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Can I Sue for That?: Civil Suits Against Regulators

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Regulators in Ontario enjoy several different types of immunities from legal challenges, including immunity from being sued in negligence for acts undertaken in good faith. Generally, the courts have judiciously protected immunities in order to spare regulators undue interference in their processes, which are designed to protect the public interest. But the legal protections for regulators do not extend to bad faith conduct, and a new case from British Columbia, *Thmbran*, may have lowered the bar for what a court is willing to consider bad faith, at least at the preliminary phase on a motion to strike as disclosing no reasonable cause of action.

i. Protecting Regulatory Activity: Statutory Immunities

In Ontario, a combination of legislation and common law has narrowed the private causes of action available to private litigants against regulators. For example, it is now established that a college cannot be held vicariously liable for the acts of practitioners that it has registered or licensed.[1] A college also cannot be construed, for the most part, as a fiduciary to the members of the public that it is protecting.[2] Courts have consistently declined to acknowledge the existence of a duty of care, a necessary element of a negligence claim, between a regulator and a member of the public or of the profession.

Health colleges covered under the *Regulated Health Professions Act* ("*RHPA*") are also statutorily immunized from negligence claims.[3] Section 38(1) of the *RHPA* prohibits actions against health colleges, committees, staff and committee members, including but not limited to negligence, if the conduct was undertaken within the scope of the *Act* and in good faith. The governing statutes of many other regulators, including the Law Society of Ontario,[4] the College of Early Childhood Educators,[5] and the College of Social Workers and Social Service Workers,[6] include similar immunity provisions.

The general idea behind the statutory immunity can be considered a principle of non-interference. The legislature has opted to immunize regulatory activity in various ways in order to prevent undue interference with regulatory processes that are designed to protect the public. Statutory prohibitions also give regulators breathing room to balance multiple competing priorities and interests.[7] Protecting regulators from negligence claims underpinned by good faith acts, for example, helps to ensure that they can balance the interests of multiple stakeholders, and do not have to labour under a paramount duty to an individual licensee or a member of the public.[8]

ii. Challenging Regulatory Activity: Bad Faith Conduct and Malicious Prosecution

Statutory immunities are a powerful tool to deflect legal challenges to regulatory activity, but they are not boundless. First, they are internally limited. The provisions protect only regulatory activities undertaken in good faith and in the performance or intended performance of a duty of the exercise of a power or intended power under the *Act*, and they only prevent suits seeking damages against regulators (*i.e.,* financial relief). Immunity clauses do nothing to prevent plaintiffs and applicants from seeking other forms of relief against regulators, such as declarations, injunctions and judicial review.[9]

Second, immunity clauses do not oust liability for regulators for acts undertaken in bad faith. Negligence is an "unintentional tort", meaning a plaintiff does not have to prove that the defendant acted in bad faith or with an improper motive. Statutory immunity provisions reflect the legislature's desire to shield regulators and their staff from potential liability arising from unintentional wrongdoing, but liability for *intentional* wrongdoing is still sometimes available.

Under this umbrella, a variety of tort claims against regulators remain on the table, though it is important to note that the case law in Ontario is not particularly well developed. Malicious prosecution and misfeasance of public office – a tort also referred to as abuse of public office or abuse of statutory power[10] – are two such causes of action.[11] Seeing as the statutory immunity in negligence is limited to good faith acts, a court may set the immunity aside if the plaintiff or applicant can show bad faith or motive.[12] Misfeasance of public office and malicious prosecution claims both require the plaintiff to show that the defendant acted with "malice or intent".[13] The legal standard for both torts is relatively strict. For example, in order to demonstrate bad faith, the plaintiff or applicant must show a "deliberate and dishonest wrongful abuse of the powers given to a public officer, coupled with the knowledge that the misconduct is likely to injure the plaintiff".[14]

iii. Thmbran: BCSC Unwilling to Dismiss Allegations Outright

In *Thmbran v the British Columbia College of Nurses and Midwives (BCCNM)*, released in March 2024, the British Columbia Supreme Court ("BCSC") preserved several tort claims against a regulator on a motion to strike.[15] A registered nurse brought a claim for civil and *Charter* damages against the College of Nurses and Midwives ("College"), the College inspector, the College's legal counsel, the College's Inquiry Committee and the BC Ministry of Health, alleging that the defendants had engaged in bad faith and "malicious use of process" when handling a professional misconduct complaint.[16] The plaintiff was formerly the Director of Care at a senior citizens residence, and the complaint stated that the plaintiff had failed to report the sexual assault of one resident by another resident before she went off on an extended health leave. In her civil suit, the plaintiff claimed that she had been wrongfully targeted by the College, used as a scapegoat in order to cover up or avoid confronting the mishandling of the incident by other College members, and coerced and targeted by the College's investigator and legal counsel.[17] She sought damages for a variety of torts, including conspiracy, civil fraud and deceit, defamation and intentional infliction of emotional distress. The defendants moved to strike or dismiss the claim on the basis of statutory immunity.

The court struck most of the claims, but found that the pleadings were sufficient to ground an ongoing claim against the College for bad faith and malicious prosecution. The court found that the defendants had engaged in a wide range of unfair conduct, including ignoring multiple requests by the plaintiff to particularize the allegations, offering different versions of the underlying facts that led to the complaint, and failing to inform the plaintiff why the College cancelled a Discipline Committee hearing three weeks before it was set to begin and unilaterally resolved the complaint by way of a Letter of Expectation ("LOE"), which is now part of the plaintiff's permanent employee record. The College also tried several times to get the plaintiff to sign a consent order making findings of fact against her and disposing of the claim prior to the hearing. She refused, and insisted on her right to be heard.

Finally, the court noted that the plaintiff could point to a variety of procedural fairness issues if she converted elements of the civil action to a judicial review, including:

the apparent arbitrariness of the process, the ever-changing "facts" and dates, and the significantly different consent orders offered with the significantly different penalties on the same facts [which] all point to procedural unfairness (and perhaps bad faith). It is further open to [the plaintiffs] to argue that the final resolution [of the complaint, via the LOE] was procedurally unfair (and perhaps in bad faith), as it robbed [the plaintiff] of proper notice, the opportunity to clear her name (which the College knew she wanted), made final findings of "fact" that the College knew she refuted, and took away from her any avenue of review or appeal.[18]

The plaintiff in *Thmbran* has a long way to go to prove her claims against the College on the merits. But the ruling shows that courts may be reluctant to dismiss claims out of hand when it is critical of a regulator's conduct. The court took issue with several aspects of

the process and disposition of the complaint against the plaintiff, including that the LOE made final findings of fact against her after she expressed a desire for a hearing. Further, the court refused to dismiss the claim of misfeasance against the College's legal counsel, on the basis that she was present during meetings of the Inquiry Committee in which strategic decisions, of which the court disapproved, were being made.[19] Overall, the case is a strong example of judicial reticence to strike civil claims against regulators at the preliminary phase if the court believes that the regulator's conduct may have been offside.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[1] Richard Steinecke et al, *A Complete Guide to the* Regulated Health Professions Act (Toronto: Thomson Reuters, 2024) at §2.12 ["Steinecke"], citing *Street v Ontario Racing Commission*, 2008 ONCA 10.

[2] *Ibid,* citing *Howatt v College of Physicians and Surgeons (Ontario)*, [2005] O.J. No. 1380.

[3] *1991,* S.O. 1991, c. 18.

[4] *Law Society Act*, R.S.O. 1990, c.L.8, s 9.

[5] *Early Childhood Educators Act, 2007*, S.O. 2007, c. 7, Sched. 8, s 50.

[6] *Social Work and Social Service Work Act, 1998*, S.O. 1998, c. 31, s 49.

[7] Steinecke, *supra* note 1 at §2.12.

[8] *Ibid.*

[9] *Ibid.*

[10] *Conway v Law Society of Upper Canada*, 2016 ONCA 72 at para 20 ["*Conway*"].

[11] See *e.g.*, *Finney v Barreau du Quebec*, 2004 SCC 36 and *Stoffman v Ontario Veterinary Assn*, 73 O.R. (2d) 737 (Div Ct), *Robson v Law Society of Upper Canada*, 2016 ONSC 5579.

[12] *Conway, supra* note 10 at para 22.

[13] *Ibid*; *Drainville v Vilchez,* 2014 ONSC 4060 at para 16.

[14] *Ibid* at para 20, citing *Odhavji Estate v Woodhouse*, 2003 SCC 69 at para 28.

[15] 2024 BCSC 441 ["*Thmbran*"].

[16] The court, interpreting the pleadings generously and with an eye to the fact that the plaintiff was self-represented, determined that "malicious use of process" was a claim for malicious prosecution: *ibid* at para 95.

[17] *Thmbran, supra* note 14 at paras 2, 43.

[18] *Ibid* at para 92.

[19] *Ibid* at paras 127-128.

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