

POLICE LIABILITY FOR NEGLIGENT INVESTIGATIONS

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The legal environment for policing in Canada recently changed forever when the Supreme Court of Canada decided that police may be sued by a criminal suspect for damages caused by a negligent investigation. To the surprise of many, the Court's October decision in *Hill v. Hamilton Wentworth Regional Police et al.* acknowledged that police owe a legal duty to a suspect to conduct a reasonable investigation.

Failing to do so may now result in a suspect bringing a civil claim against a police officer and force that have conducted an unreasonable investigation.

In this case, the plaintiff, 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, Mr. Hill sued police 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 and afterwards showed witnesses a photo lineup in which all other persons were of a different race than the suspect.
- Investigators interviewed two witnesses together with a photo of Mr. Hill in view.
- Police maintained the charge even after learning of exculpatory evidence that pointed away from Mr. Hill and toward a specific similar-looking person as the perpetrator of the crime in question.

Despite those facts, the investigating officers and the police force in *Hill* were found not to have acted negligently. However, in its ruling, 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 [and] 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." This means that, while it has long been established that a suspect can sue police officers for misconduct such as assault, false arrest or gross negligence, a wrongly accused person may now also sue them for mere negligence in an investigation.

This decision has broad implications for the policing of our communities and will generate considerable debate. Many will question how police officers can be expected to perform their roles effectively with the threat of lawsuits hanging over their heads. Others who have felt or witnessed the brunt of an unfavourable police investigation will see this decision as an important step forward in Canadian jurisprudence. Whatever one's viewpoint on this issue, it has now become an academic — not a legal — debate.

From a legal perspective, the important issue becomes what standards the courts are likely to impose on police conduct when considering a negligence claim. As with many decisions of the Supreme Court that dictate dramatic changes to the law, the ultimate effect of *Hill* will probably not be as dramatic as might now seem to be the case; 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 *Hill* that it was unwise and unfair to subject police to the threat of litigation because it would create a conflict with the duty owed by the police to the public. Rather than accept that argument as a bar to all claims, the Court focussed on the protections already built into our legal system that it said should serve to prevent a flood of litigation or a chilling effect on police work.

As noted above, the general standard that will apply in future litigation is that of the “reasonable investigator,” a general concept that applies throughout the law of negligence. While flexible, this concept is not particularly instructive. The standard of care will develop in the future on a case-by-case basis, taking into account specific facts and precedents.

In *Hill*, the Supreme Court outlined the following considerations as examples of what it considered to be reasonable:

- Acceptable police conduct will vary depending on the stage of the investigation.
- Where an officer has special skills and experience, that officer's conduct 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 *Hill* illustrates the conservative approach to the standard of care that the Court decided is appropriate and to be encouraged. The facts of the case were not favourable to the defendant officer. The plaintiff spent substantial time in custody for a crime he did not commit and the Court described the impugned practices as “questionable” and “not good police practices.” Even after taking these facts into consideration, the Court still did not find that the defendants had conducted a negligent investigation. It distinguished between “tunnel vision” and the exercise of discretion. In addition, it 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. The courts will need expert witnesses to provide opinions as to what a reasonable investigator would do. These witnesses are likely to be retired police officers and former members of other investigatory bodies. Another question to be decided after *Hill* is whether the same principles will apply to investigators who are not police officers, such as regulatory enforcement officers, private detectives and securities investigators. They probably will and, again, the question at issue will be how the courts define the standards for these other investigators and the agencies that employ 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. Some protections of individual officers already exist in policing legislation and it would be possible for a government to pass amendments to the *Police Act*, for example, providing police with a blanket immunity from a suit for any negligence. However, it remains to be seen whether such laws will be politically desirable or viable. The Canadian experience reveals much consternation about judicial activism but there is infrequent political action to curtail it. In any event, the foreseeable future is likely to have a significant proliferation of legal contests in this field.