"Uneasy lies the head that wears a crown": Crown Immunity in Canada

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Are the police able to sue the Crown for negligence?

As a former in-house lawyer for the Metropolitan Police in London, I am well aware of the importance of a strong, co-operative relationship between police and the Crown. It is crucial for information-sharing and ensuring a consistent approach to prosecutions.

However, it can sometimes be a fraught relationship: although co-dependent, police and prosecutors have their own priorities and objectives. They often co-operate well, but errors or miscommunications may prevent them from working together effectively.

In the recent decisions of the Ontario Court of Appeal, *Clark v. Ontario (Attorney General)*[1] and *Smith v. Ontario (Attorney General)*[2], police took issue with the Crown's actions at different stages of the criminal justice process, and commenced proceedings against the Crown for negligence. These two decisions highlight the issue of Crown immunity, which is generally difficult to challenge, and poses the question: should the Crown be immune from claims of negligence by police, and if so, to what extent?

These decisions also raise some interesting issues for insurers, particularly in respect of whether the police can avoid or limit their liability for negligent investigation by pointing the finger at the Crown.

To the relief of the many heads that wear the Crown, the Court has decided to uphold their immunity.

Laying the Groundwork

In order to understand the position taken by the Court of Appeal, let us first consider the history of Crown immunity in Canada.

The Supreme Court of Canada has clearly stated that the Crown is immune from civil liability except in circumstances where it has:

1. acted with malice in the context of a malicious prosecution claim[3]; and
2. intentionally withheld disclosure in a criminal proceeding contrary to an accused's legal right to disclosure.[4]

Clark and *Smith* – a Novel Approach?

In *Clark* and *Smith*, the Court of Appeal revisited Crown immunity, specifically in the context of police services alleging negligence by the Crown.

Clark

In *Clark*, police officers sued the Attorney General, alleging that the Crown Attorneys, who had prosecuted the accused, had been negligent and misfeasant because they had failed to adequately investigate assault allegations by the accused against the investigating police officers, and to call evidence to refute those allegations.

On a motion by the Attorney General, the judge struck the negligence claim. The officers appealed, arguing that the issue was novel because the police were the claimants. The Court held that the issue is not "entirely novel", emphasizing that the Supreme Court has made clear when Crown immunity applies, and that this could not be avoided simply because the claimants were police officers. Therefore, it was obvious that the negligence claim could not succeed.

The Court was highlighting the fact that Crown immunity applies regardless of whether the person seeking to challenge it is a police officer or an accused, and there is no need for a separate assessment for police officers.

Smith

Subsequently, in *Smith*, the plaintiff had been charged with murder, but the Crown withdrew the charge as there had been no reasonable prospect of conviction. The Crown advised the police to continue investigating the plaintiff using wiretaps. This led to a police operation, which Crown Attorneys allegedly supervised and advised on. The plaintiff was again charged with murder, acquitted, and sued the police and the Crown. The police service and several officers (the "Appellants") crossclaimed against the Attorney General and two Crown Attorneys (the "Respondents") for contribution and indemnity for negligent legal advice and breach of retainer.

The Respondents applied to strike out the crossclaim, but a motions judge allowed it to proceed, limited to the claim for indemnity from the Crown for negligent legal advice. The crossclaim for contribution required that there be a claim by the plaintiff against the Crown as well as the police, however, the motions judge struck out the plaintiff's claim against the Crown. A successful indemnity claim would require the Crown to pay any damages owed by the police to the plaintiff.

The Respondents appealed and the Court struck the crossclaim, partly because negligence could not pierce Crown immunity. The Court emphasized that if the civil-liability threshold for the Crown is too low, Crown Attorneys would be "diverted from their important public duties in the administration of criminal justice", and there would a chilling effect on Crown Attorneys'

decision-making because the fear of civil liability may lead to defensive lawyering by prosecutors.

The police appealed. The appeal was dismissed on the basis that it was obvious that Crown immunity barred the crossclaim, and that making the Crown liable for advice to police in the course of an investigation raises policy concerns, in particular, the chilling effect that imposing liability on the Crown would have on the relationship between the Crown and the police, and "the legal principles that underlie this relationship".

In respect of whether a claim by police was novel, the court was clear that there "is no basis upon which to treat claims brought by police differently from claims brought by individual citizens". The Court also held that Crown Attorneys do not owe a duty of care to police in respect of legal advice, and emphasized the independence of the police and the separate and distinct roles of the police and the Crown.

The decisions in *Clark* and *Smith* serve to emphasize that Crown immunity cannot be pierced by negligence. Further, the police cannot be considered as a special litigant in claims of negligence against the Crown.

Impact on Claims

These two decisions highlight the fact that police should not be looking to the Crown to apportion liability, particularly as police and prosecutors should be working in unison as much as possible.

Insurers should be aware that police services may be able to protect themselves from any adverse impact caused by the Crown's legal input without commencing proceedings for negligent advice. In a civil claim against the police, it may be possible to demonstrate that officers acted in good-faith reliance upon the Crown's input, which may suggest that the police acted appropriately.

There may also be circumstances, for example in respect of warrants, where a court would need to approve a proposed course of action before the police can act upon any input by the Crown. If that is possible, or indeed required by law, it would serve to add an extra layer of protection to the police's actions and demonstrate to the court that the police acted in good faith.

To be continued...

The Court of Appeal has made it clear that Crown immunity cannot be pierced by negligence, even if the police are the claimants.

The Supreme Court of Canada has granted leave for the Attorney General of Ontario to appeal the misfeasance part of the decision in *Clark*. It will be interesting to see if the Court will continue down the path set in earlier cases by creating another exception to Crown immunity.

It appears that the "head that wears a crown" may rest a little easier, for now at least.

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[1] [2019] ONCA 311 (Westlaw).

[2] [2019] ONCA 651 (Westlaw).

[3] In Nelles v. Ontario, [1989] 2 S.C.R. 170 (Westlaw), the Supreme Court held, for the first time, that there was an exception to Crown immunity where, in a claim for malicious prosecution, the Crown acted with malice. In Proulx v. Quebec (Attorney General), [2001] 3 S.C.R. 9 (Lexum) and Kvello v. Miazga, [2009] 3 S.C.R. 339 (Lexum), the Supreme Court reaffirmed that Crown Attorneys were immune from civil liability for acts taken in the course of the exercise of prosecutorial discretion unless malice was proved.

[4] In Henry v. British Columbia (Attorney General), [2015] SCC 24 (Westlaw), the Supreme Court recognized a further exception to absolute immunity from civil liability for Crown Attorneys: where they have intentionally withheld disclosure in a criminal proceeding contrary to an accused's Charter right to disclosure. There was no need to show malice in order to establish liability against the Crown.