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Prosecutorial Accountability?

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Cases Considered:

Miazga v. Kvello Estate, 2009 SCC 51

In its 2002 decision in *Law Society of Alberta v. Krieger*, 2002 SCC 65, the Supreme Court of Canada affirmed the ability of the Law Society of Alberta to regulate misconduct by Crown prosecutors. It held, however, that where the misconduct relates to the exercise of prosecutorial discretion, the Law Society's jurisdiction is limited to circumstances where the prosecutor has acted in bad faith. The Court reiterated that, in general, the exercise of prosecutorial discretion is entitled to deference, and may only be reviewed by the Court in circumstances of "flagrant impropriety" (*Krieger*, para. 49).

In its recent judgment in *Miazga v. Kvello Estate*, the Supreme Court has affirmed this highly deferential approach to prosecutorial discretion. The Court held that to establish liability for malicious prosecution the plaintiff must demonstrate a) that the defendant was responsible for the prosecution; b) that the legal proceedings ultimately resolved in favour of the plaintiff; c) that the defendant did not have reasonable and probable grounds for a prosecution, objectively speaking (that is, that the defendant's professional judgment should have indicated that it was not possible that "proof beyond a reasonable doubt could be made out in a court of law" (para. 63); at this stage the prosecutor's subjective belief in guilt is irrelevant); and, d) that the defendant acted for some improper purpose in bringing forward the prosecution - that the defendant "deliberately intended to subvert or abuse the office of the Attorney General or the process of Criminal Justice" (para 89).

To put it more negatively, the Court held that it is insufficient for the plaintiff to show both an absence of reasonable and probable cause, objectively speaking, and an absence of subjective belief by the prosecutor in reasonable and probable cause. The plaintiff must additionally demonstrate some improper purpose willfully motivating the defendant's actions, something which makes the prosecutor actively malicious as opposed to merely negligent, reckless, lazy or incompetent. The Court stated that liability will *not* be established where the prosecutor proceeds without reasonable and probable grounds, objectively speaking, and is guilty of "incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence" (para. 81).

The background facts leading to this decision related to the notorious and ultimately unfounded allegations of child abuse, including elements of ritualistic and satanic activities, made against the Kvello family in Saskatchewan by three children under their care. Miazga was the prosecutor on those cases, and at trial of this action was found to be civilly liable for his conduct in that capacity. The basis for the trial judge's decision was that there were "no objectively reasonable grounds upon which Miazga could have believed that the respondents were guilty" and that, as well, the allegations made by the children were so unbelievable as to preclude Miazga having a subjective belief in the allegations. The trial judge also found other "indications of malice" to support his conclusions (SCC judgment at para. 9). The Saskatchewan Court of Appeal upheld the decision, although rejecting the indications of malice found by the trial judge. They did so on the basis of the determination by the trial judge that Miazga did not subjectively believe in the allegations, which the Court of Appeal viewed as sufficient to establish liability (para. 10). Vancise J.A. dissented both on the basis that something beyond an absence of subjective belief was required to establish liability, and on the basis that the finding of an absence of subjective belief was based "on a palpable and overriding error" (para. 11).

In a unanimous judgment written by Charron J., the Supreme Court overturned the Saskatchewan Court of Appeal's decision. It did so for the reasons previously indicated - that something more than an absence of subjective belief was required for liability - and also because it agreed with Vancise J.A. that, in this case, the conclusion that "Miazga did not have the requisite subjective belief amounts to a palpable and overriding error and, as such, is not entitled to deference" (para. 96). The Court found that since the evidence established that Miazga believed the children, even if he did not believe the totality of their allegations, and since a trial judge in subsequent proceedings also believed the children, it was impossible to conclude that he lacked a subjective belief in the grounds for prosecution (para. 96).

This last aspect of the Supreme Court's judgment is sufficient to suggest that the case was rightly decided, although as a matter of curial deference it seems odd. The Court does not explain why the trial judge's error can be characterized as palpable and overriding, other than to indicate that they do not agree with his assessment of the facts (which is an error, perhaps, but not self-evidently a palpable and overriding one). Further, a finding that a decision results from "palpable and overriding error" is approaching the decision with an attitude of deference - it is simply concluding that, even on deferential review, the decision cannot stand. Be that as it may, this aspect of the decision, even if not well reasoned, seems to justify the result.

The broader position of the Court is, however, most unfortunate. Its conclusion that a Crown prosecutor may escape liability where she proceeds without objective grounds, without subjective belief in the existence of such grounds, and where her conduct can be categorized as flowing from "incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence" (para. 81), unacceptably restricts the personal accountability of Crown prosecutors for their actions in procuring wrongful convictions. This is particularly the case in light of the earlier restrictions placed by the Court on curial review of prosecutorial discretion and on law society discipline of prosecutors who abuse their discretion.

The justification offered by the Court for proceeding in this way is the need to ensure that Crown prosecutors "will not be hindered in the proper execution of their important public duties" (para. 81). That objective is certainly very important, and warrants the imposition of a rigorous standard on a plaintiff who seeks to bring forward a case of malicious prosecution. It does not, however, self-evidently demonstrate that the standard should be as rigorous as the Court sets it out to be. That is, it does not, without something more, explain why nothing short of a demonstration of something akin to corruption will be sufficient to impose personal accountability. And that something more is not evident in the judgment of the Court. Specifically, the Court does not provide any explanation as to why holding a prosecutor to account where that prosecutor has neither an objective basis for prosecution *nor* a subjective belief that she has a basis for prosecution, *and* is additionally negligent, reckless, lazy or grossly negligent, would hinder prosecutors in the proper execution of their important public duties.

It should be noted that the judgment of the Court does contain a potential ambiguity which may soften this criticism. The Court is clear that the combination of a lack of reasonable and probable grounds, objectively speaking, and a subjective lack of belief in those grounds, will be insufficient to ground a suit for malicious prosecution. The Court is also clear that a lack of a reasonable and probable grounds, objectively speaking, and a prosecutor's demonstrated "incompetence, inexperience, poor judgment, lack of professionalism, laziness, recklessness, honest mistake, negligence, or even gross negligence" (para. 81) will be insufficient to ground liability for malicious prosecution. What is slightly unclear is whether an absence of objective grounds, subjective belief and, for example, gross negligence, would be sufficient. That possibility is certainly not expressly contemplated by the Court's judgment, and I would argue that the better interpretation of the case is that the Court is not contemplating liability in such circumstances. Instead, it is requiring that prosecutors actively have some improper purpose, something akin to corruption. And, with respect, it is this position which requires explanation.

Every lawyer has an obligation not to pursue frivolous and vexatious lawsuits on behalf of a client, and lawyers who breach those obligations may be liable for cost sanctions, and their clients may be liable for much more (damages in an action for abuse of process, for example). Prosecutors have this duty even more significantly. Their obligations are more significant because of the enormity of the power that they wield on behalf of the state, and also because prosecutors have, in effect, no directing "client" from whom they receive instructions. The client - the state - manifests in the person of the prosecutor herself, and when the prosecutor proceeds with a criminal case she takes on, albeit with some internal controls, the roles that in civil liability are split between the instructing client and her lawyer. In being given this extraordinary power prosecutors should - as the Court rightly notes - be given a significant level of independence so as to be free from improper interference by, for example, elected officials. They should also, though, be held accountable when they abuse that authority, particularly where that abuse arises in circumstances where reasonable and probable grounds did not exist objectively speaking, the Crown did not believe they existed, and the Crown's conduct could be characterized as negligent, reckless or grossly negligent. To do otherwise values independence but places other values at naught.

There are other values of importance with respect to prosecutorial functioning besides independence. Excessive prosecutorial zeal, and particularly prosecutorial tunnel vision - focusing on a particular suspect such that it becomes difficult to assess information accurately - have been implicated in numerous wrongful convictions in Canada, such as Marshall and Morin. While prosecutorial independence is important, so, too, is ensuring that prosecutors discharge their function as ministers of justice properly, discharging their role as institutional safeguards against proceeding in cases that risk wrongful prosecution, or state over-reaching. Eliminating any meaningful accountability or judicial or law society oversight of the prosecutorial function provides insufficient weight to ensuring the avoidance of those real risks of injustice.

In taking this position, my disagreement with the Court turns on one of two points. Either the Court and I are in disagreement on what would be a legitimate basis for classifying a Crown prosecutor as a wrongdoer or we are in disagreement about the extent to which the need for prosecutorial independence justifies shielding a prosecutor from liability for wrongdoing. In my view prosecutorial independence should never shield a prosecutor from liability for wrongdoing, and a prosecutor is a wrongdoer when she negligently or recklessly brings forward a case without reasonable and probable grounds objectively speaking, and with no subjective belief in the existence of such grounds.

Whether my position is more justifiable than that of the Court or not, I would argue that the Court needed to give some better explanation for its position, some justification for how a Crown who does these things could be said to be innocent of wrongdoing or why independence warrants excusing wrongdoing. Asserting that independence is important does not, *eo ipso*, demonstrate any particular conclusion on either of these points.

Two final points should be noted. First, in the case of *Krieger*, the Court distinguished true prosecutorial discretion, which should only be reviewed in cases of bad faith, and other prosecutorial decisions such as disclosure, which while containing a discretionary element, are not properly characterized as exercises of “prosecutorial discretion”. The judgment of the Court here does not, therefore, speak to the question of whether a prosecutor could be liable for misconduct in relation to, for example, the presentation of perjured evidence or the failure to disclose exculpatory materials. It may be that such liability is precluded on other grounds, but it will not be precluded for the same reasons as are given here.

Second, if the Court is unwilling to impose liability on Crown prosecutors personally for malicious prosecutions, it should perhaps be willing to consider the imposition of liability against the office of the Crown in such cases. The problems of tunnel vision and excessive zeal tend to some extent to be institutional, to arise from such things as undue emphasis on conviction rates within particular Crown offices. The addressing of such institutional and system problems will not be furthered efficiently by holding individual Crown prosecutors liable. However, that does not mean that the office of the Crown should not be liable when such factors play a role in bringing a prosecution forward even where no grounds for such prosecution existed.