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ARTICLE

Negligent Investigation Claim Against Police Dismissed in Child Sexual Assault Case

In the recent decision of *J.H. v. Windsor Police Services Board et al.*, 2017 ONSC 6507, the Windsor Police Services Board successfully brought a motion for summary judgment against the plaintiff, J.H., dismissing his claim of negligent investigation. The plaintiff was charged with four offences¹ including sexual assault, invitation to sexual touching and sexual interference following a report by his 10-year-old daughter, MOH.

Police Investigation and Criminal Trial

On the morning of February 2, 2010, the Windsor-Essex Children's Aid Society ("CAS") contacted the Windsor Police Service regarding a report of sexual misconduct relating to MOH, the 10-year-old biological daughter of the plaintiff. An officer was dispatched to follow up on the report and gather information concerning the complaint. During an interview with a member of CAS, the officer learned:

- In 2008, the plaintiff lost custody of both MOH and her sibling MAH due to drug and neglect problems;
- CAS had also been monitoring of concerns about MOH's behaviour, including lying, stealing and hoarding;
- Although the plaintiff had no court-ordered visitation rights, he came to live in the children's new home for several months after his release from jail; and
- MOH told an employee from CAS that her father had been touching her breasts and engaged in other sexual touching.

On February 4, 2010, a videotaped police interview of MOH took place at the CAS office. At the beginning of the interview, efforts were made by the detectives to confirm that MOH understood the distinction between the truth and a lie. MOH advised the officers of several new details of the alleged abuse that had not been disclosed in the interview with the CAS worker. Throughout the interview, MOH proactively offered information about sexual misconduct in response to open-ended questions. There were also occasions during the interview when the detectives were perceived to be asking questions in a manner which suggested other possible misconduct by the plaintiff.

The investigating detective gave evidence that following his interview of MOH, he subjectively believed that he had reasonable and probable grounds to arrest and charge J.H., and that there were objective grounds to do so. The plaintiff was located and arrested by police and charged.

The matter then proceeded to trial by judge alone. The trial judge emphasized the weight of the credibility of MOH and J.H. as "the sole issue" in the trial given the lack of medical evidence to support the alleged abuse. The plaintiff was found not guilty in relation to all charges.

Summary Judgment

The Court found that the record presented by the parties allowed the Court to make the necessary findings of fact to rule on a summary judgment motion. In particular, the Court emphasized that

...the focus of the civil tort claim is not on whether the plaintiff actually engaged in the conduct alleged in the earlier criminal proceeding, and that accordingly is not a disputed fact that necessarily requires determination, on the civil balance of probabilities standard, in order to assess the merits of a negligent investigation claim. The focus instead is on whether the defendant and its agents breached the relevant standard of care, which in turn requires an examination of facts relating to the conduct of investigating officers, measured against what a reasonable officer would have done in like circumstances; *i.e.*, the circumstances prevailing at the relevant time.²

The crux of the plaintiff's case hinged on the police conduct during the interviews of MOH and MAH. After reviewing the evidence gathered by the police, the Court concluded that the investigating detective had a subjective belief that he had reasonable and probable grounds, which was also justifiable from an objective point of view. This finding was based on the following:

- Despite the indications of possible credibility and reliability issues in MOH's information, the police were not entitled to disregard her complaints;
- The police were not entitled to usurp the roles of the Crown attorney and court, and assume that possibly exaggerated descriptions as to the extent of misconduct would ensure reasonable doubt that any such misconduct had taken place;
- The objective existence of reasonable and probable grounds for the arrest and charging of the plaintiff is not negated by the fact that the officer had not yet completed his investigation and contemplated further inquiries;
- The plaintiff consented to committal for trial. While this may not carry the same weight as a formal court determination committing the plaintiff to trial, this was an "an implicit acknowledgment by the plaintiff and his counsel...that all three remaining charges were supported by admissible evidence which could, if believed, result in a conviction...the committal to trial therefore provides strong evidence supporting the existence of reasonable and probable grounds."
- While the trial obviously resulted in no convictions, one cannot reason backwards and conclude that reasonable and probable grounds did not exist at the time the plaintiff was arrested and charged.

The Court concluded by commenting on the plaintiff's attack on the involved police officers' interview tactics. Specifically, the Court confirmed that negligent investigation cannot be proven by focusing on one particular aspect of the police investigation separate and apart from the question of whether there were reasonable and probable grounds for arresting and charging the plaintiff. A misplaced focus on the negligence of a specific police act or tactic will likely lead to causation issues effectively preventing recovery for any such "separate" negligence and may lead the court to dismiss a negligent investigation claim entirely.

¹ Following a preliminary hearing, three charges proceeded to a criminal trial.

² Para. 36.

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