

Another negligence claim against lawyer dismissed for being a collateral attack

Civil Procedure | Dismissal of Action | Litigation | Litigation & Dispute Resolution

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Unless a decision is overturned on an appeal, the issues decided therein have been finally determined. In general, a party impacted by a final decision cannot attempt to have it overturned in another proceeding, particularly a negligence action brought against the party's lawyer on the grounds that if the lawyer had done something differently the court in the final decision would have come to a different conclusion. This kind of action is viewed as being a collateral attack on the final decision.

In *Regan v. Esterbauer*, 2023 ONSC 2905, the plaintiff had been found in contempt of court in a proceeding the Business Development Bank of Canada (the "Bank") had brought against the plaintiff's client, B. The plaintiff was a lawyer.

The Bank had contended that the plaintiff and B had breached a production order which required the plaintiff to attend for an examination under oath and to provide the Bank and its lawyers access to documents that were the plaintiff's possession. However, the plaintiff and B had made an arrangement which resulted in the plaintiff returning 14 boxes of highly relevant and prejudicial documents to B instead of preserving them for inspection by the Bank. Only 5 of those boxes were ultimately provided to the Bank by B, while the plaintiff provided only a further 4 boxes to the Bank. Notably, the plaintiff did provide the Bank with a letter he had written to B outlining the scheme to prevent disclosure of the prejudicial documents.

The Bank then sought a contempt order against the plaintiff. The plaintiff retained the defendant to represent him. Throughout the plaintiff's retainer of the defendant, the plaintiff prepared responding materials to the contempt motion. The evidence showed that the defendant had only been retained for the purposes of arguing the motion. The defendant was not listed as lawyer of record.

In the materials filed in defence of the contempt motion, the plaintiff insisted that he had not breached the production order and that he satisfied all of the undertakings to produce documents from his examination.

Three days after the contempt hearing was held, the plaintiff noticed that an Exhibit was missing from his materials. The Exhibit was an undertakings and refusals chart. The plaintiff brought this to the attention of the defendant, who subsequently advised the Bank's lawyers of the missing document and asked for their consent to provide it to the court. However, on the same day that the defendant wrote to the Bank's lawyers, the court rendered its decision finding the plaintiff in contempt. The court found that not all relevant documents had been produced by the plaintiff and B.

For the penalty hearing, the plaintiff retained the defendant. The missing Exhibit was included in the material filed by the plaintiff. Nevertheless, the court confirmed its finding of contempt and sentenced the plaintiff to 90 days imprisonment.

The contempt order and sentence were appealed to the Court of Appeal for Ontario. Again, the plaintiff retained the defendant to argue the appeal.

The plaintiff argued that the motion judge:

- failed to apply the correct legal framework for the contempt hearing;
- failed to give appropriate weight to the evidence that he complied with the production order; and
- that he should have been cross-examined on his affidavit which the plaintiff contended contained uncontradicted evidence of compliance.

The appellate court disagreed with the plaintiff's arguments.

The Court of Appeal later declined to hear a request in connection with varying the plaintiff's custodial sentence.

Attempts to seek leave to appeal to the Supreme Court of Canada were also denied.

The plaintiff eventually reported to the authorities to serve his custodial sentence, and after his release sued the defendant for professional negligence and negligent misrepresentation. He claimed, among other things, that the defendant was negligent for failing to advise him during the initial proceedings to bring a fresh evidence motion to introduce the missing Exhibit into evidence and to obtain expert medical evidence that showed the plaintiff had been harassed and threatened by B and B's family.

The defendant contended that the plaintiff's claim against him should be dismissed under [rule 21](#) of the *Rules of Civil Procedure* on the grounds that it was frivolous, vexatious or otherwise an abuse of process. The plaintiff argued that he was not challenging the contempt rulings and that if the defendant had taken the steps the plaintiff submits he failed to take, the underlying orders might still have been the same. However, the plaintiff contended that despite this position, he still suffered a loss of chance and would not have suffered the same consequences.

The court concluded that the plaintiff's action was an attempt to re-litigate the underlying issues and was a collateral attack.

The courts have held that bringing a subsequent action to determine issues that have already been determined by other courts constitutes a vexatious proceeding and is an abuse of process. A professional negligence based on allegations that another court's decision is wrong because but for the lawyer's negligence would have been different is an impermissible collateral attack: see *Lang Michener LLP v. King*, 2017 ONSC 1917.

The court essentially found that the plaintiff was arguing that the defendant had provided ineffective assistance of counsel in the contempt proceedings and the appeals, including the leave to appeal motion to the Supreme Court of Canada, yet no such allegation was raised on appeal despite his awareness that an Exhibit had been missing from his materials. In *Arconti v. Fenton*, 2020 ONCA 489, it was determined that where a party alleges that they have been wrongfully convicted because their lawyer provided ineffective services, the issue had to be pursued on appeal. The conviction cannot be corrected in a subsequent lawyer's negligence action because doing so is a collateral attack.

The court also held that the plaintiff's action was an abuse of process. The seminal case on abuse of process is *Toronto (City) v. CUPE Local 79*, 2003 SCC 63. This doctrine essentially is used to ensure that there is consistency, finality and integrity in the administration of justice and that court results are consistent and that judicial resources are not wasted by duplicative proceedings. The plaintiff was seeking to re-litigate the findings of his contempt. This was abusive.

The court also dismissed the plaintiff's negligent misrepresentation claim. The only evidence that the defendant had made a representation to the plaintiff was a bald assertion that the defendant had told the plaintiff: "...he had prior experience in defending contempt proceedings." This was insufficient to support a claim for negligent misrepresentation.

This case confirms a growing group of cases that a professional negligence claim against a lawyer for failing to provide effective assistance of counsel in another action will constitute an impermissible collateral attack on decisions rendered in that action. Arguments for ineffective assistance of counsel must be raised on appeal. If this is not done and a decision becomes final, an aggrieved party will simply not be able to shift the blame on their lawyer and seek to recover damages for negligence. In seeking to prove such a claim, the aggrieved party will inevitably be required to challenge the decisions rendered in the other action. This simply cannot be done under the collateral attack doctrine.

Representation by Gardiner Roberts LLP

The defendant was represented by Gavin Tighe and Kevin Mooibroek.

Mr. Tighe is a senior partner at Gardiner Roberts LLP and is certified as a specialist in litigation by the Law Society of Ontario.

Mr. Mooibroek is a junior associate at the firm.

Mr. Tighe and Mr. Mooibroek were assisted with their written argument by Stephen Thiele, a partner and the Director of Legal Research at the firm, and were assisted during the course of the proceedings by Michael Lauricella, a student-at-law at the firm. A PDF version is available to download [here](#).

For more information please contact: [Gavin Tighe](#)



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