COURT OF APPEAL FOR ONTARIO

CITATION: Leroux v. Ontario, 2023 ONCA 314
DATE: 20230504
DOCKET: C70224

Doherty, Zarnett and Coroza JJ.A.

BETWEEN

Marc Leroux as Litigation Guardian of Briana Leroux

Plaintiff/Respondent
(Appellant)

and

His Majesty the King in Right of the Province of Ontario

Defendant/Appellant
(Respondent)

Proceeding under the *Class Proceedings Act, 1992*

Kirk Baert, Celeste Poltak, and Caitlin Leach, for the appellant

D. Brent McPherson, Vanessa Glasser, and Ravi Amarnath, for the respondent

Heard: September 22, 2022

On appeal from the order of the Divisional Court (Regional Senior Justice Mark L. Edwards, dissenting in part, Justices David L. Corbett and Michael A. Penny), dated March 26, 2021, with reasons reported at 2021 ONSC 2269, 484 C.R.R. (2d) 67, and 2021 ONSC 4468, 75 C.C.L.T. (4th) 107, allowing an appeal from the orders of Justice Edward P. Belobaba of the Superior Court of Justice, dated December 14, 2018 and March 25, 2020, with reasons reported at 2018 ONSC 6452, 53 C.C.L.T. (4th) 228, and 2020 ONSC 1994, 63 C.C.L.T. (4th) 219.

Zarnett J.A.:

INTRODUCTION

[1] The appellant, through her litigation guardian, commenced a proposed class action against the Government of Ontario and moved for certification under s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*").[1] The motion judge granted certification. A majority of the Divisional Court reversed that order.

[2] The proposed class is composed of adults with developmental disabilities who, like the appellant, have been assessed and approved to receive three specific types of supports and services under the *Services and Supports to Promote the Social Inclusion of Persons with Developmental Disabilities Act, 2008*, S.O. 2008, c. 14 (the "*2008 Disabilities Act*"), but did not receive them or experienced substantial delays.

[3] The motion judge held that the criteria for certification were met. In particular, he was satisfied that the statement of claim disclosed a cause of action as required by s. 5(1)(a) of the *CPA*, both for negligence and breach of s. 7 of the *Canadian Charter of Rights and Freedoms*, which guarantees "the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice". Taking the facts alleged in the statement

---

[1] The appellant has a severe developmental disability and accordingly is represented by her father, Marc Leroux, who has acted as her litigation guardian throughout the proceedings.

of claim as true, the motion judge was of the view that each claim had a reasonable chance of success and neither was doomed to fail.[2]

[4] The motion judge characterized the negligence claim as one complaining of operational negligence rather than core policy decisions for which the government enjoys immunity: "[t]he complaint, in a nutshell, is about the negligent operation of a social assistance system that has approved the delivery of much-needed support and services but then fails to follow up". Although he was sceptical of the s. 7 *Charter* claim, he did not consider the appellant's claim that Ontario's conduct deprived class members of "some measure of security of the person" to be foreclosed by the existing jurisprudence. The motion judge also held that the balance of the certification criteria under ss. 5(1)(b)-(e) had been satisfied.

[5] The majority of the Divisional Court allowed Ontario's appeal and set aside the certification order. The Divisional Court was unanimous in its view that the s. 7 *Charter* claim was precluded by binding jurisprudence. In the majority's view, the negligence claim was also doomed to fail as it complained of core policy decisions about the allocation of scarce resources. The dissenting judge would have

---

[2] The motion judge considered a claim originally asserted in the statement of claim for breach of fiduciary duty to be doomed to fail and struck it. After the motion judge's decision, the appellant amended the statement of claim to implement the motion judge's decision in this respect. These reasons treat the amended statement of claim as the operative pleading.

permitted the negligence claim to continue on the basis that the motion judge correctly characterized it as impugning operational rather than policy matters.

[6] For the reasons that follow, I would allow the appeal, set aside the order of the Divisional Court, and restore the motion judge's order.

[7] I agree with the motion judge and the dissenting judge in the Divisional Court that the negligence claim does not impugn a core policy decision concerning the allocation of scarce resources. As pleaded, the action alleges that, within existing resources, Ontario has negligently implemented a program that has already assessed and approved class members for the receipt of supports and services. The majority of the Divisional Court erred in recharacterizing the appellant's claim. Taking the pleaded facts as true, it is not plain and obvious that the negligence claim is one barred by core policy immunity, nor one in which no duty of care could arguably arise.

[8] I also agree with the conclusion of the motion judge that the s. 7 claim should not be struck. The Divisional Court read that claim too narrowly, interpreting it as one that only asserted that the deprivation of the s. 7 right to security of the person stemmed from the failure to provide services or the existence of waitlists. Reading the pleading generously, the claim also identifies the deprivation as originating from Ontario's allegedly ad hoc, unreasonable administration of waitlists for persons who have already been assessed and approved for essential services.

This state conduct allegedly causes psychological harm sufficiently profound to deprive class members of their security of the person. A claim based on that fact pattern has not been foreclosed by s. 7 jurisprudence.

BACKGROUND

(1) The Pleaded Facts and Causes of Action

[9] The statement of claim describes the appellant as a young adult residing in Timmins, Ontario. She has a developmental disability and is non-verbal, requiring 24/7 support and services to meet her basic living needs.

[10] The claim alleges that, prior to her eighteenth birthday in February 2016, Ontario provided services to the appellant through the Ministry of Children and Youth Services (the “MCYS”). Despite her needs not changing, the MCYS terminated these services when the appellant turned 18 years old.

[11] In anticipation of MCYS services ending, the appellant’s family applied approximately six months before her eighteenth birthday for services and supports under the *2008 Disabilities Act*, which is administered by the Ministry of Community and Social Services (the “MCSS”).

[12] Section 3 of the *2008 Disabilities Act* defines a person with a developmental disability as someone with significant limitations in cognitive and adaptive functioning that originated before the person reached 18, that are likely to be life-long in nature, and that affect areas of major life activity, such as personal care,

language skills, learning abilities, or the capacity to live independently as an adult. Under s. 14 of the statute, if an applicant is an adult who resides in Ontario, has a developmental disability within the meaning of s. 3, and provides proof of the disability, they are eligible for supports and services, which the pleadings refer to as “Developmental Services”.

[13] In August and September 2016, the appellant was assessed for her eligibility under the *2008 Disabilities Act* by the regional Developmental Services Ontario (“DSO”) office in Timmins, for which Ontario is responsible. She was assessed as eligible and approved by the DSO for Developmental Services. Despite this approval, Ontario neither provided nor funded such services to meet her daily living needs. Instead, the appellant was placed on a waitlist, referred to in the claim as a “DSO Waitlist”, with no estimate as to the length of wait. The claim alleges that the appellant has remained on a DSO waitlist, resulting in her receiving only the supports and services that her family have been able to provide at their own expense, through to the time of the commencement of the action in April 2017 and its amendment in January 2019.[3]

[14] On the basis that the appellant’s experience is one shared by others who are similarly situated, the action is brought on behalf of the appellant and all other

---

[3] Although not referred to in the pleading, the evidence on the certification motion referred to the appellant obtaining emergency support for a limited time.

persons who have, since July 2011, been assessed as eligible and approved for services under the *2008 Disabilities Act*, and subsequently placed on one of three DSO waitlists (also known as “service registries”)[4] for approved services: (i) residential services and supports; (ii) caregiver respite services and supports, and (iii) "Passport" funding.

[15] The claim refers to and incorporates criticisms of the DSO waitlists found in three reports. First, it quotes from the 2014 report of the Legislative Assembly’s Select Committee on Developmental Services calling for the elimination of the waitlists. Second, it cites a 2014 report of the Auditor General which notes problems with the MCSS database, shortcomings in its computer system, as well as the lack of a consistent prioritization process and methods to tie funding to individuals' needs, and which called for the government to develop a consistent prioritization and waitlist management process across the province. Third, it references a 2016 Ombudsman Report decrying “interminable waitlist delays”.

[16] The claim asserts two causes of action.

[17] The first is in negligence. The nub of this cause of action appears in a paragraph in the “Overview” section of the pleading. It reads:

> Ontario has through statute and conduct undertaken to provide adults with developmental disabilities the services, supports or direct funding, to provide for their

[4] The motion judge noted, at para. 15 of his certification reasons, that Ontario conceded that service registries were waitlists and the two terms are interchangeable.

> most basic human needs and daily safety ('Developmental Services'). In performance of this undertaking, adults with developmental disabilities are assessed and approved for Developmental Services, as prescribed by statute. Despite being assessed and approved for Developmental Services, the entitlement to such services is arbitrarily denied as a result of unreasonably managed waitlists, which are maintained by regional Developmental Services Ontario offices ('DSO Waitlists')".

[18] The claim later alleges that Ontario created, administered, supervised, and managed the DSO waitlists during the class period. The claim asserts that Ontario owed a duty of care to the class members, stating that it was in a relationship of proximity with the class members, and that the harm suffered by class members was reasonably foreseeable. The claim also alleges that Ontario breached the duty of care in the way in which it administered, managed and supervised the DSO waitlists. The particulars provided include:

> (a) failing to act to reduce unreasonably long waitlist times which serve as an effective denial of approved Developmental Services;
>
> (b) creating waitlists of indeterminate length for Developmental Services which are essential to the Class Member's basic human needs, safety and security;
>
> (c) failing to have a consistent and rational scheme of prioritization for Class Members on the DSO Waitlists;
>
> (d) failing to create a cohesive system to rationally and efficiently allocate pre-existing resources to Class Members on DSO Waitlists;

> (e) failing to provide class members with Developmental Services which class members are eligible and approved for pursuant to the 2008 Disabilities Act;
>
> (f) arbitrarily cutting off existing Developmental Services to individuals when they reach the age of 18, regardless of pre-approval for such services and their continuing developmental disability;
>
> (g) returning Class Members to a DSO Waitlist when Developmental Services are discontinued;
>
> (h) failing to properly exercise discretion in determining an appropriate length of time for Class Members be subjected to a DSO Waitlist for approved Developmental Services; and
>
> (i) failing to respond adequately, or at all, to complaints or recommendations which were made concerning the administration of DSO Waitlists.

[19] The second cause of action alleged is a breach of s. 7 of the *Charter*. The claim alleges that class members are eligible and have been approved for Developmental Services which are essential to their life and security of the person, and the unreasonable and indeterminate administration of DSO waitlists deprive them of s. 7 rights. The claim lists the alleged harms suffered by the class members, which includes “mental anguish” and the “development of new mental, psychological or psychiatric disorders”.

(2) The Procedural History

i. The Motion Judge's Decision

[20] The motion judge determined that the statement of claim properly alleged a cause of action in negligence. As noted above, he viewed the crux of the complaint to be about Ontario's negligent operation of "a social assistance system that has approved the delivery of much-needed support and services but then fails to follow up".

[21] The motion judge noted that the design and funding of a social assistance scheme is a matter for the legislature, not the courts. But he found that the statement of claim was not complaining about inadequate funding or the need for a greater allocation of resources. Instead, it was about "the negligent utilization and administration of existing resources". In the view of the motion judge, the appellant was suing about "the indeterminate delays in the waitlisted services, the flawed computer programs and bad databases and poor prioritization and matching of available resources". The complaint was "not one of funding but the negligent operation of the existing system".

[22] The motion judge then turned to the requirement that a duty of care exist and referred to the two-part *Anns*/*Cooper* test: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537. Under that test, a plaintiff in a negligence action must show

the presence of proximity and foreseeability, and the absence of policy considerations that would negate the imposition of a duty of care.

[23] The motion judge was of the view that it was not plain and obvious that proximity could not be established. He referred to the allegations that every class member interacted with Ontario in receiving support and services prior to turning 18 and in applying and receiving approval for continuing support and services under the *2008 Disabilities Act*. In the motion judge's view, representations, direct contact, and reliance would have existed in the course of the relationship.

[24] The motion judge also considered that it was not plain and obvious that policy considerations negated a duty of care on the alleged facts. He distinguished two decisions − *Wareham v. Ontario (Minister of Community and Social Services)*, 2008 ONCA 771, 93 O.R. (3d) 27, and *Wynberg v. Ontario* (2006), 82 O.R. (3d) 561 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 441 − that were relied on by Ontario to show no duty of care could exist. He held that the allegations in this case are distinguishable from those advanced in *Wareham* and *Wynberg* and were the type of allegations that those cases contemplated could support a viable negligence action. Those allegations are: (i) the waitlists are not operated in accordance with the statutory scheme; (ii) the delays are the result of the defaults of Ontario's employees who administer the program; (iii) the program as enacted is capable of being administered more effectively without a further allocation of

resources, and (iv) the focus of the complaint is on the operational failures in the implementation of the program.

[25] The motion judge was sceptical of the *Charter* claim, but held it was not plain and obvious that the claim would fail. The conduct of the DSO offices and MCSS would meet the state conduct requirement. It could possibly be concluded that the conduct deprived the class members of "some measure of security of the person". Deprived was a broad enough term to encompass conduct that erected barriers to something to which class members were entitled, and state caused delay could be a deprivation in some circumstances. He distinguished the statement in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 104, that the *Charter* does not confer a freestanding right to health care, noting that the Supreme Court had gone on to confirm that a legislative scheme for health care had to comply with the *Charter* and the appellant's claim was in respect of services and support that she had been approved to receive under the *2008 Disabilities Act*.

[26] The motion judge also was of the view that, in light of the appellant's allegations that the denial of benefits to which class members were entitled was due to procedural unfairness and arbitrariness, it was not plain and obvious that the deprivation occurred in accordance with the principles of fundamental justice.

[27] The motion judge also considered whether the other requirements for certification were met. He found the class definition, common issues, preferable

procedure and suitable representative plaintiff requirements under ss. 5(1)(b)-(e) of the *CPA* were all satisfied.

[28] Subsequent to the motion judge's certification decision, the Ontario legislature passed the *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17 (the "*CLPA*"). The Divisional Court, to which Ontario had appealed the certification decision, referred the matter back to the motion judge to consider the effect of the *CLPA* on the negligence claim. The motion judge noted that s. 11(4) of the *CLPA* immunizes Ontario against negligence claims that relate to the making of, or the failure to make, a decision respecting a policy matter, and s. 11(5)(c) defines policy matter to "potentially include even operational negligence". For a number of reasons, including issues about whether the *CLPA* had retrospective operation, the motion judge concluded that it was not plain and obvious that the operational negligence claim asserted by the appellant was barred by the *CLPA*. He added a common issue about the effect of the *CLPA* so it could be determined at the common issues trial.

ii. The Divisional Court Decision

[29] The Divisional Court was unanimous in holding that the motion judge erred when he determined that the *Charter* claim was not doomed to fail. Regional Senior Justice Edwards, writing for the court on this issue, considered the jurisprudence to have rejected the proposition that "security of the person includes and requires

provision for the economic satisfaction of basic human needs". He went on to hold that what was actually alleged was a failure to positively provide benefits. Therefore, even if security of the person was engaged, there was no legally cognizable deprivation alleged as "[n]othing in the jurisprudence suggest[s] that s. 7 [of the *Charter*] places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person". He did not consider it arguable that the delay in continuing benefits which the class members had received before they were 18 and for which they were eligible constituted a deprivation, as "a long line of authorities … establish that the government is under no obligation to ensure that a claimant receives or continues to receive the same level of benefits or support before or after a certain age or following a policy decision to reduce or even eliminate that benefit". He considered the motion judge to have erred in relying on delay − that is inaction − by the government in providing benefits as arguably amounting to a deprivation.

[30] Although Edwards R.S.J. would have allowed the negligence claim to continue, the majority of the Divisional Court held that the motion judge erred in finding the appellant had alleged a cause of action in negligence that should have been certified. It held that Ontario enjoyed common law immunity against the negligence claim, and that Ontario owed no duty of care to the appellant.

[31] The majority distinguished two kinds of benefit programs offered by Ontario to persons with disabilities: "entitlement programs" and "eligibility programs".

[32] In the majority's view, the Ontario Disability Support Program (the "ODSP") is an example of an entitlement program because "[w]here an ODSP applicant meets the criteria, she is entitled to receive prescribed ODSP benefits". This was to be contrasted with an eligibility program "under which, if an applicant meets the test established to be eligible for benefits, she is placed on 'waitlists' or 'service registries' for benefits or services. The applicant is not 'entitled' to these benefits or services; she is 'eligible' for them. Available benefits or services are insufficient to meet the needs of all persons eligible to receive them. Ontario allocates the available benefits or services among eligible persons through a process of triage and 'waitlists' it has designed to implement these Eligibility Programs'".

[33] The majority further stated that "[i]t is not alleged, in this case, that the [appellant] is 'entitled' to benefits for which she is merely 'eligible'. It is not alleged, in this case, that the [appellant] is not receiving benefits to which she is 'entitled'".

[34] The majority reasoned that Crown immunity applies to the negligence claim in this case because what was complained about constituted a core policy decision at common law.[5] The choice to provide an eligibility program rather than an entitlement program is a core policy choice, and it "is implicit that there may be, and likely will be, persons eligible for benefits who wait for those benefits, or who

[5] The majority did not find it necessary to determine whether there was immunity under the *CLPA* or whether it applied retrospectively.

do not receive them at all." The majority further noted that administering a system to allocate scarce resources between individuals with developmental disabilities "is, at its core, public administration of a benefits program".

[35] In the majority's view, the same considerations led to the conclusion that there was no private law duty owed by Ontario to the appellant: "[t]he government owes no private law duty of competent public administration to individual benefits claimants". The majority also considered this conclusion to be compelled by the decisions in *Wynberg* and *Wareham*. They did not consider the appellant's case for proximity to be assisted by her receipt of benefits before she was 18, because "[e]ntitlement and eligibility under programs for Children do not establish entitlement or eligibility for programs for Adults … to import continuing duties based on past receipt of benefits as a Child would impugn the government's authority to draw a line between programs aimed at Children and programs aimed at Adults". The majority also rejected the motion judge's reasoning that representations "must have been made" to the class members as they transitioned from child to adult services. In their view, the evidence of an ongoing relationship between one of the plaintiffs in *Wynberg* and Ontario "was much better established" than it was in this case, yet the negligence claim in *Wynberg* did not succeed.

[36] The Divisional Court did not comment on the motion judge's assessment of the other certification criteria.

ISSUES

[37] This appeal raises two primary issues:

a) Did the Divisional Court err in concluding the appellant's negligence claim did not disclose a reasonable cause of action?

b) Did the Divisional Court err in concluding the appellant's s. 7 *Charter* claim did not disclose a reasonable cause of action?

ANALYSIS

(1) The Cause of Action Test and the Standard of Review

[38] The test for whether a pleading in a proposed class action meets the cause of action requirement in s. 5(1)(a) of the *CPA*, and the test for whether a pleading should be struck under r. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for failing to disclose a reasonable cause of action, is the same: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 14. The facts asserted in the statement of claim are taken to be true unless patently incapable of proof: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22. The statement of claim is to be read generously: *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 451. The question to be answered "is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiffs' pleaded claims disclose no reasonable cause of action": *Babstock*, at para. 14.

[39] The standard of review on appeal from such a determination is correctness: *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789, 148 O.R. (3d) 115, at para. 30, leave to appeal refused, [2019] S.C.C.A. No. 409.

(2) The Negligence Claim

i. Position of the Parties

[40] The appellant's primary submission is that the majority of the Divisional Court erred in concluding that Ontario is immune from the negligence claim because it impugned a core policy decision. This error stemmed from a mischaracterization of the claim. Properly characterized, the appellant argues that the negligence claim complains about the implementation of a government program, for which Ontario may be held liable. The appellant further contends that it is not plain and obvious that the *CLPA* bars this negligence claim.

[41] Ontario asserts that the Divisional Court majority correctly concluded that Ontario is immune from the appellant's negligence claim. In its view, the substance of the negligence claim targets the structure of the government's discretionary social program for adults with developmental disabilities "as a whole", and the allocation of resources to it, which are core policy decisions. Ontario also argues that s. 11 of the *CLPA* bars the negligence claim.

ii. Government Liability for Negligence and Core Policy Immunity

[42] In *Nelson (City) v. Marchi*, 2021 SCC 41, 463 D.L.R. (4th) 1, the Supreme Court clarified how to distinguish "immune policy decisions from government activities that attract liability for negligence": at para. 3.

[43] Every negligence claim must be based on a duty of care owed to the plaintiff by the defendant. In a case against a government authority, the *Anns*/*Cooper* framework is used to determine whether a duty of care exists, applied in a manner that has regard to whether the plaintiff's claim falls within or is analogous to an established duty of care or is novel because proximity has not been recognized before. In novel cases, the full two-stage framework is followed. At the *prima facie* duty stage, the court asks whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. Proximity arises in those relationships where the parties are in such a close and direct relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant": *Cooper*, at para. 34. At the policy stage, the court asks whether residual policy concerns outside the parties' relationship should negate the *prima facie* duty: *Marchi*, at paras. 15-18.

[44] In the above sense, the “tort law duty of care will apply to a government agency in the same way that it will apply to an individual”: *Just v. British Columbia*, [1989] 2 S.C.R. 1228, at p. 1244. However, the law also recognizes that “certain policy decisions should be shielded from liability for negligence, as long as they are not irrational or made in bad faith”: *Marchi*, at para. 41. If a core policy decision is involved, immunity exists, and no duty of care will be imposed: *Marchi*, at para. 36.

[45] Core policy decisions must be distinguished from “operational implementation”. Operational implementation has been defined as “the practical implementation of the formulated policies” or “the performance or carrying out of a policy”: *Marchi*, at para. 52. Such operational decisions are generally “made on the basis of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness”: *Brown v. British Columbia (Minister of Transportation and Highways)*, [1994] 1 S.C.R. 420, at p. 441.

[46] In ascertaining whether a decision is one of core policy, the use of the term “policy” is not determinative. Instead, “the key focus is always on the nature of the decision”: *Marchi*, at para. 60. Broadly speaking, it will be a decision “as to a course or principle of action … based on public policy considerations, such as economic, social and political factors”: *Marchi*, at para. 51.

[47] In *Marchi*, the Supreme Court identified four factors to ascertain whether a core policy decision is at issue. The rationale for the immunity – protecting the legislative and executive branch's core institutional roles and competencies necessary to maintain the separation of powers – guides how to assess and weigh the factors. The court explained the factors, at paras. 62-65, in the following manner:

> First: the level and responsibilities of the decision-maker. With this factor, what is relevant is how closely related the decision-maker is to a democratically-accountable official who bears responsibility for public policy decisions. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns or have a chilling effect on good governance. Similarly, the more the job responsibilities of the decision-maker include the assessment and balancing of public policy considerations, the more likely this factor will lean toward core policy immunity. Conversely, decisions made by employees who are far-removed from democratically accountable officials or who are charged with implementation are less likely to be core policy and more likely to attract liability under regular private law negligence principles.
>
> Second: the process by which the decision was made. The more the process for reaching the government decision was deliberative, required debate (possibly in a public forum), involved input from different levels of authority, and was intended to have broad application and be prospective in nature, the more it will engage the separation of powers rationale and point to a core policy decision. On the other hand, the more a decision can be characterized as a reaction of an employee or groups of employees to a particular event, reflecting their discretion

> and with no sustained period of deliberation, the more likely it will be reviewable for negligence.
>
> Third: the nature and extent of budgetary considerations. A budgetary decision may be core policy depending on the type of budgetary decision it is. Government decisions "concerning budgetary allotments for departments or government agencies will be classified as policy decisions" because they are more likely to fall within the core competencies of the legislative and executive branches. On the other hand, the day-to-day budgetary decisions of individual employees will likely not raise separation of powers concerns.
>
> Fourth: the extent to which the decision was based on objective criteria. The more a government decision weighs competing interests and requires making value judgments, the more likely separation of powers will be engaged because the court would be substituting its own value judgment. Conversely, the more a decision is based on "technical standards or general standards of reasonableness", the more likely it can be reviewed for negligence. Those decisions might also have analogues in the private sphere that courts are already used to assessing because they are based on objective criteria. [Citations omitted.]

iii. Discussion

a) Errors of the Divisional Court

[48] Against that backdrop, I return to the question of whether the majority of the Divisional Court erred in its treatment of the appellant's negligence claim. As I will explain, the majority fell into error by: (a) mischaracterizing the claim in two ways; and (b) interpreting *Wynberg* and *Wareham* as determinative.

[49] First, the motion judge and dissenting judge at the Divisional Court correctly characterized the negligence claim as one alleging the "negligent operation of a social assistance system within existing resources" (emphasis added). The pleading specifically alleges that Ontario acted negligently in failing to rationally allocate "pre-existing" resources to class members on DSO waitlists who are already "assessed and approved" for Developmental Services, thus denying them their entitlement to services. Accordingly, the negligence claim does not target the discretionary social assistance program as a whole. It does not target Ontario's allocation of resources nor Ontario's exercise of discretion over who is approved for the services at issue.

[50] In holding that the appellant's negligence claim impugns a core policy decision, the majority of the Divisional Court recharacterized the claim. The majority said, at para. 126 of its initial reasons, that the claim targeted the "administration of discretionary benefits under Eligibility Programs for Adults who are 'eligible' but not 'entitled' to those benefits." The majority added that the appellant was not even alleging an entitlement to benefits.

[51] The appellant's claim does, however, make an allegation of entitlement. The claim asserts that "[d]espite being assessed and approved for Developmental Services, the entitlement to such services is arbitrarily denied by unreasonably managed waitlists".

[52] Respectfully, the majority's distinction between "entitlement" and "eligibility" for Developmental Services elides an important point about this claim. The legal "entitlement" claimed for the class is that Ontario must take reasonable care in implementing the process to deliver Developmental Services to those it has assessed and approved to receive them.

[53] Pursuant to s. 14 of the *2008 Disabilities Act*, the class members have been deemed eligible for Developmental Services by an "application entity", and such "entity" has assessed each class member's needs as required under s. 17(1)(a). The statute then contemplates, under s. 17(1)(b), that a "funding entity shall prioritize the provision of services and supports and funding to the applicant in accordance with sections 18 and 19" (emphasis added). On the appellant's argument, the class members have moved beyond "mere eligibility" to a stage where they have been approved, assessed, and are entitled to be prioritized for benefits. The class members are therefore differently situated from those who only meet or potentially meet the criteria for eligibility. While ss. 18 and 19 have still not come into force, the appellant contends that, in the interim, Ontario must act non-negligently in how it prioritizes individuals approved to receive benefits it has placed on the DSO waitlists.

[54] Second, throughout its reasons, the majority relies on a description of the program that misses the essential nature of the allegation. These assertions include that Ontario already assists 47,000 people with developmental disabilities,

that it has a triage system it designed to allocate resources to persons in the program (although such a triage system is not referred to in the claim), that available resources are inadequate to meet the needs of all eligible claimants, that there will be persons who are eligible for benefits who do not receive them, and that making decisions in this context is a complex task.

[55] This description shifts the claim to one that challenges decisions concerning what resources to devote to a triage system addressing a complex problem in which demand outstrips supply. But those are not the decisions the appellant impugns. The appellant pleads that Ontario has no consistent and rational scheme for allocating pre-existing resources, and that the cause of the non-receipt or delayed receipt of support and services by class members is that very failure. As the motion judge and dissenting judge at the Divisional Court correctly observed, the complaint as pleaded is about the negligent administration of DSO waitlists "within existing resources" and is not about "insufficient funding".

[56] Third, the majority of the Divisional Court erred in concluding that *Wareham* or *Wynberg* were indistinguishable.

[57] In *Wareham*, this court upheld the motion judge's decision to strike the class members' negligence claim against Ontario, which related to the delay in receiving ODSP payments. The motion judge had held that it was plain and obvious that no duty of care was present between Ontario and the class members because of a

lack of proximity, or the claim impugned a core policy decision. Like the dissenting judge at the Divisional Court, I agree that *Wareham* is distinguishable because the class included those who merely applied for ODSP. In addition, the motion judge in *Wareham* indicated that the class members' allegation of reliance was only based on the existence of the *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, and not from representations made by government officials: (2008), 166 C.R.R. (2d) 162 (Ont. S.C.), at para. 23. In this case, the class members have all been assessed and approved for Developmental Services and the pleadings allege interactions with government officials through assessment and approval from which reliance could arise.

[58] Moreover, in *Wareham*, the motion judge concluded that the impugned conduct involved core policy decisions because it focused on the "design" of the ODSP and "the resources that are to be allocated to its operation": at para. 25. In contrast, the motion judge below correctly noted that the appellant's claim focuses on the operational failures in administering the DSO waitlists within existing resources and does not allege inadequate funding.

[59] In *Wynberg*, this court upheld a trial judge's conclusion that the plaintiffs' negligence claim related to a core policy decision. At issue was Ontario's decision to restrict access to the Intensive Early Intervention Program (the "IEIP") to autistic children between two and five years old. At para. 255, this court agreed that: "rather than being a claim for operational failures in the implementation of a government

program", the claim related to Ontario's "decision-making about the scope of IEIP and the services to be provided within the special education system". As the motion judge and dissenting judge at the Divisional Court correctly noted, those facts are distinct from the case at bar since the class members here do not challenge the scope of eligibility for Developmental Services, and instead make allegations that were not made in *Wynberg* about operational negligence.

b) Core Policy Analysis

[60] The deficiencies of performance alleged by the appellant do not have the hallmarks of a core policy decision identified in *Marchi*.[6] On the proper characterization of the statement of claim and in light of the facts it alleges, the motion judge and the dissenting judge in the Divisional Court reached the correct result about the negligence claim – that it is not plain and obvious that it is one complaining of core policy decisions attracting immunity.

[61] Each of the *Marchi* factors arguably suggest that the nature of the impugned decisions in the negligence claim are not ones of core policy. With regard to the first factor, the pleadings impugn the conduct of "directors" in MCSS who oversee the administration of Developmental Services and DSO employees at regional

[6] In oral argument the appellant conceded that one of the negligence allegations – arbitrarily cutting off existing Developmental Services to individuals when they reach the age of 18, regardless of pre-approval for such services and their continuing developmental disability, might go beyond operational negligence and was not being pressed.

DSO offices. These are individuals removed from democratic accountability and are clearly charged with implementing the support and services offered under the *2008 Disabilities Act*. Similarly, the second factor cuts against finding a core policy decision. By impugning the “ad-hoc” irrational prioritization approach, as well as bad databases and computer programs, the appellant focuses on matters that can be characterized as reflecting an absence of any sustained period of deliberation. The third factor likewise leans towards finding the decisions reviewable for negligence as the pleadings suggest that the administration of DSO waitlists “within existing resources” involves day-to-day budgetary decisions. The fourth factor leans the same way, as the appellant’s claim criticizes prioritization decisions and practices on the basis that they are not coherent or rational, and thus can arguably be assessed based on objective criteria.

[62] When all of these factors are weighed and considered in their totality, it is not plain and obvious that the negligence claim targets core policy decisions. The overarching guiding principle for core policy immunity, the separation of powers, remains respected if this claim proceeds to trial, as it has the potential to be adjudicated without compromising the institutional roles and competencies of the three branches of government.

c) Duty of Care Analysis

[63] Moreover, in my view, the motion judge was correct in determining that the alleged facts can support the imposition of a duty of care. Foreseeability of harm is adequately alleged. So were facts from which a conclusion of proximity could be reached. As the motion judge noted, the appellant “pleads that every proposed class member directly interacted with the defendant through the receipt of developmental services before turning 18 and had further and direct contact after turning 18 and receiving formal approval for continuing support and services”. This creates a factual foundation for the motion judge’s comment that Ontario must have made representations subsequently relied on by the class members. There is thus the possibility of sufficient proximity being established at trial.

[64] The majority in the Divisional Court erred in concluding that *Wynberg* undermined a possible finding of proximity, asserting that the ongoing relationship between the plaintiffs and Ontario in that case was “much better established” than in the case at bar. As described above, *Wynberg* involved a negligence claim that impugned a core policy decision. There was also no basis to compare the facts as alleged in the pleading in this case against the evidentiary record established through a trial in *Wynberg*.

[65] Absent core policy immunity concerns, it is not plain and obvious that the *prima facie* duty of care arising from the presence of foreseeability of harm and

proximity would be negated by any other residual policy concerns. As a result, it is not plain and obvious that the appellant's negligence claim has no reasonable prospect of success.

d) Ontario's Additional Arguments

[66] Ontario made two additional submissions about why the appellant's negligence claim is doomed to fail. First, the claim impugns actions that are said to be immune under the *CLPA*. Second, the claim is deficient because it does not advance specific allegations of tortious conduct by individual Crown servants, for whom Ontario would be vicariously liable. Ontario cannot be directly liable for negligence − it can only be liable for acts of its servants under s. 5(2) of the *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27.

[67] In my view, *Francis v. Ontario*, 2021 ONCA 197, 154 O.R. (3d) 498, stands as an answer to both arguments.

[68] With respect to the first argument, Ontario points to ss. 11(4)-(5) of the *CLPA*. Section 11(4) of the *CLPA* provides that there is no cause of action against the Crown "in respect of any negligence … in the making of a decision in good faith respecting a policy matter". Section 11(5) includes in the definition of policy matter "the creation, design, establishment, redesign or modification of a program, project or other initiative" and "the manner in which a program, project or other initiative is carried out".

[69] The courts below did not decide whether the *CLPA* applied to this action which was commenced before the *CLPA* was enacted. Ontario argues in this court that the *CLPA* applies. Even if Ontario is right on that point, which I need not decide, it does not change the analysis since this court has held that the *CLPA* merely codifies existing law.

[70] In *Francis*, at para. 127, this court held that the *CLPA* did not give the government broader immunity to that which it enjoyed for core policy decisions at common law. As such, it did not immunize the government for operational matters such as the implementation of a core policy. In light of *Francis*, it is not plain and obvious that statutory immunity would apply under the *CLPA*.

[71] With respect to the second argument, this court in *Francis* stated, at paras. 144-146:

> On a fair reading of the amended statement of claim, it is clear that the allegations being made against Ontario arise from its vicarious liability for the negligent acts of its servants … It is also clear from the amended statement of claim that the negligent acts are those of servants of Ontario. It is axiomatic to point out that Ontario can only operate through the actions of individuals.
>
> There is no absolute requirement that the individual servants of the Crown, who undertake the negligent acts, must be named in the proceeding. Section 5(2) of the *PACA* simply says that no proceeding can be brought against the Crown "unless a proceeding in tort in respect of such act or omission <u>may</u> be brought against that servant or agent" (emphasis added). The section does

> not require that the proceeding must be brought against that servant or agent.
>
> We accept that best practices in pleadings might suggest that the negligent individual, from whom vicarious liability arises, be named as a party, at least in a case where only one event or individual is involved. However, this is a class proceeding in which collective claims are made … it is impractical to expect a representative plaintiff … to name all of the individuals involved in the collectively negligent acts. [Emphasis in original.]

[72] In my view, these quoted passages are a complete answer to Ontario's second argument.

(3) Section 7 *Charter* Claim

i. Position of the Parties

[73] The appellant argues that the Divisional Court erred in finding it was plain and obvious that her s. 7 *Charter* claim had no reasonable chance of success. The appellant agrees that to establish a s. 7 violation there must be: state conduct, a deprivation of a s. 7 right, and the deprivation must not be in accordance with the principles of fundamental justice. But the appellant submits that the Divisional Court incorrectly interpreted the claim as asserting that the s. 7 breach consisted of Ontario not fulfilling a positive obligation to provide the class members economic and human needs. The appellant argues that the claim does not simply assert a deprivation of the class members' s. 7 rights flowing from Ontario's failure to provide Developmental Services or from the very existence of a waitlist. The claim

also alleges a deprivation of the class members' right to security of the person based on the manner in which Ontario has managed DSO waitlists for Developmental Services for persons it has assessed and approved to receive services. This state conduct allegedly interferes with the right to security of the person by undermining the physical and psychological integrity of class members.

[74] Ontario contends that the Divisional Court correctly struck the s. 7 claim. In its view, the Divisional Court was bound by previous s. 7 jurisprudence where claims were rejected on the basis that they sought to impose a positive obligation on the state to provide financial benefits − there is no obligation on the government to do so even in the case of benefits that accord with or enhance *Charter* values. The failure to provide benefits, or the existence of a waitlist for those benefits, cannot successfully ground a s. 7 claim. Ontario also argues that the appellant does not particularize how the deprivation fails to accord with a principle of fundamental justice, which is fatal to the viability of the s. 7 claim.

ii. The Law

[75] To demonstrate a violation of s. 7 of the *Charter*, a claimant must first demonstrate that the impugned state action interferes with or deprives them of their life, liberty, or security of the person. Once a s. 7 right has been engaged, they must show that the deprivation is not in accordance with the principles of fundamental justice: *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015]

1 S.C.R. 331, at para. 55. The pleadings must allege both constituent elements to disclose a viable s. 7 claim: *Bowman v. Ontario*, 2022 ONCA 477, 162 O.R. (3d) 561, at para. 97.

[76] In *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, [2002] 4 S.C.R. 429, at para. 81, the majority highlighted that s. 7 is focussed on a right "not to be deprived" and that nothing in the jurisprudence up to that time imposed a positive obligation on the state to ensure that each person enjoys life, liberty, or security of the person. However, the majority expressly left open the possibility that a positive obligation under s. 7 to sustain life, liberty or security of the person may be made out in special circumstances: at para. 83.

[77] In light of *Gosselin*, this court has consistently held that, to make out a deprivation of a s. 7 right, claimants cannot point to the government's failure to provide a financial benefit, even if such a benefit may be necessary to sustain life, liberty, or security of the person: see *Wynberg*, at paras. 218-220; *Flora v. Ontario (Health Insurance Plan, General Manager)*, 2008 ONCA 538, 91 O.R. (3d) 412, at para. 108. This court has upheld the striking of a s. 7 claim at the pleadings stage when the claim alleged that the deprivation stemmed from the state's failure to provide access to publicly-funded autism therapy services for children since "[g]overnment action in not providing specific programs … cannot be said to *deprive* [the claimants] of constitutionally protected rights": see *Sagharian v.*

Ontario (Education), 2008 ONCA 411, 172 C.R.R. (2d) 105, at paras. 52-53, leave to appeal refused, [2008] S.C.C.A. No. 350 (emphasis in original).

[78] However, this court has also held that claimants may be able to make out a s. 7 deprivation that stems from delay in receiving essential financial benefits for which they are statutorily entitled: see *Wareham*, at paras. 16-17. As Doherty J.A. wrote, at para. 17, "[t]here is a potential argument to be made that [such] delay … could engage the right to security of the person where that delay has caused serious physical or psychological harm".

iii. Discussion

[79] I agree with the appellant that the Divisional Court erred in finding the s. 7 claim was doomed to fail because it is completely foreclosed by existing jurisprudence.

[80] The Divisional Court interpreted the claim as imposing a positive constitutional obligation on Ontario to provide Developmental Services to the class members.

[81] But when one reads the pleading generously, the appellant's s. 7 claim includes an allegation of deprivation of the security of the person that stems from the manner in which Ontario administers DSO waitlists for Developmental Services for persons it has already assessed and approved. In other words, it does not simply allege that the failure to receive Developmental Services or the existence

of the waitlist deprives class members of a s. 7 right. It alleges that the conduct of Ontario in assessing, approving, and then placing class members into an incoherent and irrational waitlist process visits harm to their security of the person. Read in this light, the complaint is not simply about state inaction or delay – i.e., the failure to alleviate the class members' vulnerabilities that already exist due to their developmental disabilities. The complaint is about harm to their security of the person, including their psychological integrity, that is alleged to occur from state action.

[82] As such, the claim can be distinguished from the claims in *Wynberg, Flora*, and *Sagharian*. In those cases, the claimants identified their s. 7 deprivation as originating from legislative limitations on the scope of a benefit or the mere existence of a waitlist, and thus their claims could be characterized as seeking to impose a positive obligation on the state.

[83] Here, the appellant points to state action (the ad hoc, unreasonable administration of a waitlist of individuals with approval for essential services) that she alleges causes a form of psychological harm sufficiently profound to deprive class members of the right to security of the person. The claim lists "mental anguish" and the "development of new mental, psychological or psychiatric disorders" as some of the harms stemming from the impugned state conduct. The appellant argues that this psychological harm surpasses the "ordinary stress and anxiety" that the Supreme Court has held to be insufficient to constitute a

deprivation of the security of the person: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 60.

[84] As the motion judge noted, it is true that the pleading also asserts that state inaction and delay in providing Developmental Services itself constitutes a deprivation of the security of the person because the benefits are essential to the class members. To the extent the pleading does so, it sails close to asserting a positive constitutional obligation in favour of these class members. But given that the claim read generously goes beyond this, the question is whether it should be allowed to proceed or considered doomed to fail.

[85] Although I share the motion judge's scepticism about the ultimate success of the s. 7 claim, I agree with the result he reached that the claim should be allowed to proceed. It is not plain and obvious that, if proven, the psychological harm allegedly caused by Ontario's management of DSO waitlists for Developmental Services to the vulnerable class members could not amount to a deprivation of the security of the person.

[86] And even to the extent the claim goes beyond that, it is important to recognize that claims should be struck with care: *Imperial Tobacco*, at para. 21. Novel claims that may incrementally develop the law should be allowed to proceed: *Babstock*, at para. 19. This may be particularly true for novel *Charter* claims that explore the scope of a right, as such claims often require a trial and an evidentiary

record to fully understand the nature of the impugned state action and the harms experienced by claimants: Lorne Sossin and Gerard J. Kennedy, “Justiciability, Access to Justice and the Development of Constitutional Law in Canada”, (2017) 45:4 Fed. L. Rev. 707, at p. 719.

[87] It is worth repeating that in *Gosselin*, the majority of the Supreme Court left open the possibility of a positive obligation under s. 7 to sustain life, liberty, or security of the person being made out in special circumstances. While this court has held that this possibility alone is normally an insufficient basis for allowing novel positive obligation claims under s. 7 to proceed to trial, this claim is arguably distinct because the class members have already been assessed and approved for Developmental Services pursuant to the *2008 Disabilities Act*. This feature arguably shares some similarities to the features of the s. 7 claim in *Wareham* that was permitted to proceed. As such, the positive obligation dimension of this claim may likewise warrant further consideration at trial.

[88] Finally, I reject Ontario’s argument that the pleadings do not sufficiently identify a principle of fundamental justice with which the appellant’s alleged deprivation fails to accord. The appellant alleges arbitrariness, with her pleadings asserting that Ontario has created an “arbitrary” system for administrating the waitlist for Developmental Services. Taken at its highest, the appellant’s s. 7 claim argues that the deprivation of the security of the person experienced by class members has no rational connection to the purpose of the state action.

[89] Accordingly, I am satisfied that the appellant's pleadings allege the constituent elements to make out a viable s. 7 *Charter* claim and should be allowed to proceed to trial.

(4) Remaining Certification Issues

[90] Ontario argues in the alternative that, if the Divisional Court erred in its conclusion that the appellant's negligence or s. 7 *Charter* claims were doomed to fail, the setting aside of the certification order should be upheld because the motion judge erred in his common issues and preferable procedure analysis under ss. 5(1)(c) and 5(1)(d) of the *CPA*.

[91] Substantial deference is owed to a motion judge's certification decision and appellate intervention is only warranted if there is a palpable and overriding error of fact or an error in principle: *Fischer v. IG Investment Management Ltd.*, 2012 ONCA 47, 109 O.R. (3d) 498, at para. 40, aff'd on other grounds, 2013 SCC 69, [2013] 3 S.C.R. 949. To certify common issues, there must be "some basis in fact" supporting the conclusion that the proposed issues are common to all class members and their resolution will avoid duplication of fact-finding or legal analysis: *Cirillo v. Ontario*, 2021 ONCA 353, 486 C.R.R. (2d) 25, at para. 57, leave to appeal refused, [2021] S.C.C.A. No. 296.

[92] I am satisfied the motion judge did not err, as asserted by Ontario, in concluding there was a factual basis to certify the common issues of (a) whether

Ontario owed and breached a duty of care to the class, and (b) whether Ontario breached the class members' s. 7 right. On the first common issue, I see no error in the motion judge's conclusion that the question can be determined on a class-wide basis as the available evidence suggests that Ontario has a "singular approach" to administrating DSO waitlists. Similarly, on the second common issue, I see no error in the motion judge's determination that the record suggests that Ontario subjects the class to a single common course of conduct that may constitute a s. 7 *Charter* breach.

[93] Finally, I am satisfied the motion judge did not err in concluding that a class action would be a preferable procedure. The motion judge reasonably exercised his discretion and determined that the resolution of the common issues would promote the objective of access to justice and, even if a substantial number of individual assessments remain, would meaningfully advance the litigation for class members.

DISPOSITION

[94] For these reasons, I would allow the appeal, set aside the order of the Divisional Court, and restore the motion judge's order.

[95] Pursuant to the agreement of the parties, costs of the appeal and the motion for leave to appeal to this court are awarded to the appellant in the total amount of $40,000. The costs of the certification motion, the motion for leave to appeal to the

Divisional Court, and the Divisional Court appeal itself are awarded to the appellant in the total amount of $170,000. Both amounts are inclusive of disbursements and applicable taxes.

Released: May 4, 2023 "D.D."

"B. Burnett J.A."

"Jasmine Doherty J.A."

"I agree. Coroza J.A."