

Damages awarded in racial profiling case

Focus on: Human Rights Law

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Anthony Morgan says a recent ruling concerning racial profiling by police is important for a new generation of lawyers and community workers interested in the issue.

A ruling in a civil damages case awarding \$80,000 to a man racially profiled by a Toronto police officer is believed to be the largest of its kind so far in Ontario.

Lawyers say the ruling in *Elmardy v. Toronto Police Services Board 2017* will have important effects on how damages are sought in relation to racial profiling by police.

Mutaz Elmardy pursued a case against the Toronto Police Services Board and Toronto Police Service Const.

Andrew Pak, after two officers stopped him on a downtown street in January 2011 while he was coming from a mosque.

According to the ruling, Elmardy was punched twice in the face twice by the officer, had his pockets emptied without giving permission and was left lying on his hands while in handcuffs.

In an April 2017 Divisional Court ruling by Justice Harriet Sachs, Justice Ian Nordheimer and Justice Nancy Spies, the judges said Elmardy had been racially profiled and awarded him \$50,000 for breaching of his Charter rights, \$25,000 in punitive damages and \$5,000 for battery.

“The only reasonable inference to be drawn from the fact that both officers, without any reasonable basis, suspected the Appellant of criminal behaviour, is that their views of

the Appellant were coloured by the fact that he was black and by their unconscious or conscious beliefs that black men have a propensity for criminal behaviour.

“This is the essence of racial profiling,” said the ruling.

Andrew MacDonald, who represented Elmardy, says the case “highlights the protection the Charter offers even to innocent individuals who are approached by the police.”

“Policing that is inconsistent with Charter rights and freedoms exposes the police to civil claims for damages under the Charter,” says MacDonald, principal lawyer with the The Barristers Group.

MacDonald says lawyers representing clients who have been the victims of discrimination by public bodies should consider different options.

“One consideration ought to be, ‘Has there been a breach of the Charter and is this an appropriate case for an award of damages under the Charter for a breach of one of the sections?’ I think that maybe lawyers who practise human rights law . . . might not have considered in the past bringing a claim for damages under the Charter, and that may change with this case, that they will consider that as an option in the right circumstances,” he says.

The 2017 ruling notes that after stopping Elmardy, police filled out a card and recorded information about him, including that his skin colour was black and his birthplace was in Sudan.

Elmardy had initially pursued a case through the Superior Court of Justice, where he was awarded \$27,000 in damages in 2015.

However, the justice said that while Elmardy had some of his constitutional rights violated, he “did not prove on a balance of probabilities that the actions of Constable Pak were racially motivated.”

However, the justices in the 2017 ruling disagreed.

“Racial profiling has a serious impact on the credibility and effectiveness of our police services. It has led to distrust and injustice. It must stop,” said the ruling.

Anthony Morgan, an associate with Falconers LLP, says the ruling is important for a new generation of lawyers and community workers interested in the issue of racial profiling.

He says the amount of damages awarded in the case is “historic.”

“In my research, it’s the highest [civil damages award] for a racial profiling case in Ontario . . . I haven’t seen anything like this before,” he says.

Morgan says that typically at his firm, cases involving racial profiling are pursued through avenues such as the Human Rights Tribunal of Ontario.

“One of the ongoing critiques, however, of the Ontario human rights tribunal system is that damages are typically too low. This case shows that pursuing Charter damages through a civil suit is a viable option as opposed to just automatically deferring to the human rights tribunal process and proceeding,” he says.

While civil litigation can be costly, he says that with more lawyers, judges and community members aware of the decision, it will increase the number of people examining civil suits as a way of remedying racial profiling.

David Gourlay, the City of Toronto lawyer who represented the Toronto Police Services Board and the police officer named in the case, said, “Given the outcome at trial, it was somewhat unexpected that the plaintiff appealed the judgment.

“It is also uncommon for an appeal court to make a finding of fact in reversing an aspect of a trial decision,” Gourlay said in an email statement.

“The decision is dependent on factual findings made by the court, and in our view is of limited precedential value.”

Meanwhile, Mark Pugash, spokesman for the Toronto Police Service, says the way officers do business has “fundamentally” changed.

“The way we work now is very different from 2011,” says Pugash, who did not comment specifically on the judgment.