

# THE GR COURT DOCKET

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## Negligence claim against lawyer who obtained restraining order against a non-party dismissed

By Stephen Thiele, Gavin Tighe and Anna Husa

Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

**Stephen Thiele**

Partner  
416.865.6651  
sthiele@grllp.com

**Gavin Tighe**

Partner  
416.865.6664  
gigtighe@grllp.com

**Anna Husa**

Partner  
416.865.6687  
ahusa@grllp.com

Causes of action typically require a plaintiff to prove specific elements in order to succeed. In a claim for negligence, the plaintiff must prove (i) that there was a duty of care owed by the defendant to the plaintiff; (ii) that the behaviour of the defendant was in breach of the applicable standard of care; (iii) that the plaintiff suffered damages; and (iv) that the damages suffered by the plaintiff were caused by the impugned behaviour of the plaintiff. In cases involving professional negligence against a lawyer, a plaintiff will have significant difficulty succeeding in a negligence claim if the plaintiff was not the client of the defendant lawyer and if the plaintiff fails to provide expert evidence showing that the lawyer breached a duty of care or fell below a standard of care.

In *Rafferty v. Goddard*, 2022 ONSC 6026 (not yet on CanLII), the court was asked to determine if a negligence claim brought by a plaintiff who had been made subject to a restraining order in a proceeding in which he was not a party had a valid claim against the lawyer who acted for the

party that obtained the order. The court said “No” and dismissed the action on a summary judgment motion.

The restraining order had been granted in an acrimonious family law dispute that involved the plaintiff's sister and her husband, SC. The family law action dealt with custody, access and financial issues.

Even though the plaintiff was not a party to that action, he provided funding to his sister and was a very active participant in malicious conduct that was aimed at SC. The conduct included destroying items of sentimental value to SC and making fun of SC's personal medical condition in front of his children.

The plaintiff was found to have anger management issues and on April 23, 2015, a judge in the family law action ordered that the plaintiff be prohibited from having contact with his sister's and SC's children until he completed therapeutic counselling. This order was obtained on the consent of the sister and SC.

In April of 2016, the plaintiff's sister sought to vary the judge's order so that the plaintiff could have contact with the children. The plaintiff swore an affidavit in support of this motion. In the affidavit, the plaintiff admitted to trying to humiliate SC in front of his children and other troublesome conduct, and to having obtained counselling. The order was varied.

Two years later, the plaintiff's sister distributed a highly defamatory letter about SC to third parties. The evidence showed that the plaintiff had allowed his sister to use his office to assist in preparing the letter, that he read the letter before dissemination and that he was aware of his sister's intention to distribute the letter.

After learning of the letter, SC sought a contempt order against his wife (the plaintiff's sister) and a further restraining order against the plaintiff. The restraining order was obtained on consent.

The plaintiff contended that in obtaining the restraining order the defendant lawyer had failed to fully disclose to the court that he had not consented to the order. He was not a party to the family law action and had not been provided with notice that a restraining order was being sought against him. Although his sister's lawyer had consented to the order, the plaintiff argued that the defendant had negligently completed a court form which suggested that he too had consented. The court form checked the box which stated that the order being sought was "[o]n the consent of all persons affected."

The restraining order was served on the plaintiff in July of 2018. The plaintiff ultimately succeeded in setting aside the order in 2019. He then made a complaint about the defendant lawyer to the Law Society of Ontario, which refused to investigate, and then sued the defendant.

The defendant argued that he owed no duty of care to the plaintiff because the plaintiff was not his client, that the plaintiff failed to provide expert evidence to prove that the defendant's action fell below the standard of care in the circumstances, that the plaintiff, in any event, suffered no damages, and that any damages, if suffered, were not caused by the defendant's conduct. The plaintiff claimed that his damages were a loss of business reputation and credibility as a forensic engineering expert in criminal and personal injury cases, the deterioration of his health and the ability to achieve his ultimate goal to climb Mount Everest.

The defendant also argued that the plaintiff had become fixated on him.

The court found that during the family law litigation, the plaintiff was supporting his sister and had been alerted by her lawyer that a potential restraining order directed at him would be forthcoming. In the circumstances, based on the general principles applying to whom a lawyer owes a duty of care, the defendant simply did not owe a duty of care to the plaintiff when the restraining order was sought. Although the defendant could have potentially proceeded differently so that others were alerted to the fact that a restraining order against the plaintiff were being sought, the defendant dealt directly with the sister's lawyer, as he had done previously, and was entitled to presume that his materials would be reviewed by the sister's lawyer, with any concerns about the materials raised with both the plaintiff and his sister. Similarly, the court stated that if the judge who issued the restraining order had any concerns about it, she would have raised them with the lawyers.

In the result, the defendant owed no duty of care to the plaintiff. This was enough to dismiss



the plaintiff's action.

However, the court also found that the plaintiff's action should be dismissed because he had failed to provide any expert evidence to support his claim. The defendant's alleged breaches of a duty of care were not so obvious to be within the expertise of the court, and/or self-evident as a matter of common sense such that no expert evidence was required.

There was no evidence linking the plaintiff's alleged damages to the defendant's conduct either.

The plaintiff was obliged to put his best foot forward on the defendant's summary judgment, but he did not do so. Accordingly, the plaintiff failed to meet any of the required elements of negligence.

The court concluded its judgment finding that, in the alternative, that there was merit to the defendant's arguments that the plaintiff's claim could also be dismissed on the grounds of issue estoppel, abuse of process and collateral attack. The court noted that the negligence action might have qualified as the plaintiff's "third bite" at the cherry.

#### **Representation by Gardiner Roberts LLP**

The defendant was represented by Gavin Tighe and Anna Husa. Mr. Tighe and Ms. Husa are senior litigation lawyers at Gardiner Roberts LLP. Mr. Tighe is a certified specialist in litigation by the Law Society of Ontario.

Mr. Tighe and Ms. Husa were assisted in the drafting of the written legal argument used to support the summary judgment motion by Stephen Thiele. Mr. Thiele is a partner and the firm's Director of Legal Research.

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