

NEGLIGENT INVESTIGATION

Michael J. Hewitt

The legal environment for Canadian police officers was changed forever when the Supreme Court of Canada recently decided that police may be sued by a criminal suspect for damages caused by a negligent police investigation.

This Court's October 4, 2007 decision in *Hill v. Hamilton Wentworth Regional Police et al.* acknowledged, to the surprise of many, that a police officer owes a legal duty to a suspect under investigation to conduct a reasonable investigation. Therefore, when an investigation is conducted unreasonably and results in damages to the suspect, that person now may bring a civil claim against the officer and/or the police force.

In this recent case, the plaintiff/suspect Mr. Hill was charged with robbery, after a police investigation. He was convicted and spent 20 months in jail for a crime he did not commit. After his successful appeal, he sued over the manner in which the investigation was conducted. Specifically, he alleged that the police were negligent for these reasons:

- The police released the suspect's photo to the media, then utilized a photo line up for witnesses where all other persons in the line up were of a different race than the suspect.
- Investigators interviewed two witnesses together with a photo of Hill present.
- Police maintained the charge even after learning of exculpatory evidence which pointed away from the suspect and toward a specific similar looking person as the perpetrator.

Despite those allegations against investigating officers and the police force, those defendants were found not to have acted negligently. However, the Court recognized the legal existence of a claim for negligent investigation, as follows:

“...the police owe a duty of care in negligence to suspects being investigated ...their conduct during the course of an investigation should be measured against the standard of how a reasonable officer in like circumstances would have acted.”

While it has long been established that a suspect can sue police for misconduct such as assault, false arrest or gross negligence, it was not until now settled that a claim may be made for mere negligence in the investigation.

This decision has broad implications for the policing of our communities and therefore will generate considerable debate in Canadian society. Many will question how police officers can be expected to perform their roles effectively with the threat of a lawsuits hanging over their heads. Others who have felt or seen the brunt of an unfavourable police investigation will see this decision as an important step forward in Canadian jurisprudence. However, this is now a political and not a legal debate. From a legal perspective, our highest Court has concluded the debate with a single decision, and it is now time to assess what the consequences of this new principle are likely to be.

Looking forward, the important legal issue immediately becomes what standards the courts are likely impose on police conduct, when considering a negligence claim. Like many decisions of the Supreme Court that dictate dramatic changes to the law, the ultimate effect likely will not be as dramatic as it might now seem. The lower courts may well maintain a high level of deference to police discretion by interpreting the legal standard cautiously.

The Court in *Hill* clearly favoured the notion of placing controls on this type of litigation through a cautious approach to the standard of care, rather than barring it completely for policy reasons. Compelling arguments were made in that case to the effect that it was unwise and unfair to subject the police to the threat of litigation, and indeed that it would create a conflict with the duty owed by the police to the public. Rather than accept that argument as a bar to any claim, the Court focused on the protections built into our legal system that are likely to prevent a flood of litigation or a chilling effect on police work.

As noted above, the general standard that applies is that of the “reasonable investigator”. This general concept applies throughout the law of negligence. While flexible, it is not particularly instructive. Therefore the standard of care must develop on a case-by-case basis, considering the facts of that specific case and precedents. In the *Hill* case, the Supreme Court did provide some additional insight into what will be considered reasonable:

- Acceptable conduct will vary depending non the stage of the investigation.
- Where the officer has special skills and experience, that officer will be measured against a standard of a reasonable officer in like circumstances.
- The potential harm caused by police conduct will inform what is reasonable.

- The standard should “be applied in a manner that gives due recognition to the discretion inherent in police investigation”.
- An error in judgment will not in itself breach the standard.
- The standard of the day will change over time as police practices evolve.

The result in the *Hill* case itself illustrates the fact that a conservative approach to the standard of care is appropriate and will be encouraged by the Court. The facts of that case were not favourable to the defendant officer. The Court described the impugned practices as “questionable” and “not good police practices”. The plaintiff spent substantial time in custody of a crime he did not commit. Yet, the court still did not find the defendants guilty of a negligent investigation. In doing so, the Court distinguished between “tunnel vision” and the exercise of discretion, and emphasized that there was credible evidence supporting the charge.

One thing is certain in the wake of this decision: a new industry of litigation support experts will now develop. Expert witnesses will be required to assist the courts with opinions as to what a reasonable investigator would do in a particular case. Those witnesses are likely to be drawn from the ranks of retired police officers and former members of other investigatory bodies that fall under the scrutiny of this principle.

Another question to be decided after this decision is whether the same principles will apply to investigators who are not police officers, such as regulatory enforcement officers, private investigators and corporate fraud and security investigators. The answer is that they probably will. The real question again will be how the courts will define the standards that apply to them.

Finally, it is worth noting that the Court’s decision could end up being of little concern if legislators decide to override this decision with legislation. Some protections of individual officers already exist in policing legislation. Practically, it would be easy enough for a government to pass amendments to the *Police Act*, for example, providing police officers immunity from suit for any negligence. However, it remains to be seen whether such laws would be politically viable. The Canadian experience reveals much consternation about judicial activism and infrequent political action to curtail it.

In either case, we certainly have not heard the last of the new tort of negligent investigation, and we are about to see a significant proliferation of legal contests in this field. Stay tuned.....