

THE BROADENING SCOPE OF SECTION 24 CHARTER DAMAGES AGAINST POLICE OFFICERS

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*Hawley v. Bapoo*² is a significant case in the ever widening debate concerning the role of police officers in our society and the degree to which their misconduct may result in civil damage awards against them. Historically, officers avoided civil liability by acting in good faith. However, more recent cases have widened the scope of liability. This paper focuses on the impact of the decision of Justice Ducharme in *Bapoo* who found that two Ontario Provincial Police Officers unjustifiably violated an individual's rights under the *Canadian Charter of Rights and Freedoms*³ despite the fact that there was no finding of bad faith or improper motive. Rather, the court found that the officers acted in the "heat of the moment".⁴ *Bapoo* should be considered carefully by police officers who come into contact with the public on a daily basis.

A brief history of Malicious Prosecution and Negligent Investigation

Historically, officers enjoyed relative immunity in the civil courts from individuals who felt they were mistreated by law enforcement officials. Traditionally, individuals who believed that they had suffered injustice at the hands of the police launched claims for malicious prosecution. The difficulty for litigants claiming to have been maliciously prosecuted is the reality that alleging malicious prosecution is easy; proving it on the

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² *Hawley v. Bapoo*, [2005] 76 O.R. (3d) 649 (Ont. S.C.J.) [hereinafter *Bapoo*]. The decision was released on October 10, 2005 and is under appeal to the Ontario Court of Appeal.

³ *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [hereinafter *Charter*].

⁴ *Supra* note 2 at paragraph 148.

other hand is quite difficult. This is because success in a claim for malicious prosecution requires proof of all four of the following elements:

1. the plaintiff was charged with an offence by the defendant;
2. the charge was determined in the plaintiff's favour;
3. there was an absence of reasonable and probable grounds to charge the plaintiff; and
4. the officer involved acted maliciously⁵.

Typically, the first two elements are easy to prove. On the third element, the courts have said that the threshold for reasonable and probable grounds is very low. In other words, if the officer had *some* evidence upon which to lay the charge, a claim for malicious prosecution would fail.⁶ However, even if the plaintiff manages to jump the third hurdle, proving malice is extremely difficult. It is often times impossible to place evidence before the court to demonstrate malicious conduct in charging or prosecuting. Indeed, there are very few cases in all of Canada that have succeeded.⁷

In part, as a result of the onerous test of proving malice, plaintiffs have sought to allege that the investigation leading to the charges was faulty and therefore negligent. These claims focus on the conduct of police officers in their investigation of the allegations that lead to the charge. Until recently, however, it was entirely unclear whether a plaintiff

⁵ See *Nelles v. Ontario* (1989), [1989] 2 S.C.R. 170 at 45, "The required element of malice is, for all intents, the equivalent of "improper purpose"." See also *Proulx v. Québec (Procureur general)*, [2001] 3 S.C.R. 9 [hereinafter *Proulx*]

⁶ *Supra* note 2 at 103. See also *Proulx*, *ibid.*

⁷ See *Oniel v. Metropolitan Toronto (Municipality) Police Force* (2001), 195 D.L.R. (4th) 59. In *Oniel* the majority of the Court of Appeal for Ontario found that malice could be inferred from the lack of reasonable and probable grounds that gave rise to the charge. This decision is very controversial but the Supreme Court of Canada declined to grant leave to the police officers in their appeal.

was required to demonstrate bad faith on the part of police to succeed.⁸ Last year, the Ontario Court of Appeal held that a plaintiff suing for negligent investigation was not required to demonstrate bad faith. The plaintiff must prove, on a balance of probabilities that the investigation fell below a reasonable standard of care and that as a result, the plaintiff suffered damage.⁹ The court also tied in the duty of care owed to the person being investigated with the protection offered by section 7 of the *Charter*. It remains to be seen what impact *Hill* will have on future cases but given the inherent difficulties with proving malicious prosecution, it is likely that the courts will see more cases going to trial on the issue of whether the conduct of officers fell below the standard of reasonableness.

The Charter

Bapoo was released following the decision in *Hill*. *Bapoo* focuses on individual rights and the justification for violating those rights as opposed to an officer's fraudulent or extremely poor conduct. *Bapoo* says that it makes no difference if an officer acted with the utmost good faith in what they honestly believed was their duty. The focus is on the individual and the *Charter* right that was infringed. If there was no legal basis for trampling a *Charter* right, the officer will be personally liable.

In *Bapoo* the plaintiffs were two Ontario Provincial Police Officers. They had been charged with obstructing justice and assault based on a private information sworn by the defendant Mr. Bapoo. Mr. Bapoo had received a traffic ticket from the plaintiff McNabb. On the trial date, his wife attended in court and asked for an adjournment because her husband was sick. When the court asked if her husband was at home, Mrs. Bapoo

⁸ *Wiche v. Ontario* (2001), 83 C.R.R. (2d) 179.

⁹ *Hill v. Hamilton-Wentworth Regional Police Service*, 76 O.R. (3d) 481 (Ont. C.A.) [hereinafter *Hill*].

indicated that he was. The adjournment was granted. In fact, Mr. Bapoo was in the car in the parking lot. The plaintiff Hawley followed Mrs. Bapoo to her vehicle and found Mr. Bapoo in the back seat. He and officer McNabb then escorted Mr. Bapoo into court and his case was recalled. The Justice of the Peace concluded that Mr. Bapoo was sick but admonished Mrs. Bapoo for lying to the court. She apologized.

Mr. and Mrs. Bapoo were charged with obstructing justice as a result of the circumstances surrounding the adjournment. Mrs. Bapoo pleaded guilty and received an absolute discharge. The Crown withdrew the charge against Mr. Bapoo.

Mr. Bapoo then attended before a Justice of the Peace and swore out a private information charging both officers with obstructing justice for charging him and assault for removing him from his vehicle without his consent.

The Crown felt that there were reasonable and probable grounds to proceed with the charge of assault against each officer. The case took approximately 16 months to go to trial and the charges were stayed against for unreasonable delay pursuant to section 11(b) of the *Charter*.

The officers then sued both Mr. Bapoo and the two Crown Attorneys who had carriage of the matter for malicious prosecution. Mr. Bapoo counterclaimed for damages for assault. He also sought damages pursuant to the *Charter*. In particular, he alleged that his right to security of the person was infringed as a result of the assault upon him.

The court scrutinized the authority of O.P.P. officers actions pursuant to s.42 of the *Police Services Act*¹⁰, the common law¹¹ and otherwise¹². The court found that the officers had no legal authority to pull Mr. Bapoo out of his car and force him to appear in court. As such, the court found that the actions of the officers amounted to a breach of Mr. Bapoo's right to security of the person and ordered each officer to pay Mr. Bapoo \$2,500 in damages.

The malicious prosecution claims of both officers were dismissed.

The Nature of Charter Damages

Charter damages are very different than damages in malicious prosecution or negligence.

As stated above, with malicious prosecution the plaintiff must show an improper or fraudulent intention relating to the officer's conduct. Negligence is an objective standard to be determined from the viewpoint of a reasonable police officer. But *Charter* damages focus on the individual's rights and whether the officer's behavior is consistent with the inalienable rights of that individual as prescribed in the *Charter*. It makes no difference that the officer's malfeasance was unintentional or accidental.¹³ There is no requirement

¹⁰ See *Police Services Act*, R.S.O. 1990, c. P.15, section 42(1).

¹¹ *Supra* note 1 at 58. See *R. v. Godoy* (1998), [1999] 1 S.C.R. 311 (S.C.C. at p. 320, See also *R. v. Dedman*, [1985] 2 S.C.R. 2 (S.C.C.) at 11-12.

¹² the court also considered the arrest powers as set out in s.450(1) of the *Criminal Code*, R.S.C. 1970 c. C-34 [now R.S.C. 1985, c. C-46, s. 495(1)]. See *Supra* note 1 at 57, "The *Criminal Code* was not applicable because the officers denied arresting Mr. Bapoo. Moreover, as there were not reasonable and probable grounds to believe either subjectively or objectively that Mr. Bapoo had committed an indictable offence, his arrest would not have been justifiable under the provisions of the *Code*."

¹³ *Supra* note 1 at 177-184. See also *Dulude v. Canada* (2000), 192 D.L.R. (4th) 714 (Fed. C.A.) at 724 "As the harm results from illegal acts (unlawful imprisonment and assault), the existence of damages is not a prerequisite for obtaining compensation: ... Though unintentional and not from malice, the infringement is nonetheless serious and unjustified" See also K. Roach, "Charter Remedies in Litigation Against the Government" Continuing Legal Education Society of British Columbia, February 2002 "Malice or gross negligence could perhaps justify awarding extra damages, but a fault requirement, independent of the violation of the right sits uneasily with fundamental principles of *Charter* interpretation which stress the effects as opposed to the purposes of State action.

for a claimant to demonstrate bad faith, malice or even a departure from reasonable conduct.¹⁴ The plaintiff need only show that their *Charter* right was violated and that the officer has no legal justification for doing so.

In *Bapoo*, although the officers' may have thought they were doing their job when they pulled Mr. Bapoo out of his car and forced him to appear before the court, the court focused on the illegality of their conduct. In speaking of J. Easton's decision in *R. v. F. (R.G.)*, Justice Ducharme states:

the award of damages was motivated by a concern to deter unconstitutional behaviour, to ensure that "every conceivable caution" is taken, and that there is nothing "cavalier, careless or capricious in the treatment of persons charged with criminal offences."¹⁵

The courts will not accept violation of a *Charter* right without lawful justification.

Bapoo stands for the proposition that officers must be extremely cognizant of individual rights under the *Charter* and the legal limits of their own authority.

Quantum of Damages

In his decision, Justice Ducharme endorsed the proposition that "Charter damages are distinct from other damages".¹⁶ He goes on to say that this does not mean that there is no relationship between Charter damages and general damages, only that Charter damages

¹⁴ *Supra* note 2 at 182. See also *Krznaric v. Chevrette* (1997), 154 D.L.R. (41th) 527 (Ont. Gen. Div.).

¹⁵ *Supra* note 2 at 179.

¹⁶ *Supra* note 2 at 202.

are not married to the rigidity of general damages.¹⁷ If a defendant either negligently causes a physical or mental injury to a plaintiff, the court must place a monetary figure on that damage. Frequently, the court will be guided by previous cases dealing with similar injuries. Where general damages are calculated to put an individual in the position they would have been had the wrong not been committed, *Charter* damages may consider other factors as well. For example, in *Dulude* the court awarded \$10,000 in "moral damages" for an arrest by military police that violated the plaintiff's *Charter* rights.¹⁸ In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*¹⁹, Allan J. awarded \$20,000 to each of four sets of parents bringing claims under s.15 for the failure of the government to provide certain medical treatment for their autistic children.

Justice Ducharme heard evidence that Mr. Bapoo had suffered very serious injuries in a car accident prior to the day of his traffic court appearance. As a result, he was on heavy medication and had fallen asleep in the backseat of his vehicle prior to arriving at court. Mr. Bapoo had been in a lot of pain and had been suffering from severe anxiety.

Justice Ducharme awarded Mr. Bapoo \$2,500 in *Charter* damages in the following context:

"He was assaulted at a time when he was particularly vulnerable and, I find that his vulnerability would have been apparent to both officers. Moreover, his treatment was an affront to his essential human dignity – something the Supreme Court has repeatedly recognized is at the heart of Canadian democracy and of the *Charter*."²⁰

¹⁷ *Ibid.*

¹⁸ *Supra* note 14.

¹⁹ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*

²⁰ *Supra* note 2 at 205.

Although the amount awarded is not an exorbitant sum it provides a meaningful recognition of the *Charter* violation

Chill

An officer's job is incredibly important to our society and must be carried out with the utmost integrity with a view to protecting individual's rights. That is no easy task. The officers in *Bapoo* were caught in the "heat of the moment". No doubt, officers find themselves in very stressful situations on a routine basis.

Bapoo will clearly raise concern among officers regarding what is referred to as the "Chill" effect, or that officers will be so scared of being personally liable that it will have a negative impact on the performance of their duties. But the rationale behind *Bapoo* is intended to elicit the opposite effect. Justice Ducharme comments that *Bapoo* will not "chill" or hinder an officer's ability to carry out their statutory and legal duties, but should channel police behaviour toward their actual duties and away from behaviour that may have good intentions but is nevertheless unconstitutional.²¹ Justice Ducharme is very clear on this point at paragraph 198 of his judgment:

"this case will not have a negative impact on the ability of police officers to do their very important jobs. To the contrary, an award of damages will not only vindicate Mr. Bapoo's *Charter* rights, but it will also hopefully deter other police officers from engaging in such high-handed behaviour – encouraging them to do their very important jobs properly."

The Ontario Court of Appeal came to a similar conclusion regarding "chill" in the context of negligent investigation.²²

²¹ *Supra* note 2 at 198.

²² *Supra* note 8 at 63. After careful consideration of the English cases *Hill v. Chief Constable of West Yorkshire*, [1988] 2 All E.R. 238 and *Brooks v. Commissioner of Police of the Metropolis* (April 21, 2005),

Bapoo says that good faith will not shelter police officers from liability under the *Charter*. Police officers must act in accordance with their legal authority being specifically sensitive to *Charter* rights. An officer who acts without regard to individual rights may be slapped with *Charter* damages, despite their greatest intentions.

Bingham J., Brown J., Nicholls J., Rodger J., Steyn J. (U.K. H.L.) Justice MacPherson delivers a strong rebuke of the English authorities: "First, I am not convinced that the existence of a duty of care will lead to "an unduly defensive approach in combating crime". The police have important statutory and common law duties to perform. They have performed them, usually in a highly professional fashion, for centuries. They know that they must take care in the performance of their criminal investigations. Moreover, there are legal standards that already govern those investigations-- for example, the reasonable and probable grounds standard for making an arrest. The assertion that the imposition of a legal duty of care on the police with respect to their criminal investigations will cause the police to change the way they perform their professional duties is, in my view, both unproven and unlikely. Surgeons do not turn off the light over the operating room table because they owe a duty of care to their patients. They perform the operation, with care. The owners of summer resorts do not lock the gates because they owe a duty of care to their customers. They open their resorts and take care to make them safe. In short, the 'chilling effect' scenario painted fairly vividly in *Hill and Brooks* is, in my view, both speculative and counterintuitive."