

CANADA / JUDGMENT

McKee v. Shahid

2025 ONCA 666

COURT

Court of Appeal for Ontario

DECIDED

25 September 2025

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McKee v. Shahid

Collection

Decisions of the Court of Appeal

Date

2025-09-25

Neutral citation

2025 ONCA 666

Docket numbers

COA-24-CV-0912

Judges

Lauwers, Peter D.; Favreau, Lise G.; Dawe, Jonathan

Subject

Civil

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: McKee v. Shahid, 2025 ONCA 666

DATE: 20250925

DOCKET: COA-24-CV-0912

Lauwers, Favreau and Dawe JJ.A.

BETWEEN

Anna McKee

Plaintiff (Appellant)

and

Dr. Raheel Shahid and Dr. Gunter Lorberg

Defendants (Respondents)

John Adair and Ritika Rai, for the appellant

Adam Patenaude and Kathryn Ball, for the respondents

Heard: April 14, 2025

On appeal from the order of Justice R. Cary Boswell of the Superior Court of Justice, dated August 1, 2024, with reasons reported at 2024 ONSC 4258.

Favreau J.A.:

A. Introduction [1] This action arises from a tragic death.

- [2] On February 11, 2019, Bradley McKee stabbed his father, William McKee, to death. At the time of the stabbing, Bradley[1] was 27 years old; he had a long history of serious addiction and mental health issues.
- [3] The appellant, Anna McKee, is Bradley's mother and William's wife. She brought this action in negligence against two of Bradley's psychiatrists, the respondents.
- [4] Dr. Gunter Lorberg is a psychiatrist at Centre North Correctional Centre in Penetanguishene and at Ontario Addiction Treatment Centres in Barrie. Dr. Lorberg began treating Bradley in August 2016 and was Bradley's primary treating psychiatrist at the time Bradley killed his father.
- [5] Dr. Raheel Shahid is a psychiatrist with privileges at Waypoint Centre for Mental Health Care ("Waypoint"). Dr. Shahid discharged Bradley from Waypoint on December 12, 2018, two months before William's death.
- [6] The claim alleges that the respondents were negligent in treating Bradley and that they were negligent in failing to warn Ms. McKee and William that Bradley posed a danger to them.
- [7] The motion judge granted respondents' motion to strike the claim. He found that the claim for negligence in treating Bradley did not disclose a reasonable cause of action because the duty of care the respondents allegedly owed to Bradley's parents would conflict with the duty of care owed to Bradley. The motion judge did not give leave to amend this claim. He also found that the claim for failure to warn did not plead sufficient material facts and struck that claim with leave to amend.

- [8] Ms. McKee appeals the motion judge's order striking her claim based on negligence in treating Bradley without leave to amend. She argues that the motion judge erred in finding that this was not an established duty of care. Alternatively, Ms. McKee submits that the motion judge erred in his Anns/Cooper analysis, particularly in finding there to be a conflict between the duty of care the respondents owed to Bradley and the proposed duty they owed to his parents.
- [9] I do not agree with the motion judge that Ms. McKee's claim in negligence based on the respondents' treatment of Bradley is doomed to fail. While I agree that this proposed duty of care is not within an established category of duty of care, the issue of a conflict between the duty owed to Bradley and a potential duty owed to his parents should be decided on a proper evidentiary record, rather than on a motion to strike. I would accordingly allow the appeal.

B. The Issues [10] Ms. McKee's appeal raises the three following issues:

1. Did the motion judge err in finding that the claim did not fall within an established category of duty of care?
2. Did the motion judge err in finding that the respondents did not owe Bradley's parents a duty of care under the Anns/Cooper analysis because such a duty would conflict with the duty owed to Bradley?
3. Did the motion judge err in denying leave to amend?

[11] Before addressing these issues, I set out the background.

C. background (1) Statement of claim [12] Because this is an appeal from a motion to strike brought pursuant to r. 21.01(1)(b) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, the facts pleaded in the statement of claim are to be taken as true, unless they are manifestly incapable of being proven: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 22; *Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441, at p. 455.

- [13] Bradley started showing signs of addiction and mental health symptoms in 2008 when he was 16 years old. The statement of claim describes his multiple diagnoses over several years. By 2014-2015, he was diagnosed with opiate dependence and steroid abuse, major depressive episode, anxiety, suicidal thoughts and borderline antisocial personality. On August 30, 2018, less than six months before Bradley killed his father, Dr. Lorberg diagnosed him with primary panic disorder, generalized anxiety disorder/major depressive disorder, opioid use disorder and unspecified personality disorder.
- [14] Bradley has had multiple admissions to psychiatric facilities, including Waypoint, starting in 2016. Bradley has also faced criminal charges. In 2016, he was charged with assaulting his parents and a police officer. From February 3, 2017, to the date of his father's killing two years later, Bradley was on house arrest arising from a recognizance for a charge of driving under the influence. His parents were his legal sureties.

- [15] The statement of claim describes the deterioration in Bradley's mental condition and the escalation in his symptomatic behaviour. It also sets out the treatment decisions made by the respondents in the months leading up to the killing:
16. On November 24, 2018, police were contacted after an altercation between Bradley and his parents. On arrival, Bradley McKee was observed screaming at his parents and holding knives in his hands. Prior to police arriving, he had threatened to kill himself with the knives. Bradley McKee was apprehended under the Mental Health Act, R.S.O. 1990, c. M.7 and transferred to Georgian Bay General Hospital ("GBH").
 17. On November 25, 2018, Bradley was sent on a Form 1 under the Mental Health Act from GBH to Waypoint with the recommendation that he be admitted for long-term care. He was discharged a day later.
 - ...
 19. On December 1, 2018, Bradley was brought into the hospital by first responders after being found in the forest by the Ontario Provincial Police ("OPP"). He had overdosed on Methadone and Clonazepam and was hypothermic. The medications were prescribed by Dr. Lorberg. He was admitted to GBH.
 20. On December 7, 2018, at GBH, a Crisis Services Discharge Plan of Care was prepared with ten recommendations. One of the first of these recommendations indicated that Bradley may benefit from a prolonged admission for medication review and psychiatric observation.
 21. In preparation of Bradley's discharge from GBH and transfer to Waypoint, on the suggestion of GBH staff, Bradley's parents wrote a letter, dated December 12, 2018, documenting their son's struggles with addiction and mental health concerns to Waypoint and GBH pleading for Bradley to be admitted to Waypoint for a prolonged period of time. They ensured that this information was put into Bradley's discharge package from GBH to Waypoint. This letter expressed their belief that his only hope now was to get long term help at Waypoint and to connect to services as all other options had not been helpful as revealed by recent incidents indicating serious deterioration of Bradley's mental health. It was also reported that he was paranoid and increasingly delusional of late.
 - ...
 23. On December 12, 2018, after an admission of 12 days, Bradley McKee was sent on a Form 1 under the Mental Health Act from GBH to Waypoint for long-term care. He was found to have continued paranoid symptoms. He was discharged the same day by Dr. Shahid the attending psychiatrist.
 - ...
 26. While attending at his routine weekly Friday appointments with Dr. Lorberg at the [Ontario Addiction Treatment Centres] clinic in Barrie, Bradley was given a letter dated January 25, 2019 regarding concerns of his displaying assaultive behaviour while attending the clinic.

This was the first and only notice that he had ever been provided while attending his weekly appointments with Dr. Lorberg. This notice was provided as a result of his unacceptable behaviours observed at the OATC clinic since his discharge from Waypoint [on] December 12, 2018.

- [16] On February 11, 2019, Bradley was experiencing psychosis at his parents' home. Ms. McKee left the house to get some help. While she was gone, Bradley stabbed his father in the neck with a knife. Bradley also stabbed himself several times. William died from his injuries and Bradley was taken into custody with multiple self-inflicted wounds.
- [17] Bradley was found guilty of first degree murder, forcible confinement and uttering death threats in relation to his father's death. When this action was commenced, Bradley was being held at the Central North Correctional Centre in Penetanguishene.
- [18] The claim alleges that the respondents "owed a duty of care to third parties, specifically the deceased, William, arising out of the reasonable foreseeability of harm resulting from an error or omission."
- [19] The claim further alleges that the respondents breached the standard of care through a series of acts and omissions, including that "[t]hey discharged Bradley from long-term psychiatric care when it was contraindicated", "[t]hey failed to adequately assess the risk posed by Bradley or warn of that risk", "[t]hey failed to exercise reasonable care to warn and protect third parties regarding the risk posed by Bradley", and "[t]hey failed to use all due care and skill throughout their treatment of Bradley".
- [20] Based on the alleged negligence of the respondents, Ms. McKee seeks damages in the amount of \$1.2 million pursuant to the Family Law Act, R.S.O. 1990, c. F.3, for the loss of past and future care, guidance and companionship. She also seeks direct damages of \$150,000 for nervous shock and mental distress, and aggravated damages of \$150,000.
- (2) Motion judge's decision striking the claim [21] The respondents brought a motion to strike the claim on the basis of rr. 21.01(1)(b) and 25.11 of the Rules of Civil Procedure.
- [22] The motion judge stated that the claim was "not particularly clear as to the contours of the duties", but that, reading the claim generously, the claim appeared to assert that the respondents owed Ms. McKee and William duties of care to (1) provide competent medical care to Bradley, and (2) warn them of the significant risk Bradley posed to their safety.
- [23] The motion judge first addressed the proposed duty of care owed to Ms. McKee and William based on the respondents' negligence in treating Bradley. He rejected Ms. McKee's argument that the claimed duty of care fits within a category recognized by *Ahmed v. Stefaniu* (2006), 275 D.L.R. (4th) 101 (Ont. C.A.), leave to appeal refused, [2006] S.C.C.A. No. 498. In particular, he rejected the submission that this decision established that psychiatrists who treat a potentially violent patient owe a duty of care to that patient's family members. He also rejected the respondents' position that the courts have categorically established that physicians do not owe a duty of care to non-patient third parties. In doing so, he reviewed a

number of cases where courts have found that no such duty of care exists, including *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83, *Paxton v. Ramji*, 2008 ONCA 697, 92 O.R. (3d) 401, leave to appeal refused, [2008] S.C.C.A. No. 508 and *Wawrzyniak v. Livingstone*, 2019 ONSC 4900. He concluded that, while those cases did not find a duty of care, they did not establish on a categorical basis that a physician can never owe a private law duty of care to non-patient third parties.

- [24] The motion judge next considered whether the proposed duty of care should be recognized pursuant to the *Anns/Cooper* analysis. At the first stage of the *Anns/Cooper* test, he accepted that the harm alleged was reasonably foreseeable. On the issue of proximity, the motion judge held that there were aspects of the relationship between Bradley's parents and the respondents that would support finding significant proximity. However, he decided that imposing a duty of care on the respondents would place them in an "impossible conflict" with the duty they owed to Bradley:

If the defendants were found to have a duty of care to Bradley's parents, they would be placed in an impossible conflict of interest in making decisions about Bradley's future care. Quite apart from the possibility of intrusion into Bradley's privacy interests, Bradley's interests in terms of prescribed medications and courses of treatment may well conflict with his parents' interests in what medications he ought to be taking and what course(s) of treatment he ought to be following.

No more glaringly is this potential conflict evident than with the question of whether Bradley should have been the subject of long-term, residential care. His parents urged the defendants to keep Bradley in a long-term residential treatment program, even if that meant doing so against his will. But Bradley, of course, has a very strong interest in his liberty. And medical practitioners may only interfere with that liberty in limited circumstances.

- [25] The motion judge also found that other policy considerations weighed against finding a duty of care. He held that recognizing the proposed duty of care would have a chilling effect on psychiatrists taking on patients who pose a potential danger to third parties. In addition, he stated that patients with mental illnesses might be dissuaded from seeing a psychiatrist if they knew the psychiatrist was required to consider the impact on third parties when making treatment decisions.
- [26] The motion judge next addressed Ms. McKee's claim that the respondents were negligent based on an alleged duty to warn her and William of the danger Bradley posed to them.
- [27] The motion judge rejected Ms. McKee's position that this was an established category of duty of care based on *Childs v. Desormeaux*, 2006 SCC 18, [2006] 1 S.C.R. 643. He found that the alleged duty was not analogous to the duty that defendants owe to third parties when exercising a public function or engaging in a commercial enterprise. Relying on *Smith v. Jones*, [1999] 1 S.C.R. 455, the motion judge nevertheless concluded that the respondents might conceivably have had a duty to give confidential information about Bradley's condition to his parents or the police. He stated that this was a novel claim and that while he was "dubious of its likelihood of success", it should be allowed to proceed because it was

arguable.

- [28] Having found that the failure to warn claim disclosed a reasonable cause of action, the motion judge nevertheless struck it on the basis of r. 25.11 of the Rules of Civil Procedure. He found that the claim failed to plead the necessary material facts in support of the claim, such as when and how each respondent “became aware of a specific threat to cause serious bodily harm” to Bradley’s parents and what in particular they should have been warned about. The motion judge granted leave to amend the claim based on a duty to warn.

D. analysis [29] Ms. McKee appeals the aspect of the motion judge’s order striking her claim against the respondents for negligence in the treatment of Bradley. She does not appeal the part of the order striking the claim based on a duty to warn, with leave to amend.

- [30] I agree with the motion judge that the claim based on negligence in treating Bradley does not fall within an established category of duty of care. However, I disagree with him that the claim should be struck because of a conflict between a duty owed to Bradley and the proposed duty owed to his parents. This is an issue that is best decided on a proper evidentiary record. Given my conclusion on this issue, it is not necessary to address Ms. McKee’s position that she should be allowed to amend her claim, including to assert a claim based on the loss of companionship and support from Bradley under the Family Law Act.[2]

- [31] I start with a discussion of the standard of review, and next consider the test on a motion to strike and the general principles that apply in assessing a duty of care. I then address the issues of whether the claim falls within an established category and whether, based on the Anns/Cooper analysis, the proposed duty of care is doomed to fail.

Standard of review

- [32] The standard of review is correctness on an appeal from an order striking a claim as disclosing no reasonable cause of action pursuant to r. 21.01(1)(b) of the Rules of Civil Procedure: *McCreight v. Canada (Attorney General)*, 2013 ONCA 483, 116 O.R. (3d) 429, at para. 38.

Test on a motion to strike

- [33] A claim will only be struck on a motion under r. 21.01(1)(b), if it is plain and obvious, assuming the facts pleaded are true, that the pleading discloses no reasonable cause of action; in other words, the claim will only be struck if it has “no reasonable prospect of success”: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45, at para. 17; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 14.
- [34] As mentioned above, courts must assume that all facts pleaded in the statement of claim are true, unless they are patently ridiculous or incapable of proof: *Imperial*, at para. 22; *McCreight*, at para. 29; and *Operation Dismantle*, at p. 455.

- [35] The court must read the statement of claim as generously as possible, with a view to accommodating any inadequacies in the pleading: *Catalyst Capital Group Inc. v. Veritas Investment Research Corp.*, 2017 ONCA 85, 136 O.R. (3d) 23, at para. 21; *Operation Dismantle*, at p. 451.
- [36] A claim should not be struck just because it has not yet been recognized, or because the underlying law is unsettled, or because the plaintiff's odds of success seem slim. Rather, the court "must be generous and err on the side of permitting a novel but arguable claim to proceed to trial": *Imperial*, at para. 21.
- [37] That said, a motion to strike is a valuable housekeeping tool: "It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial": *Imperial*, para. 19.

General principles regarding duty of care

- [38] The first element of a claim in negligence is a duty of care. The duty of care analysis focuses on the relationship between the parties and asks whether the relationship is so close that one party might reasonably be said to owe a duty to take care not to injure the other party: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 4.
- [39] In assessing whether a defendant owes a duty of care to a plaintiff, the court must first determine whether the relationship between the parties falls within an established category of duty of care or one analogous to an established category: *Childs*, at para. 15; *Mustapha*, at para. 5.
- [40] If the relationship does not fall within an established category, the court must then apply the two-part *Anns/Cooper* test to determine whether a novel duty of care should be recognized. The two-part test asks: (1) whether the parties are in a relationship of proximity in which the defendant's failure to take reasonable care might foreseeably cause harm to the plaintiff; and (2) if there is a *prima facie* duty of care, whether residual policy concerns outside the parties' relationship should negate it: *Nelson (City) v. Marchi*, 2021 SCC 41, [2021] 3 S.C.R. 55, at paras. 17-18; *Imperial*, at para. 39; and *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 20.

Issue 1: The relationship between Ms. McKee and the respondents does not fall within an established category of duty of care

- [41] Ms. McKee submits that the motion judge erred in finding that the duty of care allegedly owed by the respondents to her and William is not an established category of duty of care. In making this argument, she relies primarily on this court's decision in *Ahmed*. She says the motion judge mistakenly stated that, in *Ahmed*, this court found that a treating psychiatrist in similar circumstances was not negligent when in fact he was found to be negligent. I agree that the motion judge misstated the outcome in *Ahmed*, but I also agree with the motion judge's assessment that *Ahmed* did not establish a duty of care applicable to the

circumstances of this case.

- [42] As a starting point, it is necessary to clearly describe the duty of care alleged in this case. As the motion judge stated, there is no doubt that the respondents owed a duty of care to Bradley, who was their patient. The question is whether the respondents, as Bradley's treating psychiatrists, also owed his parents a duty of care in their treatment of Bradley, in a context where Bradley had serious mental health issues that included a propensity to threats and violence toward his parents with whom he lived.
- [43] In *Ahmed*, a woman was killed by her brother, who had been in a psychiatric facility as an involuntary patient. He killed his sister after his status was changed to voluntary and he left the psychiatric facility. The sister's family brought a claim against the psychiatrist who had changed the brother's status and enabled him to leave the facility. The jury found the psychiatrist liable to the family in negligence. The psychiatrist appealed and this court dismissed the appeal.
- [44] In his reasons, the motion judge erroneously stated that this court in *Ahmed* "found that the psychiatrist had not been negligent and dismissed the action" (emphasis in original). However, the motion judge also stated that *Ahmed* had not established a duty of care because the trial court and this court did not decide the issue. Rather, the trial and appeal appear to have proceeded based on an assumption that the psychiatrist owed the family a duty of care when treating the brother. Neither the trial court nor this court conducted any legal analysis to determine whether a duty of care arose in *Ahmed*.
- [45] In the circumstances, I agree with the motion judge that, in the absence of any legal analysis on the issue, *Ahmed* cannot be said to have established that a treating psychiatrist owes a duty of care to the family of a patient if the patient threatens and exhibits signs of violence toward family members. As this court observed when commenting on *Ahmed* in *Paxton*, at para. 58, "the nature of the doctor's duty of care to the third party and the legal basis for imposing a duty of care [were] not fully developed."
- [46] In addition to the decision in *Ahmed*, Ms. McKee relies on this court's decision in *Spillane* (*Litigation Guardian of*) v. *Wasserman* (1998), 41 C.C.L.T. (2d) 292 (Ont. C.A.). In *Spillane*, doctors were found negligent in their treatment of a patient who suffered from epilepsy and caused a motor vehicle accident that resulted in the plaintiff's death. However, as in *Ahmed*, while this court upheld the trial court decision, there was no legal analysis regarding the duty of care.
- [47] Ms. McKee also relies on two lower court decisions to argue that the duty of care proposed in this case is an established category: *Healey v. Lakeridge Health Corp.* (2006), 38 C.P.C. (6th) 145 (Ont. S.C.), and *Wenden v. Trikha* (1991), 8 C.C.L.T. (2d) 138 (Alta. Q.B.), *aff'd* 135 A.R. 382 (1993) (C.A.), leave to appeal refused, [1993] S.C.C.A. No. 126. However, these decisions are not binding on this court, nor did they address the issue of whether the duty of care owed to a psychiatric patient would conflict with a duty of care owed to third party non-patients.

- [48] Finally, Ms. McKee relies on a number of American decisions: see e.g., *Tarasoff v. Regents of the University of California*, 551 P.2d 334 (Cal. Sup. Ct. 1976); *Volk v. DeMeerler*, 386 P.3d 254 (Wash. Sup. Ct. 2016); and *Jablonski by Pahls v. U.S.*, 712 F.2d 391 (9th Cir. 1983). Needless to say, none of these were based on the Anns/Cooper analysis nor are they binding on this court.
- [49] Because I am not persuaded that the duty of care proposed in this case fits within an established category, it is necessary to undertake the Anns/Cooper analysis.

Issue 2: The Anns/Cooper analysis does not lead to the conclusion that the claim is doomed to fail

- [50] Ms. McKee argues that the motion judge erred in dismissing the claim at the pleadings stage on the basis that recognizing a duty of care owed to Bradley's parents would conflict with the duty owed to Bradley. I agree.
- [51] Given that the standard of review is correctness, I will go through the Anns/Cooper analysis afresh and address the motion judge's errors in that context.

First stage: foreseeability and proximity

- [52] The first stage of the Anns/Cooper analysis focuses on the relationship between the parties. The inquiry at this stage is concerned with foreseeability and proximity. Foreseeability of harm is necessary before the court will impose a duty of care, but it is not enough on its own. The parties must also be in a "relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other": *Imperial*, at para. 41.

Foreseeability

- [53] On the issue of foreseeability, I agree with the motion judge that "it is reasonably foreseeable that a failure, on the part of a treating psychiatrist, to provide diligent and prudent care to a mentally ill patient with violent tendencies, may result in harm to those close to the patient, particularly family with whom he or she resides."

Proximity

- [54] It is important to stress again that this is a motion to strike. In *Imperial*, at para. 47, the Supreme Court stated that, where a proposed duty of care is based on interactions between the parties, it will rarely be appropriate to finally determine the issue of proximity at the pleadings stage unless there is an overarching statutory duty that conflicts with the alleged duty:

Since this is a motion to strike, the question before us is simply whether assuming the facts pleaded to be true, there is any reasonable prospect of successfully establishing proximity, on the basis of a statute or otherwise. ... [W]here the asserted basis for proximity is grounded in specific conduct and interactions, ruling a claim out at the proximity stage may be difficult. So long as there is a reasonable prospect that the asserted interactions could, if true, result in a finding of sufficient proximity, and the statute does not exclude that possibility, the matter must be allowed to proceed to trial, subject to any policy considerations that may negate the *prima facie* duty of care at the second stage of the analysis.

- [55] I do not agree with the motion judge's proximity analysis. The motion judge stated that there were "aspects of the factual circumstances here that tend to support a relationship of significant proximity between the defendants and Bradley's parents." He nevertheless found that a duty of care should not be imposed in this case because of policy considerations. He reasoned that the respondents would face "an impossible conflict of interest in making decisions about Bradley's future care" if they owed a duty of care to his parents.
- [56] In *Hill*, at para. 29, the Supreme Court explained that proximity is not concerned with intimacy or physical proximity, but rather "with whether the actions of the alleged wrongdoer have a close or direct effect on the victim, such that the wrongdoer ought to have had the victim in mind as a person potentially harmed." In assessing whether the parties are in relationship of sufficient proximity, the court is to look at factors such as expectations, representations, reliance and the other interests engaged by the relationship: *Hill*, at para. 24; *Fallowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132, at para. 40.
- [57] In this case, while the respondents had little direct contact with Bradley's parents, they were not strangers. Based on the pleaded facts, Bradley lived with his parents and they were his sureties. Most importantly, Bradley had made threats and been violent toward his parents in the past. As pleaded in the statement of claim, his parents wrote on separate occasions to Dr. Lorberg and to Waypoint, the clinic where Dr. Shahid treated Bradley, to express their concerns and fears over Bradley's behaviour. In the circumstances, on the face of the pleadings, it is certainly arguable that there was a relationship of proximity between the respondents and Bradley's parents. Bradley's parents were in a small category of people known to the respondents who could be harmed as a result of Bradley's violent tendencies. At trial, a court could find that it was reasonable for Bradley's parents to expect and rely on the respondents to treat Bradley, including through a long-term psychiatric placement, so as to reduce the risk that he would commit an act of violence toward them. On a motion to strike, it suffices to find, as I do, a reasonable prospect that the parties' expectations, representations, reliance and other factors could ground a duty of care owed by the respondents to Bradley's parents.
- [58] While the second stage of the *Anns/Cooper* test considers whether a *prima facie* duty of care found at the first stage should be negated because of residual policy considerations, policy also plays a role in the proximity analysis: *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, at para. 28; *Hill*, at para. 31. One such policy concern is the need to avoid imposing

conflicting duties. Therefore, besides looking at the closeness of the relationship between the parties, the proximity analysis looks at whether imposing a duty of care in the context of a particular relationship would conflict with an overarching statutory or public duty: Syl Apps, at para. 28; Cooper, at para. 44. However, the Supreme Court has cautioned that courts should not be too quick to find a conflict. As the Supreme Court stated in Hill, at para. 43:

A prima facie duty of care will be negated only when the conflict, considered together with other relevant policy considerations, gives rise to a real potential for negative policy consequences. This reflects the view that a duty of care in tort law should not be denied on speculative grounds.

See also: Fullowka, at para. 73; Rausch v. Pickering (City), 2013 ONCA 740, 369 D.L.R. (4th) 691, at paras. 67-71; and Heaslip Estate v. Ontario, 2009 ONCA 594, 96 O.R. (3d) 401, at paras. 27-28.

- [59] In this case, the motion judge stated that a duty of care owed to Bradley's parents would place the respondents in an impossible conflict of interest. In my view, this was a speculative conclusion, particularly in the context of a motion to strike.
- [60] Ms. McKee's claim is not premised on the assertion that the respondents should have made treatment decisions for Bradley with a view to preventing harm to her and William. Rather, the claim asserts that the respondents fell below the standard of care in treating Bradley and that his parents were harmed as a result of this breach of the standard of care. On the basis of the facts pleaded in the statement of claim, Bradley and his parents did not have conflicting interests; they had the same interest. That is, all three had an interest in Bradley receiving appropriate treatment, which might have prevented him from killing his father.
- [61] As multiple Supreme Court decisions instruct, a conflict in duties will generally arise where the proposed private law duty would conflict with an overarching legislative or public duty: Syl Apps, at para. 28; Imperial, at para. 44; and Fullowka, at para. 72. As Ms. McKee points out, the Mental Health Act, R.S.O., c. M.7, imposes some duties on the respondents to protect the public. For example, pursuant to s. 15 of the Mental Health Act, physicians can apply for a psychiatric assessment if they have reasonable cause to believe that a person they examine has behaved or is behaving violently and that the person suffers from a mental disorder that will result in "serious bodily harm" to another person.[3] Section 20 sets out the conditions under which a physician "shall" complete a certificate of involuntary admission. One such condition is where the physician is of the opinion that the person's mental disorder, if untreated, will result in bodily harm to another person.
- [62] This does not mean that the Mental Health Act creates a private law duty of care owed to all members of the public by physicians who decide whether or not someone should be subjected to an assessment or an involuntary admission. But that is not what this case is about. It is about a specific class of people, namely Bradley's parents, who the respondents allegedly knew were at risk if Bradley was released. On their face, the public responsibilities imposed on physicians under the Mental Health Act do not conflict with the private law duty of care the respondents allegedly owed to Bradley's parents. In addition, while the Mental Health Act already imposes public responsibilities on the respondents that might conflict

with Bradley's wishes, or even his liberty interests, such responsibilities do not conflict with Ms. McKee's proposed private law duty of care.

- [63] The respondents argue that their powers under the Mental Health Act are limited, and that they would not have been able to have Bradley admitted for psychiatric care for a prolonged period against his wishes. This might be true, but it is not an issue properly considered in the context of a motion to strike, and specifically the duty of care analysis. It might ultimately be an issue relevant at trial when the court assesses the standard of care.
- [64] The respondents rely on the decisions in *Syl Apps* and *Paxton* in support of their position that imposing a duty of care owed to Bradley's parents would conflict with the duty of care they owed to Bradley. But these decisions are distinguishable.
- [65] In *Syl Apps*, a young person had been apprehended by the Children's Aid Society, and eventually was made a Crown ward. Her parents, grandmother and three siblings sued a treatment centre and a social worker, alleging that they were negligent in treating the young person. Specifically, the plaintiffs alleged that the defendants were negligent in providing treatment to the young person based on her claim that the parents had physically and sexually abused her, without properly investigating these allegations and thereby alienating the young person from the family. The Supreme Court struck the claim at the pleadings stage, finding that the treatment centre and social worker did not owe a private law duty of care to the young person's family. In reaching this conclusion, the court relied, at para. 41, on a "genuine potential for 'serious and significant' conflict with the service providers' transcendent statutory duty to promote the best interests, protection and well-being of the children in their care."
- [66] There is no similarly obvious conflict in this case. Unlike in the child protection context, this is not a situation where Bradley and his parents have inherently conflicting interests. In addition, the respondents do not owe any evident statutory duties to Bradley that would necessarily conflict with duties owed to his parents.
- [67] In *Paxton*, the issue was whether a doctor owes a private law duty to an unborn child when treating the mother. In that case, a doctor prescribed an acne drug to a woman who was not pregnant that carried a risk of fetal malformations. The woman became pregnant after the drug was prescribed and the child was born with birth defects. An action was brought on behalf of the child against the doctor. This court dismissed the action finding, in part, at para. 66, that imposing a duty of care owed to a future child would lead to an impossible conflict:

If a doctor owes a duty of care to a future child of a female patient, the doctor could be put in an impossible conflict of interest between the best interests of the future child and the best interests of the patient in deciding whether to prescribe a teratogenic drug or to give the patient the opportunity to choose to take such a drug.

- [68] Again, there is no similar impossible conflict in this case. Paxton does not stand for the proposition that doctors never owe a duty of care to third party non-patients. Paxton was concerned with a situation where there was a real potential conflict. The mother needed treatment that could potentially harm a future baby. In this case, the conflict is not evident on the pleadings. As already mentioned, rather than having conflicting interests, Bradley and his parents had a common interest in keeping Bradley from killing his father.
- [69] Based on the pleadings and the applicable law, I am not persuaded that there is necessarily an inherent conflict between the duty owed to Bradley and the proposed duty owed to his parents such that the action is doomed to fail. Such a conflict might be established on a proper evidentiary record, but it is not so obvious on the pleadings that the action should be dismissed at this stage.

Second stage: residual policy considerations

- [70] At the second stage of the Anns/Cooper analysis, the court is concerned with whether there are residual policy reasons for negating a prima facie duty of care. At this stage, the analysis is not concerned with policy reasons arising from the relationship between the parties but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally: Cooper, at para. 37; Hill, at para. 46. These broader policy considerations can include such things as concerns over indeterminate liability or a chilling effect: Livent, at paras. 42-45; Cooper, at para. 37; and Holland v. Saskatchewan, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 10.
- [71] In this case, the motion judge did not explicitly differentiate between the policy considerations that informed his proximity analysis and those relevant to the second stage of the Anns/Cooper analysis. However, it is evident that his decision to dismiss the claim was partially based on considerations that typically arise at the second stage of the analysis. In particular, the motion judge expressed concerns over the potential chilling effect of imposing a private law duty of care owed by psychiatrists who treat patients with violent tendencies to third party non-patients. He stated that psychiatrists might become unwilling to take on patients who are potentially violent, while patients with mental illnesses might be deterred from seeking treatment if they believe that their psychiatrist will consider the impact on third parties when making treatment decisions.
- [72] I am not persuaded that it is plain and obvious that these concerns should prevent the claim from going forward at the pleadings stage. These types of policy considerations on their own should rarely be sufficient to dismiss a claim at the pleadings stage: Livent, at para. 41. The Supreme Court has emphasized that residual policy considerations must disclose “a real potential for negative consequences” in order to defeat the recognition of a new duty of care: Hill, at para. 48; Fullowka, at para. 57. Speculation is not sufficient.

[73] In this case, the potential chilling effect is not properly decided on the pleadings. The court should have the benefit of a full and proper evidentiary record before it can conclude that imposing the proposed private law duty of care will have a chilling effect on psychiatrists or people seeking psychiatric help.

[74] I see no other residual policy reasons that would justify dismissing the claim at this stage of the proceedings.

E. disposition [75] I would allow the appeal and substitute paragraphs 1 and 2 of the order with the following orders:

1. THIS COURT ORDERS that the claim in the statement of claim relating to an alleged duty to warn is struck with leave to amend.
2. THIS COURT ORDERS that the balance of the motion is dismissed.

[76] Ms. McKee is entitled to \$35,000 in costs, all inclusive, for the appeal as agreed between the parties.

Released: September 25, 2025 “P.D.L.”

“L. Favreau J.A.”

“I agree. P. Lauwers J.A.”

“I agree. J. Dawe J.A.”

- [1] To differentiate between Bradley McKee and William McKee, I refer to them as “Bradley” and “William” throughout the decision. This is not meant to be disrespectful.
- [2] On appeal, Ms. McKee asked that, if this court found that the claim as pleaded did not disclose a cause of action, she be granted leave to amend her claim to assert a Family Law Act claim based on the duty of care owed by the respondents to Bradley. Given the outcome of the appeal, the issue of whether such a claim is tenable at law does not arise. Notably, this issue was not raised before the motion judge. If, despite succeeding on appeal, Ms. McKee nevertheless wants to amend her statement of claim to assert this new theory of liability, the proper avenue for doing so would be a motion for leave to amend in the Superior Court. It would then be up to the Superior Court to determine whether such a claim is tenable.
- [3] Specifically, ss. 15(1)(b) and (e) provide: “Where a physician examines a person and has reasonable cause to believe that the person ... (b) has behaved or is behaving violently towards another person or has caused or is causing another person to fear bodily harm from him or her; ... and if in addition the physician is of the opinion that the person is apparently suffering from mental disorder of a nature or quality that likely will result in ... (e) serious bodily harm to another person ... the physician may make application in the prescribed form for a psychiatric assessment of the person.”

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Prepared on 27 October 2026 · Esheria