

# Prosecution

# Or

# Persecution

*Injustice anywhere is a threat to justice everywhere...*

Martin Luther King



Frank Preckel

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The subject matter herein discusses the judicial process and analyzes the cracks that could jeopardize the integrity of the same. The various roles of participants is discussed, and how they impact, or are impacted by changes in the judicial process to reinforce the integrity of the system. It also distinguishes a miscarriage from a mistake in justice, and the subsequent fallout of those errors. A final observation is made speculating the future and how events today may alter the future administration of the law, for better or worse.

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# Executive Summary

## *Malicious Prosecution*

In British Columbia, the authority that initiates criminal proceedings that could constitute malicious prosecution is Crown Counsel, under the direction of the Attorney General. Crown Counsel is made up of prosecutors, and being human, they make mistakes. They also possess the opportunity to abuse their authority. Upon deeper examination of any such allegation, the discovery of a Prosecutor as being either negligent or malicious becomes the subject matter of this paper. Further discussion will examine the future and evolution of the judicial system to address this subject matter.

The integrity of the judicial system hinges on advocating Crown's authority in administering justice. The dual role of advocating justice and administering justice is vulnerable to both misinterpretation and misappropriation. The implication of administering justice in error has been legally examined, and the consensus that immunity for Crown is necessary to preserve the integrity of the judicial system is qualified. The Canadian Charter of Rights and Freedom does protect its citizens from any infringement of their freedoms under Section 24(1). The policy of just behavior as detailed in the Criminal Code of Canada, and respecting a citizen's rights as guaranteed under the Charter, represent a reasonable, workable and harmonious balance.

When a citizen contravenes the Criminal Code or breaks the law, some of his rights or freedoms may be infringed upon, but he will always retain the right to a fair trial. The presumption is that the citizen is innocent until proven guilty. This represents the well-lubricated wheels of justice which has governed our society for centuries.

When an innocent citizen is accused of criminal conduct and prosecution begins in earnest, the innocent citizen falls victim to the judicial system itself. The Charter provides a remedy for such infringement, and the judicial system is prepared to recognize the merits of this argument. The difficulty is that a ruling may be too conclusive and thereby implicate the harmony that presently exists between the Criminal Code and The Charter of Rights.

Malicious prosecution can occur in civil matters as well, however the allegation by one party that the other party is acting out of malice, speaks more to the character of the individual initiating the action rather than the process itself. An example of such action is referred to in (1131 BCWLD #17, April 25, 1996). The breadth and depth of Malicious Prosecution is being studied more intensely today than ever before, perhaps because the level of understanding amongst citizens of their rights has never been more prevalent.

# The Information

## *Where does it all begin*

The term *information* in this discussion is a document that details the particulars of an alleged contravention of the law. Those particulars are recorded on a prescribed template (form # PR0004-G) which includes the name and occupation of the person supplying the information, along with the name of the accused and the date of the alleged misconduct. A Report to Crown Counsel (RTCC) is a brief description Peace Officers attach as supporting documentation to disclose details of and to reference any evidence. This constitutes *information*.

This *information* is forwarded to Crown Counsel for review and charge approval. If approved, it is sworn by a Justice of the Peace and the judicial process is set in motion. The information can be submitted by anyone. The merits of the information will always be considered by Crown and distinguished as Private (from a private citizen), or not private (from a peace officer). The practice has been that only that information submitted by law enforcement (a peace officer) will be given serious consideration by Crown. Private information is rarely endorsed by the Crown and charges are unlikely to be approved for reasons that deceive the author.

Given the limited resources afforded to Crown, the reluctance to proceed on a private information can be understood. However, the same shortcomings in law enforcement have limited the number and type of crimes that police are prepared to investigate. The reference being made is to crimes in computer technology, international activities involving the Internet, and encryption techniques for devices that exceeds the law enforcement's technology to decipher. The Stargate investigation in Vancouver two years ago is an example where law enforcement relied extensively on private citizens to discover and decipher information used to prosecute the illicit activity(s).

The new and unsettling crimes of identity theft, widespread publication of child pornography, and terrorist activities via electronic means by unidentifiable persons imposes a serious challenge to law enforcement. Law enforcement has found itself more dependent on private citizens to facilitate law enforcement in these specialized areas. This same private sector is called upon to protect the economic interests of their commercial clients. Their collaboration with law enforcement and Crown could effect better enforcement of the law. The reliance on unqualified law enforcement personnel in this type of investigation could result in prosecution that may be perceived as either malicious or negligent because of their ignorance in interpreting the evidence.

The filing of Private Information is a citizen's right and an opportunity for citizen's to contribute to the welfare of their community. Crown has not yet recognized the merits of this collaboration in preserving and/or administering justice.

# Law Enforcement

## *The legal two-step*

The initial presumption is that once charges are laid, the judicial wheel has begun rotating towards justice. If the Prosecutor is persuaded to approve a charge based on information that is perhaps illegitimate or inaccurate, then there exists the risk of prosecuting an innocent citizen. By virtue of his duty to the Crown, the Prosecutor may inadvertently be putting the Crown at risk of infringing on a citizen's right guaranteed under the Charter of Rights. Should the Prosecutor be liable for such an infringement?

Police Officer's are trained to interpret Reasonable & Probable Grounds before making an arrest by considering their own subjective belief, as well as the objective perspective of how the court will review the situation. Police Officer's are also trained to be ordinarily cautious and prudent when applying the test of reasonable grounds before making an arrest. When the matter is prepared for charge approval, their judgment in the field is compared to a 'Spectrum of Conclusion' before requesting charge approval from the Prosecutor. The 'Spectrum of Conclusion' is a foundation skill taught during their academy training. It consists of three elements that must exist before Reasonable & Probable Grounds exist. Those three elements are;

- The subjective belief of the officer must be based on conspicuous proof that would convince a normal individual to believe the allegation is true,
- There must be history of events that would lend credence to the allegation,
- There must be clear evidence to prove the allegation in court.

In *Curry v. Vancouver*, a police officer arrested and detained Curry using privileges granted to him under the Criminal Code (Section 495) to enforce the law. Crown subsequently approved a charge of assault against Mr. Curry. Later it was discovered that the Caucasian arrested did not match the victim's description of the Negro assailant. The defendant alleged that Crown had acted with Malice, Bad Faith and proceeded without Reasonable & Probable Grounds. The judge ruled that the court had to assume the facts as stated in Curry's claim were true and dismissed Crown's application of negligence to strike the claim.

In the case of *R. v. Dahlem*, the defendant was the subject of a criminal prosecution which was aborted because the Crown had failed to disclose important information to the accused until the third day of trial. The judge ruled that this constituted serious interference with the accused's right to fundamental justice. In that matter, the judge ruled that both the Crown and Police were responsible for that interference.

Nelles v. Ontario, which was a paramount examination on the issue defining negligence from malice, does not distinguish which authorities were liable for malicious prosecution. In the two preceding paragraphs, the two cases had different authorities contributing to some error. While the law enforcement officer exercised some liberties extended to him to enforce the law effectively against Curry, the officer may have abused his authority. His persuasion of Crown to proceed with inaccurate information may warrant further explanation. Curry claimed that both Crown and the officer stepped outside the boundary of their duties and immunity granted for negligence did not apply. In Dahlem, the Crown failed to disclose information and this negligence may or may not have been malicious. It does not consider whether the information was in Crown's possession to disclose. It is difficult to ascertain those facts leading to these circumstances, but both examples illustrate the difficulty in attributing responsibility for any infringement of a citizen's rights.

Nelles recognized the fact that such errors could occur, and merely examined if a remedy for such infractions was afforded to citizens as guaranteed under the Charter. It was determined that malice is a human characteristic, and may be evident when wielded by a power of indisputable authority. The potential to interfere with the fundamental integrity of the judicial system has always existed. Prosecutors have immunity against claims arising from their professional duties, but that veil of protection exists only in the absence of malice to protect against negligence. Law enforcement personnel are protected by a similar privilege. While not tested in Canada, the US acknowledges that jurors are immune for formulating their verdict based on evidence put forth to them.

However, when law enforcement is persuaded by a citizen to investigate another innocent citizen, the dramatization of events is no different than if the Prosecutor were misled by Police information, or a jury is led to a verdict on information provided by the Prosecutor. A private citizen does not have immunity, nor are they bound to a professional or moral standard of duty. The dissemination of false and misleading information may result in consequence under other paragraphs of the Criminal Code. The question to explore is whether their malice can be traced back to the origin and what remedy may exist for the victim in those circumstances.

Immunity is a necessity for those who enforce the law to administer the law effectively. Nelles demonstrated that any authority, while granted this immunity, is not above the rights of a citizen as guaranteed under the Charter of Rights and Freedom. If that authority is abused or leveraged at any level, it ought to place the burden to be prudent squarely on the shoulders of the person responsible. Perhaps Prosecutors, law enforcement and jurors ought to be held accountable for their conduct, but to what extent?. People like Martin Luther King made this observation years ago, stating "*an injustice anywhere is a threat to justice everywhere*".

# The Prosecution

## *Roles & Responsibilities*

The Canadian Charter of Rights & Freedoms, paragraph 11(d) states that every Canadian citizen is ***to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.***

If there is an infringement of that right, paragraph 24 states that ***anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.***

A Peace Officer has a privilege under Section 495 of the Criminal Code to ***arrest without warrant a person who, on reasonable grounds, he believes has committed or is about to commit an indictable offence...or he finds committing a criminal offence,***

A Prosecutor has immunity for negligence in the fulfillment of his obligations. He must act with prudence, and introduce no malice. While the above statements are definitive, qualified and concise in the preceding paragraphs, such a definitive statement of a Prosecutor's role is elusive. *Nelles v. Ontario* and *German v. Major* are just some of the cases which helped scrutinize a more legal definition. The present role of the Prosecutor is best expressed in *German v. Major, supra, Counsel for the Attorney General (has a) duty is to represent the interests of the Attorney General.* However, because the Prosecutor must rely on the evidence gathered by others, the Prosecutor should be protected from actions stemming from any negligence. Therefore, the role of the Prosecutor is to acknowledge the importance of being a vigorous advocate on behalf of the prosecution without neglecting his fiduciary duty as a minister of justice, the latter itself being founded on the Canadian Charter of Rights and Freedoms. That understanding was qualified by his Lordship in *Boucher v. The King, supra* as ***“a duty to see that all available legal proof of the facts is presented: it should be done firmly, and pressed to its legitimate strength but it must also be done fairly.”***

Herein exists a fundamental flaw...how can one account for the integrity of the Prosecutor if the legal proof is in fact, illegitimate or unscientific? What prevents the proof (evidence) from being applied to its legitimate strength upon an innocent citizen for whom the resources to dispute the same are absent?

This flaw has emerged recently as the results of more precise DNA evidence is turning a previous perception of justice into injustice, and how other dynamics can extort the judicial system to proceed with bias. Examples of this include;

1. **David Milgaard** was just 17 when he was sent to prison in 1970 for the brutal sex-slaying of nursing aide Gail Miller in Saskatoon. Milgaard was released from prison in 1992 after years of efforts by his mother led to a review of his case by the Supreme Court of Canada. The high court threw out Milgaard's conviction and he was finally exonerated in July 1997 after DNA tests proved that semen found at the crime scene didn't match his.
2. **Gregory Parsons** who had been convicted in 1994 of the 1991 murder of his mother, was officially exonerated in 1998 after DNA samples proved he wasn't the killer. There was no physical evidence, and there were no witnesses or incriminating statements. An independent commissioner found that a constable in the case had "conducted himself in a manner that can best be described as overzealous and devoid of police professionalism."
3. **Gary Staples** was dragged from his bed at gunpoint on April 26, 1970, charged with the murder of Gerald Burke. Convicted of Burke's murder at his first trial, the conviction was quashed on appeal and a new trial ordered because new evidence was discovered. A second jury found him not guilty in 1972, but by then he had already spent 22 months in prison.
4. **Thomas Soponow** would stand trial three times for a Winnipeg teenager BarBara Stoppel's murder in 1981. The first trial resulted in a hung jury. In the second and third trials he would be convicted only to have the verdict overturned on appeal. Eventually, it took an edict from the Supreme Court of Canada to stop the province from seeking a fourth trial. While he waited for his legal nightmare to come to an end Soponow languished for three years and nine months behind bars.
5. **Steven Truscott** was sentenced to hang in 1959 at the age of 14 for the murder of Lynn Harper, a 12-year old school-mate. He was Canada's youngest death-row inmate and his trial was one of the most famous and controversial in Canadian history. His sentence was commuted and after spending 10 years behind bars he went on to live an anonymous life in southern Ontario.
6. **Stephen Downing** Britain's longest running miscarriage of justice ended when Stephen Downing has his murder conviction quashed by the court of Appeal. Mr. Downing, who served 27 years in jail after falsely confessing to the killing of a secretary in a graveyard, is now set to make legal history by claiming up to £8 million in compensation. Mr. Downing, 45, was just 17 with the reading age of an 11-year-old when he was arrested.

For some innocent victims who may still be enduring some unjust punishment, the science and resources to dispute the legitimacy of the legal proof was absent or simply indisputable at the time of their defense. Is this malicious? Was it negligence? The only conclusion we can draw is that the integrity of the judicial system is under a microscope, and all the participants are debating their roles and responsibilities in this sophisticated world of science, technology and the civil liberties that are being defined as we speak.

# Negligence or Malice

## *Definition or Interpretation*

**MALICIOUS PROSECUTION - An intentional tort arising from the institution or instigation of unjustifiable and unreasonable civil or criminal litigation. An action for malicious prosecution can be brought against the underlying case's plaintiff, plaintiff's counsel and/or advisors.** Sheldon Appel Co. v. Albert & Oliker, supra & appeal. (US)

For the past century, an implicit trust in the integrity of the prosecution has existed to ground the adversarial system of justice. Referring back to the roles of the Prosecutor, the policies that substantiate immunity for the Prosecutor have merit, the presumption that the Prosecutor is of complete integrity has never been quantified in a policy. This was iterated by Judge Learned Hand in 1949 when he stated *“As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance, it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation”*

The recent determination in the Nelles v. Ontario matter lifted the veil of immunity that has cloaked prosecution. Nelles staged the argument that queries this immunity for prosecution, hearing the argument(s) that spoke directly to the importance of the role of the Prosecutor in Canadian society, and the Canadian Charter of Rights and Freedoms. The result was a more definitive look at the role of the Prosecutor, and a better definition of the protection immunity provided. This was to put forth in a decisive question of whether the Prosecutor inflicted malice in his advocacy, or was simply negligent in his fiduciary duties.

Lamer J. states *“the tort of malicious prosecution requires a demonstration of improper motive or purpose; errors in the exercise of discretion and judgment are not actionable”*. Therein lies an insinuation that negligence may exist and immunity prevails to protect the Prosecutor, however Lamer J. also reinforces his later conviction that *“When a person can demonstrate that one of his Charter rights has been infringed, access to a court of competent jurisdiction is essential for the vindication of a constitutional wrong”*.

Essentially, Lamer J. has proclaimed that when a Prosecutor has stepped outside the discharge of his or her public duties, they have disintitiled themselves from the veil of immunity that affords the protection necessary to perform their civil role without threat of interference or consequence. This wisdom enforces a code-of-conduct that polices the prosecution in administering the law faithfully, including the permission to concede any charge if the accused rights were breached or infringed upon. The aim of distinguishing negligence from malicious prosecution would be to preserve a balance between individual rights and the collective good, so that proper remedy exists for the defendant and an expectation of prudence is instilled upon prosecution.

# Criminal or Tort

*Which is it and who cares?*

Malicious Prosecution is under the Law of Tort. The action of the accused (usually the Crown Prosecutor) may be criminal, insofar as suggesting Breach of Trust, Obstruction of Justice or Conspiracy to Falsely Prosecute. However, any action alleging malicious prosecution is a civil matter.

The Charter of Rights guarantees the rights of citizens arrested under Section 10:

*Everyone has the right on arrest or detention*

- a) to be informed promptly of the reasons therefore;*
- b) to retain and instruct counsel without delay and to be informed of that right, and*
- c) to have the validity of the detention by way of habeas corpus and to be released if the detention is not lawful.*

Innocent citizens prosecuted can obtain remedy under Section 24(1).

*Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed upon may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.*

Nelles put forth that argument that prosecution can be malicious, and distinguished negligence from the malicious prosecution. However, the remedy is difficult to ascertain, since the intangible worth of the victim's reputation, their lost liberties and the emotional surrender is difficult to quantify in monetary terms. The imposition of a summary charge versus an indictable charge may also contribute the severity of the consequence for the victim. The premise of a conspiracy between authorities also makes attributing the guilt difficult, making any remedy difficult to attribute or award.

If it is discovered that the actions of authority in a malicious action constitute a criminal breach, those individuals responsible will be held accountable for their independent actions in a criminal proceeding. That does not dismiss subsequent civil proceedings by the victim for suitable remedy.

While the actions of some authority may constitute criminal infraction, each mosaic of circumstance that blossoms in a malicious prosecution action must be addressed on an individual basis. If the burden that *malice in the sense of deliberate and improper use of authority and powers* is proven, the victim has a clear right to remedy under the Charter. Beyond that, that path of justice for the victim remains undefined and un-chartered.

# Malicious Prosecution

## *Beyond Nelles - Looking South*

Richard Quinney, Saskatchewan's Chief Prosecutor states *"A key to our jurisprudence -- and this seems to be quite something forgotten -- is that if you are acquitted or the charge is stayed or withdrawn, you are deemed innocent. You should go back to the same position you were in prior to the charges being laid."*

Canada is somewhat naive to the implications of malicious actions and determining a suitable remedy. Perhaps that can be seen as an advantage in our society, or as a detriment for the citizens. Looking to the United States and its judicial history, we can see the evolution of law as it applies to this discussion.

In one of California's leading cases, its Supreme Court granted review in Sheldon Appel *"to consider a number of issues relating to the proper determination of the probable cause element in a malicious prosecution action, including the question whether a plaintiff may establish an absence of probable cause by proving that its former adversary's attorney failed to perform adequate legal research before filing the prior action."* To that end, the Court determined *"that the most promising remedy for excessive litigation does not lie in an expansion of malicious prosecution liability"* and thus found it was not *"advisable to abandon or relax the traditional limitations on malicious prosecution recovery."* It was from that perspective that the Court analyzed the specific questions presented in Sheldon Appel.

First, the Supreme Court determined the issue of probable cause is one for the court, not a jury. Thus, where there are no disputed questions of fact relevant to the probable cause issue, the matter may be determined by summary judgment.

Second, the Supreme Court determined that, where *"the facts known by the attorney are not in dispute, the probable cause issue is properly determined by the trial court under an objective standard; it does not include a determination whether the attorney subjectively believed that the prior claim was legally tenable."*

To avoid confusion, the Court *"strongly emphasize[d]"* that it did not mean to *"suggest that an attorney who institutes an action which he does not believe is legally tenable is free from the risk of liability for malicious prosecution. If the trial court concludes that the prior action was not objectively tenable, evidence that the defendant attorney did not subjectively believe that the action was tenable would clearly be relevant to the question of malice. Inasmuch as an attorney who does not have a good faith belief in the tenability of an action will normally assume that a court is likely to come to the same conclusion, the malicious prosecution tort will continue to deter attorneys from filing actions which they do not believe are legally tenable."*

*"Furthermore, the probable cause element, as so defined, imposes no improper or unjustified hardship on a malicious prosecution plaintiff. If a court finds that the initial lawsuit was in fact objectively tenable, the court has determined that the fundamental interest which the malicious prosecution tort is designed to protect -- 'the interest in freedom from unjustifiable and unreasonable litigation' -- has not been infringed by the initial action. Under such circumstances, it is not unfair to bar a plaintiff's suit for damages even if the plaintiff can show that its adversary's law firm did not realize how tenable the prior claim actually was, since the plaintiff could properly have been put to the very same burden of defending an identical claim if its adversary had simply consulted a different, more legally astute, attorney. This is a classic case of 'no harm, no foul.'"*

In Sheldon Appel, supra, the California Supreme Court held that where *"there is no dispute as to the facts upon which an attorney acted in filing the prior action, the question whether there was probable cause to institute the prior action is purely a legal question, to be determined by the trial court on the basis of whether, as an objective matter, the prior action was legally tenable or not. If the court determines that the prior action was not objectively tenable -- and thus concludes that the action was brought without probable cause -- evidence of the extent of an attorney's legal research may be relevant to the further question of whether the prior action was instituted with malice, but if the court finds that the prior action was in fact tenable, probable cause is established -- and the malicious prosecution action fails -- without regard to the adequacy or inadequacy of the attorney's legal research efforts."*

In reaching this conclusion, the Supreme Court discussed a number of malicious prosecution cases in which the attorney-defendants had been specifically charged with knowledge of the falsity of the claim asserted in the underlying action. As the Supreme Court put it in Sheldon Appel, in each of those cases the *"plaintiff's contention was that the prior action had been prosecuted 'with knowledge of the falsity of the claim . . . ."* Moreover, the *"fundamental interest"* protected by the malicious prosecution tort is *"freedom from unjustifiable and unreasonable litigation"* For this reason, even under the subjective belief standard rejected in Sheldon Appel (the question used to be whether the attorney had an *"honest belief"* that his client's claim was tenable, a jury verdict in the client's favor in the underlying case was *"conclusive evidence of the existence of probable cause even though subsequently reversed."* That rule was based on the notion that persons who initiate civil proceedings should not thereafter be subjected to malicious prosecution litigation unless it could be shown that they acted without probable cause -- and that if probable cause had been determined by the trier of fact in the prior proceedings, it was not subject to reevaluation even when the jury's determination was reversed.

The standard is *"whether any reasonable attorney would have thought the claim tenable"* The theoretical underpinnings of Sheldon Appel is the imposition of reasonable limitations on malicious prosecution actions to avoid a serious chilling effect on the assertion of litigants' rights, by permitting lawyers and their clients to present issues that are arguably correct, even if it is extremely unlikely that they will win.

# Evolution to Disillusion

## *Where are we headed?*

If citizens can mislead Police into initiating an act of malicious prosecution, and Prosecutors are vulnerable for acting on incorrect information, are jurors equally liable for convicting innocent citizens based on information proven to be inaccurate? What will happen to the integrity of the judicial process? By the same token, does that open the door for Police officers to sue citizens for their personal consequence if they are persuaded to investigate and charge innocent citizens? Will prosecutors be more selective on prosecuting cases? The volley of legal arguments is seemingly infinite.

The State of California has studied Malicious Prosecution and found this term imports a wanton prosecution or arrest, made by a Prosecutor in a criminal proceeding, or a plaintiff in a civil suit, without probable cause, by a regular process and proceeding, which the facts did not warrant, as appears by the result. There must be malice and want of probable cause. An action can be launched against the Prosecutor and even against a mere informer, when the proceedings are malicious. Grand jurors are not liable to an action for a malicious prosecution, since information is given to them and their fellow jurors, on which a prosecution is founded.

The Proceedings under which the original prosecution or action was held, must have been regular, in the ordinary course of justice, and before a tribunal having power to ascertain the truth or falsity of the charge, and to punish the supposed offender, the now plaintiff. When the proceedings are irregular, the Prosecutor is a trespasser.

The malicious prosecution or action must be ended, and the plaintiff must show it was groundless, either by his acquittal or by obtaining a final judgment in his favor in a civil action. The remedy for a malicious prosecution is an action on the case to recover damages for the injury sustained. Attached is a newspaper article reporting a sequence of events that numbs the optimism of establishing any precedence for establishing the grounds rules regarding Malicious Prosecution in Canada.

To speculate where we are headed would be foolhardy. One should respect those that are examining the issue of Malicious Prosecution and analyzing the effects of recent precedence. The argument for both parties is candid and valid, and the integrity of the entire judicial process is at stake. One can hope that evolution will reinforce that integrity and maintain confidence, as the opposite would be very anarchic and quite uncivil.

ACLU News - The Newspaper of the ACLU of Northern California, Mar/Apr 97

## Settlement in Police Malicious Prosecution Suit

After ten years of litigation, three police officers have dismissed their malicious prosecution suit against an Alameda woman who filed a civil rights suit charging the officers with brutality. The officers also sued the woman's husband and sister. The officers received nothing in return for dismissing their suit other than the agreement that each side would bear its own legal costs. This agreement was announced on February 10.

"This is a victory for Virlee Berry and her family as well as for all civil rights plaintiffs," said ACLU-NC staff attorney Ann Brick. "Police cannot use malicious prosecution suits as a form of intimidation to prevent victims of police brutality from seeking justice in the courts."

The litigation, *Fuentes v. Berry*, originated in February, 1987, when Virlee Berry filed a civil rights suit in U.S. District Court against the City of Alameda, the Chief of Police and the three individual officers, Heriberto Fuentes, Robert Villa, and Ronald Jones. Mrs. Berry alleged race discrimination by the Alameda Police Department and brutality by the arresting officers.

On the eve of trial, the City agreed to settle the suit with Mrs. Berry, paying her \$15,000. In exchange, the City required Mrs. Berry to drop her case. The three named police officers then filed a malicious prosecution suit in Alameda County Superior Court against Mrs. Berry, her husband, and her sister Betty Williams. The family turned to the ACLU for legal representation.

During the course of the litigation, the Court of Appeal held that when a settlement agreement requires a litigant such as Mrs. Berry to dismiss her claims against *all* of the defendants, even those who do not settle cannot later bring a malicious prosecution action. It was this principle that the ACLU sought to establish in taking this case.

Mrs. Berry, and her family were represented by ACLU-NC cooperating attorneys Jerome B. Falk, Jr. and Barbara A. Winters, both partners in the San Francisco law firm of Howard, Rice, Nemerovski, Canady, Falk & Rabkin, along with ACLU-NC staff counsel Ann Brick and Ed Chen.

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