

Confidential and legally privileged advice

*Bond Dickinson*

### Civil claims by SPMRs

This note highlights the potential civil actions that a SPMR could try to bring against POL if, because of errors found in the Horizon system, (1) an on-going criminal prosecution against an SPMR was abandoned or (2) an SPMR's conviction was overturned.

#### Malicious Prosecution

The tort of malicious prosecution results from the malicious institution of legal proceedings against a person. This civil action only applies where an on-going prosecution is abandoned or results in an acquittal. It does not apply where a conviction is subsequently quashed – see false imprisonment.

In an action of malicious prosecution the SPMR must show:

- 1 That he was prosecuted by POL or that POL initiated a criminal prosecution (say via the CPS) against the SPMR
- 2 That the prosecution was determined in the SPMR's favour
- 3 That the prosecution was without reasonable and probable cause

The SPMR must give evidence tending to establish an absence of reasonable and probable cause operating on the mind of POL. If the SPMR can establish either negatively that securing the ends of justice was not POL's true or predominant motive for prosecuting the SPMR or affirmatively that something else was POL's motive then the SPMR will likely be able to establish that POL did not have reasonable and probable cause for the prosecution.

- 4 That the prosecution was malicious

Malice covers not only spite or ill-will but also improper motive.

#### Possible compensation

**Basic damages** will depend upon the circumstances and degree of harm suffered by the SPMR (essentially measured in terms of the length of time and seriousness of the prosecution). Typical harms include loss of reputation and credit, humiliation, mental suffering and discomfort. Previous convictions are relevant to this figure in that a person with several prior convictions is unlikely to be as distressed by the prosecution as someone new to the court system.



- If the SPMR suffered an **economic loss** directly related to the original action, he can also recover the amount lost. This amount includes fees for counsel and court costs incurred by the SPMR in defending the original case.
- **Aggravated damages** may be appropriate where there are aggravating features which would result in the SPMR not receiving appropriate compensation if simply the basic award was relied upon. Such features can include humiliating circumstances at the time of arrest.
- **Exemplary damages** may be applied if POL's conduct has been particularly poor and has included oppressive or arbitrary behaviour which deserves the exceptional remedy of exemplary damages and where the award of basic and aggravated circumstances are deemed an inadequate punishment for POL.



- **Special damages** may be awarded for quantifiable losses suffered by the claimants, for example, for a loss of earnings due to the prosecution.

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### **False imprisonment**

It is unlikely that POL could be liable for the tort of false imprisonment.

Generally speaking, POL cannot be liable for instigating criminal proceedings that ultimately result in a SPMR being falsely convicted by a Court and imprisoned. The responsibility for this false conviction rests with the Court, not with POL. There may however be an action by the SPMR against the state for compensation.

### **Malicious Falsehood**

Malicious falsehood is the generic term for the malicious publication of false statements which cause damage to the claimant. If POL has alleged that a SPMR has acted dishonestly / criminally then POL may be open to a tortious action from a SPMR for malicious falsehood if that SPMR is later found to be innocent.

A SPMR must prove the following three limbs to bring a successful action:

- 1 POL published words about the SPMR which were false

A SPMR who has been found innocent by the Courts would likely be able to satisfy the first limb of the test for malicious falsehood as they could show that POL's allegations of dishonesty were false.

- 2 The words were published maliciously

A SPMR would need to prove malice by showing either that POL has made a statement knowing it to be false or reckless as to its truth (being negligent as to the truth of the statement is not sufficient) or by showing POL had improper motive or intent to harm without just cause.

The second limb of the test will be more difficult to satisfy. However, POL has been aware of certain historic bugs in the Horizon system. If these bugs directly and obviously affected a specific prosecution then it may be possible to argue that POL has acted recklessly in bringing that prosecution / making those allegations of dishonesty.

If, after a conviction is overturned, POL quickly publishes a correction then this will go some way to reducing the prospects of a SPMR being able to successfully show malice.

- 3 The publication has caused financial loss or that it will cause such loss

A SPMR has to establish that he or she has suffered or is likely to suffer actual damage/loss in order to be able to bring an action for malicious falsehood. "Actual damage" is to be understood to be nothing more than an actual or temporal loss which has in fact occurred.

An SPMR would probably be able to prove actual damage simply through their early termination and loss of remuneration.

### Possible compensation

Depending on the circumstances, SPMRs could recover financial losses as well as damages for injury to reputation, injured feelings, distress and anxiety.

### **Defamation**

In order to prove defamation, a SPMR will need to show that the following limbs have been satisfied:

- 1 The words complained of are defamatory of the claimant and are untrue.

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Words are defamatory if they are likely to harm a person's reputation. In the current circumstance, alleging that someone has committed a criminal offence when they are later found innocent is likely to be a defamatory and untrue statement

- 2 The words identify or refer to the claimant.
- 3 The words have been published to a third party

Publication takes place whenever the defamatory matter has been communicated to someone other than the person defamed. This will inevitably happen as part of any prosecution process.

#### Possible defences

Any action for defamation must be taken within a year of the publication of the defamatory words (as provided for in the Defamation Act 1996).

Further, POL may be able to assert a defence of qualified privileged. This defence arises where POL had a legitimate duty to make a statement and the recipient has a legitimate interest in receiving the statement. In the absence of malice (see malicious falsehood), we consider that this defence may apply where POL is investigating / prosecuting potentially criminal conduct as there is a legitimate reason for pursuing this course of action (social good, interests of justice, etc.)

#### Possible remedies

Remedies available to a SPMR if defamation is proved include compensatory damages (including damage to that SPMR's reputation and any loss of earnings), an apology and an undertaking/injunction not to repeat the defamatory allegations.

#### **Breach of the SPMR contract**

- The SPMR Contract does not contain any contractual obligation that directly relates to prosecutions by POL. As such, the overturning of a conviction or the abandonment of a prosecution will not, by itself, cause a breach of contract.
- However, the alleged act of dishonesty that supported the conviction may also have supported the SPMR's termination. If the act of dishonesty is found to be false, POL's termination of the SPMR's contract may be wrongful.

#### Possible remedies

- If proven, wrongful termination is a breach of contract and the SPMR could then sue POL for lost remuneration and also loss of earnings in any connected retail business (if any). This claim would be capped at 3 months' earnings as SPMRs can always be terminated on 3 month' notice. The SPMR will also need to mitigate any losses.
- It is unlikely that the SPMR could raise a claim for distress or reputation damages based on a breach of the SPMR contract.

#### **Data Protection Act 1998 ("DPA")**

- The DPA regulates the use of "personal data". "Personal data" is defined as information that "relates to" a living individual. Guidance from the Information Commissioner's Office (the regulator of the DPA) provides that any information used to record or make decisions about individuals is personal data.
- Arguably, therefore Horizon transaction records are "personal data" about SPMRs. This argument becomes stronger where an SPMR has been convicted as the transaction data will have been used to make a decision about that SPMR.

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- If the DPA applies, POL will have an obligation to ensure that all personal data (ie. Horizon data) is accurate.
- Under s13 of the DPA, a data subject (ie. an SPMR) may bring a civil claim against POL for breach of the DPA. The SPMR can recover compensation for any financial loss and, potentially, for distress and inconvenience. There is little guidance on how these losses are assessed and no statutory controls on their value (ie. there is no duty to mitigate loss and no limit on recovering unforeseeable losses).
- POL will have a defence to this type of claim if it can show that it took all such care as was reasonably required to prevent the Horizon data from being inaccurate.
- Please note that determining whether the DPA applies to SPMRs / Horizon data is a very complex legal question.
- However, on face value, there is a theoretical argument that, where a SPMR has been convicted on the basis of inaccurate Horizon data, POL may have breached the DPA if it has failed to take reasonable steps to keep the Horizon data about that SPMR accurate.

#### **Protection from Harassment Act 1997 ("PHA")**

- It is unlawful to undertake "a course of conduct which amounts to harassment of another". Harassment can be perpetrated by a legal entity (via its employees) against an individual. Harassment is not defined in the PHA but the Courts have held that the conduct must be "repeated" and "grave".
- A SPMR may try to argue that POL's repeated attempts to recover debts and/or the ultimate prosecution of that SPMR amounts to harassment.
- However, POL's counter-position would be that, first, it is reasonable for POL to pursue this course of action – POL's acts would not be within the meaning of harassment as understood by a reasonable person. Secondly, there is an exemption under the PHA for investigating potential criminal acts – this would exclude a wide range of possible claims against POL under the PHA.
- Nevertheless, harassment claims have been successful against over-zealous debt recovery companies. If an SPMR could show that POL had recklessly relied on the Horizon system without testing its reliability or investigating the SPMR's concern, this may undermine the above defences.
- If proven, the SPMR could bring a claim for any financial losses suffered (ie. loss of business, legal costs in defending criminal proceedings, etc) and damages for anxiety caused to the SPMR.

#### **Human Rights Act 1998 ("HRA")**

We understand that POL takes the position that it is not subject to the HRA. However, a SPMR may try to bring an HRA claim as part of a wider package of claims.