
Supreme Court refuses to hear appeal by university President sued for misfeasance in public office

University presidents may be open to being sued as public officials, following a decision rendered by the Supreme Court of Canada on September 14, 2006 which, denied leave to appeal to Lorna Marsden, President of York University. In *Freeman-Maloy v. Marsden*, student Daniel Freeman-Maloy alleged that Marsden had committed the tort of misfeasance in public office when she suspended him for three years without a hearing, after he took part in two campus protests. York University's regulations provide 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. Freeman-Maloy sought damages of \$850,000 against Marsden and the University.

Before a motions judge, Marsden moved to strike Freeman-Maloy's claim on the ground that even if all the facts alleged were true, there could be no action against her because she did not occupy a "public office", and could not be liable for misfeasance in public office. The motions judge agreed, holding Marsden could not be deemed a "public officer" from the fact that the office of President of the University was provided for by a provincial statute, and that this statute accorded the President certain powers in respect of the university community. Freeman-Maloy appealed to the Ontario Court of Appeal.

COURT OF APPEAL: NOT "PLAIN AND OBVIOUS" THAT UNIVERSITY PRESIDENTS ARE NOT "PUBLIC OFFICERS"

In a decision rendered on March 31, 2006, the Court of Appeal allowed Freeman-Maloy's appeal, holding that it was not "plain and obvious" that Freeman-Maloy's case must fail.

The Court began its analysis by noting the elements of the tort of misfeasance in public office:

- the defendant must be a public officer;
- the claim must arise from the exercise of power as a public officer; and,
- the defendant must have acted with the "mental element" of malice or bad faith.

The Court noted that Freeman-Maloy had clearly pleaded the "mental element" against Marsden. Freeman-Maloy claimed Marsden had intentionally injured him and he knew that Marsden lacked the authority to suspend him from the University. Turning to the other elements, the Court pointed out that Marsden's office was clearly a statutory office provided for under the *York University Act*. The suspension was a purported exercise of her powers under that Act. At a minimum, Freeman-Maloy had pleaded the malicious abuse of a statutory power by a statutory officer.

Marsden disputed that this was sufficient to show that she was a public officer. Citing *McKinney v. University of Guelph*, a 1990 Supreme Court of Canada decision which held that the *Canadian Charter of Rights and Freedoms* did not apply to the actions of universities, Marsden argued that in order to exercise its core academic functions, a university must be autonomous and independent of government. As she was not subject to government control for the purposes of the *Charter*, she could not be a "public officer".

The question for the Court was whether the tort of misfeasance in a public office must be restricted to public officers who are subject to such a significant degree of governmental control. In the Court's view, it was not clear that the tort should be restricted in that respect. In fact, the Court noted that no cases dealt squarely with the issue of which statutory office holders were subject to being sued for malicious acts. On the other hand, cases were allowed to proceed that involved

claims against statutory officers who enjoyed considerable independence from government direction.

The Court also rejected Marsden's argument that allowing the action to proceed against her would lead to a flood of claims against the officers of organizations such as churches and opera companies. It held that Freeman-Maloy's claim was sufficiently specific and circumscribed to avoid such a result.

In this case, although Marsden was not subject to governmental control, she was still subject to the regime of public law. The Court noted that Universities are at arms length for purposes of academic freedom, but they operate under a statutory framework, perform functions that are regarded as public in nature, and derive the major part of their funding from government. In concluding, the Court stated that while it could not say with certainty that Freeman-Maloy's claim would succeed, it could not be said that such a claim would be unsuccessful, merely because the *Charter* did not apply to the actions of university officials:

“Although the tort of misfeasance in a public office has deep roots in the history of the common law, it is constantly evolving [...] In the end, I am not persuaded that it has been conclusively established that the degree of governmental control over the actions of the statutory officer required for the *Charter* to apply is essential for the tort claim to succeed. Of course, that is not to say that the claim will succeed, only that it should be allowed to proceed to trial to be fully considered on the basis of a proper factual record and in the light of the other claims the appellant has asserted.”

Accordingly, Freeman-Maloy's appeal was allowed.

In Our View

It should be noted that after moving to have the suspension quashed by way of a judicial review application, Freeman-Maloy's suspension was eventually lifted in time for him to register for the next academic year. The decision of the Court of Appeal to allow the Freeman-Maloy case to proceed was likely influenced by the fact the decision to suspend the student was subject to judicial review as a statutory power of decision, under the principles of administrative law.

Counsel for Freeman-Maloy has indicated they are open to receiving an offer to settle the case from York. However, York says it intends to defend the case and argue that Marsden cannot be equated to the type of public officer who can be sued for the tort of misfeasance.

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