

Claim for ineffective assistance of counsel dismissed as a collateral attack (Mann v. Royle)

Claim | Dismissed | Litigation | Litigation & Dispute Resolution

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In some cases, the doctrines of collateral attack and abuse of process may be invoked to strike a claim where a plaintiff has failed to pursue remedies, such as an appeal, which were available in earlier proceedings. In *Mann v. Royle*, 2025 ONSC 1773, the Ontario Superior Court of Justice considered whether a claim against the plaintiff's former criminal lawyers could be struck on this basis.

In 2018, the plaintiff was arrested in the United States for benefits fraud. In about February 2020, after serving time in custody, he was extradited to Canada.

Upon his return to Canada, the plaintiff was charged with taking and concealing a child in contravention of a custody order contrary to [section 282\(1\)](#) of the *Criminal Code*. The charges alleged that in June 1987, the plaintiff disappeared with his 21-month-old son, taking the child to the United States, despite being required to return him to his ex-wife.

The plaintiff and his son assumed new identities in the United States and lived there for over 30 years undetected. The plaintiff told his son that his mother was dead. The plaintiff's ex-wife did not see or know the whereabouts of her son for those 30 years, or even if he was alive.

Upon his return to Canada, the plaintiff was held in pre-trial custody. In May 2020, he retained the defendants as his criminal lawyers.

In September 2021, the plaintiff entered a guilty plea to taking his son in violation of a court order with intent to deprive his wife of custody. The court conducted a plea inquiry and was satisfied that the guilty plea could be entered and the plaintiff was convicted accordingly. The court accepted a joint submission for one day in custody in light of credit for three years of pre-sentence custody but added an additional year of probation to the two years that were jointly suggested.

When passing sentence on the plaintiff, the court observed that what he had done was "despicable", and that he had "committed a terrible crime and harmed many people." The court stated that the plaintiff was "very, very, very lucky" that he did not receive a much higher sentence: *R. v. Mann*, 2021 ONSC 7071 at paragraph 12.

The plaintiff did not appeal his conviction or sentence, which was then fully served.

Instead, the plaintiff sued his former criminal defence lawyers. In his claim the plaintiff asserted that they failed to properly represent him in his criminal proceeding and that, as a result, he was incarcerated for longer than he should have been. He claimed that he was deprived of the ability to raise affirmative defences and legal arguments and that the lawyers were liable for damages due to "ineffective assistance of counsel, gross incompetence and diminished legal representations, willful dereliction of duty with impunity, gross deceptive legal acts, sham legal misrepresentations, [and] blatant gross negligence of legal duties", among other things.

The defendants brought a motion to strike out and dismiss the claim as an abuse of process or, in the alternative, for failing to disclose a cause of action.

Courts in Ontario are generally cautious about allowing civil claims against criminal lawyers for negligence or inadequate representation since such cases would usually involve relitigating the criminal charges. In that regard, the Court of Appeal for Ontario has repeatedly held that a convicted client cannot sue their defence lawyer for negligence unless the conviction or sentence is overturned on appeal.

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The motion judge referred to the decision of *Arconti v. Fenton*, 2020 ONCA 489, at paragraph 15, where the Court of Appeal stated that “a solicitor’s negligence claim that depends, for its success, on showing that the client would have been acquitted of a criminal charge but for the lawyer’s negligence, involves a collateral attack on the criminal adjudicative process, and is thus an abuse of process.”

Further, to prevail, the plaintiff would have to show that but for the negligence of the defendant lawyers, he would have been acquitted or given a lighter sentence which, practically speaking, would have required him to have been released on bail since he was sentenced to just one day plus time served. Based on this principle, the motion judge found that the action against the defendant lawyers was an improper collateral attack on the plaintiff’s criminal conviction and sentence.

The plaintiff’s main argument was that he could not obtain information on which to commence an appeal. He complained that he did not obtain disclosure from the defendants, and that he was unaware of the file number of his case in the Superior Court of Justice.

In the motion judge’s view, this was not an answer to the collateral attack problem. The plaintiff was able to commence the action in 2023 and make complaints to Legal Aid Ontario and the Law Society of Ontario. However, in the almost four years since his guilty plea, he had taken no steps to have that plea set aside or otherwise challenged on appeal. The motion judge noted that there was good reason for this, since he received a very favourable disposition.

The plaintiff also complained about poor treatment by the defendants, including their use of profane language, missed court appearances, and failure to communicate with him appropriately, which caused him emotional distress. However, the motion judge reasoned that these complaints related to the complaint of inadequate representation while the plaintiff was in custody and experiencing the expected stress and anxiety that is inherent in being in pre-trial detention. Complaints of this nature, as pleaded, do not create an independent cause of action and can be better addressed, if at all, in another forum such as through the Law Society.

Overall, the motion judge found the plaintiff’s claim and submissions to be a series of complaints in which he blamed everybody but himself for what happened and for his failure to appeal. The statement of claim was therefore determined to be an abuse of process which did not disclose a cause of action. The claim was struck without leave to amend, and the action was [dismissed](#).

The decision illustrates the court’s reluctance to allow relitigation of prior criminal proceedings where a plaintiff has failed to pursue the appeal remedies that were available at the time. A PDF version is available for download [here](#).

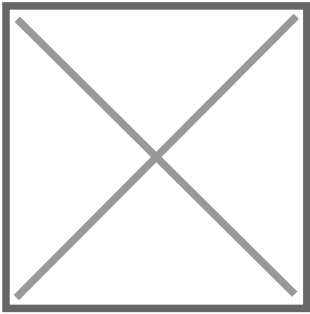
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