

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DANIEL FREEMAN-MALOY

Plaintiff

- and -

**DR. LORNA MARSDEN, YORK UNIVERSITY and
THE BOARD OF GOVERNORS OF YORK UNIVERSITY**

Defendants

FACTUM OF THE PLAINTIFF
(Motion to Strike: April 14, 2005)

THE REMAINING ISSUE ON THE MOTION

1. The parties have agreed that the Amended Amended Statement of Claim should be struck with the Plaintiff having the right to file a Fresh as Amended Statement of Claim, and that the Fresh as Amended Statement of Claim will have only two defendants, Dr. Lorna Marsden and York University. The parties have further agreed that the Fresh as Amended Statement of Claim will not include any claims for abuse of process or for conspiracy to injure. The parties further agreed to argue only one issue on this motion: whether or not it is plain and obvious that Dr. Lorna Marsden, as President of York University, does not occupy a “public office” within the meaning of the tort of misfeasance in public office. They also agreed that neither would seek costs of this motion.

PART I: RESPONDENT’S OUTLINE OF THE FACTS AS PLEADED

2. The Plaintiff is an Honours political science student at York University. On April 21, 2004, President Lorna Marsden of York University wrote to the Plaintiff stating that, pursuant to her authority over the conduct of students, she was prohibiting him from registering for classes and from attending on campus for three years. This punishment was imposed on the grounds of the Plaintiff’s

alleged misconduct in the course of his having participated in demonstrations on campus. The Plaintiff was not afforded any hearing before this discipline was imposed, even though York University regulations state that a student is entitled to a hearing by a University Discipline Tribunal before being prohibited from registering for classes on the grounds of alleged misconduct. Dr. Marsden had no jurisdiction to impose this punishment.

Amended Amended Statement of Claim, paragraphs 3, 23, 28, 32 and 11.

3. The Defendants only vacated President Marsden's punishment of the Plaintiff after their motion to quash or stay the Plaintiff's application for judicial review had been dismissed.

Amended Amended Statement of Claim, paragraphs 44 and 45.

PART II: THE LAW

a) The Rules of Civil Procedure

4. Rule 21.01 (1) (b) of the Rules of Civil Procedure provides that a party may move before a judge to strike out a pleading on the ground that it discloses no reasonable cause of action.

Rules of Civil Procedure, Rule 21.01 (1) (b)

5. On a motion to strike out a pleading, the court must accept the facts alleged in the pleading as proven unless they are patently ridiculous or incapable of proof. The statement of claim must be read generously with allowance for inadequacies due to drafting deficiencies. No evidence is admissible on such a motion.

Nash v. Ontario, (1995), 27 O.R. (3d) 1 (C.A.)

Prete v. Ontario (1993), 16 O.R. (3d) 161 (C.A.), leave to appeal refused, (1994), 17 O.R. (3d) xvii (note)

Rules of Civil Procedure, Rule 21.01 (2) (b)

7. At the pleadings stage, the court should not strike out a claim as disclosing no

reasonable cause of action unless it is “plain and obvious” that the claim has no chance of success.

Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959

Nash v. Ontario (1995), 27 O.R. (3d) 1 (C.A.)

Kellogg Co. v. Imperial Oil Ltd. (1996), 29 O.R. (3d) 70 (Gen. Div.)

8. In order to foreclose consideration of an issue of law past the pleading stage, the moving party must show that there is an existing bar in the form of a decided case directly on point demonstrating that the issue has been squarely dealt with and rejected.

Dalex Co. Ltd. v. Schwartz Levitsky Feldman (1994), 19 O.R. (3d) 463.

9. Neither the length and complexity of the issues, the novelty of the claim pleaded, nor the potential for the defendant to present a strong answer to it should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail should relevant portions of a statement of claim be struck out.

Hunt v. Carey Canada, [1990] 2 S.C.R. 959, at para. 33.

10. Where a party moves to strike a pleading under Rule 25.11 of the Rules of Civil Procedure, the test is the same or higher than the rigorous “plain and obvious” standard that applies on a motion to strike under Rule 21.

Bennett Environmental Inc. v. Toronto Star Newspapers Limited et al.,
February 23, 2004, Ontario Superior Court of Justice, Himel J.

Kellogg Co. v. Imperial Oil Ltd. (1996), 29 O.R. (3d) 70 (Ont.Gen.Div.)

b) Misfeasance in public office

11. The underlying purpose of the tort of “misfeasance in public office” is to protect each citizen’s reasonable expectation that a public officer will not intentionally injure a member of the public through deliberate and unlawful exercise of public functions.

Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263 at para 30.

12. The tort applies to public officers who wilfully injure members of the public through intentional abuse of a statutory power, as well as to public officers who wilfully injure members of the public through an intentional excess of power or a deliberate failure to discharge a statutory duty.

Odhavji Estate v. Woodhouse, [2003] 3 S.C.R. 263 at para 30.

13. There do not appear to be any decided cases describing the meaning of “public office” for the purpose of the tort of misfeasance in public office.

14. Dr. Lorna Marsden was appointed to the office of President of York University pursuant to the provisions of *The York University Act, 1965*.

Amended Amended Statement of Claim, paragraph 8.

15. President Marsden stated that her punishment of the Plaintiff was pursuant to her authority under the *York University Act* and associated regulations.

Amended Amended Statement of Claim, paragraph 30.

16. The *York University Act* is a provincial statute that creates the office of President of York University and specifies the duties of the person holding that office.

The York University Act, 1965, Bill 149, 3rd Session, 27th Legislature, Ontario, 13-14 Elizabeth II, 1965, section 13.

17. Among the powers granted to the President of York University by the *York University Act* is the power to formulate and implement regulations governing the conduct of students and student activities.

The York University Act, subsection 13 (2) (c).

18. It is respectfully submitted that President Marsden was clearly purporting to exercise her statutory power when she imposed punishment on the Plaintiff. As the Plaintiff was injured by her intentional abuse of that statutory power, she is liable for damages pursuant to the tort of misfeasance in public office.

19. In the alternative, it is respectfully submitted that it is surely not “plain and obvious” that the Plaintiff cannot succeed in establishing President Marsden’s

liability under this tort. No Statement of Defence has yet been filed; we do not know if President Marsden will deny that she purported to be acting pursuant to her authority under *The York University Act*. We do not know what positions President Marsden will advance concerning the basis of her authority and the nature of her office as president, or what evidence she might adduce in support of whatever position she advances. It is respectfully submitted that there is no basis for precluding the Plaintiff from advancing this claim at trial.

PART III: ORDER REQUESTED

20. The Plaintiff respectfully requests that he be allowed to advance his claim for damages against Dr. Lorna Marsden for the tort of misfeasance of public office at the trial of this action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto this 10th day of April, 2005.

Peter Rosenthal
Counsel for the Plaintiff

Appendix A: Authorities

1. *The York University Act, 1965*, Bill 149, 3rd Session, 27th Legislature, Ontario, 13-14 Elizabeth II, 1965, section 13.
2. *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959
3. *Nash v. Ontario* (1995), 27 O.R. (3d) 1 (C.A.)
4. *Kellogg Co. v. Imperial Oil Ltd.* (1996), 29 O.R. (3d) 70 (Gen. Div.)
5. *Prete v. Ontario* (1993), 16 O.R. (3d) 161 (C.A.), leave to appeal refused, (1994), 17 O.R. (3d) xvii (note)
6. *Dalex Co. Ltd. v. Schwartz Levitsky Feldman* (1994), 19 O.R. (3d) 463.
7. *Bennett Environmental Inc. v. Toronto Star Newspapers Limited et al.*, February 23, 2004, Ontario Superior Court of Justice, Himel J.
8. *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263