COURT OF APPEAL FOR ONTARIO

CITATION: Rivard v. Ontario, 2025 ONCA 100
DATE: 20250213
DOCKET: COA-24-CV-0536

George, Favreau and Gomery JJ.A.

BETWEEN

Donald Rivard

Plaintiff (Respondent)

and

His Majesty the King in Right of Ontario,
Kingston Police*, the Chief of Kingston Police*,
the Attorney General of Ontario,
and Unknown Officers of the Kingston Police

Defendants (Appellants*)

Stuart Zacharias, for the appellants, Kingston Police Services Board and the Chief of Kingston Police

Raymond Boggs, for the respondent, Donald Rivard

Heard: December 20, 2024

On appeal from the order of the Divisional Court (Justices John R. McCarthy, Elizabeth C. Sheard, and Paul B. Schabas), dated November 23, 2023, with reasons reported at 2023 ONSC 6627, allowing an appeal in part from an order of Justice John M. Johnston of the Superior Court of Justice, dated January 24, 2023.

Gomery J.A.:

[1] This appeal concerns what must be pled to advance a negligence action against a chief of police and a police services board. The respondent Donald Rivard alleges that he was assaulted and permanently maimed by police officers employed by the Kingston Police Service during his arrest in

September 2018, and that the appellants, the Kingston Chief of Police and Kingston Police Services Board are directly liable for his damages based on their failure to comply with their duties under the *Police Services Act*, R.S.O. 1990, c. P.15 then in force.[1] Justice McCarthy, writing for the Divisional Court, found that Mr. Rivard was advancing tenable claims and that the material allegations of fact in his pleading were sufficient to allow them to proceed. In doing so, he declined to find that the motion judge erred in his reliance on a decision staying criminal charges against Mr. Rivard due to police officers having violated his rights under the *Canadian Charter of Rights and Freedoms* during his arrest.

[2] For the reasons that follow, I would grant the Board's appeal but dismiss the appeal by the Chief of Police.

Background

[3] On September 7, 2018, Kingston police officers arrested Donald Rivard and his girlfriend, Britney Conklin, and charged them with possession of fentanyl and cocaine for the purpose of trafficking based on drugs found during a search of the truck they were driving when they were stopped by the police.

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[1] In the original version of Mr. Rivard's Statement of Claim in this action, the "Kingston Police" was named as a defendant. In the Fresh as Amended Statement of Claim now before this court, the named defendants to the action are the Kingston Police Services Board (the "Board"), the Chief of the Kingston Police (the "Chief"), and Unknown Officers of the Kingston Police Services. I will use the pronoun "he" in referring to the Chief; although the Chief when the action commenced was a woman, the current Chief, and the Chief at the time Mr. Rivard was arrested, are both men.

[4] Mr. Rivard began this action after his arrest. In his Fresh as Amended Statement of Claim, he alleges that he was seated in the front seat of a pick-up truck that was forced off the road by several police vehicles in Kingston on September 7, 2018. Despite offering no threat or resistance, he was forcibly dragged through the open passenger window of the truck by police officers and thrown to the ground. He was then "brutally beaten by a swarm of uniformed officers", even though he was unarmed and unable to defend himself, and even though there were no reasonable or probable grounds to arrest him or search him. Mr. Rivard says he was punched and kicked in his chest, back, arms and head, rendering him unconscious. He was taken to the hospital where he underwent surgery to reconstruct his shattered scapula (shoulder blade). The following day, he had a seizure and bled from the ears. Mr. Rivard alleges that he has permanent scarring and other injuries as result of the officers' actions towards him, which he characterizes as assault and battery.

[5] Mr. Rivard claims that the unidentified individual officers named as defendants brutally assaulted him during the arrest without justification or provocation. He alleges that the Chief was negligent in his screening, training, and oversight of the officers and that the Board is both directly and vicariously liable for his injuries. He claims $9,000,000 in damages for pain and suffering, future loss of income, breach of his *Charter* rights, and punitive damages.

[6] After Mr. Rivard began this civil action, Ms. Conklin pled guilty to the possession for the purpose of trafficking charge against her as well as a dangerous driving charge. She was convicted and sentenced to five years in jail. Mr. Rivard brought an application to have the charges against him stayed, on the basis that his rights under ss. 7, 8, 9 and 12 of the *Charter* had been violated during and after his arrest.

[7] Justice Tranmer granted Mr. Rivard's stay application in December 2020. The evidence in support of the application mirrored the allegations in Mr. Rivard's statement of claim in this action. Justice Tranmer found that the officers' actions towards Mr. Rivard on September 7, 2018 did not constitute a reasonable use of force under s. 25 of the *Criminal Code*, R.S.C. 1985, c. C-46. He concluded that the officers' conduct caused Mr. Rivard grievous physical and psychological harm, that the force used was so egregious that it would be offensive to society's sense of justice to move forward with a trial, and that his continued prosecution could send a message to the public that the court implicitly condoned such behaviour.

[8] Justice Tranmer also observed that, more than two years after the incident and two months before the trial of the criminal charges, the duty notes of the officers involved in Mr. Rivard's arrest had still not been produced nor had the names of the two officers who beat and kicked Mr. Rivard been disclosed. He found that a report issued following an investigation by the Special Investigations Unit ("SIU") did not substantively address Mr. Rivard's complaint, as the officers did not

provide the SIU investigator with any explanation for their conduct or Mr. Rivard's injuries.

[9] In 2022, the Board and Chief brought a motion to dismiss this civil action against them under rr. 21.01 and 25.11 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. Rule 21.01(b) permits a defendant to move to strike out a pleading on the ground that it discloses no reasonable cause of action. Pursuant to r. 21.01(2)(b), no evidence is admissible on such a motion. Under r. 25.11(b) and (c), the court may strike out or expunge all or part of a pleading, with or without leave to amend, on the ground that the pleading is scandalous, frivolous or vexatious, or is an abuse of the court's process, that is, that it does not comply with the rules of pleading set out elsewhere in r. 25. Evidence may be admissible in support of a r. 25.11 motion in some circumstances.

[10] Both parties filed evidence in support of their respective positions on the motion. Mr. Rivard's evidence included a transcript of Tranmer J.'s ruling on the criminal stay application.

[11] The motion judge dismissed the appellants' motion to strike and granted the respondent's cross-motion for leave to amend the Amended Statement of Claim, resulting in the Fresh as Amended Statement of Claim considered by the Divisional Court.

[12] The Board and the Chief obtained leave to appeal to the Divisional Court. It held that some of the allegations in the Fresh as Amended Statement of Claim should be struck but concluded that the actions against both the Board and the Chief could proceed. It granted leave to Mr. Rivard to serve and file an Amended Fresh as Amended Statement of Claim reflecting its ruling, but directed that Mr. Rivard could not "wordsmith" allegations it had struck out to make any allegation seeking to establish that the Board was directly liable for day-to-day or operational decisions of the police force or to allege after the fact conduct, investigations, or policy decisions by the Chief or Board.

[13] The appellants sought and obtained leave from this court to appeal the Divisional Court's order. Mr. Rivard has not cross-appealed. No Amended Fresh as Amended Statement of Claim has been produced on the appeal record. The pleading before us therefore remains the pleading considered by the Divisional Court, subject to modifications reflecting its order.

Questions on appeal

[14] To address the arguments raised on this appeal, I must answer four questions:

1. Did the Divisional Court err in considering Justice Tranmer's decision staying the criminal charges in determining the appellants' motion to strike?

2. Did the Divisional Court err in finding that Mr. Rivard's pleading advances a tenable claim in negligence against the Chief of Police?
3. Did the Divisional Court err in finding that Mr. Rivard has pled sufficient material allegations for a claim in negligence against the Chief?
4. Did the Divisional Court err in allowing Mr. Rivard's action in negligence to proceed against the Board?

The Divisional Court did not err by considering Tranmer J.'s decision staying the criminal charges in determining the appellants' motion to strike

[15] In assessing the tenability of Mr. Rivard's causes of action and the sufficiency of the material allegations pled in support of them, the motion judge found that Tranmer J.'s findings "are material facts that can and are considered." He held that these material facts "could lead to a finding at trial in the civil action that the officers' conduct was both grossly assaultive, and abusive, and could be the result of a systemic issue within the police department, among officers and the result of grossly insufficient training" as to the use of force in executing an arrest.

[16] The Divisional Court rejected the appellants' argument that the motion judge fell into reversible error by referring to Tranmer J.'s factual findings. In their argument before this court, the appellants contend that both the motion judge and the Divisional Court erred in law by relying on Tranmer J.'s findings, as Mr. Rivard's allegations should have been assessed solely on his pleading.

[17] This argument is unfounded, in my view.

[18] McCarthy J. noted that the motion judge referred to Tranmer J.'s findings primarily to address the appellants' contention that the pleadings were "boiler plate". He found that, despite this, the motion judge was careful to stay within the parameters of the applicable test and held that, although "strictly speaking, this aspect of the motion judge's method of analysis was possibly misplaced, it did not … deflect the motion judge from applying the appropriate test to the impugned pleading".

[19] More to the point, McCarthy J.'s reasons do not rely on Tranmer J.'s decision. He explicitly stated that there "is good reason why no evidence is permitted in motions brought under rule 21.01(1)(b); pleadings are not about evidence. They are about setting out material facts which, if proven, would tend to prove what is alleged." He analyzed the tenability of Mr. Rivard's claims against the Chief and the Board, and the sufficiency of his material allegations, based solely on the pleading, without reference to Tranmer J.'s order or his reasons.

[20] The Divisional Court applied the correct test on the appellants' motion and did not impermissibly refer to evidence. I would accordingly not grant this ground of appeal.

The Divisional Court did not err in finding that Mr. Rivard's pleading advances a tenable claim in negligence against the Chief

[21] The appellants contend that Mr. Rivard has no tenable claim in negligence against the Chief on the facts alleged in his pleading, because "a claim against a police chief is adequately pleaded [only] where the chief is alleged to have been either directly implicated in the conduct complained of, or only "one step removed" because of an alleged failure that is factually interwoven with the alleged officer misconduct."

[22] A claim should only be struck under r. 21.01(1)(b) if it is plain and obvious that there is no reasonable prospect it can succeed: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980; *Guergis v. Novak*, 2013 ONCA 449, 116 O.R. (3d) 280, at para. 34.; *Frank v. Legate*, 2015 ONCA 631, 390 D.L.R. (4th) 39, at para. 36. A court must assume that all facts pleaded in the statement of claim are true, unless they are patently ridiculous or incapable of proof: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at pp. 486-87*; Hunt*, at pp. 977-979; *McCreight*, at para. 29; *Connor v. Scotia Capital Inc.*, 2018 ONCA 73, at para. 3. The court must read the statement of claim as generously as possible, with a view to accommodating any inadequacies in the pleading: *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45, at paras. 21-22. A claim should not be struck just because it is novel, or because the underlying law is unsettled, or because the plaintiff's odds of success seem slim: *Hunt,* at pp. 979-80.

[23] The appellants' argument on the tenability of Mr. Rivard's cause of action against the Chief involves a "purely legal analysis" and so engages a standard of review of correctness: *Frank*, at para. 35. Should I accept the appellants' argument on tenability, I must find that the Divisional Court erred in law, the Chief's appeal should be allowed, and the claim against him struck.

[24] I do not accept the appellants' argument. The Divisional Court's conclusion that Mr. Rivard has pleaded a tenable claim in negligence against the Chief is consistent with the principles applicable to actions against police officers, chiefs, and boards set out by the Supreme Court in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, and by this court in *Miguna v. Ontario (Attorney General)* (2005), 262 D.L.R. (4th) 222 (Ont. C.A.) (*Miguna No. 1*) and *Miguna v. Toronto Police Services Board*, 2008 ONCA 799, 301 D.L.R. (4th) 540 (*Miguna No. 2*).

[25] Contrary to the appellants' submissions, neither *Odhavji* nor *Miguna* stand for the proposition that a claim in negligence against a police chief is untenable unless the plaintiff alleges that the chief was directly implicated in officer misconduct.

[26] In *Odhavji*, the estate and family members of a man shot dead by Toronto police officers sued the officers, their police chief, the Toronto Police Services Board, and the Attorney-General of Ontario. They alleged that the officers had

breached their statutory duties under the *Police Services Act* by failing to co-operate in an SIU investigation into the shooting, thereby causing the family members mental distress, anxiety, and depression. The plaintiffs advanced claims against the police chief and the officers for negligence and for misfeasance in public office. They sued the board and the province for negligence. The defendants moved to strike the claims against them under r. 21.01(1)(b). The Supreme Court of Canada upheld this court's decision allowing the claims against the police chief to proceed but striking the actions against the board and Ontario.

[27] The "one step removed" language quoted by the appellants appears in the discussion of the proximity required to establish that the defendant chief of police owed a duty of care to the plaintiffs in that case and does not support the appellants' position. At para. 56, Iacobucci J. wrote:

> [T]he duties of a chief of police include ensuring that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act*. In those instances in which a member of the public is injured as a consequence of police misconduct, there is an extremely close causal connection between the negligent supervision and the resultant injury: the failure of the chief of police to ensure that the members of the force carry out their duties in accordance with the provisions of the *Police Services Act* leads directly to the police misconduct, which, in turn, leads directly to the complained of harm. The failure of the Chief to ensure the defendant officers cooperated with the SIU is thus but one step removed from the complained of harm. Although a close causal connection is not a condition precedent of liability, it strengthens the nexus between the parties.

[28] Justice Iacobucci concluded that "it would be inappropriate to strike the action for negligent supervision against [the defendant] Chief on the basis that he did not owe the plaintiffs a duty of care" because "[if] the plaintiffs can establish that the complained of harm is a reasonably foreseeable consequence of the Chief's failure to ensure that the defendant officers cooperated with the SIU, the Chief was under a private law duty of care to take reasonable care to prevent such misconduct": *Odhavji*, at para. 61.

[29] A police chief's private law duty of care to a person alleging officer misconduct was considered again in *Miguna No. 1* and *Miguna No. 2*.

[30] Mr. Miguna was an immigration lawyer publicly arrested and charged with sexually assaulting two clients. After he was tried and acquitted, Mr. Miguna sued the police, the Crown attorney, the province, and other parties, alleging various known and novel causes of action. His first statement of claim was struck by Paisley J., but that order was set aside by this Court, which granted Mr. Miguna leave to amend his pleading. Blair J.A. noted that "police may be liable for independent torts committed during the course of their duties, such as false arrest, false imprisonment, and assault and battery": *Miguna No. 1*, at para. 12. Although Mr. Miguna's allegations against the defendant officers were "bald and wanting in supporting material facts", the motion judge erred by not granting him leave to amend his pleading to add material facts in support of his claim: *Miguna No. 1*, at paras. 21-22.

[31] Mr. Miguna then served a fresh amended statement of claim, which was again met with a motion to strike by the defendants, which by this time included not only police officers but their police chief Julian Fantino and the Toronto Police Services Board. The defendants again argued that Mr. Miguna had failed to plead a tenable cause of action or sufficient facts and particulars to support his allegations, such that his pleading ought to be struck out under r. 21.01 and r. 25.11. Spence J. granted the motion, but this court again granted Mr. Miguna's appeal and allowed most of the claims in his action to proceed.

[32] In *Miguna No. 2*, Blair J.A. held that the motion judge erred by finding some causes of action untenable, despite the Court of Appeal's decision to the contrary in *Miguna No. 1*; by assessing the likelihood that Mr. Miguna would be able to prove certain facts, instead of assuming the facts pleaded to be true; and by rejecting some claims because they were pleaded with excessive detail.

[33] The court also restored Mr. Miguna's claim against the Chief Fantino. As Blair J.A. noted, a chief of police is not vicariously liable for the acts of his or her police officers in the course of their employment, nor responsible for policy decisions under the sole purview of the police services board: *Miguna No. 2*, at para. 83, citing *Pringle v. London (City) Police Force*, [1997] O.J. No. 1834 (C.A.), at para. 2. A police chief is, however, responsible for the day-to-day operation of the police force, by virtue of s. 41(1)(a) and (b) of the *Police Services Act*. As a

result, “a claim *could* lie against Chief Fantino in negligence, if properly framed and pleaded”: *Miguna No. 2*, at para. 84 (emphasis in original).

[34] In striking the claim against Chief Fantino, the motion judge acknowledged that the negligence claim against the chief would be tenable if Mr. Miguna alleged that the chief knew or should have known about misconduct that was occurring but failed to take steps to correct it, or that there were inadequate procedures in place to identify and report such instances of misconduct. The problem was that, in the motion judge’s view, Mr. Miguna had not made these allegations. Blair J.A. disagreed. Emphasizing that pleadings must be read generously and that allegations of fact must be assumed to be true, he concluded that the material facts alleged by Mr. Miguna — that Chief Fantino was reckless or willfully blind in his approach and was motivated by extraneous considerations in not taking steps to intervene or to correct the alleged misconduct — would, if proved, establish Chief Fantino’s personal liability.

[35] The appellants claim that *Miguna No. 2* stands only for the narrow proposition that a statement of claim against a chief of police is adequately pleaded “where the chief is alleged to have failed to take action in response to particularized police officer misconduct and in the context of personal animus against the individual plaintiff.” There is no basis for such a narrow reading, which contradicts the general approach to pleadings endorsed in *Odjhavji* and *Miguna*, and their

specific direction about what allegations are necessary to ground a negligence claim against a police chief.

[36] The Chief's duties in 2018, at the time of Mr. Rivard's arrest, were the same as the statutory duties of the defendants in *Odhavji* and *Miguna*. These duties included "ensuring that members of the police force carry out their duties in accordance with [the *Police Services Act*] and the regulations and in a manner that reflects the needs of the community, and that discipline is maintained in the police force", and, since the Chief led a municipal police force, "administering the police force and overseeing its operation in accordance with the objectives, priorities and policies established by the [police services] board".[2]

[37] Given these duties, the allegations against the Chief in Mr. Rivard's Fresh as Amended Statement of Claim fall within the parameters of the private law duty of care described in *Odhavji*. At para. 19, Mr. Rivard alleges that the Chief owed a duty of care to him to ensure that the officers involved in his September 7, 2018 arrest were properly trained for, and supervised in respect of their duties as police officers; that the Chief breached the applicable standard of care and was negligent in supervising the officers; and that this negligence foreseeably caused

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[2] Subparagraphs 41(1)(b) and (a) of the *Police Services Act*. Under successor legislation, the *Community Safety and Policing Act, 2019*, S.O. 2019, c. 1, Sched. 1, in force as of April 1, 2024, a chief of police is required, among other things, to "manage the members of the police service to ensure that they carry out their duties in accordance with this Act and the regulations and in a manner that reflects the needs of the community" (s. 79(1)), and to ensure that discipline is maintained through investigation and reporting of misconduct and the imposition of sanctions (ss. 197, 198 and 200).

Mr. Rivard's injuries. The particulars are set out in subparas. 19(i) to (viii), in which Mr. Rivard alleges that the Chief:

- "knew, or ought to have known, that the officers were insufficiently trained, including, but not limited to, in conflict resolution de-escalation techniques";
- "knew, or ought to have known, that the officers suffered from psychological and/or psychiatric problems rendering them unfit to be police officers";
- "knew, or ought to have known, that the officers did not have the appropriate level of competence or skill to enforce the law appropriately";
- "failed to ensure that the officers complied with standards that effectively ensured the safety of members of the public, including the plaintiff, and thereby wrongfully allowed and/or permitted the assault, maiming and battery of him";
- "failed to maintain appropriate supervision and control over the officers"; and
- "failed to ensure that the defendant officers carried out their duties in accordance with the sections of the *Police Services Act*".[3]

[38] In sum, Mr. Rivard alleges that the Chief failed to adequately screen, train, supervise, and discipline officers, contrary to the *Police Services Act*, and that this

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[3] Mr. Rivard makes a further allegation against the Chief and the Board at subpara. 19(xi). I will address this allegation when assessing the claim against the Board. The Fresh as Amended Statement of Claim before this court contains other allegations at subparas. 19(ix) and (x), but the Divisional Court struck them on the basis that they were "irrelevant and immaterial allegations containing after the fact evidence".

negligence foreseeably caused their alleged misconduct on September 7, 2018 and Mr. Rivard's resulting damages. Assuming the facts alleged in his pleading are true, this is an instance where, in Iacobucci J.'s words in *Odhavji*, "a member of the public [was] injured as a consequence of police misconduct", thereby giving rise to an "extremely close causal connection between the negligent supervision and the resultant injury".

[39] The appellants contend that, in the wake of *Odhavji*, Ontario courts have consistently held that s. 41(1) of the *Police Services Act* does not create a private law duty of care between a chief of police and individual members of the public, citing *Haggerty v. Rogers*, 2011 ONSC 5312, [2012] W.D.F.L. 756; *Solak v. Brantford Police Services Board*, 2022 ONSC 4025; and *Rebello v. Ontario*, 2023 ONSC 3574 in support. But the Divisional Court's decision allowing Mr. Rivard's claim against the Chief to proceed is not premised on the creation of a private law duty of care at large. It is based on Mr. Rivard's particularized allegations that the Chief's failure to adequately assess, train, supervise, and discipline the officers involved in his arrest was negligent and that these short fallings foreseeably caused his damages.

[40] The appellants argue that the Divisional Court erred in law by not adopting the analysis in *Romagnuolo v. Hoskin*, [2001] O.T.C. 673 (S.C.), and instead relying on the reasoning in *Dawson v. Baker*, 2017 ONSC 6477.

[41] I see no error in McCarthy J.'s analysis. As he found, *Odhavji* "support[s] the principle that a police commissioner or police chief's duty of care for negligent supervision or training can be based on a pleading which alleges personal liability for a breach of his or her obligations of training or supervision" under the *Police Services Act*. In *Romagnuolo*, a motion judge struck a statement of claim against a police chief on the basis that it did not allege any direct involvement in officer misconduct. McCarthy J. found this decision inconsistent with the principles in *Odhavji*. He agreed with the motion judge in *Dawson*, who permitted an action in negligence against a police chief to proceed based on allegations similar to those in the Fresh as Amended Statement of Claim.

[42] I accordingly find no error of law in the Divisional Court's determination that Mr. Rivard is advancing a tenable cause of action in negligence against the Chief.

The Divisional Court did not err in finding that Mr. Rivard has pled sufficient material allegations for a claim in negligence against the Chief

[43] The Chief contends that the Divisional Court erred in finding that Mr. Rivard has pled sufficient material allegations of fact to ground his claim in negligence against him. He argues that the allegations against him are bald and conclusory and that the Fresh as Amended Statement of Claim does not comply with r. 25.06(1), which requires that every pleading "shall contain a concise statement

of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved."

[44] I stated earlier that a court's finding that a plaintiff had pleaded a tenable cause of action is subject to review on the correctness standard. If, on the other hand, a statement of claim advances all required constituent elements of a recognized cause of action, "the assessment of whether the pleaded material facts actually support those causes of action is a question of mixed fact and law reviewable on a standard of palpable and overriding error": *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606, at para. 36, citing *PMC York Properties Inc. v. Siudak*, 2022 ONCA 635, 473 D.L.R. (4th) 136, at para. 29 and *Jensen v. Samsung Electronics Co. Ltd.*, 2023 FCA 89, 482 D.L.R. (4th) 504, at para. 43.

[45] In assessing the sufficiency of the material facts alleged in support of the negligence claim against the chief, this court should therefore defer to the Divisional Court's decision absent a palpable and overriding error of mixed law and fact. No such error has been identified, in my view.

[46] The appellants argue that the Divisional Court failed to distinguish between "material facts" and "bald conclusory statements of fact". As held in *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121, 136 O.R. (3d) 654, at para. 15, and *Meekis v. Ontario*, 2021 ONCA 534, 158 O.R. (3d) 1, at para. 16, a

court assessing a r. 21.01(1)(b) motion is not required to assume that bald conclusory statements of fact are true.

[47] *Castrillo* and *Meekis* do not expand on how to distinguish a material fact from a bald conclusory statement of fact. Guidance is provided in *Burns v. RBC Life Insurance Company*, 2020 ONCA 347, 151 O.R. (3d) 209, at para. 16: "Each defendant named in a statement of claim should be able to look at the pleading and find an answer to a simple question: What do you say I did that has caused you, the plaintiff, harm, and when did I do it?"

[48] This functional test effectively restates the principle set out in *Miguna No. 2*, at para. 54, wherein Blair J.A. acknowledged that some allegations in Mr. Miguna's amended pleading were verbose and repetitive while elsewhere he stated legal conclusions, "without repeating much in the way of particulars." He nonetheless concluded that the defendants had notice of the case they had to meet:

> When the claim is read as a whole, however, the defendants are provided with sufficient particulars of the various allegations, and of the legal conclusions flowing from them, to enable them to plead to the allegations. The discovery phase of the action will enable them to pinpoint the allegations – and the *evidence* supporting them – further. That is one of the functions of the discovery phase.

[49] The allegations in the Fresh as Amended Statement of Claim likewise give the Chief sufficient notice of the claim against him.

[50] Having read Mr. Rivard's particularized allegations against the Chief at para. 19 in the context of the Fresh as Amended Statement of Claim as a whole, the Chief would readily understand what specific acts and omissions he is alleged to have committed and when he is alleged to have committed them. For example, the Chief would understand that Mr. Rivard alleges that the training given to the officers involved in the September 7, 2018 arrest, in particular in conflict resolution and de-escalation techniques, was insufficient as of the date of the incident and that this failure to train caused or contributed to Mr. Rivard's injuries. The Chief would likewise understand that Mr. Rivard is alleging that the officers involved in his arrest have psychological or psychiatric problems and lack the skill and competence to perform their duties, and that the Chief did know this or should have known it prior to September 7, 2018.

[51] I agree that some of Mr. Rivard's allegations, such as the allegation at subpara. 19(vi) that the Chief "failed to maintain appropriate supervision and control over the officers", are unparticularized on their face. As McCarthy J. observed, however, it would be unfair to require Mr. Rivard to provide details that are in the unique possession and control of the defendants:

> To strike a pleading because the facts as alleged are not encased in rich enough detail would unfairly hamper many wronged plaintiffs from ever getting out of the starter's box. This is especially the case where, as here, much of the evidence to be elicited in support of the allegations against the Chief and the Board (internal policies, investigations, officer records, training manuals,

> course materials) are likely in the exclusive possession of the Defendants. That "evidence" may not be routinely available for public viewing and may not be divulged to the Plaintiff prior to the discovery process. It is hardly fair to brand a broadly worded allegation as a mere fishing expedition or dismiss it as bald and conclusory when the prospective tortfeasor has exclusive possession over the documents and evidence which would support the pleading. In the absence of those documents and that evidence, it would be exceedingly unfair to expect a plaintiff to advance anything but broadly stated allegations.

[52] McCarthy J. concluded that "the allegations in support of liability against the Chief for failure to properly train, control, regulate or supervise his officers contain sufficient material facts for the Chief to understand the 'what, when and why' of a potential finding of liability against him" and, if the material facts alleged are proved, "there would exist a basis upon which a trier of fact could conclude that the Chief breached a duty of care to the Plaintiff as a member of the public in the discharge of his statutory duties" under the *Police Services Act*.

[53] I do not find any palpable and overriding error in this finding. The history of this action shows how difficult it can be for a plaintiff such as Mr. Rivard to obtain disclosure of information relevant to their claim. As noted by Tranmer J., the officers involved in Mr. Rivard's arrest did not disclose their duty notes during the SIU investigation or in response to his stay application. The notes were only provided to Mr. Rivard as items in the appellants' affidavit of documents served in July 2022, more than four years after his arrest.

[54] I would accordingly not grant this ground of appeal.

The allegations of fact pled do not support a direct claim in negligence against the Board

[55] Under s. 31(1) of the *Police Services Act*, a police services board is broadly responsible "for the provision of adequate and effective police services in the municipality". In particular, a board is responsible for determining the objectives and priorities with respect to police services in the municipality, in consultation with the chief of police; establishing policies for the effective management of the police force; recruiting, appointing and directing the chief of police, and monitoring his or her performance; and establishing guidelines for dealing with complaints, and monitoring the chief of police's administration of the complaints system. The board's ability to oversee and direct specific police operations is explicitly limited, however. Under s. 31(3), a board "may give orders and directions to the chief of police, but not to other members of the police force".

[56] Notwithstanding this limitation, in addition to any direct liability that a board may incur for its own negligence, a board is "liable in respect of torts committed by members of the police force in the course of their employment" by virtue of s. 50(1) of the *Police Services Act*.

[57] Although the Board concedes that it could be vicariously liable for torts committed by individual officers, it contends that Mr. Rivard's allegation that it failed

to discharge its statutory obligations to him is bald and conclusory, and that there are no material facts alleged that could give rise to a finding that it was directly negligent to him. I agree.

[58] At para. 64 of *Odhavji*, Justice Iacobucci noted that a police service board's lack of a direct supervisory relationship with members of the force makes it more difficult to establish a close causal connection between alleged misconduct by officers and the board's actions and omissions:

> The Board … is much further in the background than the Chief. Unlike the Chief, the Board does not directly involve itself in the day-to-day conduct of police officers, but, rather, implements general policy and monitors the performance of the various chiefs of police. The Board does not supervise members of the force, but, rather, supervises the Chief (who, in turn, supervises members of the force). This lack of involvement in the day-to-day conduct of the police force weakens substantially the nexus between the Board and members of the public injured as a consequence of police misconduct.

[59] The mandate of a police services board limits the circumstances in which it could be liable for officer misconduct. A plaintiff would have to allege (and prove) that there was a particular problem, for example an endemic excessive use of force against visible minorities, which it was required to address to discharge its statutory obligation to provide adequate and effective police services. As a general matter, however, "courts should be loath to interfere with the Board's broad discretion to determine what objectives and priorities to pursue, or what policies to enact in pursuit of those objectives": *Odhavji*, at para. 66.

[60] The Divisional Court struck most of the allegations against the Board in para. 19 of the Fresh as Amended Statement of Claim on the basis that they were premised on a supervisory role over police operations which the Board does not legally have. Mr. Rivard was further ordered to remove most references to the Board in para. 19 to reflect the limited scope of its duty of care. This leaves only two allegations specific to the Board that could ground Mr. Rivard's claim that it is directly liable in negligence for his damages.

[61] First, at subpara. 19(viii), Mr. Rivard alleges that "[t]he Board failed to discharge its statutory obligation to provide adequate and effective police services by not sufficiently addressing systemic racism within the police service, as well as the excessive use of force in the detention of visible minorities, including Black people". This allegation is problematic because Mr. Rivard has not alleged any facts that connect his racial identity with the events of September 7, 2018. At para. 21 of the Fresh as Amended Statement of Claim, Mr. Rivard states that he is a person "with native or aboriginal background and has suffered as a result of this instance of systemic police use of excessive force." He does not, however, allege that he is a visible minority or that the actions of police officers during the September 7, 2018 arrest were motivated by racism. In effect, he alleges that, as an Indigenous person, he has suffered greater damages as a result of these actions. This allegation could be relevant to the calculation of damages but could not ground a finding of liability.

[62] Second, as already mentioned, Mr. Rivard alleges, at subpara. 19(xi), that "[m]embers of the Kingston Police are sheltered by systemic policy from discipline, reprisal or fair consequence to the most heinous of brutality and poor conduct because the Board and the Chief make no or insufficient effort to curtail police brutality and by failing to do so have created a systemic problem of abuse, brutality, assaultive behavior by police as against the public, including the Plaintiff."

[63] The difficulty here is that Mr. Rivard has not alleged any other instances of police brutality, abuse, or assaultive behaviour by the Kingston police prior to his arrest. On its own, the allegation against the Chief and the Board at subpara. 19(xi) cannot, even if proved, give rise to any liability for either of these defendants.

[64] There are accordingly no material allegations of fact against the Board that could ground a claim that it might be directly, as opposed to vicariously, liable to Mr. Rivard for his damages. As a result, I am of the view that the Divisional Court erred in law in failing to strike subparas. 19(viii) and (xi). Assuming they are struck, there is no basis for Mr. Rivard's negligence claim against the Board. The only valid claim against the Board is based on its vicarious liability for the torts allegedly committed by the individual police officers.

Disposition

[65] I would grant the appeal for the limited purpose of striking subparas. 19(viii) and (xi), the only two allegations grounding Mr. Rivard's negligence claim against the Board. The Board nonetheless would remain a defendant to the lawsuit given its vicarious liability for officers' conduct under s. 50(1) of the *Police Services Act*. The Chief's appeal should be dismissed.

[66] I would not award costs, given the mixed results on the appeal.

Released: February 13, 2025 "J.G."

"S. Gomery J.A."
"I agree. J. George J.A."
"I agree. L. Favreau J.A."