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Police Duty of Care

An action against the Ontario Provincial Police by the family members of a deceased stabbing victim is allowed to proceed.

In 2011 Jesse-James Low ("Low") was killed by Raymond Reid ("Reid"). An action under s. 61 of the Family Law Act of Ontario ("FLA") was brought against the Ontario Provincial Police ("OPP") by Low's parents, brother and grandmother, alleging that the OPP breached its duty of care to protect Low.

Low, Reid and another individual attended a fair together and became intoxicated. They went their separate ways but Reid, who was required to keep the peace and be of good behaviour pursuant to a probation order, got into an altercation with another group of people. The OPP were called but instead of arresting Reid took him to the home of his father, who was an alcoholic. Low was in a relationship with Reid's sister and lived at the home with Reid.

Reid subsequently left the home and again met up with Low. A fight broke out between Low and Reid and Low was stabbed. Reid called his father who picked the two boys up and took them back home. Eventually an ambulance was called but Low died of his injuries.

The Plaintiffs alleged that the officers owed Low a private duty of care. It was well-known that Reid had a violent history and had assaulted Low in the past. It was argued that the police should have known that Reid, especially while intoxicated, was a danger to others.

The Defendant, Her Majesty the Queen in Right of Ontario, argued that the OPP does not owe a private duty of care to the Plaintiffs or to Low. Their only duty of care is with respect to the general public. The Defendant moved to have the claim struck on the basis that it did not disclose a reasonable cause of action.

The Defendant submitted that there was no special relationship of proximity between the OPP and the Plaintiffs or the OPP and Low. It also submitted that harm to Low was not foreseeable and that applying the Cooper-Anns test (*Cooper v. Hobart*) there was no *prima facie* duty of care owed.

The Plaintiffs argued that pursuant to the decision in *Jane Doe* v. *Metropolitan Toronto Municipality Commissioners of Police* "… this case falls within an established category where the police have been found to owe a private law duty of care, specifically a duty owed to a narrow and distinct group of potential victims." They also submitted that foreseeability and a proximity between Low and the OPP was disclosed in their pleadings and passed the *Cooper-Anns* test to establish a *prima facie* duty of care.

The two factors which had to be determined by the Court in this motion were:

1. Are Plaintiffs bringing an action under s. 61 of the FLA required to establish that a duty of care was owed to them, rather than the deceased, where the deceased's estate is not a plaintiff in the action?

2. Is it plain and obvious that the Plaintiffs' pleading does not disclose a reasonable cause of action?

The Defendant submitted that, notwithstanding any duty of care owed to Low, a duty of care to the Plaintiffs was "less conceivable" because, as relatives of Low, they are "one step further removed" from the OPP than Low. The Court found that this argument was not supported by legislation or the jurisprudence.

Section 61 of the FLA states:

"If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse…children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction."

Therefore, according to the FLA, the Plaintiffs did not need to prove that they were entitled to recover losses that the victim would have been entitled to recover, only that the duty of care was owed to the victim.

With respect to the second question, the Defendant submitted that the courts have rejected the idea that police owe a private law duty of care to individual members of the public. The court has held that police owe a duty of care to the general public. The Plaintiffs submit that *Jane Doe* establishes that there is an exception to this principle where "facts were sufficient to establish a relationship of proximity between the police and the victim." The "victim was part of a narrow group of potential victims".

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Lederman J. agreed that "if an alleged duty of care has not been recognized or rejected previously, a court must determine whether the foreseeability of harm and proximity between the parties give rise to a *prima facie* duty of care…" (Emphasis added).

The Defendant argued that the harm to Low was not foreseeable by the police. At no point, during the evening leading up to Low's death was there a confrontation between Low and Reid. Reid was released into the custody of his father and a confrontation broke out between Low and Reid after Reid left the home where police had left him. A confrontation between Low and Reid, according to the Defendant, was not a foreseeable consequence.

The Plaintiffs relied on the case of *Haggerty Estate (Litigation Administration of) v. Rogers* to argue that they did not need to show that the OPP knew what harm Reid could cause to Low, but only that the OPP should reasonably have contemplated that Reid would commit a violent crime against Low.

The Judge found that it was not plain and obvious that the Plaintiffs' pleading did not demonstrate that Low's harm was foreseeable. The pleadings alleged that the OPP knew Reid to be violent and knew that Low lived with Reid. They also knew that Low had been assaulted by Reid in the past.

With respect to the proximity issue the Defendant submitted that the pleadings did not show an interaction between the Plaintiffs and the OPP that would fit the requirements of a special relationship of proximity. If Reid was a threat, he was a threat to the general public, not just the victim. The Defendant argued that the Plaintiffs failed to show that Low had a "greater claim to protection" from Reid than any other member of the public. The submission of the Plaintiffs was that the potential victims belonged to a narrow group, being the residents of the house where Reid was released.

Lederman J. agreed with the Plaintiffs on this issue as well. A number of cases were referred to which showed that police must know the victim in order to find proximity between the police and the victim. As stated previously, the police knew Reid and Low and knew that they lived together. This, along with various other facts, as set out in the pleadings, could create a "close and direct' relationship between the OPP and Low".

The Defendant argued further that a finding of a *prima facie* duty of care would result in a duty being owed to an "unlimited class of persons in an indeterminate amount". This would create a duty of care that would be owed to family members "every time an individual is questioned and released and subsequently commits a crime." Lederman, J. disagreed, stating

"Finding that a duty of care exists in these circumstances will not extend a duty owed by police to an indeterminate class of persons. The duty will be owed to victims (or their families) who have a special relationship of proximity to police that is based on knowledge of the victim, or close and direct interaction with the victim."

Lederman J. went on to dismiss the motion as the Defendant did not meet the burden of proof required to strike out a statement of claim.

Castle et al. v. Her Majesty the Queen in Right of Ontario, 2014 ONSC 3610 (CanLII)

Coverage Available in Bullying Case

A child's bullying was intentional, but the insurer must provide coverage to the child's parents.

An application was made to the Superior Court of Justice by a couple who, with their daughter, were named as defendants in a lawsuit. The Applicants sought a declaration that the Respondent, Unifund Assurance Company ("Unifund") had a duty to defend and indemnify them under a comprehensive homeowner's property and liability insurance policy ("the Policy").

R.E., the daughter of the Applicants, was a grade 8 student who was sued in a matter involving the bullying of K.S, another grade 8 student at a school operated by the Toronto Catholic District School Board ("TCDSB"). Two other grade 8 students, the TCDSB and several of its employees were also named in the suit.

Unifund refused to defend the action on behalf of the Applicants, on the basis that the claims fell outside the scope of coverage described in the Policy. They took the position that the injuries claimed by the Plaintiff were as a result of an intentional act – assault, threatening and bullying.

The Policy contained the following Exclusions:…

EXCLUSIONS – SECTION II

We do not insure claims arising from:…

6. bodily injury or property damage caused by an intentional or criminal act or failure to act by:

(a) any person insured by this policy; or

(b) any other person at the direction of any person insured by this policy;

7. (a) sexual, physical, psychological or emotional abuse, molestation or harassment, including corporal punishment by, at the direction of, or with the knowledge of any person injured by this policy; or

(b) failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment".

When determining whether a claim is covered a court must look to the Statement of Claim and "accept the allegations contain in the pleadings as true. If the claim alleges a state of facts which, if proven, would fall within coverage of the policy, the insurer is obliged to defend the suit regardless of the truth or falsity of such allegations." This is not a fact-finding analysis, even if "the actual facts surrounding the claim may be different than the alleged facts". Whether a claim is covered "depends on the nature of the claim made". An insurer must defend an action where, "on a reasonable reading of the pleadings, a claim within coverage can be inferred."

The Court correctly noted that it "must interpret the provisions of a policy in light of general principles of interpretation of insurance policies including:

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(1) the *contra proferentem* rule;

(2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and

(3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties."

The party relying on the applicability of a policy provision, whether coverage or exclusion, has the onus of establishing that that policy provision applies.

In this application the Applicants argued that they were entitled to a defence and coverage under the Policy as the claims against them were claims in negligence "arising from failing to take disciplinary actions and for failing to investigate and remedy bullying." Claims such as these are not excluded under the Policy.

Unifund submitted that the claim was for damages for intentional acts committed by R.E. against K.S.. and that the policy does not cover intentional acts.

The Court went on to find "where multiple theories of liability are advanced to support the same claim for damages, an insurer may be ordered to defend the entire action, even if some of the claims are excluded by the policy." Simply because a policy "may not respond to intentional acts committed by one of the insureds does not preclude coverage being triggered in favor [sic] of the applicants, against whom liability is sought to be imposed on a theory of negligence." The actions of the Applicants' daughter, while intentional, do not exclude the coverage of all Applicants.

The court is required to follow a three-step analysis to determine whether a claim could trigger indemnity. Firstly, it must be determined whether the allegations could trigger coverage and the true nature of the claims. Secondly, the court must determine whether the claims are entirely derivative in nature. Whether or not a "claim can be cast in terms of both negligence and intentional tort" does not trigger the duty to defend. If negligence is "based on the same harm as the intentional tort" the insured cannot "circumvent the exclusion clause for intentionally caused injuries". Lastly, whether any properly pleaded non-derivative claims may trigger the duty to defend must be examined.

Non-Marine Underwriters, Lloyd's of London v. Scalera was referred to by the Judge on a number of occasions. The insurance policy in that case included a clause which excluded claims arising from "bodily injury or property damage caused by any intentional or criminal act or failure to act by…any person insured by this document." The judge in that case stated: "I believe the exclusions clause must be read to require that the injuries be intentionally caused, in that they are the product of an intentional tort and not of negligence. (Emphasis in original). He believed that "reading the clause to exclude negligent failures to act would lead to absurd consequences because almost any act of negligence could be excluded".

When deciding whether a claim is covered, the judge must decide if the negligence claim is derivative of the intentional claim or whether they can be severed. How the statement of claim is drafted as well as the actions of the defendants must be examined in order to make this determination. In this current case, the Court found that the negligence claim against the Applicants, i.e. their failing to investigate, remedy and prevent the bullying, and the intentional tort claim against their daughter were distinct. The Plaintiffs were seeking to find the Applicants liable on the basis that the harm was caused by their negligence. There was no claim that the Applicants' acts were intentional and the Clause 6 Exclusion did not apply.

The Court then had to consider the effect of Clause 7(b), which excludes "failure of any person insured by this policy to take steps to prevent sexual, physical, psychological or emotional abuse, molestation or harassment or corporal punishment." The Court found that the Clause was ambiguous because it did not specify whether it applied only to intentional failures to act. Applying the doctrine of *contra proferentem* and the principle that exclusion clauses are to be interpreted narrowly, the Judge concluded that Clause 7(b) "…should be limited to intentional failure to take steps to prevent physical abuse or molestation… The exclusion should not extend, however, to situations where that failure arose through negligence."

Since this was a liability policy intended to insure the Applicants for their own negligence, The Judge found that interpreting the policy to allow coverage where the insureds unintentionally (negligently) failed to prevent the harm was "consistent with the parties' reasonable expectations".

The application was allowed and a declaration stating that the Respondent had a duty to defend and indemnify the Applicants was issued.

D.E. v. Unifund Assurance Company, 2014 ONSC 5243 (CanLII)

Ontario Review Board Decision Upheld

The Court of Appeal for Ontario dismisses an appeal from a decision of the Ontario Review Board, notwithstanding the Board's "ill-advised" comments about the risk that the accused might pose to students at a nearby college.

The Court of Appeal recently heard a matter involving a longstanding NCR accused, Paul Conway (the "Appellant" or "Mr. Conway"). Mr. Conway has been under the jurisdiction of the Ontario Review Board (the "Board") since 1984 when he was found not guilty by reason of insanity on a charge of sexual assault with a weapon. Mr. Conway has been diagnosed as suffering from a major mental illness and a personality disorder by various treating psychiatrists at a number of forensic hospitals.

This matter went before the Court of Appeal as a result of Mr. Conway appealing a disposition of the Board made at his 2013 annual review. At the hearing Mr. Conway sought an absolute discharge or, in the alternative, a conditional discharge. If the Board did not feel that either of those were appropriate Mr. Conway sought privileges such as unescorted

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Ontario Review Board (continued)

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community passes.

Due to the Board finding that Mr. Conway still posed a significant risk to the safety of the public, they concluded that the least onerous and least restrictive disposition available was detention in a general forensic unit with the privilege of 48 hour travel passes within Southern Ontario, with hospital staff or another approved person. The Board found that Mr. Conway's risk to the public, especially the students at the nearby Mohawk College, was too great and that there was a "real possibility that an 'untoward event' could take place if Mr. Conway were left without the support from the hospital.

Mr. Conway appealed this disposition on a number of grounds:

1. The ORB erred by making a decision in the absence of positive evidence on the threshold question of significant risk. It was Mr. Conway's position that the Board placed a burden on him to demonstrate "behaviour control and a capacity to live without anger". Mr. Conway claimed that while in the community there were no incidents where he behaved inappropriately and that he had a "flawless record when outside the hospital unit". He, therefore, believed an absolute discharge was the appropriate disposition.

2. The ORB should not have made reference to the proximity of Mohawk College to the hospital in its decision as none of the parties presented evidence or arguments on this subject. The consideration of it, according to Mr. Conway, was unfair and the observation of such by the Board was improper judicial notice or mere speculation.

3. The Board's rejection of his request for indirectly supervised community privileges was unreasonable.

4. The Board fundamentally misapprehended the evidence or disregarded relevant evidence which favoured a more liberal disposition.

5. The Board misapplied the test for a conditional discharge.

The Court of Appeal did not agree with Mr. Conway. It found that the Board relied on numerous pieces of documentary evidence, including over fifty documented incidents involving threatening or assaultive behaviour on the part of Mr. Conway. Mr. Conway's treating psychiatrist testified that Mr. Conway was a significant threat to the safety of the public.

The Court of Appeal did not agree that the Board placed a burden upon the Appellant to live "without anger". Mr. Conway's lack of insight into his own condition as well as his history of explosive anger and untreated paranoia, as testified to by the Appellant's treating psychiatrist, advanced the argument that he posed a significant threat to the safety of the public.

The hospital recommended that Mr. Conway be moved from the secure forensic unit to the general forensic unit and that Mr. Conway be allowed community access with an approved person. These were seen by the Board as two "significant steps forward".

While the Court of Appeal believed that the Board's concern about the proximity to Mohawk College, an issue not raised by any of the parties, was ill-advised, it did not find that its inclusion in the Reasons "constituted an error of such significance that it requires appellate intervention". "…this reference was merely an observation and an illustration of a potential risk to public safety… if he were left unsupervised in the community."

The Court of Appeal found that the Board had correctly relied on the evidence before it with respect to Mr. Conway's potential threat to the safety of the public and considered what would be the least onerous and least restrictive disposition available to him. The Board, as it was entitled to do, relied on the hospital's plan to gradually reintegrate Mr. Conway back into the community.

Mr. Conway's appeal was dismissed.

Conway (Re), 2014 ONCA 635 (CanLII)

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