was not admitted at the first trial because of the position taken by the Crown. In the plaintiff's submission, this Court did not deal directly with the issue that was before the appeal judge; namely, the role of the Crown in assessing the information that it had as to the frailties of the DNA evidence.

Analysis

[20] As I have concluded that I will be granting leave, I will be circumspect in my discussion of the strength of the Provincial defendants' ground of appeal. In my view, the Provincial defendants have raised an arguable ground of appeal as to whether the pleadings set out sufficient facts to establish a lack of reasonable and probable cause on the part of the Provincial defendants, given the decision of this Court and of the Court of King's Bench on the second trial on the role played by DNA evidence. I am also taking into consideration the possibility that this ground of appeal will be decided on a correctness level by a full panel of this Court.

Malice

[21] As to malice or improper purpose, the Provincial defendants allege that the plaintiff has only set out bare allegations and not provided sufficient

particulars of its allegations. They argue that current jurisprudence stipulates that, conclusory allegations “in the nature of bad faith, malice, and abuse of power do not constitute material facts for pleading purposes unless they are particularized” (*Kasheke v Canada (Attorney General)*, 2017 NSSC 61 at para 27; see also *Merchant Law Group v Canada Revenue Agency*, 2010 FCA 184 at para 34). It is not sufficient to simply allege an improper purpose without pleading material facts to support that allegation.

[22] In this case, the statement of claim alleges, without any elaboration according to the Provincial defendants, that prosecutors proceeded in order to close an outstanding cold case or to prevent a malicious prosecution lawsuit and save their own reputations. They argue that these are not material facts and are simply bald conclusions pled without a foundation; as such, they are insufficient as a plea of malice (relying on *Clark v Hunka*, 2017 ABCA 346 para 31). While the appeal judge found that these allegations could be proof of malice, he failed to analyze or respond to the argument that they were merely conclusory and insufficient to base the plea.

[23] The plaintiff responds that the Provincial defendants focus solely on the allegations and fail to take into account the detailed chronology that provides additional facts setting out the allegations. The plaintiff also argues that the Provincial defendants conflate the requirement to plead material facts with the evidence that a party might rely on as the matter proceeds (see *Winnipeg (City) v Caspian Projects Inc*, 2020 MBQB 129 at para 43). As well, the prosecutors continued with a prosecution when there was no basis to do so, which should be taken as true for the purposes of these motions.

[24] Again, showing a degree of circumspection given that I've concluded that the matter should proceed to a full panel of this Court, I will only say that I am of the view that the Provincial defendants have raised an arguable ground of appeal on whether the allegations in the statement of claim are sufficient to base, at law, a proper plea of malice, as opposed to being bare allegations that require further elaboration or particulars.

[25] I am therefore of the view that the Provincial defendants have met the first aspect of the test for leave to appeal an interlocutory decision; namely, an arguable case of sufficient merit.

Issues of Sufficient Importance

[26] The second aspect of the test is whether the grounds of appeal raise issues of sufficient importance to merit the attention of a full panel of this Court.

[27] I am satisfied that the grounds of appeal raised by the Provincial defendants are of sufficient importance to merit the attention of a full panel of this Court. The issue of whether there is a reasonable cause of action is an issue that can determine the outcome of the proceedings and bring it to an early conclusion without the necessity of what will likely be a long, drawn-out trial.

[28] While a determination of whether the Crown had, at law, reasonable and probable grounds to prosecute is based on the particular facts of this case, in my view, it transcends the particular facts in this appeal. As well, the extent of the requirement to particularize the allegations of malice merits consideration by a full panel of this Court.

Decision

[29] For these reasons, the motion for leave to appeal is granted. Costs in the cause.

Monnin JA