

LEARNERS



Police Liability

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- Origin and elements of the tort of negligent investigation
- Development of the case law
- Current liability landscape

The *Hill* decision

- Prior to 2007, there were conflicting court decisions
- Then: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41
 - 6 to 3 decision
 - The tort of negligent police investigation exists
 - Dissent: “is it fair to saddle the police with the entire cost when responsibility for wrongful convictions has been attributed to all players in the justice system”

The *Hill* decision

- Jason George Hill: an aboriginal man investigated for a series of robberies
- Evidence later pointed to another perpetrator
- A number of charges were dropped
- One remaining charge went to trial
 - 2 bank tellers remained steadfast in their identifications of Hill

The *Hill* decision

- Hill was convicted
- Successfully appealed based on errors of law by trial judge; new trial ordered
- Acquitted at second trial
- Then sued the police for negligence, malicious prosecution, and breach of *Charter* rights
 - All claims dismissed at trial
 - Upheld by majority of Court of Appeal

- Supreme Court of Canada:
 - Police, like other professionals, exercise professional discretion
 - Courts are not in the business of second-guessing reasonable exercises of discretion by trained professionals
 - A legal duty is owed to suspects being investigated
 - The standard of care is that of “a reasonable police officer in all the circumstances”

The *Hill* decision

“The standard of care is not breached because a police officer exercises his or her discretion in a manner other than that deemed optimal by the reviewing court. A number of choices may be open to a police officer investigating a crime, all of which may fall within the range of reasonableness. So long as discretion is exercised within this range, the standard of care is not breached”

The *Hill* decision

“The standard is not perfection, or even the optimum, judged from the vantage of hindsight. It is that of a reasonable officer, judged in the circumstances prevailing at the time the decision was made - circumstances that may include urgency and deficiencies of information. The law of negligence does not require perfection of professionals; nor does it guarantee desired results”

The *Hill* decision

“police officers, like other professionals, may make minor errors or errors in judgment which cause unfortunate results, without breaching the standard of care. The law distinguishes between unreasonable mistakes breaching the standard of care and mere ‘errors in judgment’ which any reasonable professional might have made and therefore, which do not breach the standard of care”

The *Hill* decision

- Investigation “flawed” but not in breach of the applicable standard judged by the standards of the day
 - 2 witnesses interviewed together
 - Failure to blind-test the photos put to witnesses
 - “Not good police practices, judged by today’s standards”, but “the evidence does not establish that a reasonable police officer in 1995 would not have followed similar practices in similar circumstances”

The *Hill* decision

- A criminal acquittal does not automatically translate to civil liability
- Is expert evidence necessary to establish the standard of care that existed at the time of the investigation?
- Is it enough to show that objectively reasonable grounds existed?

Moving to an objective standard

Miazga v. Kvello Estate, 2009 SCC 51

- Malicious prosecution claim against Crown Attorney
- Unanimous decision, written by Charron J. (who wrote the *Hill* dissent)

Miazga v. Kvello Estate, cont'd

- the tort of malicious prosecution originated at a time when prosecutions were conducted by private litigants
- historical private prosecutors were “not charged with the execution of any public duty”
- therefore liable for initiating a prosecution without *subjective* belief in reasonable grounds, even if *objectively* reasonable ground existed

Miazga v. Kvello Estate, cont'd

- “in the context of a public prosecution, the ... test necessarily turns on an objective assessment of the existence of sufficient cause”
- No principled basis for distinction between Crown Attorneys and police in this context
 - *Hill*: “The police must investigate crime. That is their duty”

Miazga v. Kvello Estate, cont'd

- “While a determination of guilt at a criminal proceeding is not determinative of the reasonable and probable cause question ... it is a relevant factor that may be properly considered in ascertaining the existence or absence of reasonable cause”
- “Giving weight to antecedent judicial determinations works to ensure consistency between the criminal and civil justice systems”

Miazga v. Kvello Estate, cont'd

- “Absent a fundamental flaw in the criminal proceedings relied upon, it is perfectly reasonable that antecedent judicial determinations may support a finding by a civil court that there existed reasonable and probable cause for an impugned criminal prosecution”

Moving to an objective standard

R. v. Scott, 2002 CanLII 15489

- “whether a committal for trial is conclusive of, or strong evidence for, reasonable and probable cause, at the very least it shows that the evidence did not lean towards the probable innocence of the accused”

Abboud v. Ottawa Police Services Board, 2016

ONSC 1052

- CBSA intercepted a package of stun guns (prohibited weapons), shipped to the plaintiff from China
- Police obtained a search warrant on grounds including that plaintiff would accept delivery
- Undercover officer attended to deliver the package; plaintiff refused to take delivery
- Police still proceeded with search

Abboud v. Ottawa Police Services Board, cont'd

- Police seized computer containing evidence of the purchase
- Also found cocaine
- Plaintiff charged with attempting to import prohibited weapons, possession of illegal drugs
- At trial, all evidence from search excluded under s. 8 of the *Charter*

Abboud v. Ottawa Police Services Board, cont'd

- Plaintiff then sued for breach of *Charter* rights, false arrest and detention, and negligent investigation
- Police motion for summary judgment: granted
- Section 8 right was breached, but exclusion of evidence was a “sufficient benefit”

Abboud v. Ottawa Police Services Board, cont'd

- Reasonable and probable grounds existed for the detention and arrest
- Therefore no claim for false arrest/detention, or breach of s. 7 and s. 9 *Charter* rights
- On the negligent investigation claim, the police took the position that the plaintiff had the burden to prove his innocence, based on *Hill*

Abboud v. Ottawa Police Services Board, cont'd

- The motion judge was not prepared to decide that issue, or the negligent investigation claim, in the absence of a full evidentiary record including expert evidence

McCullough/Nossey v. Hamilton Police, 2016 ONSC 2638

- Plaintiffs were charged with murder in 1990
- Jury acquitted one (Nossey) but convicted the other (McCullough)
- McCullough's conviction was set aside by the Court of Appeal which ordered a new trial
- Crown did not proceed; plaintiffs sued

McCullough/Nossey v. Hamilton Police, cont'd

- The claims were dismissed at trial
- Court held that the plaintiffs were “wise” not to press the malicious prosecution claim, i.e., no basis to infer that the police goal was anything other than the “obvious one” (solving the crime)
- False imprisonment: once accused was remanded by court order (24 hours after arrest), no longer in police custody
- In any event, reasonable cause existed

McCullough/Nossey v. Hamilton Police, cont'd

- Standard of care: “objectively reasonable grounds before making an arrest”
- Supported by committal for trial

Du Carmur v. Cole, 2016 ONSC 4930

- Arrest and charging of plaintiff arose from wiretap evidence, obtained by judicial authorization
- Negligent investigation claim dismissed on the ground that, since the authorization was valid, carrying it out (in accordance with its terms) cannot be found to have been “negligent”

495793 Ontario Ltd. (Central Auto Parts) v. Barclay, 2016 ONCA 656

- Thunder Bay Police undertook a complex investigation regarding stolen vehicles and auto parts
- Plaintiff was charged with possession of stolen property
- Following preliminary inquiry, committed for trial on all 11 counts

495793 Ontario Ltd. (Central Auto Parts) v. Barclay, cont'd

- Some charges with withdrawn by the Crown
- 3 charges went to trial, none of which resulted in conviction
- Plaintiff sued for negligent investigation

495793 Ontario Ltd. (Central Auto Parts) v. Barclay, cont'd

- Trial judge rejected admissions made by the plaintiffs' expert that the police did have reasonable grounds to proceed with an arrest
- Trial judge rejected the expert's evidence altogether, and elected to define the standard of care herself
- Police found liable and substantial damages awarded
 - Including \$200,000 for the public humiliation in the press and worry suffered by the Plaintiff while the charges remained outstanding for six years

495793 Ontario Ltd. (Central Auto Parts) v. Barclay, cont'd

- Finding of negligent investigation reversed on appeal
- Numerous key principles affirmed
 - Police are professionals – expert evidence on standard of care almost always required
 - Police are investigators – not expected to weigh evidence to a legal standard. Role is distinct from Crown or trier of fact

495793 Ontario Ltd. (Central Auto Parts) v. Barclay, cont'd

- Police are entitled to be wrong as long as decision making is reasonable
- Determinations made in underlying criminal proceedings must be carefully considered – civil action is not a blank slate. For example, committal for trial is strong evidence that reasonable and probable grounds existed

495793 Ontario Ltd. (Central Auto Parts) v. Barclay, cont'd

- A claim for negligent dissemination of information also requires expert evidence, regarding normal police practices in communicating with the media

Farley v. Ottawa Police Services Board, 2016

ONSC 7817

- Plaintiffs convicted by a jury of first degree murder
- Court of Appeal ordered a second trial based primarily on trial judge's inadequate instructions to jury
- 2 key Crown witnesses either died or disappeared
- Second trial resulted in acquittal

Farley v. Ottawa Police Services Board, cont'd

- Both plaintiffs sued in separate actions
- One abandoned his action; other maintained
- Significant delay in moving action forward
- Police delivered extensive Affidavit of Documents
- Summary judgment granted, pre-discovery

Farley v. Ottawa Police Services Board, cont'd

- Decision primarily based on Court of Appeal's order for 2nd trial
- That meant there was evidence on which a reasonable, properly instructed jury could convict
- Therefore no possible police liability (malicious prosecution, negligent investigation, or breach of *Charter* rights)
- Costs: \$71,516.92

Farley v. Ottawa Police Services Board, 2017

ONCA 689

- *Miazga*: determinations in criminal proceedings may support finding by civil court that RPG existed
- Here: consent committal for trial; order for second trial (not acquittal); Crown proceeded to second trial; acquittal due to evidentiary problems
- Summary judgment affirmed

Rotondo v. Ottawa Police Services Board, 2016

ONSC 8101

- Massage parlour investigation
- Charges stayed after ruling at criminal trial that search violated accused's s. 8 *Charter* rights
- Lawsuit followed, and police summary judgment motion

Rotondo v. Ottawa Police Services Board, cont'd

- Judgment granted
- Criminal court did not rule on reasonable and probable grounds for arrest, so no *res judicata*
- Also, police were not a party to the prosecution
- Existence of RPG fatal to claims for false arrest/imprisonment, negligent investigation, and breaches of ss. 7 and 9 of the *Charter*

Rotondo v. Ottawa Police Services Board, cont'd

- No entitlement to damages for s. 8 *Charter* breach, because exclusion of evidence in criminal proceedings already a “significant remedy”

Henry v. British Columbia

- Plaintiff convicted of 10 sexual offences in 1983, declared a dangerous offender
- Imprisoned nearly 27 years before B.C.C.A. substituted acquittals for all convictions
- Sued police for negligence, and provincial Crown for violation of *Charter* rights, i.e., wrongful non-disclosure
- Crown motion to strike went to SCC: 2015 SCC 24

Henry v. British Columbia, cont'd

- Issue: whether *Charter* damages available absent an allegation of malicious conduct
- Majority of SCC held malice did not need to be proven in claim against Crown for wrongful non-disclosure
- Rather, threshold is “intentional withholding of information”
- Negligence standard rejected; but dissent would not have required any fault threshold

Henry v. British Columbia, cont'd

- Majority also held “it is neither prudent nor necessary to decide whether a similar threshold would apply in circumstances not involving wrongful non-disclosure”; “the prudent course of action is to address new situations in future cases as they arise”

Henry v. British Columbia, cont'd

- Plaintiff went on to succeed at trial: 2016 BCSC 1494
- Trial judge found Crown's non-disclosure in breach of plaintiff's *Charter* rights "broke the chain of causation" and negated any alleged negligence in the police investigation
- Crown ordered to pay damages over \$8 million

Smith v. HMQ et al., 2016 ONSC 7222

- Unsolved murder from 1974
- Undercover operation instituted in 2009
- Plaintiff ultimately made statements to undercover officers implicating himself in the murder
- Statements excluded at criminal trial on *Charter* grounds, leading to an acquittal

Smith v. HMQ et al., cont'd

- Plaintiff sued police for negligent investigation
- Also sued the individual Crown Attorneys alleged to have given advice to the police during the investigation
- DRPS defence included crossclaim for negligent legal advice / breach of retainer
- Crown brought motion to strike plaintiff's claim and the crossclaim

Smith v. HMQ et al., cont'd

- Matheson J. struck the plaintiff's claim against the Crown defendants in its entirety
- Police crossclaim for negligent legal advice was not struck
- Crossclaim based on breach of retainer allowed to proceed with additional particulars

Smith v. HMQ et al., 2017 ONSC 2854

- Crown granted leave to appeal to Divisional Court
- Did Matheson J. take the wrong approach to issue of Crown immunity?
- Did Matheson J. failed to properly consider the policy implications of a duty of care?
- Hearing: January 2018

R. v. Paterson, 2017 SCC 15

- Charges laid after warrantless search of dwelling
- At trial, application to exclude on *Charter* grounds
- SCC: judicial inquiry in a *Charter voir dire* is distinct from the purpose of a criminal trial
 - focus is not on accused's guilt but whether his/her constitutional rights were infringed
 - truthfulness of statements made by accused are not at issue, or the ultimate reliability of the evidence in determining guilt

Nissen v. Durham Regional Police, 2015 ONSC 1268

- Plaintiff made a report to police regarding criminal activity by neighbour's teenage son
- Confidentiality was promised
- Not aware the interview was recorded
- Recording included in subsequent disclosure package to accused
- Accused's family threatened plaintiff, who developed PTSD and moved away

Nissen v. Durham Regional Police, cont'd

- Plaintiff sued for breach of promise of confidentiality
- Trial judge found informer privilege to exist, and that police owed common law duty not to disclose identity of informer
- Claim for punitive damages rejected
- General damages of \$345,000 awarded

Nissen v. Durham Regional Police, cont'd

- Appeal dismissed: 2017 ONCA 10
- A citizen in the plaintiff's position “should be able to rely on what the police tell her”

Conclusion

- 10 years post-*Hill*: successfully suing the police for negligence is no easy task
- Expert evidence almost always required
- Many criminal cases proceed beyond a preliminary inquiry, making it difficult to argue that reasonable and probable grounds were absent
 - *R. v. Jordan*
- A civil action is not a 'blank slate'

Questions?

Thank you