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J.B. v. Ontario: Duty of Care in the Context of Child Protection Cases

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In *J.B. v. Ontario (Child and Youth Services)*, the Court of Appeal for Ontario dismissed appeals in six actions brought by parents and family members of children who were the subject of child welfare investigations and proceedings impacted by allegedly faulty drug testing conducted by the Motherisk Drug Testing Laboratory at the Hospital for Sick Children.[2] As against the Government of Ontario, the Court of Appeal also dismissed actions by children who were the subjects of those proceedings and investigations. The Court of Appeal upheld the lower court's decision that agencies acting within the child welfare system owe a duty of care only to the children they serve and not to their parents or family members. The Court also held that Ontario does not owe a private law duty of care to children who are the subject of child welfare investigations and proceedings.

Background

The events which gave rise to the claims are widely known. The Motherisk Lab conducted hair follicle testing for suspected alcohol and drug abuse. These results were used in family and criminal cases as well as in child welfare investigations and proceedings. In response to concerns raised in *R. v. Broomfield*[3] that the test results were flawed, Ontario, by way of an independent review, inquired into the reliability of the lab's test results between 2005 and 2015. The Honourable Susan Lang conducted the review and delivered a report dealing with, among other things, the reliability of the hair strand tests conducted at the lab between 2005 and 2015. Ontario subsequently established the Motherisk Commission as an independent mechanism of inquiry in 2016 to review various cases and to produce a report.

The Parties

In 2016 and 2017, family members of children who were subject to protection proceedings by their local Children's Aid Societies (CASs) brought claims against several parties including the CASs, some employees, and Ontario. In some of these actions, the Plaintiffs included the children who were the subject of investigations and proceedings. Ontario was named as a defendant in seven individual claims.[4] The Plaintiffs argued that Ontario was negligent in its oversight of the relevant CASs, the Motherisk Lab, and the Motherisk Commission. The Plaintiffs

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[2] *J.B. v. Ontario (Child and Youth Services)*, 2020 ONCA 198 [*J.B.*]. Plaintiffs have sought leave to appeal to SCC as of May 2020.
[3] *R v. Broomfield*, 2014 ONCA 725.
[4] The motion judge had considered all seven actions; however, only six became the subject of the appeal.

also alleged that Ontario had violated their *Canadian Charter of Rights and Freedoms* rights.

Ontario brought Rule 21 motions to strike the claims against it because it was plain and obvious that they could not succeed. The CAS defendants brought similar motions vis-à-vis the family-member Plaintiffs but not against the child Plaintiffs who were the subjects of the child welfare proceedings.[5] D.A. Wilson J. granted the motions.[6] She concluded that neither the CASs nor Ontario owed duties of care to the parents or family members of children dealt with under the *Child and Family Services Act*.[7] The motion judge also found that Ontario did not owe a duty of care to the children as its oversight role did not give rise to a relationship of proximity sufficient to ground a duty of care. Further, the motion judge found that, while Ontario has a broad duty to the public at large for the regulation of hospitals and laboratories, that broad public duty did not give rise to a private law duty of care owed to any specific individuals. D.A. Wilson J. also held that Ontario is immune from claims based on direct liability in tort. The actions did not make any claims against specific Crown employees, but rather the allegations were directly against Ontario.[8] As such, the claims were also struck on the basis that there can be no direct liability as against the Crown.[9] As a result, Ontario could not be liable with respect to the operation of the Motherisk Lab. The motion judge also dismissed the *Charter* claims and found that certain of the actions were largely abuses of process.

The Appeal

The Plaintiffs appealed every aspect of the decision. They alleged that the motion judge erred by (a) not properly applying the *Anns* test; (b) rejecting the claim for bad faith; (c) striking the claims under s. 7 of the *Charter*; and (d) determining that certain claims were an abuse of process. One of the Appellants also alleged that the judge erred in dismissing claims for breach of fiduciary duty and breach of s. 35(1) of the *Constitution Act, 1982*.[10] The Court of Appeal upheld the motion decision.

With respect to the alleged duty of care owed by the CASs and Ontario to the family members, Benotto J.A, writing for the Court, found that "the law is settled."[11] The duty owed by a CAS is to the child, not to child's parents or family, whether during the investigation or proceeding stage of a child welfare matter.[12] Benotto J.A. found that the law in this regard had been settled since the Supreme Court of Canada's decision in *Syl Apps Secure Treatment Centre v.*

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[5] Claims brought by children apprehended as a result of protection proceedings were excluded from the r. 21 motion. The child-plaintiffs' actions against the CAS, as well as all of the Plaintiffs' claims (the Appellants and the child-plaintiffs) against SickKids and the director and the manager of the Motherisk Lab continue.
[6] *CR v. Ontario*, 2019 ONSC 2734 at para. 165 [*CR*].
[7] *Child and Family Services Act*, R.S.O. 1990, c. C.11 [*CFSA*].
[8] *CR* at paras. 93-95.
[9] *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27 (repealed). Also see section 8 of the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17. *Canada (Attorney General) v. Thouin*, 2017 SCC 46, [2017] 2 SCR 184.
[10] *J.B.* at para. 21.
[11] *J.B.* at para. 42.
[12] *Ibid*. The finding has been affirmed in other cases, see *H.A.G. v. Family and Children's Services Niagara*, 2017 ONCA 861, leave to appeal refused [2018] SCCA No. 181.

B.D.[13] Benotto J.A. noted that *Syl Apps* centered on "the potential for conflicting duties under child protection legislation" which "negated a duty of care to the child's parents or family members."[14] The Court found that the potential conflict existed in the context of any entity which existed to protect and provide for children's best interests. It rejected the Appellants' argument that *Syl Apps* was limited to the fact-specific context of a duty of care owed by a treatment center and its employees.[15]

With respect to the claim that Ontario owed a duty of care to the children, the Court held that Ontario, pursuant to the *CFSA*, owed a general duty to the public and not to specific individuals. Relying on *Odhavji Estate*,[16] the Court found that Ontario's lack of direct involvement in the CAS proceedings "weaken[ed] the nexus" which could give rise to a relationship of proximity.[17]

The Appellant J.B's allegation that the motion judge erred in striking the claims against Ontario relating to the supervision of the Motherisk Lab were also dismissed.[18] The Court rejected the claim that the *Public Hospitals Act*[19] or the *Laboratory and Specimen Collection Centre Licensing Act*[20] give rise to private law duties owed to individuals.[21] The Court found that both statutes imposed general duties owed to the public, but that those general duties did not give rise to private law duties of care. Put another way, the Acts did not give rise to a relationship of proximity, nor were there any allegations of specific interactions which would ground such a duty.

The Court went on to dismiss the remaining grounds of appeal. The Court held that the remaining allegations depended on the negligence claims. The Court, relying on *Alberta v. Elder Advocates of Alberta Society*,[22] found that an allegation of bad faith "bootstrapped to the duty of care claim, cannot survive on its own when the plea of negligence is struck."[23] Thus, the Appellants' appeal with respect to bad faith was dismissed, as were their arguments that an allegation of bad faith changes the duty of care analysis. The Court found that this argument conflated the duty of care and the standard of care — two distinct components of a claim of negligence.[24]

The Court also rejected the argument that the Appellant's s. 7 *Charter* rights were infringed by the collection of bodily samples for testing and by the use of test results by the relevant CASs. The Court found that the basis of these claims was also negligence and that the motion judge had not erred in dismissing what were effectively negligence claims "dressed up as

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[13] *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83 [*Syl Apps*].
[14] *J.B.* at para. 36; citing *Syl Apps* at para. 20.
[15] *J.B.* at para. 39.
[16] *Odhavji Estate v. Woodhouse*, 2003 SCC 69, at para. 70 [*Odhavji Estate*].
[17] *J.B.* at para. 53.
[18] *J.B.* at para. 45.
[19] *Public Hospitals Act*, R.S.O. 1990, c. P.40.
[20] *Laboratory and Specimen Collection Centre Licensing Act*, R.S.O. 1990, c. L.1.
[21] *J.B.* at para. 47.
[22] *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24.
[23] *J.B.* at para. 56 citing *Alberta v. Elder Advocates of Alberta Society* at para. 77.
[24] *J.B.* at para. 57.

Charter breaches."[25]

The Court then turned to the *Charter* claims with respect to the Motherisk Commission, finding there was no deprivation of life, liberty or security of the person at stake with the establishment of the Motherisk Commission; in fact, the Commission provided assistance and support to individuals affected by the Motherisk testing. The Court also found that, in any event, the Commission had considerable latitude to adopt the policies and procedures it viewed as most effective and efficient to fulfil its mandate.

The Appellants also advanced a new s. 8 *Charter* claim (unreasonable search and seizure of hair) against the CASs. The Court declined to address those claims because they had been raised for the first time on appeal.

Lastly, one of the Appellants, J.B., claimed against both the CAS of Waterloo and Ontario on the basis of breach of fiduciary duty, and against Ontario for breach of treaty rights enshrined in s. 35(1) of the *Constitution Act, 1982*. The Court, in dismissing the appeal on these grounds, relied on the same reasoning it used to dismiss the negligence claims. J.B. was the father of a child dealt with under the *CFSA*. The motion judge was correct in finding that any fiduciary duty would have been owed to the child, not to J.B. Similarly, the Court found that any duty which possibly arose from s. 37(4) of the *CFSA* would be owed to the child, not the parent.[26]

Conclusion

J.B. v. Ontario (Child and Youth Services) provides definitive guidance as to the application of *Syl Apps* in Ontario. A duty owed to children in child protection matters negates any potential duty of care owed to the parents or family members. Negligence-based claims brought by parents or family members with respect to child welfare investigations and proceedings have little chance of success. Similarly, those individuals will have little chance of success advancing other torts which are, in effect, negligence claims in disguise. Finally, this case reinforces that, absent some specific interaction between the Plaintiff and Ontario, Ontario likely does not owe a private law duty of care. Statutes that impose general duties owed to the public at large do not thereby impose private law duties of care.

[25] *J.B.* at para. 60.
[26] *J.B.* at paras. 75-76.