Managing the Risks of Witness Anonymity

On January 9, 2017, the Ontario Court of Appeal confirmed that damages may be awarded where police break a promise of confidentiality made to a witness in exchange for information. *Nissen v. Durham Regional Police Services Board*[1] provides a cautionary tale for police officers taking witness statements during the course of their investigation. If not careful, those officers may find themselves creating a confidential informant relationship that they did not intend and were not authorized to create.

Background

The facts in Nissen start with the Plaintiff's desire to anonymously get information to the police. Margaret Stack learned from her neighbour that teenagers in the neighbourhood stole guns from the neighbour's home. The youths then took the guns to school. Stack was unnerved by the thought of guns in her suburban neighbourhood and wanted to relay this information to police, but did not want any involvement beyond that point.

Stack enlisted the help of a friend, Ken Rumak, to call the police on her behalf. Rumak called Detective James Liepsig and explained that his friend learned about a situation where kids stole guns and took them to school. Rumak did not identify Stack as the source of this information and explained that his friend did not want to be involved. Detective Liepsig told Rumak that guns were a serious matter and that he needed the name for his investigation. Rumak then identified Stack and gave the officer her telephone number.

Det. Liepsig contacted Stack. When they spoke, Stack states that she emphasized her disinterest in being involved in the matter; she felt vulnerable because kids with guns lived across the street from her family. According to her, the officer promised to keep her identity completely anonymous if she agreed to attend the police station to provide a statement. She agreed. Det. Liepsig did not recall this conversation and his officer notes were not detailed on the subject. Stack's evidence on this point was therefore accepted at trial.

Rumak drove Stack to the police station. According to Stack, she repeated to Det. Liepsig that no one could know about the attendance before going into the interview room. Det. Liepsig agreed. Again, the officer had no recollection of this exchange and his notes were silent on the matter. Again, the trial judge accepted Stack's evidence on this point.

The only objective evidence at trial about the conversation between Det. Liepsig and Stack was the videotaped interview, which Stack states she did not know was being recorded. At the end of the interview, Stack is heard asking the officer not to let anyone know about the attendance. Det. Liepsig responds by saying "This is between you and I. Of course, I have to keep records of this for ourselves. … That stuff does not get disclosed. It is not made available to the public. You don't have to worry about that."

Police then arrested the two youths identified by Stack for gun related offences. They ultimately plead guilty. The videotaped interview was put in the Crown brief and disclosed to the youths and their parents in the normal course of criminal proceedings. After this disclosure was made, the accuseds' family began harassing Stack and her family and blamed Stack for the criminal charges. The harassment was pervasive and led Stack to develop post-traumatic stress disorder with depressive episodes and anxiety. Stack and her family ultimately moved away from their neighbourhood to escape.

Trial and Appeal Decisions

Stack sued Det. Liepsig and the Durham Regional Police Services Board alleging that she was a confidential informant and that her informer privilege was breached when the videotaped interview was placed in the Crown brief. The trial judge agreed. He found that Stack was promised anonymity and was therefore entitled to an informer privilege that had to be protected absolutely. This trial decision was affirmed on appeal, although the Court of Appeal characterized the case as one of breach of confidence instead of breach of informer privilege. Like the trial judge, the Court of Appeal focused on the fact that an unqualified promise was made in exchange for information and that damages flowed from the disclosure of Stack's identity.

[1] 2017 ONCA 10

Risk Management Lessons from a Police Liability Perspective

Nissen provides some important lessons that police officers should keep in mind when dealing with issues of witness anonymity.

1. Treat requests for witness anonymity as requests for confidential informant status. The trial judge in Nissen held that Stack was entitled to informer privilege. The Court of Appeal sidestepped the issue of whether Stack was a confidential informant by characterizing the case as one of breach of confidence. This creates an ambiguity as to whether Stack was actually a confidential informant or merely a witness entitled to remain anonymous. This is a distinction without a difference from the perspective of a plaintiff who may be entitled to a damages award in either case. But it is a significant distinction for police forces who have designed formal procedures and structures for creating and handling confidential informants.

   In light of Nissen, it is best practice to simply treat requests for anonymity as if they were requests to be a confidential informant. Once a request for anonymity is made, the police should follow their internal policies for assessing whether the witness should be treated like a confidential informant, which may include assessing the value of the proposed information, whether the information could be obtained through other means, and the danger the witness may face if their identity were revealed.

   If police ultimately decline the request, this should be communicated clearly to the witness before the statement is obtained. The witness may then be given the option of proceeding with the statement or using another means of conveying the information anonymously (Crime Stoppers, for example).

   If, on the other hand, the police agree to the request for anonymity, they should treat the witness as a confidential informant and use the procedures set up in their directives to ensure the anonymity is maintained.

2. Refusing requests for anonymity should be the default. Most witnesses do not raise concerns about their anonymity when they provide a statement. When they do, however, the officer's default should be to deny those requests unless they intend to treat the witness as a confidential informant. These denials should be done in clear, simple terms. Using too many qualifiers or ambiguous language may cause the officer to unwittingly create obligations they did not intend. This approach may be difficult in cases where the officer is trying to strike a balance between coaxing or reassuring a reluctant witness into making a statement while maintaining an unequivocal denial of anonymity. However, the standard to create an obligation to maintain anonymity is low; the trial judge in Nissen held that "there must be a promise, either express or implied, that confidentiality will be maintained". No formality is required beyond the mere promise. The key is to ensure that the witness does not have the erroneous impression that they are promised anonymity.

3. Officers should maintain good records of any discussions of anonymity. One of the difficulties facing the Defendants in Nissen was the passage of time: 12 years lapsed between the underlying events and the civil trial. Naturally, the officers' memories faded, which forced them to rely more heavily on their duty book notes that had little to no details about the discussions of anonymity held with Stack. The trial judge therefore had little to support the Defence argument that no promises were made.

   As outlined above, if police agree to the request for anonymity, they should treat the witness as a confidential informant and apply their own policies with respect to documenting interactions with the witness. However, if police decline the request, that denial should be recorded on videotape whenever possible. If it is not practical to videotape the interaction, officers should keep detailed notes of the conversation, regardless of how uneventful or mundane it may seem at the time.

   Police officers are well trained to take contemporaneous notes when they give someone their rights to counsel and caution, or when an accused is afforded their opportunity to speak with counsel. Officers should adopt a similar approach to any discussion of confidentiality held with a witness. As was the case in Nissen, the officer may later be asked to recall details of such conversations that they perceived to be uneventful small talk and be unable to do so.

4. Take immediate steps to rectify the disclosure error. The promise to keep Stack's identity anonymous included a duty to protect her from the consequences of wrongful disclosure. Once police learn that a witness' identity has been erroneously disclosed, they must take proactive steps to ensure there are no repercussions from the disclosure. The scope of these measures will vary from case to case, but includes assessing the risk to the witness and their family then ensuring their safety in a manner that is responsive to the level of risk they face. Police should always err on the side of being overly cautious. The disclosure of witness information creates different degrees of jeopardy for a witness. The traditional scenario in which confidential informants are found involve guns and gangs where disclosure will place a confidential informant's life in grave danger. Under those circumstances, police should quickly remove the informant from the situation and take the necessary steps to ensure their immediate and long term safety. This may include, but is not limited to, relocation and witness protection in certain circumstances.

   Such drastic steps are not necessary for witnesses who, like Stack, are not exposed to the grave danger from the world of guns and gangs. Nevertheless, police should still take steps to ensure that there are no repercussions from the disclosure of their identity. Where a witness like Slack complains about harassment, the officer in charge of the investigation should be immediately notified of the complaint and police should take immediate steps to ensure that this harassment stops. This includes, but is not limited to, calling or visiting the harasser and instructing them to stop the behaviour, following up to ensure the behaviour has stopped, or arresting the harasser for the conduct.

5. General comment for risk managers. Risk managers should also make a note of the Nissen decision from a damages perspective. Stack was awarded $345,000.00 in general and aggravated damages for the psychological injuries she experienced as a result of the harassment. At trial, she relied on the testimony of her family and friends to describe her affect as a result of the harassment and the expert evidence of a psychiatrist she met 10+ years following the incident regarding her diagnosis. While the Court of Appeal described this award as "very generous", it still sets a high bar for general damages awards. This case should be kept in mind when a risk manager is facing a claim for psychological injuries that seem spurious and unsupported by the evidence.

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