

## Civil Liability of Police Forces to Members of the Public

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## Civil Liability of Police Forces to Members of the Public

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The past several years have been a period of considerable change in terms of civil liability of police forces. The Supreme Court's recognition of the tort of negligent investigation in 2007 in *Hill v. Hamilton Wentworth Regional Police Services Board*<sup>2</sup> caused considerable concern that there would be an exponential expansion of civil litigation against police officers and significant costs – both financial and potentially chilling the conduct of police officers. The progress of several cases seeking to expand the scope of the tort of negligent investigation to include liability to victims and/or their families has fanned the flames.

In assessing the most important issues affecting civil liability of police forces to members of the public, we will begin with a review of the post-*Hill* cases of negligent investigation by suspects. While we are not yet at the third anniversary of *Hill*, there has nonetheless been considerable litigation in this area and early trends are discernible. Significantly, to date there do not appear to be any cases in which plaintiffs have been successful. Many actions in negligent investigation against the police are dismissed at an early stage in the proceedings through summary judgment or Rule 21 motions. It could be argued that courts have been sensitive to the realities of police work, and are not seeking to impose a “standard of perfection.”

We turn then to examine the next major area of litigation in police liability, which is the issue of whether police investigators owe a duty of care to victims of crime. At present, there are several cases working their way through Ontario courts. We address the pre-*Hill* Ontario judgments that expressly rejected such a duty of care, and consider whether *Hill* is likely to change the analysis. It can reasonably be argued that many of the factors that led the Supreme Court to conclude that police owe a duty of care to suspects could be said to apply equally to victims. On the other hand, new evidence about potentially negative policy implications could steer the courts in a

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<sup>2</sup> *Hill v. Hamilton-Wentworth Regional Police Services Board*, [2007] 3 S.C.R. 129.

different direction. It may be several years before there is a determinative appellate decision on the issue.

Given the important role that the *Charter* plays in the interactions between police officers and suspects, recent developments in constitutional liability are of particular relevance to police liability to the public as claims for *Charter* damages are typically made in actions brought against police officers. A recent Ontario Court of Appeal decision has effectively overturned past jurisprudence that held that limitation periods do not apply to *Charter* claims. In addition, the Supreme Court will soon be ruling on whether the jurisprudence in Ontario is correct in limiting *Charter* damages to cases in which police officers act in bad faith. Both of these lines of cases in Ontario have had the effect of narrowing the circumstances in which police officers will face potential liability for allegations of breaches of *Charter* rights by members of the public.

### **Negligent Investigation post-*Hill***

While recognized much earlier in Ontario in *Beckstead*,<sup>3</sup> the existence of a tort of negligent investigation as between suspects and police officers was confirmed by the Supreme Court in *Hill* in 2007.<sup>4</sup> Following this ruling, the law in Canada is clear that police officers owe a duty of care to suspects to conduct a competent investigation.

It is significant that in concluding that there is a duty of care by investigators to suspects, the Supreme Court specifically rejected the approach taken by the United Kingdom in cases such as *Brooks v. Commissioner of Police for the Metropolis*.<sup>5</sup> Duwayne Brooks, a Black male, was present when his friend Stephen Lawrence was assaulted and murdered in what the House of Lords described as “the most notorious racist killing which our country has ever known.” A strongly-worded report by a subsequent inquiry identified a “litany of derelictions of duty and failures in the police investigation”, including in the treatment of Brooks by police. Brooks commenced a lawsuit against the police arising from the flawed investigation.

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<sup>3</sup> *Beckstead v. Corporation of the City of Ottawa*, 1997 CanLII 1583 (Ont. C.A.).

<sup>4</sup> *Hill*, *Supra* note 1

<sup>5</sup> *Brooks v. Commissioner of Police for the Metropolis*, [2005] UKHL 24.

In dismissing the claim, the House of Lords held that the welfare of the “whole community” outweighs the dictates of “individualized justice” and thereby signaled their reluctance to protect racial minorities who are the target of police misconduct. Ignoring the effect that police misconduct can have on the welfare of racialized communities, the House of Lords held that the law could not offer relief to “the heartache and the thousand natural shocks that flesh is heir to.”<sup>6</sup>

The dismissive attitude that typified the House of Lords decision in *Brooks* toward the psychological harm that can flow from police misconduct towards racialized communities was specifically rejected by the Supreme Court in *Hill* and in other cases. While the House of Lords trivialized important Canadian legal developments, noting only “this tour d’horizon was interesting”, the Supreme Court’s judgment in *Hill* gave consideration to the UK approach, but ultimately concluded that “whatever the situation may have been in the United Kingdom, the studies adduced in this case do not support the proposition that recognition of tort liability for negligent police investigation will impair it.”<sup>7</sup>

Thus, the Court recognized that negligent investigation can cause foreseeable harm to suspects that ought to be compensable through tort law. The harm caused by a negligent investigation can be significant, including damage to reputation, imprisonment, financial loss and emotional distress. The tort provides an important tool for access to justice for individuals who suffer such harms, provided of course that they are factually innocent. The Supreme Court specifically held that the “lawful pains and penalties imposed on a guilty person do not constitute compensable loss.”<sup>8</sup>

The standard of care is that of a “reasonable officer in all the circumstances.” The Court recognized that police practices advance as time passes, and that the standard of care to be considered is the one in place at the time of the investigation. Developments of law and policy after the investigation has been concluded are not determinative. Furthermore, police officers are

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<sup>6</sup> *Brooks v. Commissioner of Police for the Metropolis*, [2005] UKHL 24 at para. 1, 30-31; J. Falconer and S. Mathai (2008), “State Misconduct: A Continuum of Accountability” in *Honouring Social Justice*, ed. M. Beare (University of Toronto Press: Toronto) 394 at 403-408.

<sup>7</sup> *Hill*, *Supra* note 1 at para. 57; *Brooks v. Commissioner of Police for the Metropolis*, [2005] UKHL 24 at para. 1, 30-31. See also *Odhavji v. Woodhouse*, 2003 CarswellOnt 4851 (S.C.C.) at para. 66; *R. v. Golden*, [2001] 3 S.C.R. 679 at para. 83.

<sup>8</sup> *Hill*, *Supra* note 1 at para. 92.

not expected to meet a “standard of perfection.” The reasonable officer standard allows for minor mistakes and misjudgments. Police officers are given considerable scope to exercise their professional discretion as police officers in the conduct of an investigation.<sup>9</sup>

Now, almost three years post-*Hill*, enough time has passed to warrant examining the trends that are emerging in the jurisprudence. While it remains early days, actions pleading negligent investigation on the part of police are overwhelmingly and almost without exception unsuccessful.<sup>10</sup> The majority of actions are dismissed by way of either summary judgment or a Rule 21 motion (or the equivalent in other provinces).<sup>11</sup> While a small number of cases have survived a rule 21 motion,<sup>12</sup> there does not appear to be a single reported case in which a plaintiff has been awarded damages for negligent investigation. In practice, it appears that plaintiffs will face a difficult hurdle in establishing that the standard of the “reasonable officer in all the circumstances” has not been met.

The standard of care is examined in some detail in *Lawrence v. Peel Regional Police Force*, an action for negligent investigation that proceeded to trial.<sup>13</sup> The case arose from an investigation into an alleged domestic dispute. Lawrence was arrested and charged with various offences. The charges were ultimately dismissed. He argued that his ex-wife fabricated the domestic dispute in order to assist her in divorce proceedings. Lawrence alleged that the investigation was negligent because the investigating officers failed to take a statement from him prior to charging him; failed to listen to a relevant message left on his answering machine prior to laying charges; and failed to contact potential witnesses prior to the arrest.

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<sup>9</sup> *Ibid* at para. 77.

<sup>10</sup> See *Magas v. Pasanen*, 2009 ONCA 302 (CanLII); *Chmielewski v. Niagara (Police Services Board)*, 2009 ONCA 51 (CanLII); *Whatcott v. Schluff*, 2009 SKQB 56 (CanLII); *Jovanovic v. Hamilton-Wentworth Regional Police Services Board*, 2008 CanLII 53856 (ON S.C.).

<sup>11</sup> *Ontario (Attorney General) v. Greater Sudbury Police Service*, 2008 CanLII 65752 (ON S.C.); *Matton v. Yarlasky*, 2007 CanLII 56507 (ON S.C.); *Moak v. Haggerty*, 2008 CanLII 65 (ON S.C.); *Solomonvici v. Toronto (Police Services Board)*, 2010 ONCA 85 (CanLII); *Wilson Fuel Co. Limited v. Canada (Attorney General)*, 2009 NSSC 215 (CanLII); *Wong v. Toronto Police Services Board*, 2009 CanLII 66385 (ON S.C.); *Gale v. Ontario Racing Commission*, 2009 ONCA 92 (CanLII); *Jeremiah v. Toronto (Police Services Board)*, 2009 ONCA 671 (CanLII)

*Ferron v. Goodier et al.*, 2010 ONSC 540 (CanLII).

<sup>12</sup> *Miguna v. Toronto Police Services Board*, 2008 ONCA 799 (CanLII); *Ettinger v. Peters, Dunlop et al.*, 2010 ONSC 176 (CanLII); *Lucas v. Faber*, 2008 SKQB 25 (CanLII).

<sup>13</sup> *Lawrence v. Peel Regional Police Force*, 2009 CanLII 19934 (ON S.C.).

The Court rejected each of these grounds. To some extent, the finding that the standard of care was not breached relied upon negative credibility findings as against the plaintiff. For example, the Court did not accept that Lawrence had attempted to provide a statement but had been refused. Similarly, the court preferred the evidence of the officers that Lawrence did not invite them to listen to his answering machine.

Of greater interest for other cases is the Court's ruling on whether an officer is negligent in failing to contact potential witnesses prior to arrest. The Court held that an officer is not obligated to interview other witnesses prior to arrest where reasonable and probable grounds for arrest exist, particularly in cases of alleged domestic abuse.<sup>14</sup> There were sufficient grounds in this case to justify arrest. Moreover, a plaintiff alleging that the police negligently failed to interview other witnesses will have to establish that the witness's evidence would have had an impact on the decision to either lay or continue with charges.<sup>15</sup>

Thus, the claim in negligent investigation failed. The Court concluded that even had there been negligence, the plaintiff did not suffer any compensable damage.<sup>16</sup>

In *Small v. Stec*, the Court similarly examined the standard of care of a reasonable officer. The case arose from an arrest by campus police following an incident of alleged relationship violence.<sup>17</sup> As in *Lawrence*, the investigators were criticized for failing to interview other potential witnesses. However, this ground failed as the plaintiff was unable to prove that interviewing the potential witnesses would have had any impact upon the outcome of the investigation. The interviewing officer was justified in not interviewing proposed witnesses who had not witnessed the assault.<sup>18</sup> The Court also rejected expert evidence adduced by the plaintiff

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<sup>14</sup> *Ibid* at para. 47.

<sup>15</sup> *Ibid* at para. 46.

<sup>16</sup> *Ibid* at para. 53-74.

<sup>17</sup> *Small v. Stec*, 2009 CanLII 3565 (ON S.C.).

<sup>18</sup> *Ibid* at para. 75.

to the effect that the investigator was negligent in failing to obtain a signed statement from the victim because “that was something she was not prepared to give.”<sup>19</sup>

If these two cases are indicative of emerging trends, plaintiffs will face a very difficult task in convincing a court that police officers acted too quickly to arrest and ought to have taken further investigative steps prior to doing so. If reasonable and probable grounds exist to justify the arrest, the fact that other steps were not taken to examine potentially exculpatory evidence will likely not be found to constitute negligence. Similarly, a plaintiff who alleges that a failure to continue an investigation after an arrest was negligent will likely have to establish a basis for claiming that evidence would have come to light that would have resulted in a different outcome. In other words, “no harm no foul.” If additional investigative steps would not have changed matters, the plaintiff has no damages.

*Franklin v. Toronto Police Services Board*, deals directly with the issue of an investigator’s obligation to continue an investigation post-arrest.<sup>20</sup> It is also one of the few reported cases in which a court has concluded that police investigators failed to meet the standard of care. In that case, several police officers attempted to sue their own police force for negligent investigation. The officers were each arrested and charged with offences relating to fraud and forgery. Following the withdrawal of the charges, they launched an action in negligent investigation and malicious prosecution, naming the Toronto Police Services Board, the investigating officers and two Crown Attorneys.

Of particular concern to the Court was the failure on the part of police investigators to reasonably investigate evidence that came to their attention post-arrest that potentially called into question the reliability of a confidential informant. Instead, a “single-minded focus” on whether the evidence pointed to additional obstruct justice charges was a “mindset that pervaded everything the [Toronto Police Service] and OPP did from that point forward”.<sup>21</sup> Consistent with *Hill*,<sup>22</sup> the

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<sup>19</sup> *Ibid* at para. 78.

<sup>20</sup> *Franklin v. Toronto Police Services Board*, 2008 CanLII 67896 (ON S.C.).

<sup>21</sup> *Ibid* at para. 41.

<sup>22</sup> *Hill*, *Supra* note 1 at para. 84.

Court concluded that the investigators had an obligation to investigate and re-assess their case in light of the new information.<sup>23</sup>

In assessing whether the investigators' conduct breached the standard of care, the Court took care to note that hindsight has no role to play in evaluating conduct that is said to fall below the standard. Because practices change and standards evolve, as much as possible one must try to go back and experience the event as it was then.<sup>24</sup> This requires evidence. The Court was troubled by the fact that the plaintiffs did not lead any direct evidence about what a reasonable officer would do in like circumstances.<sup>25</sup> Expert evidence will be required in circumstances in which a judge or jury cannot "form their own conclusions without help".<sup>26</sup> In this case, because one of the investigating officers testified that he was obliged to investigate the new information in all respects, the Court concluded that it had sufficient information to evaluate whether the standard of care was met without assistance from expert evidence.<sup>27</sup> The Court concluded that the investigators fell below the standard that was expected of them.

However, the Court ultimately concluded that the police investigators were not liable despite their breach of the standard of care. Had the investigators investigated the new information in a timely fashion, the Crown's prosecution would have continued nonetheless. This finding is somewhat puzzling, given the fact that the charges were ultimately withdrawn by the Crown. Nonetheless, the Court concluded that the failure by the investigators to conduct a detailed review of the new evidence did not "materially contribute" to the Crown's decision to "continue the prosecution at that time." As a result, the action for negligent investigation failed.<sup>28</sup>

Thus, the post-*Hill* cases today suggest that courts are approaching negligent investigation actions with a careful eye to the realities of policing. Plaintiffs should take care in bringing such actions in the absence of strong evidence establishing the standard of care, that the standard was

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<sup>23</sup> *Franklin, Supra* note 19 at para. 46.

<sup>24</sup> *Ibid* at para. 47.

<sup>25</sup> *Ibid* at para. 48.

<sup>26</sup> *Ibid* at para. 51.

<sup>27</sup> *Ibid* at para. 52.

<sup>28</sup> *Ibid* at para. 54.

breached and that the plaintiff suffered harm as a result. These cases form a back drop for the legal question that looms post-*Hill*: whether an action in negligent investigation against police officers can be brought by victims.

### **Liability to victims for negligent investigation**

In 1987, the Canadian Federal Minister of Justice commented that “the victim of crime is often a forgotten person in our criminal justice system.”<sup>29</sup> Since that time, there has been a growing awareness and recognition of victim’s rights within the justice system, including the expansion of compensation and victim-witness programs, social service referral programs, crisis intervention programs, victim advocacy programs and victim-offender mediation programs. Police officers have played an important role in advocating for the rights of victims.

In Ontario, victims of crime and their families have a number of significant statutorily-protected rights. Further to the *Victim Bill of Rights*, amongst others, victims’ rights include: the right to be treated with “respect for their personal dignity”; to information about the progress of investigations that relate to crime; to information about charges laid or the reasons why no charges were laid; to information about the outcome of all significant proceedings; to make representations to the court by way of a victim impact statement; to the return of personal property in the custody of the justice system; and to compensation where appropriate.<sup>30</sup> The principles of victims’ rights address not only the need to ensure that potential victims are protected from harm, but also that they are treated with respect and dignity when the commission of a crime has occurred.

Police officers in Ontario have particular statutory duties to victims. The opening “Declaration of Principles” in the *Police Services Act* specifically recognizes the “importance of respect for

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<sup>29</sup> A. Young (2001), “The Role of the Victim in the Criminal Process: A Literature Review – 1989-1999”, Canada: Victims of Crime Research Series at p. 1.

<sup>30</sup> See: *Victim Bill of Rights* S.O. 1995, CHAPTER 6, ss. 1, 2; *Compensation for Victims of Crime Act*, R.S.O. 1990, Chapter C.24. See also: *Corrections and Conditional Release Act*, 1992, c. 20, s. 2(1) (definition of “victim”); *Police Services Act*, R.S.O. 1990, CHAPTER P.15, s. 42(1) (assisting victims of crime); *Coroners Act*, R.S.O. 1990, CHAPTER P.15, s. 41(3) (persons with standing at an inquest); *United Nations Declaration on Basic Principles of Justice for Victims of Crime and the Abuse of Power*, Approved by the UN General Assembly, on 29 November 1985 (resolution 40/34), on the recommendation of the Seventh Congress.

victims of crime and understanding of their needs.”<sup>31</sup> “Assistance to victims of crime” is defined as a “core police service.”<sup>32</sup> Police chiefs are authorized to disclose information to the public about crime for the purpose of protection of victims of crime.<sup>33</sup> Police officers have a specific statutory duty to “assist victims of crime”.<sup>34</sup>

While the Supreme Court in *Hill* definitively determined that police owe a duty of care to suspects of criminal investigations, the Court explicitly stated that it was not deciding whether or not police owe a similar duty to victims of crimes. Prior to *Hill*, the *Jane Doe* case had established that police owe a duty to warn specifically identifiable victims.<sup>35</sup> However, higher courts have expressed reluctance to expand upon this principle.<sup>36</sup> *Jane Doe* thus cannot stand for the principle that police can be liable for negligent investigation to victims more generally. The potential for liability to victims is the new legal frontier in the hotly contested law of police accountability to members of the public.

#### **i. Liability to victims pre-*Hill***

Prior to *Hill* and *Odhavji*, the Ontario Court of Appeal in *Norris* determined that police officers do not owe victims of crime a private law duty of care. *Norris* arose from an accident in which an OPP officer struck and killed a bicyclist. The family of the bicyclist sued both the officer who struck and killed their family member and the police officer (Gatien) with the City of Nepean who investigated the accident. It was alleged that the investigating officer failed to determine the circumstances of the accident, violated an instruction to administer an ALERT demand to the OPP officer who struck Norris, failed to either demand or administer a breathalyzer test, failed to collect evidence and failed to provide the OPP officer with his rights to counsel. The family argued that as a result of the negligent investigation, their emotional distress had been exacerbated.<sup>37</sup> Further, the specified negligence was alleged to have constituted a serious failure to facilitate and support the eventual prosecution of the OPP officer.

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<sup>31</sup> *Police Services Act*, R.S.O. 1990, Chapter P.15, s. 1.

<sup>32</sup> *Police Services Act*, R.S.O. 1990, Chapter P.15, s. 4(2).

<sup>33</sup> *Police Services Act*, R.S.O. 1990, Chapter P.15, s. 41.(1.2).

<sup>34</sup> *Police Services Act*, R.S.O. 1990, Chapter P.15, s. 42(1).

<sup>35</sup> *Jane Doe v. Metropolitan Toronto (Municipality) Commissioners of Police*, [1998] O.J. No. 2681 (Gen. Div.).

<sup>36</sup> For example, see *Hill*, *Supra* note 1 at para. 27.

<sup>37</sup> *Norris v. Gatien*, 2001 CanLII 2486 (Ont. C.A.) at para. 4.

The investigating officer brought a motion to strike out the action on the basis that he did not owe any duty of care to the family of the victim of the accident. The Ontario Court of Appeal agreed, and dismissed the action on the basis that the family members of the victim had no “legal interest” in the investigation, rather the investigation of crime is done in the public interest:

In my view, the resolution of the instant motion is to be found in the words of the first question, namely “in the reasonable contemplation of the authority [Gatien/Nepean], might carelessness on [their] part cause damage to that person [the plaintiffs]?” The answer to that question must be no.

This is so because the plaintiffs had no legal interest in the investigation or prosecution of Loranger; that investigation and prosecution were matters of public law and public interest. Nor had the plaintiffs any legal interest in the disciplinary proceedings taken against Loranger. Had Loranger been convicted on either or both charges, the plaintiffs, or some of them, may have derived some personal satisfaction from that conviction. That satisfaction, however, would have been a purely personal matter; it would have no reality in law. Nor did the failure to reach that verdict have any consequence for the appellants sounding in damages.<sup>38</sup>

Similarly, in *Fockler*, the Superior Court granted a motion to strike an action alleging claims of negligent investigation made against other police officers. The plaintiffs claimed that the investigating officers falsely led them to believe that disciplinary action had been taken, and generally tried to help cover up the misbehavior of the officers who were the subject of the complaints. The plaintiffs claimed that the negligent investigation had exacerbated their distress. As with *Norris*, the Superior Court concluded that the investigation into alleged police misconduct were “matters of public law and public interest”:

Had those officers been found guilty of misconduct, the plaintiffs may have derived some satisfaction from the finding, but that is not sufficient to found a private cause of action ... Similarly trying to cover up a breach of duty might be a disciplinary offence but it cannot found a cause of action because the duty to discipline officers for breach of duty is owed to the public and not to any one private individual.<sup>39</sup>

The Superior Court in *Porter v. Brampton (City)* also granted an application to dismiss a claim of negligent investigation brought against a police officer and a fire marshal in a case arising from

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<sup>38</sup> *Norris v. Gatien*, 2001 CanLII 2486 (Ont. C.A.) at para. 17-18.

<sup>39</sup> *Fockler v. City of Toronto*, 2007 CanLII 32 (Ont. S.C.) at para. 71-72.

an investigation into a fire. Again, the court concluded that there was no private duty of care owed because the defendants were conducting a public function.<sup>40</sup>

Thus, prior to the Supreme Court's ruling in *Hill*, the Ontario courts had fairly conclusively ruled that victims and their families could not sue for negligent investigation. These rulings are consistent with a line of authorities concerning the duties owed by public authorities, particularly regulatory bodies, to private individuals. For example, the Supreme Court in *Cooper v. Hobart* declined to impose a duty of care to investors by a regulatory body with jurisdiction over mortgage brokers, even though it was foreseeable that a failure to properly regulate could result in economic losses for investors.<sup>41</sup> The Supreme Court held that there was insufficient proximity between the registrar and individual investors to ground a duty of care because the Registrar's duty was to the investing public collectively and not individually. Although unnecessary to dispose of the action, the Court held that even if sufficient proximity existed, it would have negated the existence of a duty on policy grounds on the basis that a duty of care to investors could conflict with the Registrar's overarching duty to the public and the need to balance competing interests. The lack of an explicit statutory basis for imposing a duty to investors was an important factor.

This analysis has been relied upon in order to dismiss a class action in negligence against the Ontario Ministry of Health by individuals who contracted SARS;<sup>42</sup> a class action against Ontario by nurses who contracted SARS;<sup>43</sup> a claim against Canada for negligently approving a faulty medical device;<sup>44</sup> a claim against the Law Society of Upper Canada by investors who lost money as a result of a lawyer's misuse of trust funds;<sup>45</sup> a claim in negligence against Ontario with respect to the implementation of a plan to protect against West Nile Virus;<sup>46</sup> and a claim of negligent regulation against Health Canada by women harmed by breast implants.<sup>47</sup> In each case the courts concluded that the duty of public authorities is to the public generally and not to

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<sup>40</sup> *Porter v. Brampton (City)*, [2002] O.J. No. 5132.

<sup>41</sup> *Cooper v. Hobart*, [2001] 3 S.C.R. 537.

<sup>42</sup> *Williams v. Canada (Attorney General)*, 2009 ONCA 378.

<sup>43</sup> *Abarquez v. Ontario* 2009 ONCA 374 (CanLII).

<sup>44</sup> *Klein v. American Medical Systems*, 2006 CanLII 42799 (On. S.C.D.C.).

<sup>45</sup> *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562.

<sup>46</sup> *Eliopolous v. Ontario (Minister of Health and Long Term Care)* 2006 CanLII 37121 (O.C.A.).

<sup>47</sup> *Attis v. Canada (Health)*, 2008 ONCA 660.

private individuals, even where the risk of harm was clearly foreseeable. Police officers, so the argument goes, are also public authorities who owe duties to the public generally and thus ought not to be liable to private individuals such as victims.

*ii. Is Norris still good law?*

There have been two significant changes in the legal landscape since the Ontario Court of Appeal decided *Norris* that may take the liability of police officers to victims and their families in a different direction.

The first is the Supreme Court’s decision in *Odhavji v. Woodhouse*, a case brought by the family of a man shot and killed by police officers. When the police officers involved in the shooting disobeyed a specific statutory obligation to cooperate with a Special Investigations Unit investigation, the family sued the police chief for negligent supervision. The Court noted that a duty of care by the Chief of Police to victims in SIU cases is consistent with the statutory obligations that section 41(1)(b) of the *Police Services Act* imposes on the Chief to ensure that the members of the force carry out their duties in accordance with the *Police Services Act* and the needs of the community. This includes “an obligation to ensure that members of the police force do not injure members of the public through misconduct in the exercise of police functions.”<sup>48</sup> While *Odhavji* is not conclusive, it is suggestive that the Court’s may be open to finding a duty of care by police to victims, particularly where there is a statutory basis for so doing.

The second major development is, of course, the Supreme Court’s decision in *Hill*. While the analysis in *Norris* may ultimately prevail – namely, that police officers owe a duty to the public to conduct competent investigations but not to private individuals – the majority of the Supreme Court in *Hill* sent a strong signal that the issue of whether a duty of care is owed to victims is something that Ontario courts will need to take a fresh look at:

It might well be that both the considerations informing the analysis of both proximity and policy would be different in the context of other relationships involving the police, for example, the relationship between the police and a victim, or the relationship between a police chief and the family of a victim. This decision deals only with the relationship between the police and a suspect being investigated. If a new relationship is alleged to

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<sup>48</sup> *Odhavji v. Woodhouse*, 2003 CarswellOnt 4851 (S.C.C.) at paras. 54-61.

attract liability of the police in negligence in a future case, it will be necessary to engage in a fresh *Anns* analysis, sensitive to the different considerations which might obtain when police interact with persons other than suspects that they are investigating.<sup>49</sup>

*iii. The Anns analysis*

When faced with a novel negligence claim, a court must first assess whether there is a relationship of sufficient “proximity” between the parties to warrant the imposition of a private law duty of care. *Anns v. Merton London Borough Council* [1978] A.C. 728 at 751 established a two part test to establish proximity:

- Whether, as between the alleged wrongdoer and the person who has suffered damage there is sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter – in which case a prima facie duty of care arises.
- If the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damage to which a breach of it may give rise.<sup>50</sup>

In assessing whether the *Anns* test leads to liability on the part of police officers to victims, it is useful to examine the factors that led the Supreme Court in *Hill* to recognize the tort of negligent investigation in respect of suspects:

- a. The actions of the alleged wrongdoer have a close or direct effect on the suspect, such that the wrongdoer ought to have had the suspect in mind as a person potentially harmed.
- b. The presence or absence of a personal relationship between alleged wrongdoer and suspect.
- c. The interests engaged by the relationship. For example, suspects in a criminal investigation have a critical personal interest in the conduct of the investigation because at stake are their freedom, reputation and how they may spend a good portion of their life.
- d. The absence of complete remedies for wrongful prosecution and conviction.
- e. The personal interest of the suspect in the conduct of the investigation is enhanced by a public interest. The Court noted, “recognizing an action for negligent police

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<sup>49</sup> *Hill*, *Supra* note 1 at para. 27.

<sup>50</sup> *Anns v. Merton London Borough Council* [1978] A.C. 728 at 751.

investigation may assist in responding to failures of the justice system, such as wrongful convictions or institutional racism”.

- f. The absence of conflict between the duty of care to a suspect and a duty to the public. The Supreme Court concluded that not only was there no conflict, but that requiring police officers to take reasonable care toward suspects in the investigation of crimes may have positive policy ramifications. Reasonable care will reduce the risk of wrongful convictions and increase the probability that the guilty will be charged and convicted. By contrast, the potential for negative repercussions is “dubious.”<sup>51</sup>

Those who advocate that police ought to have a duty of care to victims point out that many of these same factors support recognizing the tort in respect of victims, including family members. As with suspects, there is a close, personal and direct connection between the actions of a negligent investigator and the harm caused to the victim. Victims have no other remedies that can protect their significant interest in the conduct of a competent investigation that holds police officers accountable for the use of force. It is hard to conceive of a scenario in which a victim’s interest in a diligent investigation would come into conflict with the public interest. To the contrary, the interests of the victim and the public are the same.

In addition, the fact that *Hill* specifically distinguished the *Cooper* lines of cases poses a significant obstacle for those who wish to oppose the extension of the tort to victims on the basis of this jurisprudence. Unlike the allegedly negligent regulators, the Supreme Court pointed out that in a criminal investigation, the identity of suspects is known to the investigator, and thus proximity is much more easily established:

The relationship between the police and a suspect identified for investigation is personal, and is close and direct. We are not concerned with the universe of all potential suspects. The police had identified Hill as a particularized suspect at the relevant time and begun to investigate him. This created a close and direct relationship between the police and Hill. He was no longer merely one person in a pool of potential suspects. He had been singled out. The relationship is thus closer than in *Cooper* and *Edwards*. In those cases, the public officials were not acting in relation to the claimant (as the police did here) but in relation to a third party (i.e. persons being regulated) who, at a further remove, interacted with the claimants.<sup>52</sup>

In the case of victims, where there is an identifiable and known victim, the Supreme Court has found that there can be a duty of care on the part of regulators. *Finney* involved a lawsuit by a

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<sup>51</sup> *Hill*, *Supra* note 1 at para. 27-41.

<sup>52</sup> *Ibid* at para. 33.

complainant to the law society in Quebec for negligence in the manner in which it responded to her complaint about a lawyer who was eventually found to be incompetent. Although the case involved the Quebec Civil Code, the Supreme Court expressly stated that it would have found there to be a duty of care under the *Cooper* analysis:

The nature of the complaints and the lawyer's professional record in fact made it plain that this was an urgent case that had to be dealt with very diligently to ensure that the Barreau carried out its mission of protecting the public in general and a clearly identified victim in particular.... As the respondent pointed out, in common law, the Barreau would have been no less liable in the circumstances of this case if the analysis adopted by this Court in *Edwards v. Law Society of Upper Canada* [citation omitted] and *Cooper v. Hobart* [citation omitted] had been applied. The decisions made by the Barreau were operational decisions and were made in a relationship of proximity with a clearly identified complainant, where the harm was foreseeable. The common law would have been no less exacting than Quebec law on this point.<sup>53</sup>

On the other hand it is argued that, unlike *Odhavji* for example, there is nothing in the wording of the *Police Services Act* that either explicitly or implicitly creates a private law duty of care to anyone. Rather, the intention of the *Police Services Act* is to create duties to the general public as a whole. Section 42(1) of the *Police Services Act* sets out the duties of police officers, which includes duties to prevent crimes, assist victims of crime and apprehend criminals. In analyzing whether this statutory provision can ground a private law duty of care to a victim of criminal activity, the Court in *Project 360* stated:

[I]t is manifest from the statement of principles governing the delivery of police services set forth in s. 1 of the *PSA*, the duties of police officers set forth in s. 42(1), and the common law powers and duties incorporated by s. 42(3), that the duty of the police is to the public as a whole and not to specific individuals. To paraphrase language used by the Supreme Court in *Edwards v. Law Society of Upper Canada*, *supra*, and borrowed by the Court of Appeal in *Williams*, *supra*, in fulfilling their duties the police are required to act in the general public interest and to balance "a myriad of competing interests the nature of which are inconsistent with the imposition of a private law duty of care."<sup>54</sup>

Thus, post-*Hill*, the *Cooper* analysis emphasizing duties to the public as opposed to duties to private individuals has prevailed, although caution should be taken in relying too heavily on the

<sup>53</sup> *Finney v. Barreau du Québec*, [2004] 2 S.C.R. 17 at para. 44-46.

<sup>54</sup> *Project 360 Investments Limited (Sound Emporium Nightclub) v. Toronto Police Services Board*, 2009 CanLII 36380 (S.C.J.) at para. 18-19.

*Project 360* case as a predictor of what the courts are going to do with this tort as the case is best characterized as a “negligent failure to warn” as opposed to a negligent investigation case. Moreover, *Project 360* does not address at all the statutory duties found in statutes such as the *Victim Bill of Rights* referenced above that do in fact create specific duties by police officers to victims.

Should the courts conclude that there is *prima facie* a duty of care owed to victims, the analysis then turns to the question of whether there are public policy reasons that ought to negate the duty of care.

At a time of public concern over the economy and the cost of public services, the diversion of scarce resources to pay for litigation due to an extension of police liability has an element of controversy. Criminal activity is a risk faced by every member of the public. In deciding how to investigate criminal activity, investigators must weigh and balance a myriad of competing considerations including the need for resources to be directed to investigations that have a greater public interest element. Police decision-making is primarily a matter of discretion and such discretion is essential to the proper functioning of the judicial system. Furthermore, commentators such as Paciocco have raised concerns about the potential conflict between the interest of victims and the interests of the target of the investigation. A duty to victims may foster “a regime in which [investigators] will feel either entitled or obliged to use their authority to advance the interests of the victim.”<sup>55</sup>

On the other hand, the Supreme Court’s analysis in *Hill* included a lengthy consideration of many of the public policy concerns that are now raised to defeat the extension of the tort to include victims. Parties before the Supreme Court raised concerns about the potential chilling effect on police investigators, potential indeterminate liability to a large class of individuals, and a floodgate of litigation at significant cost to already stretched police forces. The Supreme Court concluded that these concerns about the potential impact of recognizing a duty of care to suspects were speculative, and that recognizing the duty was more likely to have positive effects. The Court stated that it “is not necessarily a bad thing” if it caused police officers to take more

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<sup>55</sup> D. Paciocco (2005), “Constitutionalization of Victim Rights Should Not Occur” 49 *Crim. L.Q.* 393 at 423.

care in conducting investigations. Similarly, concerns about indeterminate liability were rejected on the basis that the class of potential claimants was limited to particularized suspects and a requirement that the plaintiff establish compensable injury.<sup>56</sup>

The Supreme Court also took pains to point out that in order to negate a *prima facie* duty of care on the basis of policy concerns such as conflict with other duties, *Cooper* and previous cases require a conflict that poses a “real potential for negative policy consequences.”<sup>57</sup> The Court found that there was no such risk in respect of suspects. Rather, requiring police officers to take reasonable care toward suspects in the investigation of crimes may have positive policy ramifications. Reasonable care will reduce the risk of wrongful convictions and increase the probability that the guilty will be charged and convicted. By contrast, there was no evidence presented that acting with reasonable care to suspects would inhibit police investigation. The Supreme Court was quite critical of the failure of the defendants to provide evidence:

The record provides no basis for concluding that there will be a flood of litigation against the police if a duty of care is recognized. As the Court of Appeal emphasized, the evidence from the Canadian experience seems to be to the contrary (majority reasons, at para. 64). Quebec and Ontario have both recognized police liability in negligence (or the civil law equivalent) for many years, and there is no evidence that the floodgates have opened and a large number of lawsuits against the police have resulted. (See the majority reasons in the Court of Appeal, at para. 64.) The best that can be said from the record is that recognizing a duty of care owed by police officers to particular suspects led to a relatively small number of lawsuits, the cost of which are unknown, with effects on the police that have not been measured. This is not enough to negate the *prima facie* duty of care established at the first stage of the *Anns* test.<sup>58</sup>

These policy principles apply equally to victims, and perhaps even more strongly. It could be argued that given that the courts have recognized a duty to suspects to conduct a competent investigation, there is a need for a countervailing duty to victims in order to maintain balance.

In light of *Hill*, to the extent that police forces wish to raise policy as a means for negating a potential duty of care to victims, it will be necessary to amass evidence to support any assertions that liability could have a negative impact contrary to the public interest. It should be borne in

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<sup>56</sup> *Hill*, *Supra* note 1 at para. 56-63.

<sup>57</sup> *Ibid* at para. 40.

<sup>58</sup> *Hill*, *Supra* note 1 at para. 61.

mind that the standard of care in respect of victims would almost certainly be the same standard of care that police officers are already required to meet: that is, the standard of the reasonable police officer in the circumstances. Recognizing the tort in respect of victims would not require police officers to do anything other than what they are already doing. Although *Hill* was only decided three years ago, there has now been a lengthy history of negligent investigations in at least two provinces. In Ontario, the tort was recognized by the Ontario Court of Appeal thirteen years ago.<sup>59</sup> Negligent investigation has also been recognized for some time in the civil code of Quebec.<sup>60</sup> The Court may reasonably expect to be presented with evidence of any negative repercussion that have resulted.

*iv. Historically disadvantaged communities*

Any negative policy repercussions will also have to overcome the countervailing principles of access to justice and state accountability, particularly for historically disadvantaged communities.

An examination of the troubled relationship between Aboriginal people and the criminal justice system is instructive. Aboriginal people are three times more likely to be victims of violent crime than non-Aboriginal people.<sup>61</sup> Aboriginal women are five times more likely than other women of the same age to die as the result of violence.<sup>62</sup> In Saskatchewan (one of the only provinces to keep such records), 60% of the long-term cases of missing women are Aboriginal, although Aboriginal women make up only 6% of the population of that province.<sup>63</sup> The social impact of this epidemic of violence against Aboriginal women is stark and extensive. For example, it is estimated that 90% of Aboriginal women in federal penitentiaries have a history of physical and/or sexual abuse.<sup>64</sup>

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<sup>59</sup> *Beckstead v. Corporation of the City of Ottawa*, 1997 CanLII 1583 (Ont. C.A.).

<sup>60</sup> See Art. 1457 of the *Civil Code of Quebec*.

<sup>61</sup> Statistics Canada (2006), *Victimization and Offending Among the Aboriginal Population in Canada* (Queen's Press: Canada).

<sup>62</sup> Amnesty International (2009), *No More Stolen Sisters: The need for a comprehensive response to discrimination and violence against indigenous women in Canada* at p. 1.

<sup>63</sup> Amnesty International (2009), *No More Stolen Sisters: The need for a comprehensive response to discrimination and violence against indigenous women in Canada* at p. 1.

<sup>64</sup> L. Arbour, Report of the Commission of Inquiry into Certain Events at the Prison for Women in Kingston at p. 200, 220.

The Courts have recognized that Aboriginal people face “systemic discrimination in the justice system” at all levels of the justice system, including the investigations of crimes perpetrated against Aboriginal victims. Aboriginal victims of crime have been under-served by the justice system as a result of investigations that have been judicially-recognized to have been incompetent and/or undermined by racial bias. Indeed, there are a large number of high profile examples of Aboriginal victims being under-served by the justice system as a result of poor quality investigations.<sup>65</sup>

Similarly, there is considerable evidence that members of the Black community have faced systemic discrimination and disadvantage from the criminal justice system including racial profiling,<sup>66</sup> over-representation as persons charged, convicted and imprisoned<sup>67</sup> and over-representation as victims.<sup>68</sup>

It will likely be argued that immunity for criminal investigators from civil actions brought by victims who have been harmed by a negligent investigation is inconsistent with a rights-based approach to the development of the common law and would undermine efforts by Aboriginal and Black communities to obtain redress for negligence in responding to violent crimes committed against them.

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<sup>65</sup> See, for example: *R v. Williams* [1998] 1 S.C.R. 1128, *R. v. Gladue* [1999] 1 S.C.R. 680; Public Inquiry Into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba, The Justice System and Aboriginal People*, vol 1. (Winnipeg: Queen’s Printer. 1991); Cariboo-Chilcotin Justice Inquiry, *Report on the Cariboo-Chilcotin Justice Inquiry* (Canadian Cataloguing in Publication Data, 1993), at 8, 26, 30 (hereinafter “*Cariboo-Chilcotin*”); Saskatchewan Commission on First Nations and Métis Peoples and Justice Reform (Saskatchewan Justice Reform Commission) (2004), *Final Report* (Regina: Queen’s Press); Royal Commission on the Donald Marshall, Jr. Prosecution, *Commissioners’ Report, Findings and Recommendations vol. 1:* (Halifax: Canadian Cataloguing in Publication Data, 1989), at 162; *R. v. Nepoose*, [1992] A.J. No. 220, 125 A.R. 28 at para. 13, 22, 27, 30; Saskatchewan Department of Justice (October 1993), *Report of the Commission of Inquiry into the Shooting Death of Leo Lachance*; D.H. Wright (2004), *Report of the Commission of Inquiry into Matters Relating to the Death of Neil Stonechild* (Saskatchewan); *R. v. Carambetsos*, 2004 CanLII 5096 (ON S.C.) (death of Max Kakekagumick); Davies Commission of Inquiry into the Death of Frank Paul (2009), *Alone and Cold: Interim Report* (British Columbia).

<sup>66</sup> *R. v. Brown*, 2003 CanLII 52142 (ON C.A.); *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679.

<sup>67</sup> Cole & Gittens (1995), *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Queen’s Printer: Ontario); C. Lewis (1992), *The Report of the Race Relations and Policing Task Force* (Queen’s Printer: Ontario); S. Lewis (1992), *Report to the Premier on Racism in Ontario* (Queen’s Printer: Ontario).

<sup>68</sup> Statistics Canada (February 13, 2008), “Visible Minorities as Victims of Crime” *The Daily*.

Thus, public policy concerns about chilling effects, floodgates and so on face a counter-argument in terms of the need to ensure access to justice to those communities that are most at risk of the harms associated with negligent investigation.

*v. Emerging trends in the duty of care to victims*

It is noteworthy that many of the cases brought by victims alleging negligent investigation arise in the context of investigations into alleged misconduct by other police officers. This was the case in both *Norris* and *Fockler*, and it is a trend that continues in the cases that are poised to be the definitive post-*Hill* victim cases in Ontario. This trend suggests that civil litigation may be playing a significant role in the system of police accountability. It is an area of law that has been developing through somewhat unexpected parties, with police officers playing the role of suspects (i.e. in *Franklin*, above), alleged drug dealers playing the role of victims (i.e. *Markovic*, see below), and one of the biggest boosters of victims' rights – the Ontario Association of Chiefs of Police – taking an active role in attempting to limit access by victims to the courts (i.e. as intervenors in *Wellington*, discussed below).

In *DeHeus v. Niagara Regional Police Services Board*, the plaintiffs brought an action for negligent investigation arising from what they claimed was an incompetent police response to their complaints of criminal harassment. With little analysis, the Court concluded that the defendant police officers did indeed owe a duty to investigate the concerns raised by the plaintiffs. However, the action was dismissed on the basis that the investigation was “thorough and complete” and that the police officers had “fully and completely fulfilled their duty.”<sup>69</sup>

*Traversy v. Smith* is one of the few victim cases that does not involve allegations of a botched investigation into police misconduct. In that case, the plaintiff brought an action for negligent investigation arising from the police investigation of a motor vehicle accident in which he was injured. The Defendants brought a Rule 21 motion to dismiss the action, which was not granted. The Defendants sought leave to appeal, which was also denied. The Divisional Court relied

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<sup>69</sup> *DeHeus v. Niagara Regional Police Services Board*, [2005] O.J. No. 1014 (Sup. Ct.) at paras. 67-68.

heavily on the analysis in *Hill* and concluded that “there exists, in my opinion, a strong likelihood that the *Hill* decision will be extended to include victims ...” and concluded that:

In my opinion, the existing jurisprudence does not, as argued, stand for the proposition that there is no private law duty of care giving rise to an action in negligence between a police officer investigating a motor vehicle accident and one of the persons (or to that person’s family) whose injuries in the accident were caused by others and who is claiming damages as a result of the underlying accident.... In addition, without a court having an opportunity to examine the entire circumstances of the relevant circumstances, it cannot be stated categorically that the relationship is not a proximate one.<sup>70</sup>

The most important battleground over police liability to victims is in *Wellington v. Ontario*, where the question of whether police officers owe a duty of care to victims is very much an open question. The case concerns an investigation by the Special Investigations Unit (“SIU”) into the shooting death of a 15 year-old Black youth, Duane Christian, on June 20, 2006 by a Toronto Police Service officer. The plaintiffs – Duane’s estate, his mother and sister – allege that the SIU investigators were negligent by, amongst other things, failing to interview the subject officer, closing the investigation prior to receiving the pathology report and failing to assess whether the account provided by the witness officer was consistent with the forensic evidence from the scene. The family and the estate claimed damages for deprivation of the right to understand the circumstances of the death, compounding their grief and lessening their opportunity to participate in an inquest and to recover damages for the wrongful killing.

The Defendants brought a Rule 21 motion to strike the action on the basis that SIU investigators do not owe a duty of care to victims and their families. The motions judge refused to strike the pleading on the basis that it was not plain and obvious that there was no private duty of care owed by the SIU to the victim’s family. A full evidentiary record was needed to determine whether there was sufficient proximity between the plaintiffs and the SIU, including any specific contacts between the SIU and family members and whether there is a causal connection between the inadequate investigation and the harm to the plaintiffs, such that a private law duty of care should be imposed.

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<sup>70</sup> *Traversy v. Smith*, [2007] O.J. No. 4505 (Sup. Ct.) at para. 33

The Divisional Court granted leave to appeal.<sup>71</sup> In granting leave, the Court concluded that *Hill* had not explicitly overruled *Norris*, *Fockler* and *Porter*, and that appellate review was desirable in order to resolve conflicting jurisprudence.

The appeal was argued on April 1, 2010, and judgment was reserved. It is likely that whatever the decision, this case is likely to be heard at the highest appellate levels. As was recognized by the Divisional Court in granting leave to appeal, the appeal will have an impact on the development of the law as it relates to the general accountability of “other investigative bodies” and therefore its potential impact extends well beyond the SIU.<sup>72</sup> The case will certainly be precedent-setting in terms of the ability of victims to hold police accountable.

There is another case that is following closely behind *Wellington: Markovic v. Abbott*.<sup>73</sup> Again, this is a case alleging an incompetent investigation into alleged police misconduct. The underlying action arises from an investigation conducted by the Toronto Police Service drug squad into false allegations that the plaintiffs were involved in the trafficking of narcotics. It is alleged in the action that police officers from the drug squad unlawfully arrested and assaulted the plaintiffs, and that in the course of the execution of search warrants the defendants stole approximately \$250,000 in cash and valuables from the plaintiffs’ home, business and safety deposit boxes.

Allegations had been swirling about corruption on the drug squad for years, and in 2001, a “Special Task Force” was created to investigate. The main focus of the investigation was on the conduct of “Team Three” of the Central Field Command drug squad. The allegations in the Markovic claim relate to “Team Two.” While the investigation concluded with charges laid against a number of officers from Team Three, the investigation of Team Two did not result in any charges.

In the course of documentary production in the action, the plaintiffs concluded that the investigation into Team 2 officers was done negligently, was deliberately incomplete and that

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<sup>71</sup> *Wellington v. Ontario*, 2009 CanLII 66616 (Ont. S.C.D.C.).

<sup>72</sup> *Ibid* at paras. 8, 10.

<sup>73</sup> *Markovic v. Abbott*, 2010 ONSC 26 (CanLII).

investigative findings, including an alleged finding that that there were “thieves” on Team 2, were suppressed.<sup>74</sup> The plaintiffs sought to amend their claim in order to plead that the investigation deliberately covered up corruption on the part of drug squad officers. In resisting the amendments to the pleading, the defendants argued that the proposed amendments were not “legally tenable” because cases such as *Norris* had determined that there was no duty of care owed to victims in Ontario.

In concluding that the proposed amendments were, in fact, legally tenable, the Court placed considerable weight on the leave decision in *Wellington* to the effect that there is a conflict in the law in Ontario concerning whether a duty of care is owed to victims:

The issue before me is whether the claim for punitive damages for vicarious liability of the Board for a negligent and deliberately flawed police investigation and a subsequent cover-up and misrepresentation as to the nature and then the results of the investigation is tenable. As stated in *Plante*: “Amendments are to be granted unless the claim is clearly impossible of success.” I am bound by the findings in *Wellington* that there is a conflict in the law that must be determined by appellate review, possibly on a full evidentiary record, and by the determination of the Supreme Court in *Hill* that a full *Anns* analysis may be required to determine whether a private law duty of care exists between police and victim for negligent investigation. The matter before me may be even more compelling than the facts before the court in *Wellington* since the plaintiffs’ claims herein involve much more than simply negligent investigation and include deliberate acts such as suppression of evidence and greater proximity to these specific plaintiffs may be considered because of alleged misrepresentations to them to solicit their cooperation.<sup>75</sup>

The court has granted leave to make the proposed amendments, and the case continues, although the defendants have indicated that they may revisit the issue should the appellate court in *Wellington* determine that there is no duty of care to victims. Given the Court’s comments that the Markovics’ claims “may be even more compelling than the facts before the Court in *Wellington*” it may well be that appellate decisions in *Wellington* will not be determinative and the full scope of liability to victims of an incompetent investigation will be mired in uncertainty for some time to come.

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<sup>74</sup> *Markovic v. Abbott*, 2010 ONSC 26 (CanLII) at p. 1-2.

<sup>75</sup> *Ibid* at para. 40.

## **Police liability for *Charter* Damages**

Most police interactions with suspects have potential *Charter* implications. *Charter* claims for alleged unlawful arrest and detention, unlawful search and seizure, failure to provide the right to counsel and so on are a common aspect of many actions against police officers.

Two recent developments in the law will likely have a significant impact on the ability of plaintiffs to sue for *Charter* damages: the application of limitation periods to *Charter* claims and the potential reduction of availability of *Charter* damages in civil claims.

### *i. Limitation Periods and the Charter*

Ever since the Ontario Court of Appeal's 1993 decision in *Prete*, it was commonly understood that limitation periods did not apply to *Charter* claims.<sup>76</sup> *Prete* was an action for damages for breach of section 7 of the *Charter*, alleging actions on the part of Crown Attorneys and police officers that in essence amounted to malicious prosecution. The Defendants argued that the *Charter* claim was really a malicious prosecution claim that was dressed up as a *Charter* breach in order to defeat the limitation period as well as a statutory Crown immunity.

The Ontario Court of Appeal rejected both arguments. While section 5(6) of the *Proceedings Against the Crown Act* purported to limit causes of action for actions taken in the furtherance of a judicial process, the Court concluded that "a statutory enactment cannot stand in the way of a constitutional entitlement".<sup>77</sup> The remedy section of the *Charter* would be "emasculated if the provincial government, as one of the very powers the *Charter* seeks to control, could declare itself immune"<sup>78</sup> and thus the statute could not infringe upon a s. 24(1) *Charter* remedy.<sup>79</sup>

In what seems a clear statement concerning the applicability of limitation periods to *Charter* remedies, the Court of Appeal stated:

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<sup>76</sup> *Prete v. Ontario*, [1993] O.J. No. 2794 (C.A.).

<sup>77</sup> *Ibid* at para. 8.

<sup>78</sup> *Ibid*.

<sup>79</sup> *Ibid* at para. 9.

I do see identity between statutes granting immunity and those imposing limitation periods after the time when the limitation arises. Having found that immunity is not available under the *Proceedings Against the Crown Act* from a claim for *Charter* remedy, it therefore follows that in my opinion s. 11 [the limitation period] of the *Public Authorities Protection Act* should be read as not applying to relief claimed under s. 24(1) of the *Charter*.<sup>80</sup>

As a result, many plaintiffs with ancient claims of wrongdoing against police officers simply relied upon the *Charter* as the foundation for an action. However, this legal terrain has undergone a fundamental shift with the Ontario Court of Appeal's decision in *Alexis v. Darnley*.<sup>81</sup> On October 5, 2005, the plaintiff sent an email to the Premier in which she appeared to be contemplating suicide. The police were notified and the next day she was escorted by the defendant police officers to the hospital where she was involuntarily admitted for a psychiatric assessment. On March 12, 2008, she commenced an action alleging that she was unlawfully detained under the *Mental Health Act*. The defendants argued that the two-year limitation period in the *Limitations Act* barred her from raising her claim.

The Ontario Court of Appeal distinguished the Supreme Court's judgment in *Prete*:

As noted by the motion judge, *Prete* has been distinguished by courts of other jurisdictions on the basis that the six month limitation period being addressed was an exception to the six year limitation period of general application that was available only to the Crown. This more favourable treatment of the government by the government was, with respect to *Charter* claims, found to be unfair .... In my view, therefore, the Supreme Court's reasons clearly signal that limitation periods of general application will apply to claims made under s. 24(1) of the *Charter* that are, "brought as an individual for personal remedy."

...

With the adoption of the *Limitations Act*, the law of Ontario relating to limitation periods has now been substantially altered from that under consideration in *Prete*. The new Act applies to everyone and the limitation provisions of the *Public Authorities Protection Act* have been repealed. As a result, public authorities in Ontario no longer benefit from a preferential position in relation to others and plaintiffs are no longer disadvantaged in bringing *Charter* claims against public authorities.

A plain reading of the *Limitations Act* makes it apparent that, in adopting the new *Limitations Act*, the legislature intended that the 2 year limitation would apply to claims brought as an individual for personal remedy under s. 24(1). Section 4 states that "Unless

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<sup>80</sup> *Ibid* at para. 14.

<sup>81</sup> *Alexis v. Darnley*, 2009 ONCA 847 (CanLII).

this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.” The exclusions set out in the Act are listed in ss. 2 and 16. Among the exceptions is a class of constitutional claims. Section 2(1)(e) excludes claims based on aboriginal and treaty rights recognized and affirmed in s. 35 of the *Constitution Act, 1982*. There is however no exclusion for claims brought under s. 24(1) of the *Charter*, and certainly none such as the one brought by the appellant as an individual claim for a personal remedy. It is apparent in my view that, at a minimum, the Act was intended to apply to such claims. Nothing in the statute or in the legislative debates surrounding the adoption of the Act suggests otherwise.

.... Once the *Public Authorities Protection Act* limitation was repealed and the new *Limitations Act* was adopted, *Prete*, in my view, was overtaken.<sup>82</sup>

The Ontario Court of Appeal’s decision in *Alexis* does not appear to be consistent with the plain reading of *Prete*. In particular, the distinction that the Court of Appeal now seeks to draw between a limitation period that provides an unfair advantage to the Crown was not the subject of any consideration in the *Prete* decision. Rather, 17 years later, the Court of Appeal has effectively overturned *Prete*.

The plaintiff has sought leave to appeal to the Supreme Court and a decision on that application has not yet been made. However, as the law stands now in Ontario any claim for *Charter* damages as against police officers must comply with the limitation periods in the *Limitations Act* or risk dismissal on the basis that it is statute-barred.

## *ii. Charter damages*

The second major recent development has been a narrowing of the circumstances in which plaintiffs who have established that the police violated their *Charter* rights will be entitled to *Charter* damages.

Section 24(1) of the *Charter* provides that “anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” While this

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<sup>82</sup> *Alexis v. Darnley*, 2009 ONCA 847 (CanLII) at para. 15-22.

language is seemingly fairly broad, the Ontario Court of Appeal has restricted the circumstances in which a civil litigant is entitled to obtain damages for a *Charter* breach.

In *Ferri v. Ontario*,<sup>83</sup> and again in *Hawley v. Bapoo*,<sup>84</sup> the Ontario Court of Appeal held that liability for a constitutional tort requires proof of willfulness or *mala fides*. Both cases involved claims of *Charter* breaches against police officers. The Court in *Ferri* relied in part on the decision of the New Brunswick Court of Appeal in *McGillivray v. New Brunswick* in which the court stated:

...So long as the carrying out of duties in relation to the investigation and prosecution of persons in pursuit of the aims of the justice system is done within jurisdiction and with an absence of *mala fides*, there can be no recovery. A breach [of the *Charter*], in order to be actionable must be carried out in disregard of fundamental justice resulting in, for example, a loss of liberty. In order for the criminal justice system to function effectively, there has to be something more than an allegation of an error in reaching a conclusion or in the making of a decision by law enforcement officers, or the experts upon which they rely for professional advice.<sup>85</sup>

There have been similar rulings in Saskatchewan and British Columbia.<sup>86</sup>

The issue of whether a *Charter* litigant in an action against the police must establish that the police were acting in bad faith is squarely before the Supreme Court in the case of *Vancouver (City) v. Ward*.<sup>87</sup> The case arises from the arrest and strip search of a Vancouver lawyer. The police had information that someone intended to throw a pie at the prime minister at a public event. Mr. Ward was in the area, but was moving away from the ceremony. While he was in detention, his car was unlawfully seized. He was ultimately released without charge. At the conclusion of a trial he was awarded \$5,000 in *Charter* damages for the strip search and \$100 in *Charter* damages for the unlawful seizure of his car. No finding of bad faith on the part of the defendants was made.

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<sup>83</sup> *Ferri v. Ontario (Attorney General)*, 2007 ONCA 79.

<sup>84</sup> *Hawley v. Bapoo*, 2007 ONCA 503.

<sup>85</sup> *McGillivray v. New Brunswick* (1994), 116 D.L.R. (4<sup>th</sup>) 104 (N.B.C.A.) at para. 10.

<sup>86</sup> *Mullins v. Levy*, 2009 BCCA 6; *Whatcott v. Schluff*, 2009 SKQB 56.

<sup>87</sup> *Vancouver (City) v. Ward*, [2009] S.C.C.A. No. 125.

The defendants appealed, arguing that in the absence of bad faith they could not be liable for constitutional damages and urging the British Columbia Court of Appeal to accept the approach taken in Ontario. It was argued that declaratory relief would be sufficient to right the wrong. In rejecting this argument, and implicitly the Ontario approach, the British Columbia Court of Appeal stated:

For the kind of breach that occurred in the present case, however, only a past wrong is under consideration. A declaration of breach, therefore, has no ongoing benefit and is not a remedy at all. It is really nothing more than a finding of fact that may not, by itself, effectively redress the past wrong. To require that the breach be accompanied by a tort or by bad faith to justify an award of damages in many cases will give the victim of the breach only a pyrrhic victory, not a true remedy....I do not suggest that an award of damages is the appropriate remedy in all cases in which a government actor has breached a person's Charter rights. Section 24(1) vests the court with a broad judicial discretion to grant "such remedy as the court considers appropriate and just in the circumstances." Appropriate and just remedies must be determined judicially from case to case.<sup>88</sup>

The defendants in *Ward* have argued that the British Columbia Court of Appeal erred, and have urged an interpretation consistent with the law in Ontario.<sup>89</sup> It is argued that the first and paramount principle of remedies under Canadian constitutional law establishes that when a citizen applies to a court of competent jurisdiction any remedy must be effective in bringing the legal and political system into compliance with the constitution and its values. In so doing, the remedy "vindicates the right." The second countervailing principle is that the remedy should intrude as little as possible on the exercise of authority by the legislative and executive branches of government. The third principle upon which the defendants rely is that *Charter* principles are primarily aimed at prospective deterrence, not retrospective correction or compensation. The overarching objective is to ensure future government compliance with constitutional norms. The defendants argue that these principles suggest that damages should not normally be available under section 24(1) of the Charter to remedy good faith government action, and that rather declaratory relief would suffice to vindicate the right. It is only in circumstances where a government official acts in bad faith, abuses their power or otherwise acts in a tortious fashion that damages may be necessary.

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<sup>88</sup> *Ward v. British Columbia*, 2009 BCCA 23 (CanLII) at para. 63-64.

<sup>89</sup> See the factum of the Province of British Columbia, as filed before the Supreme Court in *City of Vancouver, et al. v. Alan Cameron Ward, et al.*, docket 33089 at para. 39-43.

The plaintiff and supporting intervenors in *Ward* have argued before the Supreme Court that given the broad language of section 24(1), the approach taken by the British Columbia Court of Appeal is the more principled position and is consistent with the general approach to *Charter* interpretation. For example, the Supreme Court has consistently rejected any notion that intention is determinative of the scope of rights or the entitlement to a remedy under the *Charter*. Serious violations of *Charter* rights can occur in the absence of intention. From its inception, the primacy of effects over purpose has been a foundational principle for the interpretation of rights guaranteed by the *Charter*.<sup>90</sup> The constitutional character of the *Charter* signaled a fundamental shift from the narrow and impoverished understanding of rights that characterized common law and *Bill of Rights* jurisprudence to a broad, purposive and public interest approach.<sup>91</sup>

Significantly, the French language version of section 24(1) uses the term “réparation”, which is translated in English to mean “compensation”.<sup>92</sup> The use of the word “réparation” indicates that monetary compensation is explicitly contemplated as an individual remedy for a breach of the *Charter*. To the extent that there is any ambiguity in the English language version, the rule of internal consistency requires that the English and French versions of the same section should be interpreted in the same way.<sup>93</sup> Thus, it is submitted that compensation for individual breaches of the *Charter* is not only permitted by the specific language of section 24(1), but lies at the heart of the provision.<sup>94</sup>

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<sup>90</sup> For example, see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 88; *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 37; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 16-17, 26; *R. v. Golden*, [2001] 3 S.C.R. 679 at para. 95.

<sup>91</sup> See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 88; *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 25-34; *Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145 at pp. 9-10; *R. v. Therens*, [1985] 1 S.C.R. 613 at paras. 44-45, 47.

<sup>92</sup> The *Larousse Dictionnaire Francaise* defines “réparation” in the legal context as: “Dédommagement d'un préjudice par la personne qui en est responsable, soit par le rétablissement de la situation antérieure, soit par le versement d'une somme d'argent, c'est-à-dire de dommages-intérêts. (On dit parfois réparation civile.)” (<http://www.larousse.fr/index/dictionnaires/francais>). The Government of Ontario's *Lexique bilingue de termes législatifs* translates compensation into French with the word “réparation” ([http://www.onterm.gov.on.ca/lexicon\\_e.html](http://www.onterm.gov.on.ca/lexicon_e.html)). Collins Robert, *Dictionnaire français-anglais – anglais-français* (HarperCollins Publishers, Inc: New York, 2003 5<sup>th</sup> ed.) defines “réparation” *inter alia* as “compensation” in English and “dommages-intérêts” in French.

<sup>93</sup> *R. v. Kapp*, [2008] 2 S.C.R. 483 at para. 87

<sup>94</sup> Similarly, in *Ravndahl v. Saskatchewan* [2009] 1 S.C.R. 181 at para. 16, this Honourable Court recognized the distinction between personal claims for constitutional relief and claims for declarations of invalidity.

The “intention” of the infringer is not determinative to the availability of the exclusionary remedies pursuant to section 24(2) of the *Charter*. Section 24(2) permits a court to exclude evidence at a criminal trial if it was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *Charter* and the admission of the evidence would bring the administration of justice into disrepute. Although section 24(2) is explicitly focused prospectively on societal interests (as opposed to remedying past wrongs to an individual), “good faith” is but one factor to be considered in determining whether evidence is to be excluded. “Good faith” on the part of police officers is not determinative of whether evidence obtained in violation of the *Charter* will be admitted.<sup>95</sup>

As with *Hill*, in the development of the law of negligent investigation, a rights based approach can assist in formulating an approach to state accountability that ensures that historically disadvantaged groups have access to justice. For example, to have meaning in the lives of Aboriginal people, any approach to *Charter* remedies must take account of the perspective of Aboriginal people and the broader context of social and historical disadvantage. It must address itself to ameliorating the position of Aboriginal people within Canadian society. Most importantly, it must acknowledge the reality that Aboriginal people have been devastated by “well-intentioned” policies and that a purportedly benign purpose should never bar appropriate redress in respect of *Charter* violations.

The Supreme Court has recognized that substantive *Charter* rights should be interpreted in a manner consistent with the principles and purposes of section 15’s equality guarantee.<sup>96</sup> The “interpretative lens of the equality guarantee” ensures that the *Charter* “responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15”.<sup>97</sup>

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<sup>95</sup> *R. v. Grant*, 2009 SCC 32 at paras. 68, 73 & 75; *R. v. Harrison*, 2009 SCC 34 at paras. 62, 71-74.

<sup>96</sup> *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at para. 20; *Law v. Canada*, [1999] 1 S.C.R. 497 at para. 53; *Auton v. British Columbia*, [2004] 3 S.C.R. 657 at para. 25.

<sup>97</sup> *New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]*, [1999] 3 S.C.R. 46 at para. 115; *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 52 (“The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the Charter.”); *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 90-94 (Equality concerns must also inform the contextual circumstances in which the rights of full answer and defence and privacy will come into play); *R. v. Osolin*, [1993] 4 S.C.R. 595 at para. 166 (the use of s.15 to interpret the limits of sections 7 and 11(d)); *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 48 (the use of s.15 to interpret the scope of the right to a fair trial pursuant to s.11(d)); *R. v. Golden*, [2001] 3 S.C.R. 679 at para. 90 (the

The purposive approach to the interpretation of substantive *Charter* rights is equally applicable to the interpretations of the remedy provisions of the *Charter*<sup>98</sup> and is consistent with the specific language of section 24(1), which invites an examination of the broader social and historical context affecting the *Charter* claimant. By empowering a court to order a remedy that is appropriate and just “in the circumstances”, section 24(1) requires an assessment of all of the circumstances affecting the claimant, including his or her position of historical disadvantage and political and social vulnerability.

Accordingly, the interpretive lens of the equality guarantee should inform the interpretation of section 24(1) of the *Charter*. Disadvantaged individuals and groups have an acute interest in an interpretation of *Charter* remedies that fully accounts for the broader social and historical context of disadvantage and exclusion. A narrow and restrictive approach to *Charter* remedies that ignores equality principles is unresponsive to the reality affecting disadvantaged individuals and groups who may have very different perceptions and experiences with the “well-intentioned” exercise of government power.

...equality rights jurisprudence has long recognized that even governments having the best of intentions may nevertheless act in a manner that has the unintentional effect of discriminating against minorities that are not well understood by those in power. This fundamental insight of equality jurisprudence has yet to be applied to remedial jurisprudence.<sup>99</sup>

The following equality principles ought to infuse the analysis of what is an appropriate and just remedy pursuant to s.24(1):

- Courts should approach their analysis from the perspective of the claimant including pre-existing historical disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group.<sup>100</sup>
- The purpose of infusing equality principles is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the

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use of equality principles to interpret the scope of s.8); *R v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (“Dunedin”) at para.18; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at para.24-25.

<sup>98</sup> *Ontario v. 974649 Ontario Inc.*, [2001] 3 S.C.R. 575 (“Dunedin”) at para.18; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3 at para.24-25.

<sup>99</sup> Kent Roach, “Remedial Consensus and Dialogue Under the Charter: General Declarations and Delayed Declarations of Invalidity”, (2002) 35 *U.B.C. L. Rev.* 211 – 270 at paras. 20-21.

<sup>100</sup> *Law, supra* at paras. 59-63.

position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society”.<sup>101</sup>

- Intent of the violator is not determinative. The stated purpose of legislation or government action need not be accepted at face value.<sup>102</sup>

It is argued that the application of the above-described equality principles would ensure that the broad remedial purposes of s. 24(1) in particular and the *Charter*, in general, are achieved.

At the time of the writing of this paper, the Supreme Court has not yet ruled in the case. The judgment should be watched closely by those with an interest in the law of police liability to members of the public, as it will certainly have a significant impact.

## **Conclusion**

In sum, there remain a number of unanswered questions in terms of civil liability of police forces to the public. This is an area of law that continues to evolve with parties on each end of the spectrum arguing that they best represent the public interest. As the Supreme Court in *Hill* has warned, any litigants would be wise to ensure that they have the evidence to support their positions – whether it be on issues of liability or public policy. The Courts so far have not felt compelled to determine these important legal issues based on arguments made in the air.

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<sup>101</sup> *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241 at para. 66 [emphasis added].

<sup>102</sup> *Gosselin*, *supra* at paras. 26-27.

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