

Breach of Statutory Duty and Private Law Remedies: Muddying the Waters?

by Sophia M. Stadnyk, Senior Associate Counsel

One of the Supreme Court of Canada's more interesting decisions this year is *Holland v. Saskatchewan*, 2008 SCC 42 (July 11, 2008). In a unanimous ruling, the Court allowed, in part, an appeal involving a class action lawsuit against a provincial government alleging negligence. Mr. Holland and a group of approximately 200 game farmers had all refused to register in a federal/provincial program for preventing chronic wasting disease (CWD) in domestic cervids. They objected to indemnification and release clauses that they felt were invalidly included in the registration form (the farmers were asked not only to assume "sole responsibility for any death losses" that could occur "when [their] animals [were] being handled for purposes of inspection, sampling or testing," but to also indemnify the federal and provincial governments "from and against all claims and demands [...] arising out of or attributable or with respect to the Program, or any aspect of the Program"). As a result, the farmers lost the "CWD-free" herd certification level they had previously acquired by conforming to provincial CWD prevention rules. This downgrading of status both reduced the market price of their product and diminished their ability to sell, causing financial losses. The farmers successfully established, on judicial review, that the indemnification and release clauses had been invalidly included; however, the government took no steps to reinstate their certification or to compensate them. The farmers then brought a new action against the provincial government, claiming damages for misfeasance in public office, the tort of intimidation, and negligence. Dealing with the government's motion to strike out the claims, the court below struck the intimidation claim for lack of evidence of any threat; granted leave to amend the statement of claim for the misfeasance claim; and denied the motion on the negligence claim. On appeal, the Court of Appeal of Saskatchewan allowed the government's appeal from the ruling on the negligence claim, holding that no action could lie against public authorities for negligently acting outside their lawful mandates. The question before the Supreme Court of Canada was whether the appellate court erred in striking out the negligence claim in its entirety.

The Supreme Court held that it did, in part. The negligence allegation consisted of two distinct claims. The first was based on the requirement that the farmers enter into the indemnification agreement and downgrading the status of those who refused to do so. The alleged fault could be described as failing to act in accordance with the authorizing acts and regulations—namely, that the government and its employees "were under a duty of care to the Class [game farmers] to ensure those Acts and Regulations were administered in accordance with law and not to operate in breach of them." The second claim was that, despite the finding on judicial review, the government took no steps to reinstate the certifications, being a negligent failure to implement a judicial decree. On the first claim, the Supreme Court agreed that the Court of Appeal correctly characterized the negligence claim as a claim for negligently acting outside the law. "The law to date has not recognized an action for negligent breach of statutory duty. It is well established that mere breach of a statutory duty does not constitute negligence." On whether such a new cause of action in negligence should be recognized under *Anns v. Merton London Borough Council*, the Court held that, even if the requirement of proximity was established, policy considerations arising at the second stage of the *Anns* test (including the "chilling effect and specter of indeterminate liability"), militated against recognizing this new instance of negligence. The remedy for such breaches remained an application in judicial review.

While the Court firmly shut the door against expanding public tort liability for the negligent breach of a statutory duty, it did allow the appeal on the second issue (whether a claim for the negligent failure to implement a judicial decree clearly could not succeed in law). The court below had struck this claim, not because it failed to disclose a cause of action, but because it found the farmers and Holland had "not pleaded any facts to the effect his herd or any other farmer's herd had been maintained so as to warrant any particular CWD status, including the status it enjoyed before being reduced to 'surveillance.' " The Supreme Court found that the appellate court had, nonetheless, failed to address the "real issue." The claim was distinguishable from the first breach-of-duty claim as it was "not a claim for negligent breach of statute. It [stood] on a different footing." The Court referred to the established dichotomy of policy versus operational decisions: governments were generally immune for policy decisions, but once a decision to act had been made, a government could be liable in negligence for the manner in which it implemented that decision. "Public authorities are expected to implement a judicial decision. Consequently, implementation of a judicial decision is an 'operational' act. It is therefore not clear that an action in negligence cannot succeed on the breach of a duty to implement a judicial decree." The specific pleading

continued on page 38

Supreme Court

continued from page 18

exception to the warrant requirement authorizes police to enter a home without a warrant immediately after an undercover informant buys drugs inside, or whether such warrantless entry violates the Fourth Amendment; second, whether the Tenth Circuit properly denied qualified immunity when the only decisions directly on point had all upheld similar warrantless entries.

Other "search and seizure" cases before the Court are *Herring v. United States*, No. 07-513, *Arizona v. Gant*, No. 07-542, and *Arizona v. Johnson*, No. 07-1122. *Herring*, on appeal from the Eleventh Circuit, arose out of a challenge to a search incident to arrest, where the arrest itself was based on erroneous information provided by another law enforcement agency. Herring was arrested in Coffee County while picking up items from a sheriff department's impound lot. The lot's clerk decided to see if there were any warrants outstanding for Herring and was told, by a clerk in neighboring Dale County, that there was an active warrant in Dale County. Herring was arrested, and a search incident to arrest turned up methamphetamine in his pocket and a pistol under the front seat of his truck. At the same time, the clerk had checked on the warrant and was informed that the Dale County warrant had actually been recalled. At issue in this case is whether the Fourth Amendment requires evidence found during a search incident to an arrest to be suppressed, when the arresting officer conducted the arrest and search in sole reliance upon facially credible, but erroneous, information negligently provided by another law enforcement agent.

The question presented in *Gant* is whether a warrantless search of a vehicle incident to arrest requires proof of a threat to the safety of police officers or a need to preserve evidence. In *New York v. Belton*, 453 U.S. 454 (1981), the Supreme Court had previously ruled that the risks to officer safety and to the preservation of evidence inherent in the arrest of a vehicle's recent occupant justify a contemporaneous warrantless search of a vehicle's passenger compartment incident to the arrest. In *Gant*, police, acting on a tip, approached a residence. Gant answered the door. He told the officers that the owners were not home, but would return later that day. The officers left, but ran a records check on Gant that indicated an outstanding warrant for driving on a suspended license. When the officers returned later that evening, Gant drove up, parked his car, and got out. An officer called him over, and Gant was arrested. A search of his car—conducted while Gant was handcuffed and locked in the back of a patrol car—turned up drugs and a gun. There were at least four police officers, but no other persons, on the scene. An officer testified at trial that the scene was "secure" while Gant's car was searched. Gant sought to suppress the evidence on the basis that the reasons for a warrantless contemporaneous search of the vehicle—protection of the arresting officers and preservation of evidence—did not, in the circumstances, justify the search and, therefore, the police were required to obtain a warrant. The Arizona Supreme Court, finding the issue was whether police could conduct a search incident to arrest at all once the scene was secured, granted the motion.

Arizona v. Johnson involved a police stop of a vehicle based on an insurance suspension. The officers had not targeted the car for any reason, but simply ran the license plate while they were patrolling a gang-intensive area. The officers had seen no behavior in the car indicative of criminal activity. Johnson was a passenger in the back and was cooperative. One officer wanted to gather "gang intelligence" and asked him to get out of the car. She conducted a pat-down search of Johnson and found a gun. Johnson applied to suppress the evidence on the basis that the search was unreasonable. The court held that the initial lawful seizure of Johnson, incident to the traffic stop of the driver, had evolved into a separate, entirely consensual encounter stemming from an unrelated investigation by the officer. There was no reason to believe Johnson was involved in criminal activity, or any "officer safety" purpose requiring the search. Accordingly, the officer had no right to pat him down for weapons. The question before the Supreme Court is whether, in the context of a vehicular stop for a minor traffic infraction, an officer can conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but has no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense. ML

Inside Canada

continued from page 30

at issue was sufficient to put the government on notice of the essence of the claim; accordingly, whether or not the claim ultimately succeeded, it should not have been struck.

One commentator points out that recognizing this claim in negligence was probably the "most puzzling part of the judgment," as "surely there was no negligence here; there was an intentional decision [on the part] of the government not to implement a judicial decree" (Lewis Klar's posting on the case, University of Alberta Law Faculty blog, July 11, 2008). The other difficulty with the ruling is that the ostensibly neat division between policy and operational decisions is not so easy to apply in real life. Moreover, the decision not to implement a judicial decision is arguably itself a form of policy decision.

Perhaps more light will be shed on the matter when the merits of the case are addressed—the Supreme Court itself declined to comment "on whether the evidence and the applicable law will in fact establish a claim for negligence...at the time of trial." ML

For the latest in municipal attorney news, visit
www.imla.org