EXPECT THE BEST

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RECENT JUDICIAL DECISIONS AFFECTING PERSONAL INJURY CLAIMS

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RECENT JUDICIAL DECISIONS AFFECTING PERSONAL INJURY CLAIMS

INTRODUCTION[1]

The intention of this paper is to provide the reader with a review of recent developments in personal injury law and practice that have nothing to do with motor vehicle issues, causation, medical negligence, social host liability or practice and procedure. Those topics will be canvassed by other speakers. What I have ended up with is an eclectic mix of cases that cover a variety of topics. In particular, this paper canvasses a number of decisions of the Ontario Court of Appeal and the Supreme Court of Canada handed down in 2005 and 2006. These decisions cover such topics as loss of income awards, management fees and discount rates, future care costs, the tort of negligent investigation by the police, the principles regarding the assessment of non-pecuniary damages for sexual assault, the apportionment of damages with multiple causes and the types of misconduct that will result in the ordering of a new trial. As well, there is a brief discussion regarding the expansion of the duty of care owed to parents by those providing social services to children in need of protection under the *Child and Family Services Act*.

[1] I would like to thank Jason Mangano, a student-at-law at Blaney McMurtry LLP, for conducting most of the research and writing much of this paper.

LOSS OF INCOME AWARDS

Overview

It is trite law that a court in Canada can order a defendant to pay a plaintiff damages to compensate for both pecuniary and non-pecuniary loss. Awards for such losses can pertain to, *inter alia*, the cost of future care and prospective loss of earnings. Non-pecuniary losses, however, relate to compensation for physical and mental pain and suffering endured and to be endured by the plaintiff. Such damage awards generally address loss of amenities and enjoyment of life.

Several recent decision have clarified the law in respect to the calculation of pecuniary loss awards and, in particular, loss of income awards. One of those cases canvasses the ability of a plaintiff to recover damages in respect of times he has been incarcerated and also addresses the question of the deductibility of social assistance payments.

The Supreme Court of Canada addressed both of the foregoing issues last year in its *L. (H.) v. Canada Attorney General*[2] decision.

The L. (H.) v. Canada Attorney General

The facts of the Supreme Court of Canada's *L. (H.)* decision are as follows. The plaintiff was a member of a boxing club operated by the Government of Canada during the years of his youth. The plaintiff brought an action against the

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[2] [2005] SCC 25 - hereinafter referred to as "*L. (H.)*"

Government for vicarious liability arising out of instances where an employee at the club sexually abused the plaintiff. The claim was filed 20 years after the alleged incident.

The plaintiff alleged that a Government of Canada employee sexually assaulted him on two occasions when the plaintiff was about 14 years old. The plaintiff sought damages under several heads contending that the assaults had a profound and enduring effect. In particular, the plaintiff alleged that he left school at about the age of 17 without completing his grade eight education. As a result, he was unable to attain meaningful employment. As well, he alleged the assault caused him to drink heavily and this allegedly led to frequent incarcerations and reliance on social assistance.

After weighing the evidence, the trial court found that the criteria for the imposition of vicarious liability of the Government of Canada had been met. The plaintiff was awarded a total of $80,000.00 in non-pecuniary damages, $296,527.09 in pecuniary damages and $30,665.00 in estimated pre-judgment interest. The non-pecuniary damages were intended to address the emotional distress suffered by the plaintiff as well as the emotional distress the plaintiff would continue to suffer as a result of the abuse.

With respect to the pecuniary damages, the trial judge estimated that the plaintiff would have worked as a labourer 25 weeks annually between 1978 and 1987 earning a total of $27,150.00. The trial judge based these findings on Statistics

Canada data. For the years between 1988 and 2000, the trial judge again relied on Statistics Canada data and applied the median rate of $303.00 per week for all persons engaged in the repair and overhaul of motor vehicles.

The judge then deducted, from foregoing income amounts, a 20 percent contingency factor to reflect the plaintiff's vulnerability to job loss due to his limited education. As well, the trial judge deducted the income actually earned by the plaintiff during the various periods.

With respect to the plaintiffs claim for loss of future earnings, the trial judge relied "inferentially" on the evidence relating to the plaintiff's past earning capacity.

The Saskatchewan Court of Appeal dismissed the Government's appeal as it related to vicarious liability and to the $80,00.00 award for non-pecuniary damages. However, the Court of Appeal did allow the appeal in relation to pecuniary damages and the pre-judgement interest. Cameron J.A. concluded that the trial judge's award for pecuniary damages lacked in evidenciary foundation and therefore could not stand. In particular, Cameron J.A. found several errors with the trial judge's reasoning. For example, according to Cameron J.A., the trial judge erred in awarding the plaintiff damages for loss of earning capacity while the plaintiff was incarcerated. Furthermore, Cameron J.A. highlighted that the trial judge did not address the issue of whether the social assistance benefits received by the plaintiff constituted an offsetting collateral benefit.

As such, the Court of Appeal set aside the trial judge's award of pecuniary damages. The plaintiff then launched an appeal to the Supreme Court of Canada.

As noted by the Supreme Court of Canada, the appeal raised two main issues. The first related to the correct standard of review by provincial appellate courts on questions of fact. The second issue was whether the Saskatchewan Court of Appeal misapplied the governing standard to the trial judges findings of fact.

The Supreme Court of Canada noted that the Court of Appeal reversed the trial judge on six points: (1) the qualification of experts; (2) causation; (3) mitigation; (4) incarceration; (5) collateral benefits; and (6) loss of future earnings. The Supreme Court held that the Court of Appeal erred in interfering with the first three issues. However, the Court also held that the trial judge did in fact err by awarding the plaintiff damages for lost earnings for the time he spent in prison, by failing to deduct the social assistance received by the plaintiff from the award for loss of past earnings, and by granting an award for loss of future earnings.

Incarceration

The trial judge did not discount any time spent by the plaintiff in jail for the purpose of assessing the plaintiff's loss of past earnings. According to the Supreme Court, the Court of Appeal quite properly intervened in this respect. The Supreme Court held that the trial judge's finding that the sexual abuse caused the plaintiff loss of income due to imprisonment is both "contrary to judicial policy and unsupported by the evidence".

The Supreme Court said that the question before the trial judge was not whether the plaintiff had committed certain crimes while drunk. Rather, the question was whether his ensuing incarceration was caused by his addiction to alcohol. In reference to of Cameron J.A.'s decision, the Supreme Court said:[3]

> *…to compensate an individual for loss of earnings arising from criminal conduct undermines the very purpose of our criminal justice system." (paras. 240-1); an award of this type, if available in any circumstances, must be justified by exceptional considerations of a compelling nature and supported by clear and cogent evidence of causation.*

The Supreme Court of Canada does not close the door to the collection of loss of past earnings during periods where a plaintiff is incarcerated. Rather, the Court suggests that a plaintiff is only able to collect a loss of past earnings for a period while incarcerated where the incarceration was clearly caused by the tort. This suggests that much more persuasive evidence will be required to obtain such an award than is generally encountered in these types of cases. Given this pronouncement by the Supreme Court we would anticipate that judges will be reluctant to award any damages during periods of incarceration unless the evidence to support the causal link is compelling.

Social Assistance

Regarding the plaintiff's receipt of social assistance, the Supreme Court of Canada held that the Court of Appeal was correct in reversing the trial judge's decision. It

[3] *L. (H.), ibid* at note 1 para. 137.

concluded that social assistance payments should be deducted from the plaintiff's award for loss of past earnings.

The trial judge found that the plaintiff "generally relied on social assistance to meet his needs" during the period of time while the plaintiff was unemployed. The Supreme Court referred to its 2003 *B. (M.) v. British Columbia* decision.[4] In that case, the Court affirmed the "common sense proposition that social assistance benefits are a form of wage replacement" and as result are to be discounted from a loss of past earnings award. This of course is intended to prevent double recovery.

In some jurisdictions, including Ontario, the government reserves the right to subrogate or recover from any damage award received by the plaintiff in respect of past wage losses the amounts it has paid in respect of social assistance. There is some suggestion in the western cases that without this statutory right of recovery social assistance payments should not be treated as indemnity payments which attract a right of subrogation. It would appear that if the government has a right to insist on recovery, then the social assistance payments cannot be deducted from the plaintiff's damage award.

The Supreme Court noted that the trial judge did not have the benefit of the decision in the *B. (M.)* case when he rendered his decision.

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[4] [2003] 2 SCR 477 (SCC) - hereinafter referred to as "*B. (M.)*"

The *L.(H.)* decision effectively put to rest any controversy concerning the impact that social assistance has on a loss of past earnings award. As of the date of writing this paper, the decision has been cited in over 40 Canadian cases.

MANAGEMENT FEES AND DISCOUNT RATES

Damages for future care costs are usually present valued and that present value calculation assumes that the lump sum that is awarded will be invested and earn income during the balance of the plaintiff's life. However, under what circumstance, if any, will a court include compensation for the investment management fees in making an award?

The Supreme Court of Canada in *Townsend v. Kroppmanns*[5] explained its rationale for awarding a plaintiff that had a suffered a debilitating injury as a result of the defendant's tortious conduct. The explanation for making such an award was as follows:[6]

> *The dollars amount received for future care costs is actually lower than projected costs because it is assumed that the amount paid will be invested and will earned income before being used for future needs…[The award is] discounted to reflect the present value of the expenses incurred or the income earned at a future date, taking inflation adjustments into consideration. The purpose of the discount rate is thus to ensure that victims will be fully compensated but that defendants will not called on to over pay.*
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> …

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[5] *Townsend v. Kroppmanns,* 2004 SCC 10 (S.C.C.) - hereinafter referred to as "*Townsend*"

[6] *Townsend, ibid* at paras. 5 and 6.

> *The same underlining rationale guides the attribution of management fees and tax gross up. The law aims at insuring the value of the amounts awarded to victims is maintained over time. In tort law, victims of personal injuries are awarded management fees when there ability to manage the amount they receive is impaired as a result of the tortious conduct. The purpose of this segment of the award is to ensure that amounts related to future needs are not exhausted prematurely due to the inability of the victims to manage their affairs.*

The Ontario Court of Appeal in the *Bartosek (Litigation Guardian of) v. Terret Realties Inc.*[7] case addressed the issue of management fee awards. In that case, a six-year-old boy was seriously injured after riding his bicycle down a ramp and into the path of an oncoming vehicle. The ramp was situated on the property of an apartment building owned by one of the defendants. The plaintiff brought an action against both the owner and operator of the car that struck him. As well, the plaintiff sued the apartment building owner.

The trial judge dismissed the actions against the owner and the operator of the vehicle. However, the apartment building owner was held to be 50 percent liable and the plaintiff was held to be contributorily negligent.

The apartment building owner appealed the trial courts decision. As well, the plaintiff cross-appealed with respect to the contributory negligence finding and the failure of the trial judge to award future care management expenses.

[7] 185 O.A.C. 90 - hereinafter referred to as "*Bartosek*". Note an application for leave to appeal to the S.C.C. was dimissed 201 O.A.C. 200.

The Ontario Court of Appeal dismissed the apartment building owner's appeal. However, the Court allowed the plaintiff's cross-appeal with respect to the trial judge's refusal to award a management fee.

The Court of Appeal held that the trial judge's findings brought the case within the principle described in *Townsend* cited above. In particular, the Court of Appeal highlighted that the trial judge found the plaintiff had a serious impairment as a result of the accident. This plaintiff was rendered the plaintiff incapable of managing his own finances. As such, he and his family would require professional assistance in that regard.

The Court of Appeal, however, did not agree with the trial judge's reasoning for refusing to award a management fee. According to the trial judge, "A professional manager of funds of that magnitude ought to be able to earn his or her fee without really encroaching the award and the income earned by it."[8] In contrast, the Court of Appeal said the foregoing reasoning was speculative in nature. The Court felt the trial judge's reasoning was inconsistent with the acceptance of the plaintiff's expert evidence as to the cost of professional management assistance.

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[8] *Bartosek, ibid* at para. 18.

In holding in favour of the plaintiff, the Court of Appeal said that "Fairness requires that where, because of the defendant's tort, the plaintiff will incur a cost to achieve the level of assumed income, the defendant should bear that cost."[9]

It should be noted that the trial judge's decision was not based on any expert evidence that was adduced on this issue. Many of us have seen exactly the same opinion expressed by Professor Pesando from U. of T. We do not believe that adducing such expert evidence would convince either a trial judge or the Court of Appeal to decline to award a management fee particularly if the plaintiff is incapable of managing his or her own affairs.

FUTURE CARE COSTS

The Ontario Court of Appeal in *Barkhtiari v. Axes Investments Inc.*[10] was faced with a cross-appeal launched by the plaintiffs on the question of damages. In that case, the plaintiffs, mother and son, were trapped by smoke in a stairwell and ultimately suffered brain damage. The plaintiffs brought an action against the building for damages.

The plaintiffs succeeded on the issue of the building's liability at trial. The building appealed but was only able to reduce its liability apportionment relative to other defendants.

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[9] *Bartosek, ibid* at para. 20.

[10] 182 O.A.C. 185 (ONT. C.A., 2004) - hereinafter referred to as "*Barkhiari*"

The plaintiffs crossed-appealed on the issue of whether or not the trial judge erred in taking into consideration evidence that the mother did not want to live in an institutional setting, but wished to live independently, for the purposes for ascertaining the future care cost award. According to the plaintiffs, the trial judge should not have taken the mother's express wishes into account in awarding future care costs. The plaintiffs relied on the Supreme Court of Canada *Andrews v. Grand & Toy Alberta Limited*[11] where it was observed that it was not for the court to conjecture on how a plaintiff would actually use the sums awarded to him after they have been awarded. In the *Andrews* case, the Court had to decide whether to ascertain future care costs based on the cost of home care, or the less expensive institutional care option. The Supreme Court held that the setting that was the more advantageous to the plaintiff should be awarded.

The Ontario Court of Appeal took the view that the trial judge did not misinterpret *Andrews*. As the trial judge noted, " It is not reasonable to base an award to [the plaintiff mother] on the cost of a type of care which would help her, but which she will not use." The plaintiff had a choice between living independently or in an institutional setting. When the trial judge made the decision it was unclear if the cost of care in the home or in an institution would be more costly. As previously indicated, the trial judge did take into account the plaintiff's desire to remain in her home in making his decision. It should be noted

[11] (1978), 83 D.L.R. (3d) 452 (S.C.C.) - hereinafter referred to as "*Andrews*"

that he described both care plans as "reasonable possibilities for her immediate living arrangements".

The Court of Appeal cited the trial decision extensively in its decision. In short, the Court held that the trial judge did not misinterpret the *Andrews* decision. Furthermore, the Court held that the trial judge was entitled to take the mother's express wishes into account in awarding the future care costs component in of a damages award. Such an approach does not depart from the principle of full compensation as enunciated in the *Andrews* decision.

It should be noted that the trial judge, based on evidence, assumed that over time the plaintiff's physical condition was likely to deteriorate and this would increase the likelihood that she would require institutional care. This contingency was given a weighting which was factored into the future care claim by the trial judge.

Leave to appeal the *Barkhiari* case was denied by the Supreme Court of Canada on September 16, 2004.[12]

ORDERING NEW TRIALS

A recent Ontario Court of Appeal case provides us with examples of situations where the Court of Appeal will actually order a case to be re-tried.

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[12] 2004 CarswellOn*t* 3779 (S.C.C.).

The decision of the Court is *Landolfi v. Fargione*[13]. In this case the Court ordered a new trial due to the trial judge's exclusion of defence video surveillance evidence, his failure to declare a mistrial after a the plaintiff's inflammatory closing address to the jury and deficiencies in the jury charge.

The Court's comments on each of these complaints are instructive.

The video surveillance was intended to be used to impeach the credibility of the plaintiff. Defence counsel intended to use it to show that the plaintiff was malingering and, in particular, had been untruthful regarding the stiffness and pain in his neck. Many particulars of the contents of the video surveillance had been provided to plaintiff's counsel prior to the trial but the video itself had not been produced. The trial judge excluded the video for a variety of reasons. They included his finding that videos which are to be used for impeachment purposes should not be shown to a jury "unless they would be otherwise admissible as substantive evidence"; that given the quality of the videos (they were grainy and did not always show the plaintiff's facial expressions) was inadequate, that the videos did not truly represent the facts they apparently depicted; the videos were not continuous and complete and that the disclosure was deficient. The trial judge also suggested that the test for admission of videos was higher than for other documents that are used to attack credibility during cross-examination. His Honour suggested that as the video showed the plaintiff engaged in activities

[13] 2006 CarswellOnt 1855

where he was not seen to move his neck and that the jury might use the videos to make conclusions regarding his abilities rather than to judge his credibility.

The Court concluded that for video surveillance to be admissible to attack credibility it need not meet the test for admission of substantive evidence. The tests that must be satisfied to use a video for impeachment are that the video evidence is relevant to the credibility of the witness and that the potential value of the video in assisting in the assessment of credibility outweighs the potential prejudicial effect of the evidence.

The Court also concluded that there is no principled reason to treat video evidence differently than other evidence used to attack credibility.

With respect to the misuse of the videos by the jury, the Court commented that if the jury found that the plaintiff had lied any additional harm that could flow from the jury using the video to draw conclusions regarding his physical capacity would be minimal. The Court also indicated that a limiting instruction could have been given to the jury on this issue.

The Court rejected the respondent's contention that the video must demonstrate a clear inconsistency with previous testimony before it can be used. The Court stated:

> *Given the undisputed fact that the videos, at least in part, portray Landolfi engaged in activities that required him to move his neck and body, it was open to defence counsel to attempt to show that these activities were inconsistent with the extent of the neck condition described by Landolfi in his trial testimony and with the recorded observations of Dr. Moro.*

> *I conclude that while the probative value of the video evidence may not have been high, it was not trifling. Nor did the potential prejudicial effect of the videos outweigh their probative value. It was for the jury, as the trier of fact, to determine what weight, if any, should attach to the evidence of Landolfi and his medical experts elicited through cross-examination on the videos. Although this court will not lightly interfere with the discretionary decision by a trial judge to exclude potentially prejudicial evidence, the exclusion of the videos in this case was based on the application of the wrong legal test for admissibility and a flawed analysis of their prejudicial effect.*

That takes us the inflammatory comments made by the plaintiff's counsel in his closing address to the jury. Plaintiff's counsel accused defence counsel of telling "whoppers", indicated that defence counsel had made up evidence and sarcastically referred to him as "Dr." on six occasions. He also intimated that the actual defendant was an insurance company, that the insurer had retained a "hired gun" (the defence medical expert), the insurer had instructed the defendant not to admit liability when it should have been admitted and that the insurer had considerable assets but nevertheless had been unable to find witnesses adverse to the plaintiff.

The Court concluded that all of these remarks were highly inappropriate and that the failure of the trial judge to consider striking the jury and his failure to comment on the inappropriateness of these remarks to the jury simply aggravated the situation.

Finally, the trial judge was found to have failed to properly present the defence case to the jury. When all of these failures were combined, the Court concluded that the case needed to re-tried.

APPORTIONING DAMAGES WITH MULTIPLE CAUSES

The Supreme Court of Canada has yet again addressed the issue of how to apportion damages from multiple causes.

In *Blackwater v. Plint*[14] the S.C.C. had to consider this issue in the context of sexual assaults suffered by the plaintiff while he was at a residential school. The lower courts determined that the plaintiff had, in addition to being sexually assaulted, been subjected to trauma's while in the care of residential schools which were statute barred. The lower courts also concluded that the plaintiff had suffered from trauma in his home before he attended the residential school. The trial judge, in awarding damages, attempted to exclude from his assessment any damages suffered before the plaintiff came to the residential school or resulting from the statute barred injuries.

The plaintiff argued that that these issues must be considered in awarding damages but, as the court put it, taking these other factors into account would "increase" the damages beyond what the law allows. Counsel argued that the principle of *ex turpi causa non oritur actio* prevented the defendants from arguing that the statute barred wrongs should be ignored in assessing damages.

The Chief Justice summarized the position of the Court in the following passage commencing at paragraph 78 of the decision:

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[14] 258 D.L.R. (4th) 275

It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway: Athey. Mr. Barney's submissions that injury from traumas other than the sexual assault should not be excluded amount to the contention that once a tortious act has been found to be a material cause of injury, the defendant becomes liable for all damages complained of after, whether or not the defendant was responsible for those damages.

79 At the same time, the defendant takes his victim as he finds him -- the thin skull rule. Here the victim suffered trauma before coming to AIRS. The question then becomes: what was the effect of the sexual assault on him, in his already damaged condition? The damages are damages caused by the sexual assaults, not the prior condition. However, it is necessary to consider the prior condition to determine what loss was caused by the assaults. Therefore, to the extent that the evidence shows that the effect of the sexual assaults would have been greater because of his pre-existing injury, that pre-existing condition can be taken into account in assessing damages.

80 Where a second wrongful act or contributory negligence of the plaintiff occurs after or along with the first wrongful act, yet another scenario, sometimes called the "crumbling skull" scenario, may arise. Each tortfeasor is entitled to have the consequences of the acts of the other tortfeasor taken into account. The defendant must compensate for the damages it actually caused but need not compensate for the debilitating effects of the other wrongful act that would have occurred anyway. This means that the damages of the tortfeasor may be reduced by reason of other contributing causes: Athey, at paras. 32- 36.

81 All these scenarios flow from the basic principle that damages must seek to put the plaintiff in the position he or she would have been in but for the tort for which the defendant is liable.

82 The trial judge correctly apprehended the applicable legal principles. He recognized the "daunting task" of untangling multiple interlocking factors and confining damages to only those arising from the actionable torts, the sexual assaults (2001 decision, para. 365). He tried his best to award fair damages, taking all this into account. He recognized the thin skull principle, but in the absence of evidence that Mr. Barney's family difficulties prior to coming to AIRS had exacerbated the damage he suffered from the sexual assaults he sustained at AIRS, the trial judge had no choice but to attempt to isolate those traumas. Similarly, there was no legal basis upon which he could allow damages suffered as a result of statute-barred wrongs committed at AIRS, like the beatings, to increase the award of damages.

Hopefully, this decision will blunt the effect of the Ontario Court of Appeal's earlier decision in *Alderson v. Callaghan*.[15]

THE TORT OF NEGLIGENT INVESTIGATION

Negligent investigation is a relatively new cause of action in Ontario. Generally, a plaintiff will claim that the officers were negligent in the manner in which they conducted a criminal investigation and that negligence resulted in the plaintiff sustaining damages.

As an aside, Crown Attorneys are granted a broad, but not complete, immunity from civil liability arising from negligent acts.[16] Specifically, there is immunity from liability for negligent acts following within the scope of their duties. In recent years, however, efforts have been made to extend the immunity afforded to Crown Attorneys to police officers. However the courts have cautiously rejected these efforts. The leading case in this regard is *Beckstead v. City of Ottawa.*[17]

In *Beckstead*, the plaintiff sued the Ottawa police force and alleged that it had conducted a shoddy and negligent investigation. That investigation led to charges being laid against the plaintiff and then later withdrawn by the Crown on the basis that the evidence was unsatisfactory. The Court of Appeal, without any extensive

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[15] (1998), 40 O.R. (3d) 136. In this case the court held a tortfeasors responsible not only for the damage he inflicted with respect to the claim advanced in the lawsuit but also in respect of earlier injuries that he had inflicted upon the plaintiff.

[16] The immunity of Crown Attorney's has been carefully discussed in *Nelles v. Ontario*, [1989] 2 S.C.R. 170.

[17] (1997), 37 O.R. (3d) 62 (C.A.).

analysis, found that the actions of the police were negligence and that the police were not immune from a claim for such negligent.

There have been several cases, since the decision in *Beckstead*, that have accepted the possibility of waving immunity in favour of the police with respect to the tort of negligent investigation. The Ontario Superior Court of Justice in *Wiche v. Ontario*[18] affirmed the existence of a tort of negligent investigation against police officers:[19]

> *In my view, whereas the court of appeal in Beckstead did recognize the liability of a police officer for negligent investigation in the particular circumstances of that case, the overriding public policy considerations, such as the effective functioning of the criminal justice system, granting immunity to police officers and other investigators from liability for negligent investigations should prevail in all but the most egregious circumstances.*

The Ontario Court of Appeal recently addressed the tort of negligent investigation in the *Hill v. Hamilton - Wentworth Regional Police Services Board* case[20]. In that case, the police suspected an aboriginal man committed a string of bank robberies. The police arranged a photo line-up that included the accused and 11 other white men. However, while the accused was in custody, two other banks had been robbed. At that point, the police shifted their investigation to another person. Nine out of the ten bank robbery accusations where dropped and following several court proceedings the accused was eventually acquitted.

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[18] 83 C.R.R. (2d) 179 *affirmed by* 2003 WL 5182 (Ont. C.A.) - hereinafter referred to as "*Wiche*".

[19] *Wiche, ibid* at para 83.

[20] 202 O.A.C. 310 (Ont. C.A.) - hereinafter referred to as "*Hill*".

The accused commenced a negligent investigation action against the police. The police argued that the tort should not exist in Ontario law. As such, the issue before the Court of Appeal was framed as follows: whether or not the decision of the Ontario Court of Appeal in *Beckstead*, holding that there is a tort of negligent investigation relating to police officers, should remain the law of Ontario. Furthermore, the Court had to determine whether or not the conduct of the various police officers, in this case, constituted either malicious prosecution or negligent investigation.

In determining whether or not the tort of negligent investigation should remain the law in Ontario, the Court reviewed the *Beckstead* case with great detail. The Court of Appeal also said that there are two categories of relationships from which the police could owe a duty to a third party. The first category is a duty of care that arises between a police officer conducting a criminal investigation and a suspect. The second category of relationship, under which courts have also recognized a duty, is between police officers conducting a police investigation and a victim.

The police submitted that a tort of negligent investigation by the police must be considered within the framework of the so-called "Anns test". To establish liability under the Anns test, the person must establish:[21]

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[21] *Hill, ibid* at para. 47.

I. that the harm complained of is a reasonably foreseeable consequence of the allege breach;

II. that there is sufficient proximity between the parties that it would not unjust of unfair to impose a duty of care of the defendants; and

III. that there exist no policy reasons to negative or otherwise restrict that duty.

The Court of Appeal held that "there was no real debate on the point that harm to a suspect is a foreseeable consequence of negligent investigation by a police officer."[22] As well, the Court took the view that there could be no "serious dispute about the proximity component of the Anns test."[23] Instead, the "real focus" of whether there should be a tort of negligent investigation by the police is the second branch of the Anns test.

Under the second branch of the Anns test the court is entitled to consider all the policy reasons why it might or might not be advisable for the courts to create a new common law duty of care. In this regard, the police argued that imposing such an obligation would have an undesirable chilling effect on the performance of police duties. As well, the police argued that the tort of malicious prosecution was a more appropriate tort for balancing the needs of suspects and society's need for police. For this latter point, the police submitted old English case law holding that the police do not owe a duty of care to the *victims* of crime.

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[22] *Hill, ibid* at para. 48

[23] *Hill, ibid* at para. 49

The Court of Appeal did not accept the submission of the police force for several reasons. The Court held that the tort of negligent investigation should continue under the law of Ontario. The court cited several reasons for not accepting policy arguments forwarded by the police. These reasons are concisely worded in the headnote of the decision as follows:

> *The policy rationales advanced by the police where not sufficiently compelling to deny the existence of a duty of care owed by the police of the context of how they conduct their criminal investigations. The existence of the duty of care will not lead to an unduly defence of approach in combating crime. Recognition of the tort of negligent investigation in Ontario and in Quebec has not led to a deluge of cases. Recognition of the tort protects victims of crime as well as suspects. Recognizing the right of suspects and victims is in keeping with the protecting of individual rights enshrined in the Canadian Charter of Rights and Freedoms. There is not alternative remedy for the loss suffered by a person by reason of wrongful prosecution and conviction. In particular, the existence of a public complaints process that might result in the imposition of disciplinary sanctions is no alternative to liability in negligence. Consequently, the tort of negligent investigation should continue to be recognized.*

Having decided that the tort of negligent representation exists in Canadian law, the Court of Appeal proceeded to ascertain whether or not the police breached the duty owed to the aboriginal suspect. The majority of the panel of five judges held that the police were not negligent in there investigation. In the majority's view, there was nothing presumably biased by having one aboriginal man stand in a photo line-up with 11 Caucasians.

There was, however, a dissenting opinion with respect to the application of the tort. According to Feldman and LaForme J.J.A., the trial judge made palpable

and over riding errors in his assessment of whether the police were liable for negligent investigation.

The *Hill* decision was decided in April 2005. The Ontario Court of Appeal has since then affirmed its opinion that the tort of negligent investigation exists in Ontario.[24]

The police may be liable for other independent torts committed during the course of their duties, such as false arrest, false imprisonment, and assault and battery: *Miguna v. Ontario (Attorney General).* [25]

PRINCIPLES REGARDING THE ASSESSMENT OF NON-PECUNIARY DAMAGES FOR SEXUAL ASSAULT

Overview

It is not uncommon, particularly in the context of sexual abuse cases, for a court to award the plaintiff non-pecuniary damages. The basis for awarding such damages was described by Cameron J.A. in *Canada (Attorney General) v. Longman:*[26]

> *As the trial judge recognized, non-pecuniary damages are, a matter of principle functional in nature, their function being to provide solace for a person who suffers intangible loss in the nature of pain and suffering and loss of amenities in consequence of another's wrong doing: Andrews v. Grand & Toy Alberta Limited, [1978] 2 S.C.R. 229; Louis v. Todd, [1980] 2 S.C.R. 694, and Lindal v. Lindal, [1981] 2 S.C.R. 629. He also recognized the principle that the circumstances in which the wrongful act underlining the loss occurred*

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[24] *Miguna v. Ontario (Attorney General)*, 2005 CarswellOnt 7302 (Ont. C.A.).

[25] 2005 CarswellOnt 7302 (Ont. C.A.).

[26] 2002 SKCA 131 (Sask. C.A.) at para. 204.

> *may on occasion be so humiliating or undignified as to aggravate the wrong and to justify an increase in what would otherwise be an appropriate amount: Norberg v. Wynrib, [1992] 3 S.C.R. 226. In addition, he recognized that the amount is determinable on a conventional basis, which is to say with reference to awards in like cases.*

As to the quantification of non-pecuniary damages in the context of sexual assault cases, the Saskatchewan Court of Appeal in *A. (M.) v. Canada (Attorney General)*[27] noted that the range of damages in previous decisions does not inflexibly bind a trial judge. Rather, the range provides a guideline to assist a judge in the assessment of damages.[28] That said, the Court indicated that the range of damages in sexual assault cases was from $18,000.00 to $80,000.00.

The *A. (M.)* decision involved two plaintiff sisters who attended a high school and lived at a residence operated by the Canadian Federal Government. They alleged to have been sexual assaulted by an employee at the residence. They sought damages against the Government and the employee for emotional injuries and financial losses as a result of the sexual assault. The trial judge awarded $45,000.00 in damages against the defendants, which included $30,000.00 for non-pecuniary damages. The Crown appealed on the basis that the non-pecuniary damages amount was to high. The Saskatchewan Court of Appeal allowed the appeal reducing the damages award to $20,000.00.

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[27] 2003 CarswellSask. 29 (Sack. C.A.) - hereinafter referred to as "*A. (M.)*".

[28] *A. (M.), ibid* at para. 32.

The *A. (M.)* decision makes it clear that the amount of non-pecuniary damages awarded in a particular case will depend entirely on the facts of that case. In other words, damages awards in previous cases are to be used as a guideline only.

The Ontario Court of Appeal in *Weingerl v. Seo*[29] also had the opportunity to assess non-pecuniary damages in the context of a sexual assault case. In that case, the plaintiff patient filed an action against the defendant ultrasound technician and his clinic employer for damages arising from a sexual assault. The plaintiff alleged that the technician perform unauthorized tests of the plaintiff's lower abdominal area. It was also alleged that the defendant hid a video recorder in a temporary change room that had been setup for the plaintiff to robe and disrobe.

The case was heard before a civil jury. The jury awarded the plaintiff $150,000.00 in non-pecuniary damages. One of the issues at appeal was whether that award was excessive. The appellant clinic submitted that the award for pain and suffering was out of proportion to the suffered harmed. The Ontario Court of Appeal agreed based on recent jurisprudence relating to damages in sexual in assault cases.

According to the Ontario Court of Appeal, the $150,000.00 non-pecuniary damages award was a palpable and overriding error by the jury.

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[29] 1999 O.A.C. 172 (Ont. 2005) - hereinafter referred to as "*Weingerl*"

The damages should have been significantly less than the damages awarded in cases where by the plaintiffs endured ongoing and deviant assaults. One of the cases referenced by the judge was *D. (P.) v. Allen*.[30] In that case, a priest sexually abused a young plaintiff approximately 100 times over a 3-year period. The Ontario Superior Court of Justice awarded general damages of $125,000.00. As well, aggravated damages were awarded in the amount of $75,000.00.

After canvassing various cases similar to the *Allen* case, the Ontario Court of Appeal said the following regarding the assessment of non-pecuniary damages:[31]

> *General non-pecuniary damage should be assessed after taking into account any aggravating features of the defendant's conduct. The court may separately identify the aggravated damages, however, in principle they are not to be assessed separately. The purpose of aggravated damages, in cases of intentional torts, is to compensate the plaintiff for humiliating, oppressive, and malicious aspects of the defendant's conduct which aggravate the plaintiff's suffering. In cases of negligence, aggravating factors can also be taken into account where the defendant's conduct recklessly disregards the plaintiff's rights.*
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> *The following are aggravating factors which should be taken into account to determine whether non-pecuniary damages should be increased: humiliation, degradation, violence, oppression, inability to complain, reckless conduct which displays a disregard of the victim, and post-incident conduct which aggravates the harm to the victim.*

As a result, the Ontario Court of Appeal fixed the damages awarded at $25,000.00, $15,000.00 for general damages and $10,000.00 to take into account the aggravating features of being humiliated on video tape by a health care

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[30] [2004] O.J. No. 3442 (Ont. S.C.J.) - hereinafter referred to as "*Allen*"

[31] *Weingerl*, *supra* note 25 at paras. 69 and 70

worker during a stressful and intimate procedure. The Court lowered the amount awarded by the civil jury because of the age of the plaintiff, the plaintiff's apparent recovery from emotional and psychological trauma, the ability of the plaintiff to maintain a lasting relationship, and the lack of serious prolonged sequelae. As well, the Court emphasized that, in the case at bar, the sexual assault was a one time, non-evasive incident.

The *Weingerl* decision appears consistent with the *A. (M.)* decision by the Saskatchewan Court of Appeal. The Ontario Court of Appeal adjusted the quantification of non-pecuniary damages on the basis of other cases. The use of these "other cases" by the Ontario Court of Appeal was consistent with the opinion of the Saskatchewan Court of Appeal that prior cases should be used as a guideline for the purposes of quantifying a non-pecuniary damages award.

DUTY OF CARE OWED TO THE FAMILY OF A CHILD IN NEED OF PROTECTION

The Ontario Court of Appeal has recently suggested that a service provider, as that term is defined in the *Child and Family Services Act* may, in fact, owe a duty of care to the family of a child in need of protection. In *D. (B.) v. Children's Aide Society of Halton (Region)*.[32] The Children's Aide Society of Halton ("CAS") apprehended a child in need of protection and placed her in a secure treatment facility. It was alleged that the child had been sexually abused by her parents. The

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[32] 2006 WL 6261(Ont. C.A.) - hereinafter referred to as "*D. (B)*"

family of the child, but not the child, launched an action against various defendants that were associated with the treatment of the child including the secure treatment facility, one of its employees and its medical director and one other doctor and the CAS. The family contended that there had been no abuse and that the child was delusional. The family sought damages for negligence and bad faith arising out of their dealings with this treatment centre and its employees. In particular, the family claimed that the secure treatment facility failed to carry out its mandate to assist in re-uniting the family and in adhering to court orders that allegedly required that it do so.

On a motion to strike the claim under Rule 21, counsel for the treatment centre and counsel for the medical doctors argued that the neither the statute nor the orders created any duty of care and that if they did the court should decline to recognize a duty owed to the family when the moving defendants already owed a potentially conflicting duty of care to the child. The motion judge agreed and dismissed the action against the treatment facility and the doctors.

The plaintiffs appealed the motion judge's decision but abandoned the appeal as against the doctors (one of whom was the medical director of the treatment facility) before the case was heard in the Court of Appeal. In a split decision, the Ontario Court of Appeal concluded that while the treatment facility's submission that owing duties to both the child and the family could place the treatment

facility in a conflict of interest was compelling nevertheless it was possible that their would be no such conflict and the action could proceed.

According to the Court, the plaintiff's allegations satisfied the foreseeability and proximity components of the Anns test. As such, the Court proceeded to address the second branch of the Anns test, which pertains to policy considerations. After canvassing the defendant's arguments the Court concluded that the Court should be wary of foreclosing novel duty claims on a Rule 21 motion. According to Laskin J.A. writing for the majority:[33]

> *In the present case, I do not think it is so obvious that a service provider's overriding duty to a child under its care cannot co-exist with a duty to the family of the child.*
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> ...
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> *Therefore, in my view, we should not be to quick to conclude that a service provider and its employees can never owe a duty of care to a family of a child in need of protection. Before deciding this important question, we should have the benefit of an evidentiary record. In my opinion, at the pleading stage, it is not plain and obvious that the plaintiffs' claim against [the non-doctor defendants] in negligence must certainly fail.*

Interestingly, Sharpe J.A. wrote a dissenting judgement. In his view, it was plain and obvious that the respondents did not owe a duty of care to the plaintiffs. While Justice Sharpe agreed that the viability of the plaintiffs' claim depended on the application of the Anns test, in his view the test was not satisfied on the basis of proximity. According to Sharpe J.A., the defendants were not "in a close and direct relationship" to the appellants. Furthermore, in his view, there were

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[33] D. (B), *ibid* at paras. 57 and 58.

residual policy considerations that negated the plausibility of the plaintiffs' novel claim. He concluded that an actual conflict of interest need not be established to engage the second branch of the *Anns* test. The potential for a conflict of interests was a sufficient ground for the court to refuse to create a previously unrecognized duty of care.

Leave to the appeal *D. (B.)* decision before the Supreme Court of Canada has been sought.

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