SUPREME COURT OF YUKON

Citation: *Carlick v. Canada (Attorney General)*, 2013 YKSC 115

Date: 20131118
S.C. No. 10-A0085
Registry: Whitehorse

Between:

ELYCIA CARLICK

Plaintiff

And

THE ATTORNEY GENERAL (CANADA), ROB MACDOUGAL, JASON MACDONALD, TERRA TAYLOR, JEFF MORAN, BEN DOUGLAS, PHIL WHILES and VINCE GAGNON, members of the ROYAL CANADIAN MOUNTED POLICE

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

No one appearing for the Plaintiff

Suzanne Duncan and Jonathan Gorton — Counsel for the Defendants

REASONS FOR JUDGMENT
(Summary Judgment Application on Misfeasance)

INTRODUCTION

[1] The plaintiff claims misfeasance in public office against the defendants for psychological damages to her arising out of her father's death following a violent incident with the RCMP on August 30, 2008. The defendants apply for summary judgment under Rule 18(6) of the *Rules of Court* to dismiss the claim of misfeasance on the ground that there is no *bona fide* issue to be tried.

[2] In *Carlick v. Canada (Attorney General)*, 2012 YKSC 92, I dismissed the plaintiff's claim under the *Fatal Accidents Act*, R.S.Y. 2002, c. 86, as the action was commenced after the one-year limitation period and the discoverability principle did not assist the plaintiff. Claims under s. 2(1) of the *Fatal Accidents Act* are based upon deaths caused by wrongful acts, neglect or default.

[3] Counsel for the plaintiff amended the Statement of Claim on March 1, 2012, to add the plaintiff, in addition to her father, as the subject of the misfeasance claim which was not addressed in the previous summary judgment application.

[4] In the spring of 2013, counsel for the defendants indicated he would bring this summary judgment application to dismiss the misfeasance claim or alternatively apply to have the misfeasance claim struck out under Rule 20(26) as disclosing no reasonable claim.

[5] By Case Management Order dated May 1, 2013, the applications were set down for hearing on October 17 and 18, 2013.

[6] On October 1, 2013, counsel for the plaintiff advised her client of her intention to withdraw as lawyer. On October 2, 2013, counsel for the plaintiff filed a Notice of Intention to Withdraw as lawyer and advised counsel for the defendants that she intended to withdraw as lawyer of record.

[7] On October 10, 2013, counsel for the plaintiff filed a Notice of Withdrawal of Lawyer indicating the last known address of the plaintiff.

[8] On October 10, 2013, counsel for the defendants wrote a letter to the plaintiff, emailed on October 11, 2013, indicating that her claim could be dismissed at the hearing on October 17, 2013. He also requested she contact him if she was unable to

attend or needed more time to prepare. Counsel for the defendants advised the Court that Ms. Carlick did not contact him.

[9] Ms. Carlick did not appear on October 17, 2013.

[10] Counsel for the defendants was permitted to proceed and did so on the summary judgment application only. The application proceeded on the affidavit evidence of the defendants, most of which was presented to a Coroner's Inquest held September 14 – 18, 2009. Counsel for the plaintiff had received the Coroner's brief and had participated in the Inquest proceeding.

[11] The plaintiff has not presented any evidence in response to the evidence presented by the defendants in this summary judgment application. However, former counsel for the plaintiff filed an expert opinion by Dr. Butt, a forensic pathologist, which may be relevant to this application.

[12] In order to establish misfeasance in public office, the plaintiff must establish, on the balance of probabilities, that the defendants:

1. deliberately and intentionally engaged in unlawful conduct as police officers; and
2. did so knowing that it was unlawful and that it would likely cause harm to Ms. Carlick.

The Pleadings

[13] Grant Edwin McLeod died on August 30, 2008, after a violent altercation with RCMP officers who were attempting to take him into custody pursuant to the *Mental Health Act*, R.S.Y. 2002, c. 150.

[14] Ms. Carlick is the daughter of Mr. McLeod. The RCMP informed her of her father's death on September 1, 2008.

[15] The Amended Statement of Claim, filed March 1, 2012, states the following:

…

> 4. On August 30, 2008, McLeod was taken into custody by the Defendants RCMP members at the Chilkoot Inn, Fourth Avenue, Whitehorse, pursuant to the *Mental Health Act* (the "Arrest"). The Defendants RCMP members restrained McLeod inappropriately with excessive and deadly force under the circumstance, strangled him and failed to provide timely first aid care and failed to summon timely medical care (the "conduct").
>
> 5. McLeod died during the arrest due to excessive and deadly force applied by the Defendants RCMP members and failure of the said Defendants to provide first aid care to McLeod after applying excessive and deadly force to him.
>
> 6. The Defendants RCMP members displayed mob behavior during the Arrest due to lack of policy, procedure and training, alternatively failed to follow policy and procedure when making the Arrest pursuant to the *Mental Health Act*.
>
> 7. The Defendants RCMP members owed a duty of care to McLeod, as well as to the Plaintiff, to keep him safe and protect his well-being during the Arrest, but they breached that duty of care.
>
> 8. The lack of policy, procedure and training resulted in conduct by RCMP members that breached the duty of care to McLeod, as well as to the Plaintiff, alternatively, the Defendants RCMP members did not follow policy and procedure during the Arrest and therefore the Arrest resulted in conduct by RCMP members that breached the duty of care owed to McLeod, as well as to the Plaintiff.
>
> 9. The Defendants RCMP members had a duty of care to McLeod, as well as to the Plaintiff, during the Arrest and breached that duty of care through intentionally negligent, grossly negligent, deliberate indifferent, reckless and bad faith conduct.

> 10. The conduct of the RCMP members was deliberate and unlawful; they were aware that their conduct was unlawful and likely to injure the Plaintiff (the “misfeasance”).
>
> 11. The Defendants owed a duty of care to the Plaintiff to keep McLeod safe, to grant McLeod his Charter Rights and to protect McLeod pursuant to the relevant United Nation Principles and breached that duty of care.
>
> 12. The Plaintiff pleads the relevant provisions of the *Fatal Accidents Act*, R.S.Y., 2002, Chapter 86.
>
> 13. The Plaintiff suffered damages and continues to suffer damages due to the Defendants’ conduct, misfeasance and breach of duty of care to McLeod during the Arrest and breach of duty of care to her;
>
> 13.1 she suffered psychological injury, and continues to suffer psychological injury;
>
> 13.2 she incurred expenditures and continues to incur expenditures for treatment of her psychological injury;
>
> 13.3 she lost the companionship and affection of her father; and
>
> 13.4 any further damage to be added by Plaintiff’s lawyer.
>
> …

The Evidence of the Defendants

[16] Counsel for the defendants submits that the following facts were established from the transcript of direct evidence and cross-examination of witnesses testifying at the Coroner’s Inquest.

The Decision to Take McLeod into Custody

[17] At 6:58 a.m. on August 30, 2008, the Whitehorse RCMP Detachment received a 911 emergency telephone call from Josephine Smith (“Smith”), a front desk clerk at the

Chilkoot Inn. Smith requested immediate police assistance as she was afraid of a large man in the lobby staggering around, who appeared to have a needle in his hand.

[18] At 7:03 a.m., Constables Jason MacDonald ("MacDonald") and Terra Taylor ("Taylor") responded to Smith's request for assistance.

[19] Prior to their arrival on scene, the RCMP Operational Communications Centre ("OCC") advised MacDonald and Taylor of the following:

> We have an unknown male, large male, staggering around the lobby of the Chilkoot, the night clerk is on the phone and he has a needle in his hand. She's very wary of her safety and not too sure what this gentleman is planning on doing.
>
> The night clerk doesn't know who this person is but she has been told not to approach him. He has been there before.

[20] Arriving at the Chilkoot Inn, MacDonald and Taylor found Smith hiding behind locked shutters at the front desk. Smith identified a man, later identified as McLeod, as the subject of her complaint. MacDonald and Taylor had no previous experience with McLeod. He presented as a large male, approximately 6'2" or 6'3", who was dishevelled, rubbing his hair, bobbing his head, wearing only one shoe, and bleeding from his bare foot.

[21] MacDonald identified himself as a police officer and asked McLeod to speak to him. McLeod did not respond to MacDonald's request and instead proceeded upstairs to the second floor of the Chilkoot Inn. MacDonald and Taylor followed him up the stairs.

[22] At 7:04 a.m., MacDonald radioed the OCC requesting the assistance of another police officer.

[23] MacDonald and Taylor located McLeod in a narrow hallway on the second floor. MacDonald again identified himself as a police officer and asked McLeod to stop and speak with them. McLeod did not respond or acknowledge MacDonald's request.

[24] McLeod walked to the end of the hallway on the second floor, opened the emergency exit door, looked outside, turned around and began walking back towards MacDonald and Taylor. He continued to rub his hair and bob his head up and down. He looked right through the officers, had a "thousand yard stare", muttered words to the effect of "the Father, Son and Holy Ghost", and appeared to grimace as though he was in pain.

[25] MacDonald and Taylor concluded there were grounds for taking McLeod into custody under the *Mental Health Act*. Their conclusion was based on a number of considerations, including the following;

a) McLeod exhibited abnormal, erratic and non-responsive behaviour; he was wearing only one shoe; was bleeding; appeared disoriented, and confused; and

b) Smith's fear of McLeod; reports he was waving a needle; he was in the hallway of a hotel full of guests; the possibility of harm to himself, and to others.

Taking McLeod into Custody

[26] MacDonald advised McLeod that he was under arrest under the *Mental Health Act*. McLeod replied "No" in a low voice. MacDonald initiated the taking into custody by taking hold of McLeod's wrist.

[27] McLeod actively resisted. MacDonald asked Taylor to place handcuffs on McLeod. She was unable to do so. As McLeod attempted to push past the officers, all three individuals fell to the floor of the narrow hallway. MacDonald became pinned between McLeod, the wall and the floor. He struggled to control McLeod's right arm as McLeod continued to resist. MacDonald believed he was not able to access any of the tools on his duty belt.

[28] During the struggle, MacDonald was able to radio the Whitehorse Detachment, calling out the "10-33" code three times. The "10-33" code is a rarely used emergency code which means officers in distress/need assistance. It is the highest level of a request for backup that an officer can make. The two officers were not in control of the situation.

[29] Taylor could not see MacDonald after they were on the floor. She was unaware of his well-being and felt he was unable to assist her in controlling McLeod. She attempted various techniques to gain control of McLeod, but he continued to resist, attempting to bite her and pull her handcuffs underneath him. Taylor felt she could not use OC spray or her baton in the confines of the narrow hallway.

[30] As Taylor attempted to control McLeod, he repeatedly tried to throw her from her position on top of him. Taylor's body was thrown into the wall and her head struck the floor a number of times. At one point, Taylor's head became wedged between McLeod and the door jam of one of the hotel room doors. She felt extreme pressure against her head and feared McLeod might break her neck. During the struggle, both Taylor and MacDonald feared that they would be overpowered by McLeod, who was showing significant strength in resisting them.

[31] Believing it was justified and appropriate in the circumstances, Taylor attempted to apply a vascular neck restraint (applying pressure to his carotid artery) on McLeod. After three attempts, she was still unable to gain control of McLeod.

[32] During the struggle, guests at the Chilkoot Inn opened their doors to see what was occurring in the hallway. Gunnar Clarkson ("Clarkson"), one of the guests, realized that Taylor and MacDonald could not control McLeod and offered to assist them. The officers accepted his help and Clarkson took hold on one of McLeod's arms.

[33] At approximately 7:07 a.m., Corporal Rob MacDougall ("MacDougall"), Constables Phil Whiles ("Whiles") and Vince Gagnon ("Gagnon") arrived at the Chilkoot Inn in response to the 10-33 call, followed shortly thereafter by Constable Jeff Moran ("Moran"). They went upstairs to the second floor where they saw Taylor, Macdonald and Clarkson struggling with McLeod.

[34] Gagnon, MacDougall and Whiles asked Clarkson to get out of the way, and tried to take control of McLeod. Moran placed his knee on McLeod's head and tried to control McLeod's left arm. McLeod continued to resist. Together, the officers brought McLeod's arms behind his back and placed him in handcuffs.

[35] At 07:08 a.m., MacDonald radioed the OCC and confirmed that the situation was now under control.

Post-Arrest Conduct

[36] After McLeod was placed in handcuffs, Constables Wallingham ("Wallingham") and Ben Douglas ("Douglas") arrived on the scene. As the situation was then under control, Gagnon returned to RCMP headquarters while Wallingham went outside to secure the police vehicles.

[37] Immediately after he was in handcuffs, Whiles, under the direction of MacDougall, conducted a thorough search of McLeod. The search was done to ensure the safety of the officers and anyone else that was going to tend to McLeod, and because Smith had reported seeing McLeod with a syringe. Moran further advised he had a prior experience with McLeod where McLeod had hid a syringe in his shoes.

[38] McLeod did not resist during the search. Once the search was completed, he was rolled over. Douglas checked McLeod's pulse and reported McLeod had a pronounced and steady pulse. Douglas and MacDougall both observed that McLeod was breathing and his chest going up and down.

[39] The officers moved McLeod from the confined hallway to a landing above the second floor stairway. At 7:13 a.m., MacDougall requested Emergency Medical Services ("EMS") to attend the scene. The call was made because he was concerned that McLeod now needed immediate medical attention.

[40] McLeod was placed in the recovery position. Douglas remained near McLeod's head to monitor his condition. While waiting for EMS to arrive, Douglas noted McLeod's skin tone change and he could no longer find a pulse. McLeod's handcuffs were removed. At 07:17, MacDonald contacted the OCC and advised that McLeod was now unresponsive.

[41] The officers moved McLeod to the main lobby of the Chilkoot Inn in order to facilitate medical treatment. At 7:19 a.m., as Douglas and Whiles prepared to perform emergency resuscitation, two EMS attendants arrived at the Chilkoot Inn.

[42] The EMS attendants found McLeod had a weak carotid pulse and began artificial respiration. The EMS attendants, with assistance from Douglas, transported McLeod to the hospital via ambulance. During transport, McLeod went into cardiac arrest.

[43] In the emergency room at Whitehorse General Hospital, medical staff made further resuscitation attempts. They continued their efforts until McLeod was pronounced dead at 8:06 a.m.

[44] The Chief Coroner of the Yukon sent McLeod's body to Vancouver for autopsy and blood analysis. The toxicology report prepared by the Provincial Toxicological Centre of British Columbia showed elevated and lethal levels of cocaine and its primary metabolite. The report was consistent with a lethal cocaine overdose.

[45] The autopsy conducted by Dr. Lee concluded that the principal cause of death of McLeod was cocaine intoxication. Dr. Lee's autopsy report provided the following comment:

> The combination of pre-existing heart disease, acute cocaine intoxication, and the stress of being subdued all likely contributed to his death. However, since all of these were as a result of his cocaine intoxication, the underlying cause of death is cocaine intoxication.

[46] The Coroner's Jury classified Mr. McLeod's death as accidental.

[47] As a result of their struggle with McLeod, MacDonald attended at Whitehorse General Hospital on or about August 30, 2008, to seek medical attention for a strained right hand. Taylor received numerous injuries including bruising on her arms, legs, and right side, above her right eye, a sore right shoulder, a sore head, and a cut on her right arm.

Evidence of the Plaintiff

[48] While Ms. Carlick did not file an affidavit in response to this specific application for summary judgment, it is appropriate to consider evidence put forward in the earlier summary judgment application cited above.

[49] At that time, counsel for Ms. Carlick was of the view that Dr. Lee was not provided with the full nature and extent of the neck restraints applied by the RCMP officers. Dr. Lee remained firm that the underlying cause of death was cocaine intoxication.

[50] Former counsel for Ms. Carlick obtained an expert report from Dr. John C. Butt, dated May 21, 2011. Dr. Butt is a fellow of the Royal College of Pathologists since 1973. He has taught a 2-day sudden death/forensic pathology program at the Canadian Police College in Ottawa in 1976 and was the principal resource in forensic pathology until 2003.

[51] Dr. Butt's report is a critique of Dr. Lee's report focussing specifically on his conclusion that the underlying cause of death was cocaine intoxication. The essence of Dr. Butt's 16-page report is his concluding opinion as follows:

> In my opinion the cause of death of Grant McLeod was:
>
> 1. a) Restraint related death with excited delirium
>
> (due to)
>
> b) Cocaine toxicity.

[52] Speaking generally, and earlier in his report, Dr. Butt said at p. 9:

> The paranoid psychotic manifestations of cocaine use are more commonly seen after long-term exposure and include bizarre and violent behavior, hyperthermia and sudden collapse. It is this alliteration of symptoms lately termed *excited delirium* which has been associated with sudden

> death and notably with use of force including restraint related deaths.

[53] Dr. Butt placed a great significance on the neck injuries and a fracture of the right laryngeal horn consistent with neck compression. In layman's terms, this refers to the larynx which is the upper part of the trachea or windpipe.

[54] He stated in reference to Dr. Lee's report, at p. 13:

> Little emphasis was provided on the neck injuries ('minor') and petechiae in the eyes. My conclusion from these findings is not that Macleod [sic] was fatally strangled but that he was restrained around the neck during a struggle with 2 or 3 persons. An attempt by one of them to apply a carotid sleeper hold resulted in good evidence of features of significant pressure in the wrong places of the neck (i.e., to effect the sleeper response) and reminding us of why – when two or more persons are struggling – this mechanism of restraint has generally been discredited because of the unpredictable outcome. Rather curiously, in the absence of any other options, Dr. Lee, perhaps to 'soften the blow', opines that the laryngeal cartilage injury: "*could be* due to use of a neck hold" and not that it *was due to a neck hold.* (my emphasis)

[55] Petechiae refer to an indication of bleeding.

[56] Dr. Butt also opined, at pp. 14 and 15, that:

> Within the historical information available about the demise of McLeod are the *important clues* to this particular type of fatality, one commonly fatal in cocaine users and particularly with those who have chronically abused cocaine. Paranoid, excited, bizarre behavior in cocaine abusers especially those that are restrained or struggle, that flee or run around, has let to many sudden deaths. This is universally recognized and for at least 20 years, *excited delirium* has been the subject of numerous recurring medical reports, reviews, chapters in textbooks and has featured widely in the popular daily press and magazines.
>
> …

> *Excited delirium and restraint related death* have become the basis for significant changes in police protocols which now generally invoke concurrent attendance of emergency medical services. The consequences of ignoring or failing to understand the behaviour of excited delirium results in:
>
> - Loss time during a medical emergency;
> - Escalation of restraint/use of force and
> - Inadequate life-saving through poor or nonexistent protocols. (my emphasis)

The Law of Misfeasance

[57] *Roncarelli v. Duplessis*, [1959] S.C.R. 121, is a Canadian case that found the Premier of Quebec liable for gross abuse of legal power when he revoked the liquor licence of Roncarelli for supporting the Jehovah's Witnesses. It is seminal in the sense that it is recognized as the first case to establish misfeasance in public office as a tort in Canada.

[58] Subsequently, in *Gershman v. Manitoba (Vegetable Producers' Marketing Board)*, [1976] 4 W.W.R. 406 (Man. C.A.), the Manitoba Court of Appeal applied *Roncarelli,* among other grounds, confirming that a citizen has an action for damages resulting from "a flagrant abuse of power aimed at him."

[59] The law has continued to evolve, and more recently, in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 ("*Odhavji*"), the Court formalized the analytical framework for the tort of misfeasance in public office. Odhavji was fatally shot by police officers while running from his vehicle subsequent to a bank robbery. The actions at issue in the appeal were not related to the allegedly wrongful death but rather based on the assertion that the defendant officers intentionally breached their statutory obligation to cooperate with the Special Investigations Unit ("SIU") and that the lack of a thorough

investigation caused the plaintiffs to suffer mental illness, anger, depression and anxiety.

[60] Starting at para. 18, Iacobucci J. set out the defining elements of the tort, relying on jurisprudence from other commonwealth jurisdictions. There are two categories of the tort (para. 22). Category A considers conduct by a public officer that is specifically intended to injure a person or class of persons. Category B involves a public officer who acts knowing that he is doing so in an excess of authority and knowing that his actions are likely to injury the plaintiff. It is the latter category that applies to this case, and the two constituent elements of the tort of misfeasance as it applies to Ms. Carlick are:

1. the public officer must have engaged in deliberate and unlawful conduct in his or her capacity as a public officer; and
2. the public officer must have been aware that his or her conduct was unlawful and that it was likely to harm the plaintiff.

[61] The plaintiff must prove the two ingredients of the tort independently of one another.

[62] In fleshing out the policy behind these two independent elements, Iacobucci J. stated at para. 28:

> … Knowledge of harm is thus an insufficient basis on which to conclude that the defendant has acted in bad faith or dishonestly. A public officer may in good faith make a decision that she or he knows to be adverse to interests of certain members of the public. In order for the conduct to fall within the scope of the tort, the officer must deliberately engage in conduct that he or she knows to be inconsistent with the obligations of the office.

[63] Similarly, at para. 29:

> … Liability does not attach to each officer who blatantly disregards his or her official duty, but only to a public officer who, in addition, demonstrates a conscious disregard for the interests of those who will be affected by the misconduct in question. This requirement establishes the required nexus between the parties. …

[64] The distinguishing feature between negligence and misfeasance in public office is that the latter is significantly more blameworthy in that it is a misuse of public power or conscious maladministration.

Summary Judgment Applications

[65] Rule 18(6) of the *Rules of Court* states:

> In an action in which an appearance has been entered, the defendant may, on the ground there is no merit in the whole or part of the claim, apply to the court for judgment on an affidavit setting out the facts verifying the defendant's contention that there is no merit in the whole or part of the claim and stating that the deponent knows of no facts which would substantiate the whole or part of the claim.

[66] On an application under Rule 18, the test to be met is whether there is a *bona fide* or genuine issue to be tried on the material before the court in the context of the applicable law. The test is set out in *Skybridge Investments Ltd. v. Metro Motors Ltd.,* 2006 BCCA 500:

> 10 A judge hearing an application pursuant to Rule 18(6) must: examine the pleaded facts to determine which causes of action they may support; identify the essential elements required to be proved at trial in order to succeed on each cause of action; and determine if sufficient material facts have been pleaded to support each element of a given cause of action.
>
> 11 If <u>insufficient</u> material facts have been pleaded to support every element of a cause of action, then beyond a doubt that cause of action is bound to fail and a defendant

> bringing an application pursuant to Rule 18(6) will have met the onus to negative the existence of a *bona fide* triable issue.
>
> 12 If sufficient material facts have been pleaded to support every element of a cause of action, but one or more of those pleaded material facts are contested, then the judge ruling on a Rule 18(6) application is not to weigh the evidence to determine the issue of fact for the purpose of the application. The judge's function is limited to a determination as to whether a *bona fide* triable issue arises on the material before the court in the context of the applicable law. If a judge ruling on a Rule 18(6) application must assess and weigh the evidence to arrive at a summary judgment, the "plain and obvious" or "beyond a doubt" test has not been met.
>
> 13 On appeal, as on the application in chambers, the question addressed in a Rule 18(6) application of whether there is a *bona fide* issue to be tried must be decided assuming that the uncontested material facts as pleaded by the plaintiff are true: *Van Den Akker v. Naudi*, [1997] B.C.J. No. 1649, 1997 CarswellBC 1470 (WeC) (C.A.). (emphasis already added)

[67] In a summary judgment application under Rule 18, the court can only accept uncontested material facts as true. This is unlike an application under Rule 20(26) (as disclosing no reasonable claim), where the court acts on the basis that all the facts alleged in the pleadings are true. In *Canada (Attorney General) v. Lameman*, 2008 SCC 14, at para. 10 (“*Lameman*”), the Court stated that the summary judgment rule serves an important purpose in the civil litigation system in preventing claims or defences that have no chance of success from proceeding to trial. The Court also stated while claims that have no chance of success should be weeded out at any early stage, claims disclosing real issues should proceed to trial.

[68] The Court went on to say in para. 11 that the bar on motions for summary judgment is high and set out the burden on the defendants as follows, which I repeat omitting the authorities cited:

> 1. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is “no genuine issue of material fact requiring trial”. The defendant must prove this; it cannot rely on mere allegations or the pleadings.
>
> 2. If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal.
>
> 3. Each side must “put its best foot forward” with respect to the existence or non-existence of material issues to be tried.
>
> 4. The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts.

[69] The Court concluded in *Lameman* that a motion for summary judgment must be judged on the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future.

ISSUES

[70] There are two issues to be addressed:

1. Has the plaintiff pleaded sufficient material facts to support every element of the cause of action?
2. If sufficient material facts have been pleaded to support every element of the cause of action, does a *bona fide* triable issue arise on the material before the court?

ANALYSIS

[71] Counsel for the defendants submits that the RCMP officers not only acted lawfully in taking Mr. McLeod into custody, but had a duty to do so.

[72] Section 18 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 states:

> It is the duty of members who are peace officers, subject to the orders of the Commissioner,
>
> > (a) to perform all duties that are assigned to peace officers in relation to the preservation of the peace, the prevention of crime and of offences against the laws of Canada and the laws in force in any province in which they may be employed, and the apprehension of criminals and offenders and others who may be lawfully taken into custody;
> >
> > (b) to execute all warrants, and perform all duties and services in relation thereto, that may, under this Act or the laws of Canada or the laws in force in any province, be lawfully executed and performed by peace officers;
> >
> > …

[73] Section 8 of the *Mental Health Act*, states:

> 8(1) A peace officer may take a person into custody if at least one of the following conditions applies
>
> > (a) The peace officer believes on reasonable grounds that the person as a result of a mental disorder
> >
> > > (i) is threatening or attempting to cause bodily harm to themselves or has recently done so,
> > >
> > > (ii) is behaving violently towards another person or has recently done so, or
> > >
> > > (iii) is causing another person to fear bodily harm or has recently done so,

> and the peace officer further believes on reasonable grounds that the person as a result of the mental disorder is likely to cause serious bodily harm to themselves or to another person; or
>
> (b) The peace officer believes on reasonable grounds that the person as a result of the mental disorder shows or has recently shown a lack of ability to care for themselves and the peace officer further believes on reasonable grounds that the person as a result of the mental disorder is likely to suffer impending serious physical impairment.
>
> (2) A peace officer who has taken someone into custody pursuant to subsection (1), shall immediately take that person to a physician or a health facility and shall
>
> (a) provide the physician or person in charge of the health facility with a written statement setting out the circumstances that led them to take the person into custody; and
>
> (b) remain at the place of examination and retain custody of the person until the examination under section 10 is completed, or the physician or health facility accepts custody of the person.

[74] It is my view that the defendants have met their initial evidentiary burden of showing that there is no genuine issue of material fact requiring a trial. It now falls on the plaintiff to respond, and the opinion of Dr. Butt must be considered in this context. The ultimate burden of proving that there is no triable issue still remains with the defendants.

Issue 1: Has the plaintiff pleaded sufficient material facts to support every element of the cause of action?

[75] As stated in *Odhavji*, the RCMP defendants, to fall within the scope of the tort of misfeasance in public office, must first be found to have deliberately engaged in conduct that they know is inconsistent with the obligations of office.

[76] The plaintiff has pleaded the material fact that the officers restrained Mr. McLeod with excessive and deadly force, strangled him and failed to provide timely first aid and medical care. The pleading also alleges that they knew their conduct was unlawful.

[77] The second element of misfeasance is establishing the nexus between the parties in that the pleadings must set out the material facts that demonstrate a conscious disregard for those who will be affected by the application of deadly force. The Amended Statement of Claim simply states that Ms. Carlick is the daughter of the deceased coupled with the conclusory allegation that the defendants were aware that their conduct was unlawful and likely to injure the plaintiff.

[78] In my view, there is no pleading of any material fact that would suggest that the RCMP officers were deliberate, knew their conduct was unlawful or that their actions had any nexus with, or knowledge of Mr. McLeod's daughter. The plaintiff has not pleaded any law that would contradict s. 8 of the *Royal Canadian Mounted Police Act* or s. 8 of the *Mental Health Act* which establishes the lawfulness of the RCMP action in arresting Mr. McLeod.

[79] It could certainly be a triable issue under the *Fatal Accidents Act* whether the RCMP officers negligently applied force to Mr. McLeod as they attempted to bring him under control. But assuming misfeasance in public office is not covered by the *Fatal Accidents Act*, the pleadings must plead a material fact that shows the RCMP officers knew that their actions were unlawful. A bare conclusory pleading devoid of a material fact is insufficient.

[80] An allegation of deliberate strangulation would satisfy the requirement of pleading deliberate and unlawful conduct. However, the undisputed fact is that there

was no strangulation of Mr. McLeod. This conclusion was reached by both Dr. Lee and Dr. Butt.

[81] Even if I accept that the defendants knew their actions were likely to harm Mr. McLeod and knew that his daughter was likely to be consequentially harmed as well, as stated by Iacobucci J. in *Odhavji*, the knowledge of harm to a person is not sufficient. There must be knowledge that the conduct leading to the harm is inconsistent with the obligations of the public office held.

[82] I am satisfied that the Amended Statement of Claim should be struck on the basis of no material facts being pleaded to establish the knowledge of unlawfulness of the RCMP actions and that it would likely harm or injure Ms. Carlick.

Issue 2: If sufficient material facts have been pleaded to support every element of the cause of action, does a *bona fide* triable issue arise on the material before the court?

[83] In the event that I have erred in finding that the plaintiff has not pleaded sufficient material facts to support the knowledge element of a claim of misfeasance in public office, have the defendants met the evidentiary burden of showing that there is “no genuine” issue of material facts requiring trial?

[84] The defendants seek summary judgment on the basis that there is no genuine triable issue. They submit that the uncontested material evidence shows that the police officers were acting within the scope of their statutory and common law authority. They have broken their analysis down into three questions.

a) Did the police have the jurisdiction to arrest Mr. McLeod under the *Mental Health Act*?

[85] In order to exercise their arrest power under the *Mental Health Act,* the defendants must have believed on reasonable grounds that Mr. McLeod had a mental disorder, that he was causing another person to fear bodily harm, and that he was likely to cause serious bodily harm to themselves or another person. The uncontradicted evidence is that the RCMP officers received a request for immediate police assistance from the front desk clerk at the Chilkoot Inn who was afraid of a large man in the lobby, who appeared to have a needle in his hand, staggering around. The desk clerk, hiding behind locked shutters at the front desk, identified the man, who was unknown to the two attending police officers. The officers reported that he was 6'2" or 6'3", dishevelled, rubbing his hair and bobbing his head. He was wearing only one shoe and bleeding from his bare foot. He did not respond to the officers' request to talk and proceeded to the second floor of the Chilkoot Inn. The two police officers radioed for assistance of another police officer.

[86] Mr. McLeod walked to the end of the hallway and opened the emergency exit, put his head out and came back along the hall approaching the two officers. He appeared to look "right through" the officers and uttered words to the effect of "the Father, Son and Holy Ghost" and appeared to be in pain.

[87] In my view, these facts provide reasonable grounds for taking a person into custody under the *Mental Health Act*. I conclude that there is no genuine triable issue on the reasonable grounds to take Mr. McLeod into custody under the *Mental Health Act*.

b) Was the force used reasonable and appropriate in the circumstances?

[88] Mr. McLeod actively resisted the officers' attempts to take him into custody. The police officers could not handcuff him and the two officers and Mr. McLeod fell to the

floor in the narrow hallway. The officers did not have control of the situation and called out the 10-33 code indicating they were in distress and needed assistance. Neither officer felt capable of using their baton or OC spray to control Mr. McLeod. Taylor was thrown into the wall and her head struck the floor a number of times. Taylor believed she was justified in attempting to apply a vascular neck restraint at this point. She was not successful.

[89] A guest in the hotel opened the door to his room and attempted to help the officers. It was not until three more officers arrived that Mr. McLeod was brought under control. Moran placed his knee on Mr. McLeod's head and the others successfully handcuffed him.

[90] The opinion of Dr. Butt must be considered at this stage. His opinion evidence suggests that:

1. The RCMP officers should have known that they were dealing with a person under the influence of cocaine and exhibited excited delirium; and
2. That the use of a neck hold or attempting the carotid sleeper hold in a situation of excited delirium is discredited because of its unpredictable outcome.

[91] The opinion of Dr. Butt does not create a genuine triable issue for misfeasance in public office. It does not address the required deliberate unlawful conduct. As stated in *Lameman*, speculation in what might be pleaded or proven is not enough. The expert opinion of Dr. Butt cannot be imputed to be the knowledge of the RCMP officers to raise a negligence or wrongful death claim to the intentional tort of misfeasance in public office.

[92] The use of force that police officers are permitted to use must be considered to be appropriate as to proportionately, necessity and reasonableness. See *R. v. Nasogaluak,* 2010 SCC 6, where the Supreme Court stated at para. 35:

> Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in R. v. Bottrell (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):
>
> > In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

[93] In my view, the RCMP officers began with talking, escalated to taking Mr. McLeod down when he refused to cooperate and attempted to apply the vascular neck restraint.

[94] In their evidence, they felt their use of force was justified and objectively, based as well on the hotel guest assisting them, it appears to have been reasonable and appropriate.

[95] I add that there is no evidence to suggest that they knew that they did not have reasonable grounds or that they knew their force was unreasonable or excessive.

c) Did the defendants monitor Mr. McLeod’s condition and provide timely emergency medical assistance?

[96] After he was taken into custody, the intention was to take Mr. McLeod to the hospital for medical assistance. He was breathing and had a pulse. The officers

searched him. They noticed that he was having trouble breathing, placed him in the recovery position and called the EMS.

[97] The opinion of Dr. Butt must be considered on this issue as he suggests that the RCMP officers should have recognized the “excited delirium” condition of Mr. McLeod and should have called EMS at the same time as additional RCMP manpower. Once again, this is not pleaded and it suggests a standard that exceeds the statutory requirement of s. 8(2) of the *Mental Health Act* which requires medical aid subsequent to taking the person into custody.

[98] I conclude that the intention and deliberateness required for misfeasance on the provision of emergency medical assistance is not a *bona fide* triable issue on the evidence.

d) Is there any evidence or fact that indicates the defendants knowingly acted beyond their reasonable grounds, reasonable and appropriate use of force or that they intended to harm Mr. McLeod?

[99] As indicated in *Lameman*, the plaintiff must put some evidence or facts before the court to refute or challenge the facts raised by the defendants. Neither the plaintiff nor her former counsel provided any factual basis that the defendants knowingly acted unlawfully or knowingly intended to harm Elycia Carlick.

CONCLUSION

[100] I conclude that there is no evidence from the plaintiff to raise a *bona fide* triable issue that the RCMP officers knew they were acting unlawfully and that such conduct would harm Mr. McLeod or Ms. Carlick. The evidence could support a claim in

negligence and wrongful death but that claim was filed after the expiry of the limitation period and dismissed as previously discussed.

[101] I conclude that both the pleadings and the evidence before the Court are insufficient to establish a genuine triable issue on the claim of misfeasance in public office.

[102] I grant the defendants' summary judgment application and dismiss the plaintiff's claim of misfeasance in public office.

VEALE J.