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Supreme Court of Canada Dismisses Negligence Action in Case Involving Miners Killed During Bitter Strike

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In *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, the Supreme Court of Canada dismissed an appeal by survivors of miners killed in a 1992 explosion at Giant Mine (NWT) owned by Royal Oaks. They claimed damages against the security company Royal Oaks had hired to protect the miners and against the territorial government (in its capacity as regulator of the mine) for negligently failing to prevent the murders. The survivors also unsuccessfully claimed against the strikers' national union, some union officials and members of CASAW Local 4 for failing to control and inciting the disgruntled former employee who set the fatal explosive device. The claims largely succeeded at trial, but the trial judgment was overturned by the Court of Appeal. The Court of Appeal's decision has now been upheld by the Supreme Court, though for different reasons in some respects.

FACTS

There had been a bitter strike at the mine during 1992. A tentative agreement was reached between Royal Oaks and CASAW Local 4 but was rejected by the union membership, and Royal Oaks had continued to operate the mine with replacement workers. The strike became violent, and security guards from Pinkerton's were hired by Royal. The violence continued to escalate, resulting in riots, damage to property and injury to the security guards. A number of the miners were fired, including union member Roger Warren. Explosives were then stolen from the mine by three miners. During the summer, explosions were set which damaged company property and the mine's ventilation shaft plant. In September, Warren planted an explosive device inside the mine. The device was tripped when a man car went over it, killing nine miners. The government ordered that the mine be closed and Warren was subsequently convicted of second degree murder.

LEGAL ACTION

The survivors of the nine victims brought an action in negligence against Pinkerton's, arguing that it failed to take reasonable precautions to prevent the murders of the miners. The NWT Government was sued in its capacity as a regulator for failing in its duties to the deceased miners to maintain safe working conditions and to order that the mine be closed until it was safe. The appellants also sued the union, arguing it was vicariously liable for breaches of a duty to avoid conduct that created a foreseeable risk of harm, for failing to make clear to persons under its influence that death or injury was unacceptable and for failing to prevent Warren from acting. It should be noted that Royal Oaks had also been sued and found liable by the trial judge. Along with the other defendants it had appealed to the NWT Court of Appeal. However, after that appeal was commenced, the company settled with the plaintiffs and abandoned its appeal, remaining a party only with respect to cross-claims by other defendants. Thus, neither appellate court commented on the employer's liability in this case.

DUTY OF CARE

The Supreme Court found that a *prima facie* duty of care had been established against both Pinkerton's and the NWT Government. The issue here was not whether the defendants were responsible for the tort of another "but whether they, in relation to another's tort, failed to meet the standard of care imposed on them and thereby caused the ultimate harm". In finding a duty of care existed, the Supreme Court found that Pinkerton's was aware of the earlier explosions and had heard threats that the replacement workers might be killed. Similarly, the government was aware of the earlier explosions and the potential damage they could have caused to workers in the mine at the time.

The Supreme Court found that Pinkerton's duty was to take "reasonable care" in protecting the workers and exerting control over the risk. It reviewed jurisprudence relating to regulators and concluded that the mining inspectors owed a duty of care, as they had a duty to inspect and enforce mine safety laws. While the inspectors had no authority to address strike-related violence, they were given statutory authority "to make orders to prevent obvious and serious risks to the miners in the mine even though the risks were by-products of the labour relations situation". The mine inspectors had a duty to inspect the mine and order cessation of work where unsafe. Policy considerations did not negate that duty of care.

STANDARD OF CARE

The trial judge had made legal and factual findings that Pinkerton's breached its standard of care, and that the government's conduct had fallen below a standard of care. It was, in the trial judge's view, of no consequence that the mine inspectors had relied on legal advice suggesting the matter was essentially one involving criminal law and labour relations.

The Supreme Court agreed with the Court of Appeal that in relying on the legal advice, the government met its standard of care: the inspectors had sought advice about the scope of their powers, had been advised they did not have jurisdiction to close the mine for reasons relating to criminal law and labour relations, and they relied on such advice. It found that the trial judge had also erred in imposing an absolute duty, rather than a duty of reasonable care, on Pinkerton's. As the Supreme Court found that Pinkerton's and the government had met a standard of care, the claims against them were dismissed.

CLAIMS AGAINST THE UNIONS

With respect to the claims against the unions, the miners had been represented by CASAW Local 4 at the time of the explosion. In 1994, the CASAW National amalgamated with CAW National. The trial judge had found CAW National liable for the acts of certain executives of the CASAW Local 4 and treated the local and national unions as one legal entity.

In reviewing jurisprudence relating to the legal status of unions, both local and parent, the Supreme Court found that the CASAW National and CASAW Local 4 were separate legal entities, and therefore CAW National had not acquired the debts and obligations of CASAW Local 4. Any duty owed by the CASAW National and CAW National to the miners "did not extend to preventing the intentional torts of persons beyond the control of the unions". As stated by the Court of Appeal: "[a]bsent a finding of incitement or other tortious conduct by a representative of the national unions within the scope of his employment, or a decision to conduct business in a tortious way, liability does not arise".

The Supreme Court concluded that CASAW Local 4 was a legal entity capable of being sued in its own right, and had "legal rights and obligations distinct from those of the national union". Each of the local and national unions had "its own management structure, areas of responsibility and assets and liabilities". The Supreme Court stated that the appellants were mistaken in arguing that a union holds its assets in trust for the membership as a whole, not just for members of a local.

NO VICARIOUS LIABILITY FOR UNIONS

The appellants further argued that the CAW National was vicariously liable for the acts of Warren and another union member. The appellants first argued that the national union was vicariously liable because one of its executives had effectively controlled the strike. However, the Supreme Court found that the facts did not support this allegation, as the Local had remained in control of the strike throughout.

The appellants also argued that the relationship between the CAW National and the CASAW Local 4 rendered the national union vicariously liable for torts committed during the strike. This argument was also rejected.

The test for broad vicarious liability involves: (1) considering whether the issue has been determined conclusively by precedent and, if not, then (2) applying a further two-part analysis where the "plaintiff must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close and the wrongful act is sufficiently

connected to the conduct authorized by the party against whom liability is sought".

Here, the authorities were not settled so the Court proceeded to the two-part analysis. It found that the appellants' proposition failed at the first part, as the relationship between CASAW National and Warren and the other union member was not "sufficiently close to justify imposing vicarious liability on the national union for their unlawful acts". Moreover, the Court rejected the argument that there was joint liability with the union on the basis that it "incited" the miners: "there was no finding of any common design between Mr. Warren and CAW National to murder the miners and no finding that the murders were committed in direct furtherance of any other unlawful common design between Mr. Warren and the union".

CONCLUSION

The Giant Mine bombings was an unfortunate event all around. Through its decision, the Supreme Court has affirmed that private organizations that are hired to provide security during a strike owe a duty of care to those they are hired to protect, as will government regulators in some cases. Furthermore, the Court has confirmed that, depending on the constitutional structure of the union, the locals and national bodies are separate legal entities. The Court has also signaled that it will be difficult to find that national unions are vicariously liable for the acts of individual union members in many cases. Finally, given the analysis of the Supreme Court, it seems clear that employers will also owe a duty of care to their employees, both under statute and very likely tort law. Whether the standard of a duty of care is met in the individual case will, of course, depend on the specific facts involved. In situations of a work stoppage (e.g. strike or lockout), employers should be mindful of this duty and take all reasonable steps to ensure the safety of their employees, especially where the employer intends to operate during the work stoppage or where the stoppage involves violence or threats of violence.

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