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FULLOWKA V. PINKERTON'S OF CANADA LTD.

Area of Coverage - [Insurance](#)

The most recent decision by the Supreme Court of Canada on tort law issues including duty of care, standard of care and causation is Fullowka v. Pinkerton's of Canada Ltd. [2010] S.C.C. 5. The decision was welcome news to Peter Gibson and Christine Pratt, partners in Field Law's insurance group, who successfully argued for the dismissal of the claim as against their client, the Government of the Northwest Territories.

The case arose from one of the few mass murders in Canada's history - the murder on September 18, 1992 of nine miners at the Giant Mine in Yellowknife, a hard rock gold mine that was in the midst of a bitter and protracted strike. After a lengthy investigation and criminal trial, one of the striking miners, Roger Warren, was convicted on nine counts of second degree murder.

The Workers' Compensation Board of the Northwest Territories, having paid pensions to the miner's widows, instituted a massive subrogated civil lawsuit against a host of Defendants including Royal Oak, the owner of the mine, Pinkerton's, the security company, the CAW, the Territorial Government and others, alleging that some or all of them were liable along with Warren for either inciting his act or for failing to prevent it.

To recap the history of the case, the Trial Judge found that Defendants, including Pinkerton's, the GNWT and the CAW, were liable as they

- owed a duty of care in tort,
- negligently breached that duty, and
- that their actions or inactions met the "material contribution" test for causation.

The Court of Appeal reversed on all three points, finding

- that the Defendants did not owe a duty of care,
- that the trial judge failed to define or describe any standard of care that was not met and
- that he erred in law in applying the "material contribution" test for causation instead of the "but for" test.

The SCC came to the same conclusion as the Court of Appeal, but on different and narrower grounds, holding that they,

- would have found a duty of care for Pinkerton's and the GNWT,
- agreed with the Court of Appeal that there was no reasonable standard of care that these defendants failed to meet, and

EDMONTON

2000 OXFORD TOWER
10235 - 101 STREET
EDMONTON AB T5J 3G1
PH 780 423 3003

CALGARY

400 THE LOUGHEED BUILDING
604 - 1 STREET SW
CALGARY AB T2P 1M7
PH 403 260 8500

YELLOWKNIFE

201, 5120 - 49 STREET
YELLOWKNIFE NT X1A 1P8
PH 867 920 4542

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- agreed with the Court of Appeal that the trial judge should have applied the "but for" test for causation.

It will take some time to see how this most recent decision from the Supreme Court of Canada influences other courts. The reasons on duty of care do not focus on a new statement or refinement of the law but rather on the application of established principles to the remarkable facts of the case at hand; an approach that can be expected to restrict the number of cases to which it can be applied in the future. What can be expected to get more widespread application is the clearly worded conclusion that it was an error in law to find a defendant guilty without articulating the standard of care that applied to them. As a whole, and while clearly driven by the unique facts before the court, the decision is a useful reminder to all litigants, counsel and Courts that all elements of a tort claim have to be made out, and each such finding must be clearly linked, before a finding of liability can be justified.

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