Court Of Appeal For Ontario Overturns Finding Of Negligent Investigation 495793 Ontario LTD (Central Auto Parts) V Barclay, 2016 ONCA 656

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The Court of Appeal for Ontario recently canvassed the law relating to the tort of negligent police investigations and confirmed the "general rule" that expert evidence will be necessary to determine the content of the standard of care of a professional, including a police officer.

Mr. Mercuri and his company, 495793 Ontario Ltd. c.o.b. as Central Auto Parts ("Central"), were the subjects of a police investigation into stolen vehicles and auto parts. Mr. Mercuri was arrested and charged with various counts of possession of stolen property . A number of charges were eventually withdrawn and Mr. Mercuri was later acquitted at trial on a remaining charge. Mr. Mercuri and Central subsequently sued the investigating police officer and police service for negligent investigation.

At first instance, the trial judge rejected the testimony of an auto theft investigation police expert on behalf of the plaintiffs on the basis that the testimony was unnecessary to establish that the investigation was negligent. Coincidentally, the expert also opined on the standard of care and found that the police had reasonable and probable grounds to arrest Mr. Mercuri, which may have explained, in part, why no expert evidence was tendered on this point by the police defendants. The trial judge further highlighted various ways in which the police's conduct was "egregious", including the police's acknowledgement that the investigation was deficient, the failure to "document and investigate innocent explanations", and the police's "wanton destruction of the plaintiffs' property without legal authority". Significant damages were awarded including non-pecuniary damages to compensate Mr. Mercuri for his "humiliation and worry" while the charges were outstanding for six years.

The Court of Appeal allowed the appeal of the police defendants, reaffirming that, as a "general rule", expert evidence is necessary to determine the content of the standard of care of a professional, including a police officer. The trial judge erred in determining the content of the standard of care absent such evidence, as there was no basis upon which it could be determined that the standard (whatever it was) was breached. Neither of the two exceptions to this rule applied (i.e., (a): the standard of care was of a

"nontechnical matter" within the knowledge and experience of the ordinary person; and (b): the police conduct was so egregious that it is obvious that it has fallen short of the standard of care). The Court of Appeal found that the investigation was "replete with technical aspects of both legal and factual issues" that did not fall within the standard knowledge and experience of a Superior Court Judge. The Court of Appeal also took issue with the trial judge's reasoning that the police's conduct was "egregious", noting in particular, that the hindsight acknowledgement of omissions and mistakes of the police officers did not establish that the standard of care was breached. Second, the police failure to properly store and preserve the seized property was not relevant to the question of whether the police had reasonable and probable grounds to carry out the arrest and lay charges. Finally, the Court of Appeal emphasized the established jurisprudence that "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".

The Court of Appeal further held that, even if the standard of care could have been determined without relying on expert evidence, the trial judge erred in determining the content of the standard of care on the basis of whether the police could prove Mr. Mercuri's guilt. Rather, the standard of care analysis should have been informed by whether the police had reasonable and probable grounds to lay the charges. In this regard, the Court of Appeal found that the police defendants had accumulated a body of evidence that suggested reasonable and probable grounds existed to lay the charges at the time. Furthermore, the trial judge ignored the fact that Mr. Mercuri had been committed to trial on all charges following a preliminary hearing, which constituted "strong evidence" that the police had reasonable and probable grounds to lay the charges. Finally, the Court of Appeal emphasized that the withdrawal of charges should not imply that the police did not have reasonable and probable grounds to lay the charge at the time.

Lastly, in respect of the award for damages, the Court reiterated the Supreme Court of Canada's decision in *Mustapha v Culligan* and that, as "frustrated and upset as Mr. Mercuri may have been", his unsupported testimony of emotional upset was insufficient to support a substantial award (of $200,000, which the Court of Appeal also rejected) for non-pecuniary damages.

This case reviews a number of key principles on the tort of negligent investigation and is a reminder of the importance of evidence to establish the appropriate standard of care in all negligence actions.

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