Court of Appeal Affirms Substantial Damages in Police Liability Case for Breaching Confidentiality

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In February 2015, the Superior Court of Justice awarded substantial damages against the Durham Regional Police Services Board ("Police") for releasing the identity of an alleged confidential informant. That decision was recently upheld by the Ontario Court of Appeal in Nissen v. Durham Regional Police Services Board, 2017 ONCA 10 ("Nissen").

The Plaintiff learned that the teenaged son of one of her neighbours had broken into a neighbour's home with his brother and stolen some guns. The Plaintiff attended at the police station to report this information on the condition that her identity and reporting of the theft remain confidential. Unbeknownst to the Plaintiff, the interview was recorded by the Police. Soon after, the young men were charged. During the criminal proceedings, the recording of the Plaintiff's interview was disclosed to defence counsel. This information infuriated the accuseds' parents, who subsequently threatened and harassed the Plaintiff. As a result of these events, the Plaintiff had to sell her house and was diagnosed with post-traumatic stress disorder.

Although disputed by the Police, the trial judge found that the Plaintiff was promised anonymity and confidentiality. Therefore, in law, the Police owed a common law duty not to disclose the identity of the Plaintiff which it breached by failing to maintain confidentiality. The Plaintiff was awarded general damages in the amount of $345,000. Of note, the trial judge found that the failure of the Police to act after learning of the harassing behaviour by the accuseds' parents was an aggravating factor in assessing damages. The Plaintiff's husband and two children were awarded damages for loss of guidance, care and companionship in the amount of $65,000 and $25,000 (each) respectively. The Police appealed and raised three issues.

First, the Police argued that the trial judge made a palpable and overriding error in finding that the Plaintiff was promised confidentiality. The Court of Appeal rejected this argument and stated that the trial judge's finding — which attracts deference — was based on his assessment of the Plaintiff's credibility and reliability as a witness and supported by other corroborating evidence.

Second, the Police contended that a civil claim for damages for breach of a promise of confidentiality by police requires more than a finding that there was a promise which was breached and led to damages. They argued that the alleged informant must also show that the information provided be difficult or impossible to obtain and that the informer must be likely to suffer harm or danger if his/her identity is disclosed. They also argued that the formal requirements set out in the Durham Police's Criminal Informant Directive ("Directive") to classify an individual as an informant were not followed and the claim must therefore fail. The Court of Appeal disagreed and found the case was properly decided as a civil claim for damages for breach of confidence. The Plaintiff was promised confidentiality which gave rise to a common law and equitable right entitling her to have that promise kept. It was a right that was not contingent on the level of difficulty in obtaining the information provided or what dangers she may later face. Nor should her claim be dismissed because the Directive was not followed. Although the Police may have thought that the Plaintiff was not an informant on that basis, it does not affect the Plaintiff's claim for breach of confidence.

Third, the Police argued that the damages awarded were excessive on the basis that the trial judge placed too much emphasis on non-analogous cases, failed to consider the Plaintiff's pre-existing psychological conditions and erroneously awarded aggravated damages when there was no finding of "reprehensible or outrageous conduct". These arguments were all rejected. The Court of Appeal stated that while the damages awarded were very generous, they did not reveal any error of law or principle that required appellate justification. Specifically, the case law relied upon was not so different in quality that it could not be used as a reference point in assessing damages. The Court also found that the trial judge had considered the Plaintiff's pre-existing conditions and was still open to find that the psychological harm suffered was entirely attributable to the disclosure of her identity and the subsequent harassment by the accuseds' parents. Lastly, the Court disagreed that a trial judge can only take into account aggravating features where there has been a finding of reprehensible or outrageous conduct. Aggravated damages aim not at punishing wrongful behaviour (which is the role of punitive damages) but at fully compensating the loss suffered.

This decision reinforces the obligation to maintain the confidentiality of people who provide information to police on a confidential basis, and establishes that substantial damages can be recovered in the event of a breach.

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