Court decision on defence bars assault claim

February 12, 2021

On December 1, 2020, the court released its decision in *Teglas v. City of Brantford*, 2020 ONSC 7408 (*Teglas*). This decision followed a five-day non-jury liability trial in which the defendants were ultimately found not liable for injuries sustained by a plaintiff following an assault in a parking garage's stairwell.

Background

The action arose from an assault that took place in a parking garage on the evening of February 24, 2012. The plaintiff, who had parked his car at the garage for the workday, was subjected to a sudden and unprovoked assault by two individuals in one of the stairwells of the garage. The plaintiff had no warning and the entire altercation took place in less than a minute. The perpetrators left the scene after the plaintiff began to fight back. The perpetrators were never located or identified.

The plaintiff commenced an action against the municipality that owned the parking garage as well as the security company that was contracted to patrol the garage. The plaintiff alleged that the defendants owed a duty to keep the garage reasonably safe and failed to discharge that duty.

Court's findings

The court was critical of the condition of the garage, citing numerous uncontested factual indicators of unsafety. These included graffiti and human waste in the garage as well as relatively high rates of crime in the area around the garage. The court was also critical of the municipality for failing to undertake a "threat/risk assessment" for the garage, failing to install signage publicizing the security measures taken on-site and failing to install security cameras in the stairwells, although there were unmonitored cameras elsewhere in the structure.

Ultimately, the court agreed with the plaintiff that the defendants owed a duty of care to garage users, failed to meet the requisite standard of care, and injury or loss was reasonably foreseeable as a result of the defendants' breach of the standard of care.

Plaintiff's claim fails on causation

Despite the findings above, the court decided that the defendants were not liable to the plaintiff. The court stated that "even if all the proper steps to fulfill their duty of care had been done by the defendants, this incident could not have been prevented" (para. 105).

The court considered the Alberta Court of Appeal's decision in *McAllister v. Calgary*, 2014 ABCA 214. In that case, the plaintiff was subject to an extended assault that lasted for about twenty minutes in a municipal light rail station. The court found that the municipality was liable for failing to detect and respond to the assault in a timely way, but was only liable for the damages sustained by the plaintiff in the second half of the assault, noting that it would have been reasonable to expect a security response within ten minutes of the commencement of the assault. In other words, the court agreed that the municipality would not have been able prevent the commencement of the attack or the injuries sustained in the first ten minutes.

In *Teglas,* the court accepted that security cameras' primary function is to assist in the apprehension of perpetrators after a crime has been committed, rather than preventing crime from occurring in the first place. In addition, the court accepted that security cameras in the stairwell where the attack occurred would likely not have deterred the assailants in this instance. Finally, the court accepted that security personnel would not have been able to prevent the assault, even if the stairwell had been equipped with a monitored security camera. This attack was simply too fast and too unexpected.

The court's decision in the defendants' favour is especially significant in light of the court's findings with respect to the defendants' breaches of the duty and standard of care. Large organizations and institutions operating publicly accessible premises or spaces can take some comfort in knowing that they may not be found liable for the unpredictable tortious acts of third parties.

Issue-based approach to costs

On February 8, 2021, the trial judge released his endorsement on the costs of the action in *Teglas v. City of Brantford*, 2021 ONSC 997. The successful defendants sought a total of $59,000 in partial indemnity costs.

In his decision, the judge approved of the parties' decision to agree on damages, thereby reducing the complexity and length of the trial. However, the judge noted that the trial could have been further simplified if the defendants had conceded that they owed the plaintiff a duty of care, breached the standard of care, and that damages were foreseeable. The judge also noted the absence of a Rule 49 offer from the defendants and two refusals to mediate the case, and indicated that

> When a plaintiff does bring an arguably meritorious case to trial and does not succeed, it should not be subject to a partial indemnity or substantial indemnity costs award in every case… plaintiffs should not be subject to 'hard ball' positions taken by insurers who assume that because they succeed, they will be fully or partially indemnified (para. 29).

Ultimately, the judge assessed the defendants' costs at $59,000, and then made reductions for costs thrown away due to two adjournments, costs of the plaintiff's liability

expert, and a final reduction of 50 per cent “for issues on which the plaintiff succeeded,” for a net costs award of just under $14,000.

The court’s reasoning on costs is a reminder to parties and counsel to try to simplify disputes when possible. It also seems to open the door to a more nuanced, issue-by-issue analysis of costs entitlements in proceedings.

By

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