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ARTICLE

COURT OF APPEAL OVERTURNS TRIAL DECISION ON POLICE NEGLIGENCE INVESTIGATION, FALSE ARREST, FALSE IMPRISONMENT AND CHARTER BREACH

In *Tremblay v. Ottawa (Police Services Board)*, 2018 ONCA 497, the Ontario Court of Appeal overturned the trial decision of Aitkin J. finding the Ottawa Police Service Board ("OPSB") liable for negligent investigation, false arrest, unlawful detention, unlawful imprisonment and breach of Charter rights.

Background

The plaintiff and his wife were involved in a prolonged dispute with their neighbours. The OPSB was called and consequently, the investigating officer, Sergeant Aylen ("Sgt. Aylen"), charged the plaintiff with intimidation and mischief. During the course of the investigation, Sgt. Aylen also obtained a public safety firearms warrant and searched the plaintiffs' home, seizing firearms and ammunition.

At the criminal trial, the plaintiff was convicted of the mischief charge and acquitted on the intimidation charge.

The plaintiff and his wife sued the OPSB, Sgt. Aylen and other members of the OPSB. The trial judge found Sgt. Aylen liable for negligent investigation, false arrest, unlawful detention and various breaches of the Charter. The plaintiffs were awarded \$50,000 in damages. The OPSB appealed the decision.

Court of Appeal Analysis

The Court of Appeal held that while the trial judge had correctly identified the applicable legal principles, she erred by not applying them to the facts and evidence before her. The Court reaffirmed the following principles:

- The trial judge should not focus on the steps the judge believes should have taken, but rather on whether the information available to police at the time amounted to "reasonable and probable grounds to arrest";
- Significant weight should be given to the fact that the investigating officer had consulted with his supervisor before proceeding to arrest and lay charges — this is significant, if not determinative, of the issue of reasonable conduct;
- A trial judge can err by defining his or her own standard of care without any evidentiary basis and, more specifically, in the absence of expert evidence. Using different approaches taken by other officers to criticize the approach used by the defendant officer is "inconsistent with the established jurisprudence";
- The trial judge should not substitute his or her own view of whether the public interest could be satisfied without an arrest in absence of evidence that the arresting officer believed, on reasonable grounds, that the public interest could be so satisfied;
- With respect to the propriety of obtaining the public safety firearms warrant, the trial judge should not form his or her own views and inferences from the evidence submitted to apply for the warrant, but must assess whether the Information to Obtain used to obtain the search warrant contained reliable evidence that might reasonably be believed by the authorizing justice; and
- Regarding the manner of execution of the search warrant, finding that the execution of the entry followed normal police procedures in such circumstances, it is an error in the absence of contrary evidence, expert or otherwise, to determine that the execution of the search warrant was unreasonable.

In addition to identifying these errors in the decision, the Court of Appeal reinforced the following key legal principles in police liability claims:

- The standard applicable at the time of the events must be applied;
- Police are "not required to exhaust all avenues of investigation, establish that an accused has no defence, or even obtain an accused's version of events";
- In assessing whether an arrest is lawful, the question is whether the officer had reasonable and probable grounds to arrest, not whether they could have done something other than arrest; and
- The police must be accorded a certain amount of latitude in determining the manner in which they enter a premises. Specifically, they cannot be expected to "measure in advance with nuanced precision the amount of force the situation will require" (*R. v. Cornell*).

Finally, the Court of Appeal was critical of the "after-the-fact assessments," where a court substitutes its own views of how the police should have acted. A court should not identify and rely upon other options available to the police without these options being put to the defendant officers for explanation or comment. The Court of Appeal reminded against "Monday morning quarterbacking," rather than engaging in an analysis of whether police acted reasonably in the difficult and fluid circumstances of the investigation, arrest and search.

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