



Prosecutorial Negligence and Negligent Police Investigation: An Analysis of recent Canadian and South African Decisions (3)

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Abstract

That the State could be held liable for the negligent performance of prosecutorial duties has been well established in contemporary South African law since Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC). In contrast, in the Canadian jurisdiction the element of malice, not mere negligence, has been the prerequisite for prosecutorial liability since Proulx v Quebec (Attorney General) (2001) 206 DLR (4th) 1 (SCC). While, however, the South African Constitutional Court, as discussed in part one of this article, opened the door for the simultaneous development of the law of prosecutorial and police negligence, the Supreme Court of Canada appeared to have closed such door partly by rejecting the concept of prosecutorial negligence, the subject matter of part two of this article. However, as the discussion in part three in this series shows, the Supreme Court of Canada has ushered in the tort of negligent police investigation in modern Canadian public authority liability law. Even so, the courts in both jurisdictions had to jettison the public interest immunity principle of the English common law whereby the police is immune from liability in their investigative duties. The South African development is traceable to a combination of three factors: the influence of the Bill of Rights; the constitutional mandate to the courts to develop the common law to accord with the spirit, purport and objects of the Bill of Rights; and the adjudicative dynamism of the courts towards the interpretation and application of the provisions of the Constitution. The recent decisions bear witness to the proposition that South African courts ensure, at all times, that the law affords the individual the protection the Bill of Rights was designed to provide such

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that the only exception to liability known to the courts in this regard is the immunity of judicial officers from negligent performance of judicial duties.

7 The Modern Law of Negligent Police Investigation in Canada

A combination of the enforcement provisions of the *Charter of Rights and Freedoms*;¹ the application of the less complicated, more encompassing and straightforward test in *Anns v Merton London Borough Council*² as against the more complex *Caparo/Murphy* test applicable in determining the existence of a duty of care in the English common-law of negligence;³ the rejection of the *Hill* immunity principle which exempts the police from liability in damages for negligent investigations; and the construction of the statutes authorising the police to act in a particular manner in any situation,⁴ have enabled the courts in Canada to consider the liability of the police on a case to case basis. This has meant that Canadian courts do not hesitate to extend the duty of care to new areas of liability insofar as the two criteria laid down in *Anns* as modified by the Canadian Supreme Court in *Cooper v Hobart*⁵ and subsequently in *R v*

1 Section 24(1), Canadian *Charter of Rights and Freedoms* 1982.

2 1978 AC 728 at 751–752 per Lord Wilberforce, followed consistently by the Supreme Court of Canada since *Kamloops (City of) v Nielsen* 1984 10 DLR (4th) 641; *BDC Ltd v Hofstrand Farms Ltd* 1986 26 DLR (4th) 1; *Canadian National Railway Co v Norsk Pacific Steamship Co* 1992 91 DLR (4th) 289; *London Drugs Ltd v Keuhne and Nagel International Ltd* 1992 97 DLR (4th) 261; *Winnipeg Condominium Corporation No. 36 v Bird Construction Co* 1995 121 DLR (4th) 193; *Cooper v Hobart* 2001 206 DLR (4th) 193; *Edwards v Law Society of Upper Canada* 2001 3 SCR 562; *Odhavji Estate v Woodhouse* 2004 233 DLR (4th) 193 (SCC); *Childs v Desormeaux* 2006 1 SCR 643; *Hill v Hamilton-Wentworth Regional Police Services Board* 2008 285 DLR (4th) 620 (SCC). In *D(B) v Halton Region Children's Aid Society* 2008 284 DLR (4th) 682 (SCC) paras 24–28, the Supreme Court restated and applied the prevailing test in Canada as follows: in order to determine whether there is a *prima facie* duty of care, the factors of reasonable foreseeability and proximity had to be examined. The basic proposition underlying reasonable foreseeability is that people must take reasonable care to avoid acts and omissions which a person can reasonably foresee would be likely to injure his or her neighbour. There must also be a relationship of sufficient proximity between the parties. A compelling policy reason for refusing to find proximity may exist where an alleged duty of care conflicts with an overarching statutory or public duty. Even if a *prima facie* duty of care is found to exist, there may be residual policy reasons which make the imposition of a duty of care unwise.

3 See *Caparo Industries plc v Dickman* 1990 1 All ER 568 (HL) 5744a-b per Lord Bridge; *Murphy v Brentwood DC* 1990 2 All ER 908 (HL) 933j–934a per Lord Oliver.

4 Under s 25(1)(b) of the Canadian Criminal Code 1985 and s 39 of the Police Act 2000 (Alberta), the police would be justified and therefore could so plead justification if its officers had acted on reasonable grounds in apprehending a suspect or using reasonable force to do so. In *Crampton v Walton* 2005 250 DLR 292 (Alta CA), the Court of Appeal upheld the trial judge's rejection of s 25(1) defence, in that in executing a warrant to search a particular premises for drugs, the police had gone to the wrong home, the plaintiff's home, where no drug was found. It was a case of mistaken identity. Even so, the police had used unnecessary force in effecting the search. The Court of Appeal held that in operating with a sealed warrant of which they had no way of knowing its contents, the police bungled. They were therefore unable to prove the reasonableness of the grounds for their action. Although they were not expected to measure the precise amount of force the situation required, there was no evidence that force was required to subdue or control the plaintiff. The police were therefore held liable for the assault that occurred.

5 2001 206 DLR (4th) 193 (SCC) paras 29, 30, 32, 37 per Iacobucci J. It was held that at the first stage of the *Anns* test there must be reasonable foreseeability of harm "plus something more." This "something more" is proximity which is not so much a test in itself but "a broad concept which is capable of subsuming different categories of cases involving different factors." Thus, at this first stage, the court must consider whether the harm that occurred was the reasonably foreseeable consequence of the defendant's act, and whether there were reasons, notwithstanding the proximity between the parties, that tort liability should not be recognised. In the present context, even if a *prima facie* duty of care had been established under this arm of the test, it would have been negated at the second arm for overriding policy reasons. At the second stage of the *Anns* enquiry, the court would not be concerned with the relationship between the parties but with the effect of recognising a duty of care on other legal obligations, the legal system and society generally. Here, the court is concerned with whether any 'residual policy considerations' existed that would negate or reduce the scope of the duty or the class of persons to whom it is owed. The question to be asked is whether broad policy considerations exist that would make the imposition of a duty of care unwise, despite the fact that harm was a reasonably foreseeable consequence of the conduct in question and there was a sufficient degree of proximity between the parties that the imposition of a duty would not be unfair. In the present case, the duty of care was also negated on the basis of the distinction between government policy and the execution of policy. The spectre of indeterminate liability would loom large if a duty of care was recognised, because the imposition of a duty of care would be to create an insurance scheme for investors at great cost to the taxpaying public. See also *Edwards v Law Society of Upper Canada* 2001 3 SCR 562; *Odhavji Estate v Woodhouse* 2004 233 DLR 193 (SCC); *Childs v Desormeaux* 643; *Fullowka v Pinkerton's of Canada Ltd* 2010 1 SCR 132. See the criticism of this approach by Neyers "Distilling Duty: The Supreme Court of Canada amends *Anns*" 2002 118 LQR 221.

*Imperial Tobacco Canada Ltd*⁶ are satisfied.

This is precisely what the majority of the Supreme Court did in their judgment in *Hill v Hamilton-Wentworth Police Services Board*⁷ where it did not only create a common-law tort of negligent police investigation but went further to extend its ambit to incorporate the suspects' category in criminal investigations. The Canadian courts also resort to the tort of misfeasance in public office to accommodate government liability including the police in those cases involving intentional torts,⁸ deliberate dishonest conduct of public officers and abuse of office.⁹ Not unexpectedly, therefore, the recent development spear-headed by the Supreme Court of Canada has given impetus to the expansion of the law of police liability in contemporary Canadian public authority liability.¹⁰

The Canadian approach to the vexed problem could be likened to the following classic situations. The first is where a serial rapist was on the prowl in the neighbourhood and the police, instead of warning potential victims of the rapist's presence, used the same victims as bait in a ploy to apprehend the rapist.¹¹ The second concerned a situation where the special investigations' unit bungled with the investigation into a fatal shooting by police officers and the Supreme Court was convinced that a case of negligence and misfeasance in public office could proceed against the uncooperative police chief of the unit.¹² In the third illustration, which is the main case for the discussion, the police had misidentified an Aboriginal as a "suspect" in robberies in a botched identification parade. They had him tried, convicted and sentenced for offences he did not commit. The fourth category is the Canadian parallel¹³ to the South African case of *Minister of Safety and Security v Geldenhuys*.¹⁴ Although the result of the latter case went the opposite direction, it does illustrate, like all the other decisions

6 2011 3 SCR 45 para 39.

7 2008 285 DLR (4th) 620 (SCC).

8 In *Driskell v Dangerfield* 2007 MBQB 142, the first plaintiff, Mr. Driskell, was convicted of murder and had served 13 years in jail when he was released after the Minister of Justice quashed the conviction upon his application for review under the Criminal Code. The Minister's order of a new trial was stayed by the Crown. Thereupon the plaintiff and his mother instituted a claim for damages against the Crown and the police. On a motion to strike out various portions of the statement of claim, the questions before Greenberg J revolved around: whether the Crown and the police could be liable in negligence for the manner in which they conducted a prosecution, in particular, for failing to disclose evidence to the defence; and, whether Florence, the mother of the first plaintiff, had a cause of action for damages against the defendants, separate from that of her son. The plaintiffs also alleged conspiracy between the Crown and the police; fraudulent misrepresentation by the Crown, malicious prosecution, misfeasance in public office, conspiracy and breach of the plaintiff's sections 7 and 11(d) Charter rights. Apart from striking out those parts of the claim that sought damages for lost care, companionship and support by the plaintiff's mother, Greenberg J refused the application to strike out the plaintiff's claim.

9 See e.g. *Odhavji Estate v Woodhouse*. See further: *KRP Enterprises Inc v Haldimand (County)* 2007 (CanLII) 56521 (ONSC); *Driskell v Dangerfield* 142. *Contra* the earlier case of *Gerrard v Government of Manitoba* 1993 98 DLR (4th) 167 (Man. CA).

10 See e.g. *Traversy v Smith* 2007 (CanLII) 49879 (ONSC) where Power J held that while the Supreme Court of Canada did not expressly extend the duty to include victims, yet there exists in the majority judgment, a strong likelihood that the decision in *Hill v Hamilton-Wentworth Police Services Board*, will be extended to include victims notwithstanding the strictures in para 27 of that judgment. In part, the judgment of the Chief Justice states: "I cannot accept the suggestion that cases dealing with the relationship between the police and victims or between a police chief and the family of a victim are determinative here, although aspects of the analysis in those cases may be applicable and informative in the case at bar. (See *Odhavji Estate v Woodhouse* and *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* 1998 160 DLR (4th) 697 (Ont. Ct. (Gen Div.)) ... In fact, and with great respect to the Court of Appeal who relied to some extent on this case, I find the *Jane Doe* decision of little assistance in the case at bar." And, since the Supreme Court of Canada expressly stated that the categories of relationships characterised by sufficient proximity to attract legal liability are not closed, and since the existing jurisprudence does not 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, the action cannot be struck off the court record. Cf in *Collis v Toronto Police Services Board* 2007 (CanLII) 36634 (ONSCDC) where Swinton J held that the police had met the standard expected of them in the circumstances of the case and, in any event, having found that there were reasonable grounds for the arrest, there could be no liability for negligent investigation. See also: *Kabbabe v Québec (Procureur général)* 2007 QCCA 1471; *Miguna v Ontario (Attorney General)* 2005 (CanLII) 46385 (ON CA) para 12, which had relied on the Court of Appeal judgment in *Hill v Hamilton-Wentworth Police* 2006 259 DLR (4th) 676 (Ont. CA).

11 *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*.

12 *Odhavji Estate v Woodhouse*.

13 *Roy v Canada (Attorney General)* 2005 251 DLR (4th) 233 (BCCA).

14 2004 (1) SA 515 (SCA).

from that jurisdiction, that a plaintiff alleging police liability other than malicious prosecution or wrongful arrest and detention, could only recover damages where the basic ingredients of the tort of negligence or misfeasance in public office were in existence or *Charter* rights were breached but not otherwise.¹⁵ In this case and other instances discussed in this article where the plaintiffs' claims failed, the reason has been that a relationship creating duty of care did not exist in that there was the absence of proximity or that the damage was unforeseeable or that both criteria were lacking, or because the standard of care expected of a reasonable police officer in the circumstances of the defendant was met in the case.

Like South Africa's Bill of Rights, Canada's Charter of Rights and Freedoms of 1982 invests in the courts the power to grant appropriate relief that will vindicate any breach of a fundamental right¹⁶ or, for that matter, any constitutional right.¹⁷ Suffice it to reiterate here what was said elsewhere that the development of the law of public authority liability in South Africa and Canada "has been influenced radically by an inter-play of constitutional dynamics and the private law."¹⁸ Thus making it difficult for "the public interest immunity as a concept ... to blossom" in the respective constitutional environments of these two common-law countries.¹⁹ The courts in both jurisdictions have left nothing to chance; they have gone further in expressly rejecting the "three unreliable assumptions"²⁰ advanced by the House of Lords as the basis for the public interest immunity principle. The Constitutional Court of South Africa held that such a principle excusing the police from liability in circumstances where they should or ought to be held liable would be inconsistent with the Constitution and its values.²¹ Nor could the immunity principle avail in the face of the constitutional principle of legality in modern South African public law.²²

Whereas the Ontario Court of Appeal spent quality time trashing the public interest immunity doctrine in order to make it clear that it was inapplicable to the Canadian jurisdiction, the Supreme Court of Canada was pre-occupied in *Hill v Hamilton-Wentworth Police Services Board*²³ with enunciating the law of negligent police investigation. In his judgment for the Court of Appeal, MacPherson JA rejected the same "three unreliable assumptions" or policy rationales as not sufficiently compelling the court to deny the existence of a duty of care owed by the police in the context of how they conduct their criminal investigations.²⁴ Instead, the Justice of Appeal advanced three reasons to support the court's conclusion that the police need no immunity from liability in negligence for their investigative duties. First, there was no

15 In *Mammoliti v Chief of the Niagara Regional Police Service* 2007 ONCA 79 (CanLII), the Ontario Court of Appeal considered extensively the four elements laid down in *Nelles v Ontario* 1989 2 SCR 170 at 192–193 (SCC) which a plaintiff for claim for malicious prosecution must successfully prove and allowed the appeals for claims under that head of tort to proceed. In respect of the tort of negligent investigation, the court was split. The majority, La Forme and Gillese JJA, held that pursuant to the decision of this court in *Wentworth (infra)*, the standard of care issue which underpins the tort of negligent investigation by police in Ontario is defined as whether the Niagara Regional Police Service conducted their investigation in the same manner that would be undertaken by a reasonable police officer in the same circumstances. Accordingly, there were material issues to be tried with respect to whether the Niagara Regional Police Service met the required standard of care in all circumstances of this case. In respect of Charter claims, the majority held that liability for a constitutional tort under ss 6 and 7 of the Charter as claimed by the plaintiffs, required wilfulness or *mala fides* in the creation of a risk or course of conduct that leads to damages. Proof of simple negligence is not sufficient for an award of damages in an action under the Charter: *McGillivray v New Brunswick* 1994 CanLII 4465 (NBCA), 1994 116 DLR 104 at 108 (NBCA). This case requires a trial on the issue of malice, which in the view of La Forme JA could potentially satisfy the element of bad faith required to support an action under the Charter as it would satisfy the claim for malicious prosecution. On his part, Juriansz JA held that the fact that the police had reasonable and probable grounds to initiate and continue the prosecution of the appellants leads to the finding that there are no genuine issues for trial as to whether the police met the required standard of care. Since there was no malice or bad faith on the part of the police, there can be no action under the Charter and all the claims must fail.

16 Section 24, Canadian Charter 1982; s 38, Constitution of South Africa 1996.

17 Section 172(1)(b), Constitution of South Africa 1996.

18 Okpaluba "Public Interest Immunity for Negligent Performance of Police Investigative Duties: Recent Commonwealth Case Law (2)" 2008 *THRHR* 210 para 5.

19 Okpaluba 2008 *THRHR*.

20 Namely: (a) the absence of sufficient proximity; (b) the dictate of public policy; and (c) the chilling effect of floodgates of litigation. See Okpaluba 2008 *THRHR* para 2.

21 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) (*Carmichele* 1) para 49.

22 *Van Eeden v Minister of Safety and Security* 2003 (1) SA 389 (SCA) para 20. See also *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

23 2008 285 DLR (4th) 620 (SCC).

24 Per MacPherson JA, *Hill v Hamilton-Wentworth Police Services Board* (2006) para 62.

concrete proof that imposing liability would change the way the police perform their duties.²⁵ Second, there were impressive local precedents in Canadian courts where the police have been held liable for negligently performing their investigative duties.²⁶ Third, the need to balance the Charter liberty rights of suspects and victims of crimes with the important duties of the police, hence the existence of a duty of care on the police in the context of criminal investigation, will be developed with an eye on section 7 of the Charter.²⁷ The objective in the present context is to confine this investigation to negligent police investigation since negligent prosecutorial conduct had been discussed in part two of this article series (Volume 32 Issue 1 of 2018). However, the relationship between prosecutorial negligence and malicious prosecution in Canada will, in appropriate circumstances, be shown.

7 1 Three Remarkable Aspects of the Majority Judgment in *Hill v Hamilton-Wentworth Police*

There are three remarkable aspects of the majority judgment delivered by McLachlin CJC in *Hill v Hamilton-Wentworth Police Services Board*²⁸ that deserve seminal attention. The first is the recognition that a *prima facie* duty of care exists in the circumstances of the case.²⁹ That the court came to that conclusion is perhaps not surprising as that could be inferred from the court's earlier judgment in *Odhavji Estate v Woodhouse*.³⁰ It will be recalled that the Supreme Court had ruled in that case that an action could be brought in negligence against a police chief for alleged negligent police investigation. The second aspect is that having recognised such a duty, the court literally, but silently, brushed aside the public immunity doctrine thereby systematically dismantling that principle in its entirety. In the process, the majority took the opportunity presented by the appeal and cross-appeal in *Hill v Hamilton-Wentworth Police Services Board* to pronounce, in emphatic terms, the existence in Canadian common law of a tort of negligent police investigation. The court thereby restated the current Canadian approach to determine the duty of care in negligence and proceeded to extend the boundaries of that duty in the present case. The third is the less important aspect though one vital to the litigant. It is the application of the duty of care principles to the facts before court. Granted that a duty of care is recognised and there was no policy consideration to negate it, then the breach stage of the duty of care – the standard of care stage – comes up for consideration. The question raised in the plaintiff's appeal was whether the police conduct met the standard expected of a reasonable police officer in the circumstances. Incidentally, this was the only instance where the Supreme Court was unanimous in arriving at the same conclusion in this matter. The aim here, is to attempt to analyse this interesting development from the Supreme Court of Canada for the benefit of the readership of this Journal while carefully avoiding boring them with those aspects that formed the subject of earlier analysis.

The plaintiff had appealed against the majority judgment of the Court of Appeal to the effect that the police had maintained the appropriate standard of care that was required of reasonable officers in like circumstances. The State, on the other hand, contended on a cross-appeal that there was no tort of negligent police investigation known to the common law. The questions with which the court was confronted were stated by McLachlin CJC as follows:

Can the police be held liable if their conduct during the course of an investigation falls below an acceptable standard and harm to a suspect results? If so, what standard should be used to assess the conduct of the police? More generally, is the police conduct during the course of an investigation or arrest subject to scrutiny under the law of negligence at all, or should police be immune on public policy grounds from liability under the law of negligence?³¹

This is a novel question in the sense that the existing common-law precedents had concerned the duty of care owed by the police to victims of crimes resulting from negligent police investigations but not suspects of crimes. One explanation is the assumption at common law

²⁵ *Hamilton-Wentworth (CA)* para 63.

²⁶ *Hamilton-Wentworth (CA)* para 66.

²⁷ *Hamilton-Wentworth (CA)* para 69.

²⁸ 2008 285 DLR (4th) 620 (SCC).

²⁹ It is important also to observe that in recognising this tort the majority went back to the juridical roots of the duty of care – the Atkinian aphorism in *Donoghue v Stevenson* 1932 AC 562 (HL) 580–581.

³⁰ 2004 233 DLR (4th) 193 (SCC).

³¹ *Hamilton-Wentworth* para 2.

that the constitutional right to a fair trial conferred on the accused adequately takes care of his interests in the criminal justice system. As far as damages were concerned, there were two instances where suspects had traditionally obtained damages against the police for wrongful investigation of crime. The first is the apparent assumption that the private law actions for wrongful arrest and malicious prosecution adequately vindicate the violations of personal liberties and unlawful incarcerations. The second is that bad faith-motivated investigation, imprisonment and prosecution could give rise to an action for misfeasance in public office. Indeed, inferences that could be drawn from the line of reasoning of the minority of the Supreme Court of Canada is that the current law adequately provided redress to a suspect so that the tort of negligent police investigation was superfluous and unwarranted.

Chief Justice McLachlin had no hesitation in breaking ranks with the House of Lords. She held that the police were not immune from liability under the Canadian law of negligence. They owed 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. The Chief Justice made it clear that the tort of negligent investigation exists in Canada, and the trial court³² and the Court of Appeal³³ were correct to consider the appellant's action on that basis. However, the law of negligence did not demand a perfect investigation. It required only that police conducting an investigation act reasonably in respect of which, allowance need be made in two regards. First, the police must be allowed room for "minor mistakes and misjudgements." Second, they must be accorded "proper scope" to the "discretion police officers properly exercise in conducting an investigation."³⁴ Having granted these indulgences, when they fail to meet the standard of reasonableness required of them, then, they may be accountable through negligence law for harm resulting to a suspect.³⁵

In order to establish a cause of action for negligent police investigation, the plaintiff must show that he or she suffered compensable damage³⁶ and a causal connection to a breach of the standard of care owed to him or her. But, lawful pains and penalties imposed on a guilty person do not constitute such compensable loss. This is because negligent police investigation may cause or contribute to wrongful conviction and imprisonment,³⁷ fulfilling the legal requirement of causal connection on a balance of probabilities. The test here is the traditional "but for" test³⁸ in determining causation.³⁹ While the issue of policy considerations are taken up later in this article, the discussion of the Supreme Court judgment in the present context focuses on: (a) foreseeability and proximity in establishing a duty of care; (b) the standard of care; and (c) the application of that standard of care in weighing the reasonableness of police conduct in this case.

32 2003 66 OR (3d) 746 (Marshall J).

33 2006 259 DLR (4th) 676 (Ont. CA).

34 *Hamilton-Wentworth* para 77. Cf in *R v Chief Constable of Sussex: ex parte International Trader's Ferry Ltd* 1999 2 AC 418 para 23, where Lord Slynn had put the dilemma facing the police in the discharge of their duties in these words: "In a situation where there are conflicting rights and the police have a duty to uphold the law, the police may, in deciding what to do, have to balance a number of factors, not the least of which is the likelihood of a serious breach of the peace being committed. That balancing involves the exercise of judgment and discretion."

35 *Hamilton-Wentworth* para 3.

36 *Hamilton-Wentworth* paras 90–92.

37 As McLachlin CJC put it [para 92]: "The police must be allowed to investigate and apprehend suspects and should not be penalised for doing so under the tort of negligent investigation unless the treatment imposed on a suspect from a negligent investigation and causes compensable damage that would not have occurred but for the police's negligent conduct. The claimant bears the burden of proving that the consequences of the police conduct relied upon as damages are wrongful in this sense if they are to recover."

38 The "but-for" test in South African law was stated by Corbett JA in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) 700E-701F as follows: "The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test, one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. The enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the loss; *aliter*, if it would not have ensued."

39 *Hamilton-Wentworth* paras 93 and 94. On recent cases on foreseeability and causation in Australian law see: *Roads & Traffic Authority of NSW v Dederer* 2007 234 CLR 330 (HCA); *Roads & Traffic Authority of NSW v Royal* [2008] HCA 19.

7.2 Developments since *Hill v Hamilton-Wentworth Police*⁴⁰

Since the decision of the Ontario Court of Appeal in *Hamilton-Wentworth*, courts across Canada embraced the principles therein enunciated and now that the Supreme Court of Canada has emphatically laid down far-reaching principles on the tort of negligent police investigation, Canadian courts have been inundated with an avalanche of claims that might have given credence to the erstwhile floodgates argument,⁴¹ that have trailed the shadow of the apex court's pronouncements in that case.⁴² This is, perhaps understandable, as the police, in the discharge of their regular duties of crime prevention and enforcement of the criminal law, come across members of the community more frequently than any other group of functionaries in the executive branch. Owing to space constraint and the process of elimination, the judgments selected for discussion were handed down by the Courts of Appeal of British Columbia,⁴³ Ontario,⁴⁴ and a Supreme Court judgment in a case from the North West Territory involving: (a) a botched police investigation; (b) death caused by use of a taser; (c) the police delay in responding to an assault scene; (d) failure to prevent intentional tort by a third party; and (e) the SIU investigations and victims of crimes. A brief summary of the principles garnered from subsequent case law relating to the application of the *Hamilton-Wentworth* principles is attempted after an analysis of specific fact-situations have been undertaken.

7.2.1 A Botched Private Investigation

The case of *Correia v Canac Kitchens*⁴⁵ is not only one of a botched criminal investigation but also a case of a misidentified thief. As a result of undercover surveillance carried out by a private investigating agency engaged by the employer to track down those employees who were involved in theft and drug dealing in its industrial premises, the plaintiff was wrongly identified. The plaintiff, a 62-year-old long serving employee was accused of theft and dismissed from his employment. Depending on information from the private investigators, the police arrested the plaintiff. Meanwhile, it was discovered that he was confused with another employee with a similar name but almost 40 years younger than him. Claiming that he suffered serious injury, the plaintiff sought damages for, among other torts, negligent investigation.

40 Some examples from the Province of Ontario will suffice: *Moak v Haggerty* 2008 CanLII 65 (ONSC); *Drady v Canada (Minister of Health)* 2009 300 DLR (4th) 443 (Ont. CA); *Attis v Canada (Minister of Health)* 2009 300 DLR (4th) 415 (Ont. CA); *Benjamin v Hamilton (Police Services Board)* 2010 ONSC 3557 (CanLII); *Forrest v The Queen* 2012 ONSC 429 (CanLII); *Rausch v Pickering (City)* 2012 ONSC 4688 (CanLII); *Bodick v R* 2013 (CanLII) 19893 (ONSC); *495793 Ontario Ltd v Barclay* 2014 ONSC 3517 (CanLII); *Grann v Thunder Bay Police Services Board* 2015 ONSC 438 (CanLII); *495793 Ontario Ltd v Barclay* 2015 ONSC 602 (CanLII); *F v Greater Sudbury (Police Service)* 2015 ONSC 3937 (CanLII); *Fazekas v Greater Sudbury Police Services Board* 2015 ONSC 4316 (CanLII); *Abboud v Ottawa Police Services Board* 2016 ONSC 1052 (CanLII); *George v Larkin* 2016 ONSC 4961 (CanLII); *Eid v Canada (AG)* 2016 ONSC 3612 (CanLII); *Rosin v Dubuc* 2016 ONSC 5678 (CanLII); *Lindhorst v Continental College* 2016 ONSC 4079 (CanLII).

41 See Okpaluba "Delictual Liability of Public Authorities: Pitching the Constitutional Norm of Accountability against the 'Floodgates' Argument" 2006 *Speculum Juris* 248–258.

42 Cf in *De Pinto v Toronto Community Housing Corp* 2013 ONSC 2479 (CanLII) paras 41–53, where it was held that owing to the wide discretionary power wielded by the police in their investigative and prosecutorial-like functions – *R v Beare* 1988 2 SCR 387 paras 51–52, it is they that would decide whether or not to proceed with an investigation – *Clements v Canada* [1995] OJ No. 1094; *R v COP of the Metropolis, Ex p Blackburn* 1968 2 WLR 893 at 902–903 – such that it is an ill-founded concept to seek to extend liability for negligent investigation to circumstances where a complainant could seek redress from the police for failure to conduct a sufficiently thorough investigation of his or her complaint – *Lloyd v Toronto (City) Police Services Board* [2003] OJ No. 83 (QL) (SCJ); *Bhoopaul v Canadian Imperial Bank of Commerce* [2011] OJ No. 2357 (QL) paras 17–19 (SCJ). Thus, quite apart from the action being statute barred in – *De Pinto*, the plaintiff could not claim against the police for failing to inadequately or thoroughly investigate an alleged crime reported to them.

43 See also *Reilly v Bissonnette* 2008 BCCA 167 (CanLII); *Thompson v Webber* 2010 BCCA 3612 (CanLII); *Neuman v Canada (Attorney General)* 2011 BCCA 313 (CanLII); *Henry v British Columbia (AG)* 2014 BCCA 15 (CanLII).

44 See also *495793 Ontario Ltd (Central Auto Parts) v Barclay* 2016 ONCA 656 (CanLII) paras 47–53 where the appeal emanated from a judgment finding the appellants, a police officer and the City of Thunder Bay Police Services Board, were negligent in investigating the individual and corporate respondents. The appropriate standard of care for the tort of negligent investigation was established by the SCC in *Hill v Hamilton-Wentworth* paras 68 and 73, where it was held that the "flexible overarching standard" is that of "a reasonable police officer in similar circumstances." The Chief Justice of Canada also emphasised that it was not the standard of perfection judged from the vantage of hindsight, but a standard of a reasonable officer judged from the circumstances prevailing at the time the decision was made.

45 2008 294 DLR (4th) 525 (Ont. CA) (*Correia*).

The defendants, including the employer, the private investigators, excluding the police, brought summary judgment motions to dismiss the claims. The motions judge dismissed his claim for negligent investigation.

The question before the Court of Appeal of Ontario was the application of the two-stage test enunciated in *Anns/Kamloops* as modified in *Cooper* and applied in *Hamilton-Wentworth*. In line with that analysis, the first question was whether foreseeability and proximity existed in the circumstances of *Correia* to establish a *prima facie* duty of care.⁴⁶ The Court of Appeal held that in the circumstances and context of this case, where the employer and its investigating agent did a complete investigation, a trial judge could find that they ought to have known that the police would rely completely on their investigation. It is probable that a trial court could conclude that it was reasonably foreseeable given the facts that negligence by the parties in identifying the real perpetrator of the crime would cause harm to the plaintiff. There was, therefore, a close and direct relationship of proximity hence a triable issue existed whether the relationship between the plaintiff and the employer and his private investigators disclosed sufficient foreseeability and proximity to establish a *prima facie* duty of care.⁴⁷

The second question the court had to resolve was whether there were any policy considerations that should limit the duty of care.⁴⁸ The Court of Appeal was satisfied that there was no conflict between a duty of care in negligence and other duties the private security firm might owe to the public. In stating the reasoning of the court, Rosenberg and Feldman JJA explained that:

While the [private security] firm may have contractual obligations to the party that has retained it, it is not apparent how those obligations would conflict with a duty of care to the person being investigated. The other policy considerations mentioned such as the impact on police discretion and the standard of reasonable and probable grounds have no application to the potential liability of a private security firm.⁴⁹

The chilling effect of the English *Hill* vintage recognised by the motions judge that private investigators would be less willing to provide law enforcement authorities with information or cooperate with the police was too speculative. This holding was erroneous in light of the view of the Chief Justice of Canada in *Hamilton-Wentworth* that “policy concerns raised against imposing a duty of care must be more than speculative; a real potential for negative consequences must be apparent.”⁵⁰ The fact that private investigation firms performed public policing functions, but with limited oversight or clear lines of redress to those injured by their activities, strongly favoured extending tort liability.⁵¹ The Court of Appeal⁵² would not place the same weight on the existence of alternative remedies as did the court in *Elliott v Insurance Crime Prevention Bureau*.⁵³ Recognition of a duty of care would not distort the legal relationships among the employer, employee and investigator. The spectre of indiscriminate liability was not a consideration in this case. The universe of potential claimants was circumscribed by the necessity of the employment relationship and the requirement that the duty was owed by the private investigator or firm to particularised suspects who were being investigated for the employer.⁵⁴ There was no incoherence in requiring a private investigator to be careful in its investigation. The circumstances of private investigators were roughly analogous to police investigators where a duty of care had been recognised.⁵⁵ The policy considerations favoured recognising a duty of care in respect of a private investigation firm retained by an employer to investigate criminal wrongdoing. The dismissal of the claim for negligent investigation against the private investigator must be set aside.⁵⁶

On the other hand, different policy considerations applied when considering the potential liability of an employer who embarked on a criminal investigation of its employees. To recognise a tort of negligent investigation for an employer would be inconsistent with the Supreme Court

46 *Correia* paras 20–34.

47 *Correia* para 35.

48 *Correia* paras 36–39.

49 *Correia* para 39.

50 *Hill v Hamilton-Wentworth Police Services Board* (2008) para 48.

51 *Correia* para 47.

52 *Correia* para 58.

53 2005 256 DLR (4th) 674.

54 *Correia* para 64.

55 *Correia* paras 66 and 68.

56 *Correia* paras 69 and 70.

decision in *Wallace v United Grain Growers Ltd*⁵⁷ where a duty of care was not recognised on the employer due to the potential chilling effect on reports of criminality by honest citizens to the police. Someone who was in the business of private investigation but, who honestly, even if mistakenly, provided information of criminal activity should be protected.⁵⁸

7 2 2 Death Caused by the Use of a Taser

The parents and sister of Robert Bagnell (RB) brought an action in *Bagnell v Vancouver Police Board*⁵⁹ under the Family Compensation Act 1996 on account of the death of RB who died in police custody as a result of the use of a taser by police officers. The claimants alleged negligence against the Board for supplying police officers with tasers and by failing to ensure the tasers were independently tested and properly maintained. The case came to the Court of Appeal of British Columbia on the Board's application under the Rules of Court arguing that liability did not and could not arise as no private law duty of care was owed to the claimants by the Board in the present case. The test for determining whether to strike out the action as disclosing no cause of action depends on whether it was plain and obvious that the claim could not succeed.⁶⁰ The determination of this issue involved, in turn, the examination of the principles governing the existence of a duty of care in Canada as set out by the Supreme Court in *Cooper v Hobart*.⁶¹ In other words, the focus of the inquiry was, first, whether there was a relationship between the Board and the claimants that gave rise to a duty of care. This is the foreseeability and proximity inquiry. The Board's argument was to the effect that the injury sustained was reasonably foreseeable in the present case but it denied that there was insufficient proximity between it and the claimants having regard to the Police Act 1996 establishing the Board.

In delivering the judgment of the court, Hall J observed that: "the core issue in this case is the interpretation of the [Police] Act. Does the Act, properly construed, indicate that a claim such as the one advanced here is not one that should be entertained by a court? The appellant submits that the legislature manifested an intention in this legislation to not impose a legal duty towards claimants in a situation like the instant case."⁶² The court had two previous cases to consider. One is that the court had the benefit of the Supreme Court judgment in *Odhavji Estate v Woodhouse*.⁶³ However, it is the observations of the chamber judge in the present case (*Bagnell*) on the necessary intendments of that case that was referred to in the instant case. The chamber judge observed that the difference in the construction of section 34(4) of the Ontario Police Services Act 1990, from the legislation from the British Columbia, is the lack of involvement of the Board in the operational matters of its police force. This substantially weakened the nexus between the plaintiffs and the Police Services Board.⁶⁴

The second case considered by Hall J was that of *Ribeiro v Vancouver (City of)*⁶⁵ where Kirkpatrick J observed that the duties owed by the Board under the statutory scheme were owed to the general public as a whole, not to a particular class of persons, and are inherently public and political in nature.⁶⁶ It was held in that case that the Board did not owe a private law duty of care to the plaintiff who was injured in an interaction with police officers. The plaintiff had been involved in a confrontation with officers and suffered injuries as a result. The plaintiff suffered from mental illness and argued that under the Police Act, the Board had a duty to ensure that there were proper policies in place to effectively and safely deal with mentally ill citizens; and that the Board had breached that duty. Madam Justice Kirkpatrick held that the plaintiff was attempting to litigate a social policy issue by means of a tort claim. These are matters better dealt with in the political and legislative context rather than in the courts through an independent tort claim.⁶⁷ It followed that the primary function of the Board was to determine the policies that should govern the police department, but it is not in a relationship

57 1997 152 DLR (4th) 152 (SCC).

58 *Correia* paras 71–75.

59 2008 80 BCLR (4th) 255 (*Bagnell*).

60 *Hunt v Carey Canada Inc.* 1990 2 SCR 959 at 980.

61 2001 206 DLR (4th) 193 paras 37–38.

62 *Bagnell* para 12.

63 2004 233 DLR (4th) 193 (SCC).

64 See *Bagnell* para 14 citing per Wedge J in *Bagnell v Taser International Inc* 2006 BCSC 1857 (CanLII) para 40.

65 2005 41 BCLR (4th) 67 (*Ribeiro*).

66 *Ribeiro* para 62.

67 *Ribeiro* para 62.

of sufficient proximity with the plaintiff to justify imposing a *prima facie* duty of care.⁶⁸

After examining various sections of the Police Act, namely, sections 20(1) and (2), 23(1), 26, 28 and 34, the judge held that although the primary duty of the Board, as in *Ribeiro* was to provide governance and to establish general policies for the police department, section 26(3) of the Act appeared to have conferred a duty upon the Board that is arguably operational in nature. This fact removed the case from the category in which *Ribeiro* fell and that means that the necessary relationship of proximity existed.⁶⁹ With respect to the second stage of the *Cooper* enquiry on there being residual policy reasons for declining to recognise the duty of care alleged, Hall J concluded that it was not presently plain and obvious that the case of the plaintiff was bound to fail. Since the claimants alleged that the Board was negligent in supplying these weapons to police officers, the issue of operational versus policy remained to be decided on the facts to be adduced in evidence to be tendered in future trial. While the claim against the Board may not ultimately succeed, it could not at this stage be held that it was certain to fail. It would thus be appropriate that the matter of the liability or otherwise of the Board be determined by a trial court.⁷⁰

7 2 3 Delay in Responding to an Assault Scene

In *Craig v Tone*,⁷¹ the British Columbia Court of Appeal was neither concerned with negligent investigation nor with police negligence in not taking an arrested person to hospital. This was a case where the plaintiff alleged that the police failed to respond promptly to his call to a domestic violence scene. The defendant (DT) was married to JB for some 20 years. After they separated, JB and the plaintiff became romantically involved. DT did not take kindly to that relationship hence he reacted violently to it. DT smashed his way through the front door of the plaintiff's home and attacked him, causing him serious personal injury. DT also caused extensive property damage. Before the assault, the plaintiff had called the police using a non-emergency number provided by a police officer on an earlier date in connection with a report he had made about the defendant's threatening conduct. After receiving the report, the dispatcher did not forward the call to an on-duty police officer for 20 minutes. DT was convicted of assault causing bodily harm. The plaintiff sued DT and the defendant municipality for damages. The trial judge found DT liable and the municipality for the failure by its police officers to respond in a timely manner to the telephone call made by the plaintiff prior to the assault. Liability was apportioned 85 per cent to DT and 15 per cent to the municipality.⁷²

At the Court of Appeal of British Columbia, the municipality contended that the trial judge erred in: imposing a too high duty of care, imposing on its employees requirements for interpretation and judgment not supported by evidence, and making a contradictory finding of fact as to the imminent risk of confrontation by DT of the plaintiff. No authorities were cited in the Court of Appeal's judgment not even on the foreseeability of risk of danger or on the standard of care expected of an officer in the position of the police officer who received a call not on the emergency line. The Court of Appeal nonetheless held that the conclusion the trial judge reached, that the call taker was negligent in not making further inquiry, was at odds with the earlier conclusions reached by the judge. The plaintiff did not expect DT to arrive at his home that evening.⁷³ There was no known or foreseeable risk that DT would force his way into the plaintiff's residence and attack him.⁷⁴ Further, the call taker processed the information provided to her by the plaintiff and indicating no imminent danger to him. That was a reasonable exercise of judgment on her part in all the circumstances. On this score, the trial judge had imposed on the call taker a duty of care that required her judgment to be correct, but not just reasonable.⁷⁵ Again, the plaintiff was informed that there would not be an emergency response. If the plaintiff felt his safety was at risk he would have sought an urgent response by a police officer. His words and his tone during the conversation made it clear that he was content with the level of response which would be 'in the next little while' proposed by

68 *Ribeiro* para 63.

69 *Bagnell* para 29.

70 *Bagnell* paras 30–32.

71 2008 285 DLR (4th) 754 (BCCA) (*Craig*).

72 2006 BCSC 1020, 151 ACWS (3d) 953.

73 *Craig* paras 29 and 30.

74 *Craig* 767 para 31.

75 *Craig* 768 para 32.

the call taker.⁷⁶

7.2.4 Failure to Prevent Intentional Tort by a Third Party

The central issues in *Fallowka v Royal Oak Ventures*⁷⁷ are the circumstances in which one defendant can be found liable for damage caused by the intentional tort of another defendant, and what test should be applied to determine causation. The plaintiffs in this action were surviving family members of the nine miners who were killed in the blast from the bomb detonated by a striking miner (Warren). Three of the deceased were replacement workers hired by Royal Oak to operate the mine when the union went on strike. The other six were union members who crossed the picket line and returned to work after the strike had lingered for many months. The questions before the North West Territory Court of Appeal were: Did any of the appellants owe the respondents a duty of care in tort, specifically did they owe a duty to take reasonable care to prevent Warren's intentional criminal act? And, if the answer to the first question is in the affirmative, was any breach of the duty owed by the appellants a cause of the respondents' damage or loss?

The Court of Appeal found that the appellants (defendants) did not owe a duty of care in negligence to the respondents (plaintiffs) and summed up its lengthy discussion of the duty analysis in the following three paragraphs:⁷⁸

- The essential issue on these appeals is which of the appellants (all ancillary tortfeasors) are liable for the intentional tort of Warren (the immediate tortfeasor). The traditions of the common law are inconsistent with any general rule that one person is liable for the torts of another;⁷⁹ liability is exceptional.⁸⁰ The policy behind the law of tort is against such liability. Simply being able to foresee the torts of another is not enough.⁸¹ Liability is exceptionally found to exist when there is a "special relationship" between the plaintiff and the ancillary tortfeasor, or where the ancillary tortfeasor has some control over the immediate tortfeasor.
- There are potentially three relationships in these appeals that might be "special" enough to support a duty of the appellants to be responsible for the torts of Warren: employer and employee, regulator and worker, and occupier and invitee. None is sufficient. The existence of the strike and the resulting violence were notorious, as were the frequent trespasses onto the mine property; the appellants had no superior knowledge of these risks. The deceased miners were not particularly vulnerable or dependent on the appellants for protection; they could have exercised their autonomy and withdrawn from the danger at any time. As "competent people" they had "the right to engage in risky activities." While these relationships are sufficient to create "proximity"⁸² with respect to some risks,

⁷⁶ *Craig* 768 para 33.

⁷⁷ 2008 7 WWR 411 (*Fallowka*).

⁷⁸ *Fallowka* paras 98–100.

⁷⁹ *Weld-Blundell v Stephens* 1920 AC 956 at 986; *P Perl (Exporters) v Camden LBC* 1984 QB 342 (CA) 354–355, 359–360; *Smith v Littlewoods Organisation Ltd* 1987 AC 241 at 270–272 and 278 quoting HLA Hart and Honoré *Causation in the Law* 2ed (1985) 196–197; *Graves v Warner Bros.* 253 Mich. App. 486, 656 NW 2d 195 2002 paras 9–10; *James v Meow Media Inc* 90 F Supp 2d 798 (WDKy 2000), affm'd 300 F 3d 683, 2002 FED App. 0270P (6th Cir.); *Modbury Triangle Shopping Centre Pty Ltd v Anzil*, [2000] HCA 61, 205 C.L.R. 254 para. 29; *Klar Tort Law* 3 ed (2003) 439.

⁸⁰ *Smith v Leurs* 1945 70 CLR 256 at 261–262 (HCA).

⁸¹ *P Perl (Exporters) v Camden LBC* 1984 QB 342 (CA). Responding to the trial judge's finding on foreseeability [*Fallowka* para 55], the Court of Appeal held: "It is of course imaginable that if a person operated a mine, and had explosives in that mine, that someone would break into the mine, steal explosives, and deliberately set a bomb that would go off when a man car drove over it. The scenario is more likely in the midst of a violent strike. The law does not require that the exact way that the damage materialized be foreseeable, so long as it arises within the scope of the foreseeable risk. But even so, Warren's act was not necessarily foreseeable in law as a result."

⁸² The Court of Appeal spoke of "proximity" as not just being a matter of physical or temporal juxtaposition – *Hill v Hamilton-Wentworth Regional Police Services Board* 2007 3 SCR 129 para 29. It denotes the type of relationships that the law recognises as giving rise to a duty of care. Accordingly, in order to determine whether it exists between a plaintiff and the defendant also involves considerations of policy internal to the relationship between the parties – *Cooper v Hobart* paras 25 and 30. Policy considerations also come into play in the second stage of the duty analysis, but they relate to matters external to the relationship between the parties, namely the effect of recognising a duty of care on other legal obligations, the legal system, and society generally – *Cooper v Hobart* paras 28 and 37.

they do not extend far enough to qualify as a “special relationship” in this context.

- The second potential source of a duty is control.⁸³ None of the appellants had any legal right to control Warren. None of them had control of him in fact; indeed Warren did all he could to avoid any control by the appellants. Arguments that the appellants could have “controlled the risk” by closing the mine assume an obligation to cease engaging in a lawful activity in order to eliminate all risk of injury. Absent any special relationship or control, there is no basis to find a general duty of care on any of the appellants to answer for Warren’s intentional tort.

Although the Supreme Court of Canada dismissed the appeal as well as the cross-appeal in *Fallowka v Pinkerton’s of Canada Ltd*,⁸⁴ Cromwell J held for a unanimous court that the question is not whether these defendants are responsible for the tort of another, but whether they, in relation to another’s tort, failed to meet the standard of care imposed on them and thereby caused the ultimate harm.⁸⁵ This question must be resolved by an analysis of the applicable legal duties,⁸⁶ following the approach set down by the Supreme Court in a number of cases since *Cooper v Hobart*⁸⁷ down to *Hill v Hamilton-Wentworth Regional Police Services Board*.⁸⁸ The analysis turns on whether the relationship between the appellants and the defendants discloses sufficient foreseeability and proximity to establish a *prima facie* duty of care and, if so, whether there are any residual policy considerations which ought to negate or limit that duty of care.⁸⁹ The analysis must focus specifically on the relationships in issue, as there are particular considerations relating to foreseeability, proximity and policy in each.⁹⁰ In these circumstances, Cromwell J held that the relationship between the murdered miners and Pinkerton’s and the government, meets the requirements of foreseeability and proximity such that a *prima facie* duty of care existed. In this regard, the Justice of the Supreme Court of Canada parted company with the Court of Appeal in concluding that these *prima facie* duties are not negated by policy considerations.⁹¹ To this extent, the trial judge did not err in finding that both Pinkerton’s and the government owed the murdered miners a duty of care.

The Supreme Court however agreed with the Court of Appeal that the trial judge erred in finding that they failed to meet the requisite standard of care. It follows that, like the Court of Appeal, Cromwell J similarly dismissed the claims against these parties.⁹² The trial judge was of the view that CASAW National and CAW National were in control of CASAW Local 4. Although he did not discuss this point in the portion of his reasons dealing with vicarious liability, this finding nonetheless seems to underpin his conclusion that the national union is vicariously liable for the Local’s actions. The appellants advance a broader basis for vicarious liability. They submit that the relationship between CAW National and the members of CASAW Local 4 renders CAW National vicariously liable⁹³ for torts committed by members of the local in the course of a strike. CAW National was the successor under the merger to the liabilities of CASAW National. The question, therefore, is whether CASAW National is vicariously liable for the acts of members of CASAW Local 4. Answering that question in the negative, Cromwell J held that the Court of Appeal was thus correct in holding that the trial judge’s finding relating to control cannot be upheld.⁹⁴ Cromwell J then held that:

The question of whether vicarious liability should be imposed is approached in three steps. First, the court determines whether the issue is unambiguously determined by the precedents. If not, a further two-part analysis is used to determine if vicarious liability should be imposed in light of its broader policy rationales....⁹⁵ The plaintiff must show that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close and that the

83 See the discussion in *Fallowka* paras 65–75.

84 2010 1 SCR 132 (SCC) (*Pinkerton*).

85 *Pinkerton* para 17.

86 *Pinkerton* para 18.

87 [2001] 3 SCR 537. See also *Edwards v Law Society of Upper Canada* 2001 3 SCR 562; *Odhavji Estate v Woodhouse*; *Childs v Desormeaux*.

88 2007 3 SCR 129.

89 See e.g. *Hill* para 20.

90 See e.g. *Hill* para 27.

91 *Pinkerton* para 19.

92 *Pinkerton* para 91.

93 *Pinkerton* para 138.

94 *Pinkerton* para 142.

95 *Bazley v Curry* 1999 2 SCR 534 para 15; *John Doe v Bennett* 2004 1 SCR 436 para 20.

wrongful act is sufficiently connected to the conduct authorized by the party against whom liability is sought.⁹⁶ The object of the analysis is to determine whether imposition of vicarious liability in a particular case will serve the goals of doing so: imposing liability for risks which the enterprise creates or to which it contributes, encouraging reduction of risk and providing fair and effective compensation.⁹⁷

7.2.5 SIU Investigations and Victims of Crime

The Ontario Court of Appeal held in *Wellington v Ontario*⁹⁸ that while the police owe a duty of care to a particular suspect under investigation such as in *Hamilton-Wentworth* and *Beckstead v Ottawa (City) Chief of Police*,⁹⁹ and to warn a narrow and distinct group of potential victims of a specific threat as in *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*,¹⁰⁰ there is now a long list of decisions rejecting the proposition that the police owe victims of crime and their families a private law duty of care in relation to the investigation of alleged crimes.¹⁰¹ The Special Investigation Unit (SIU) did not owe the plaintiffs, victims of a fatal police shooting, a private law duty of care when it conducted the investigation into allegations of criminal conduct by police officers as a consequence of the shooting. The SIU was established by the Police Services Act 1990 as a statutory body independent of the police. It is charged with the responsibility of investigating circumstances of serious injury and death that may have resulted from criminal offences committed by police officers, and laying information against the police officers investigated and referring the matter to the Crown Attorney. Its' appointees are not police officers or former police officers and their investigations are conducted by persons who are not police officers.¹⁰² There is nothing in section 113 of the Police Services Act 1990 that either explicitly or implicitly creates a private law duty of care to any individual; it imposes no duty on the SIU in relation to victims or their families.¹⁰³

When the SIU investigates allegations of criminal misconduct by the police, its duties are overwhelmingly public in nature.¹⁰⁴ To impose a private law duty of care would introduce an element seriously at odds with the fundamental role of the SIU to investigate allegations of criminal misconduct in the public interest.¹⁰⁵ The SIU did not engage the plaintiffs in a relationship giving rise to a duty of care by interviewing the mother of the deceased.¹⁰⁶ *Hamilton-Wentworth* was distinguished in *Wellington*¹⁰⁷ on the ground that the plaintiffs were victims and not suspects who were under investigation.¹⁰⁸ Sharpe JA reasoned that

96 *John Doe v Bennett* para 20.

97 *John Doe v Bennett* para 20.

98 2011 333 DLR (4th) 236 (Ont. CA) para 20.

99 1997 CanLII 1583 (ONCA).

100 1990 74 OR (2d) 225.

101 *Thompson v Saanich (District) Police Department* 2010 320 DLR (4th) 496 (Ont. CA); *Fockler v Toronto (City)* [2007] OJ No 11 (SCJ); *Project 360 Investments Ltd (cob Sound Emporium Nightclub) v Toronto Police Services Board* 2009 CanLII 36380 (ON SC); *Spencer v Canada (Attorney General)* 2010 NSSC 446 (CanLII); *Petryshyn v Alberta (Minister of Justice)* 2003 ABQB 86.

102 Section 113(3), (5) and (7), Police Services Act 1990.

103 *Wellington* para 41.

104 *Wellington* para 43.

105 *Wellington* para 45. At para 44, Sharpe JA also held that there exists a well-established line of cases supporting the proposition that public authorities, charged with making decisions in the general public interest, ought to be free to make decisions without being subjected to a private law duty of care to specific members of the public. Discretionary public duties of this nature are "not aimed at or geared to the protection of the private interests of specific individuals" and do "not give rise to a private law duty sufficient to ground an action in negligence." See *Ellipoulos (Litigation Trustee of) v Ontario (Minister of Health and Long-Term Care)* 2006 CanLII 37121 (ONCA) para 17; *Williams v Ontario* 2009 ONCA 378 (CanLII) paras 29–30; *Attis v Canada (Minister of Health)* 2008 ONCA 660 (CanLII) paras 59–60; *River Valley Poultry Farm Ltd v Canada (Attorney General)* 2009 ONCA 326 (CanLII) paras 41–42.

106 *Wellington* para 50. See also *Heaslip Estate v Mansfield Ski Club Inc.* 2009 ONCA 594 (CanLII) para 21, where it was held that the case fell within an established category of negligence, namely, a public authority's negligent failure to act in accordance with an established policy where it is foreseeable that the failure to do so will cause physical harm to the plaintiff.

107 *Wellington* paras 29–30.

108 *Hamilton-Wentworth* para 27.

[t]he situation of a suspect is distinguishable from the situation of his or her family. A suspect faces the risk of the stigma of being charged and convicted, as well as the potential loss of liberty and Canadian Charter of Rights and Freedoms rights. The interests of victims and their families in a proper investigation are simply not comparable in nature. While no doubt deeply felt on a subjective level, the interests for which these individuals seek compensation do not ordinarily attract legal protection. Claims for added grief and mental distress are compensable only in exceptional cases.¹⁰⁹

Wellington was further distinguished from *Fullowka v Pinkerton's of Canada Ltd*¹¹⁰ on the ground that the miners in that case were held to be a narrow and clearly defined group relating directly to the statutory duties of the mining inspectors analogous to the duties of building inspectors towards property owners and purchasers recognised in *Kamloops (City of) v Nielsen*.¹¹¹ On the other hand, the duties of the SIU in investigating crimes committed by police officers are not focused on the protection or promotion of victim's interests, but instead, relate to the public at large.¹¹²

7 2 6 Summary of Principles Garnered from Subsequent Case Law

It is important to note first and foremost that the test for negligent police investigation is whether the police had evidence which provided reasonable and probable grounds for laying the charge in the first place.¹¹³ In so doing, it must be borne in mind that a police officer need not exhaust all possible avenues of investigation or inquiry, interview of potential witnesses prior to arrest, or to obtain the suspect's version of events or otherwise establish that there is no valid defence before being satisfied that there was reasonable and probable ground to arrest.¹¹⁴ The police are not required to: demonstrate anything more than reasonable grounds in the course of the investigation; establish a *prima facie* case for conviction prior to making an arrest; or to establish that the accused has no valid defence before concluding that there are no reasonable and probable grounds to lay a charge.¹¹⁵ They are responsible to investigate incidents which might be criminal, make an informed decision whether charges should be laid and then present the full facts to the prosecutor.¹¹⁶ Although this requires to some extent, the weighing of evidence in the course of the investigation, police are not required to evaluate the evidence to a legal standard and to make legal judgments. This is the task of prosecutors, defence lawyers and judges.¹¹⁷ As *Juriansz JA* held in *495793 Ontario Ltd (Central Auto Parts) v Barclay*,¹¹⁸ the conduct of a reasonable police officer may vary depending on the stage of investigation and the legal considerations. In laying charges, the standard is informed by the legal requirement of reasonable and probable grounds to believe the suspect is guilty.¹¹⁹ Again, as it was further explained by *Thorburn J* in *Wong v Toronto Police Services Board*:¹²⁰

The determination as to whether reasonable grounds exist is based upon an analysis of the circumstances apparent to the officer at the time of the arrest and not based upon what the officer or anyone else learnt later. Reasonable grounds still exist where the information relied upon changes at a future date or otherwise turns out to be inaccurate. The requirement is that the information be reliable at the time the decision was made to arrest the accused.

It was further held in *Central Auto Parts*,¹²¹ that the general rule is that the content of the standard of care of a professional such as a police officer, will require expert evidence¹²² and

109 *Wellington* para 31. See also *Healey v Lakeridge Health Corp.* 2011 ONCA 55 (CanLII); *Mustapha v Culligan of Canada Ltd* 2008 2 SCR 114.

110 2010 1 SCR 132 (SCC).

111 1984 10 DLR (4th) 641.

112 *Wellington* para 49.

113 *George v Larkin* 2016 ONSC 4961 (CanLII).

114 *Wong* para 59; *Kellman v Iverson* 2012 ONSC 3244 (CanLII) para 16; *F v Greater Sudbury (Police Service)* 2015 ONSC 3937 para 88; *Grann v Thunder Bay Police Services Board* para 24; *Lawrence v Peel (Regional Municipality) Police Force* [2009] OJ No. 1684 para 48.

115 *F v Greater Sudbury* para 88; *Wong* para 49;

116 *Wong* para 56; *F v Greater Sudbury (Police Service)* 2015 ONSC 3937.

117 *F v Greater Sudbury* para 89; *Hill v Hamilton-Wentworth* para 50.

118 2016 ONCA 656 (CanLII).

119 *Central Auto Parts* para 48; *Hamilton-Wentworth* para 55.

120 2009 CanLII 66385 (ONSC) para 61.

121 *Central Auto Parts* para 53.

122 *Meady v Greyhound Canada Transport Corp.* 2015 ONCA 6 (CanLII) paras 34–35; *Krawchuk v Scherbak* 2011

that the trial judge erred in determining the content of the standard of care without expert evidence in the particular circumstances of the case.¹²³ This was a particularly technical, complicated investigation outside the knowledge of an ordinary person and there was no basis for finding that the police conduct was egregious. And even if the trial judge could have determined the standard of care without relying on expert evidence, she nonetheless, erred in formulating the content of the standard of care by considering whether the police could prove that Mr Mercuri had knowledge that the auto parts were stolen, rather than whether the officers had reasonable and probable grounds to believe that an offence had been committed. Even though the local industry could offer innocent explanations for the removal or reattachment of VIN and certificate information, but that was not sufficient to conclude that the police investigators were negligent. It was held in *F v Greater Sudbury*¹²⁴ that the plaintiff has put forward no evidentiary basis how the investigation of allegations against him were conducted in a negligent manner beyond the argument that the police should have believed the allegations of MV. The claims of negligent police investigation were dismissed.

In order to succeed with a claim of negligent police investigation, the plaintiff would have to establish a duty of care owed to him by the defendant;¹²⁵ that the negligence caused the charges to be laid in circumstances where reasonable and probable grounds did not exist;¹²⁶ and that considering all the circumstances of each instance, the defendant police officers breached the standard of reasonable care.¹²⁷ The plaintiff must, in addition, show that he or she suffered compensable damage and that there is a causal connection to the breach of the duty of care owed to him or her.¹²⁸ For, if, on a balance of probabilities, the compensable damage would not have occurred but for the negligence on the part of the police, then the causation requirement is met.¹²⁹ The police are not required to obtain an accused's version of events before being able to establish reasonable and probable grounds.¹³⁰ And, for that matter, the withdrawal of charges at a later time or absence of a criminal conviction does not lead to an automatic conclusion that reasonable and probable grounds did not exist for an accused's arrest.¹³¹ In *Charlton*, the court found that the duty of care of an investigating police officer did not require him or her to interview an accused person prior to the laying of the charge.¹³² According to the decision in *Solomonvici v Toronto (City) Police Services Board*,¹³³ proceedings have to be "initiated" by a defendant in order for a plaintiff to satisfy the first portion of the four-fold test set out to prove a cause of action for negligent investigation.¹³⁴ Based on the findings concerning the first and third branches of the test in *Solomonvici*,¹³⁵ the

ONCA 352 (CanLII) para 130; *Bergen v Guliker* 2015 BCCA 283 (CanLII) paras 114–131; *Camaso Estate v Saanich (District)* 2013 BCCA 6 (CanLII) paras 71–72.

123 *Central Auto Parts* paras 87, 89 and 97.

124 *F v Greater Sudbury* paras 108–109.

125 *John v Peel Police* para 31. In *John v Peel Police* 2016 ONSC 2012 paras 24, 27–28 and 34, the plaintiff pleaded that the Peel Police and Officer Finnie made no attempts to recover the vehicle and were negligent in their investigation of his report of a stolen vehicle and Bielby J held that the claim by the plaintiff against the Peel Police and Officer Finnie for negligent investigation does not disclose a cause of action. The reason is that the plaintiff has not established that the Peel Police owed him a private duty of care; they have discretion in regard to what complaints are to be investigated. Accordingly, the claim against the Peel Police had no chance of success as the pleadings disclose no reasonable cause of action on the facts or lack of facts pleaded. *Contra* in *Barton v Nova Scotia (AG)* 2013 NSSC 121 (CanLII) para 33, although Wright J found that the material facts were sparsely pleaded, yet they were sufficient to disclose a reasonable cause of action.

126 *Kellman v Iverson* 2012 ONSC 3244 (CanLII) para 23; *Kolosov v Lowe's Companies Inc.* 2016 ONSC 1661 (CanLII) para 135(a).

127 *F v Greater Sudbury* para 102; *Eid v Canada (Attorney General)* 2016 ONSC 3612 (CanLII) para 42.

128 *Grann v Thunder Bay Police Services Board* 2015 ONSC 438 (CanLII) para 22; *Eid v Canada (Attorney General)* 2016 ONSC 3612 (CanLII) paras 44–45.

129 *Franklin v Toronto Police Services Board* 2008 CanLII 67896 (ONSC) para 53; *Hill v Hamilton-Wentworth* para 93.

130 *Charlton v St Thomas Police Services Board* [2009] OJ No. 2132 para 40.

131 *Charlton* para 41.

132 *Grann* para 62.

133 [2009] OJ No. 3144 para 9, where Wilson J held that the plaintiff must establish three elements: (a) the proceedings must have been initiated by the defendant; (b) the proceedings must have been terminated in favour of the plaintiff; and (c) there must be absence of reasonable and probable cause to commence or continue with the prosecution. See also *Franklin v Toronto Police Board* 2008 CanLII 67896 (Ont.SC).

134 *Grann* para 66.

135 *Solomonvici* para 14, it was held that in order to prove element 2, the plaintiff in that case cannot show that the proceedings terminated in his favour since he had entered a plea of guilty to the included offence of common assault and acknowledged to the court that he accepted the version of facts read out in court. He cannot now

issue could be resolved regarding the claim for negligent police investigation of which there was no genuine issue requiring a trial.¹³⁶

8 Conclusion

South African and Canadian courts adopt similar approaches in respect of negligent police investigation. Their approaches however differ on the issue of the liability of the prosecutor. Both the police investigator and the prosecutor play vital but similar roles in the criminal justice systems in both jurisdictions. It is clear from the jurisprudence encountered in this study that the due performance or otherwise of these functionaries of their respective duties have enormous implications on the personal liberty rights of the persons who come in contact with them in matters of arrest, detention and prosecution in their functions of combatting crimes in the society. The police officer does the arresting of suspects and the investigation of the crimes allegedly committed, while the prosecutor takes the decision based on the information provided by the investigating officer as to whether or not to prosecute, whether to withdraw the prosecution for lack of sufficient evidence or to continue the prosecution. The trial court depends on information provided by the prosecutor to grant or refuse bail or to continue the detention of the accused person.

The liability of both the police and the prosecutor was launched simultaneously in South Africa in *Carmichele 1* while the delictual guidelines regarding such liabilities were set out in *Carmichele 2*. In effect, *Carmichele 1* gave the courts the go-ahead to develop the common law in line with the constitutional mandate of ensuring that the justice they mete out is in consonance with the spirit, purport and objects of the Bill of Rights. The Constitutional Court thereby expressed no doubt that a prosecutor could be held accountable for a negligent conduct occasioning damage in the circumstances of the case. In *Carmichele 2*, the SCA then made a finding of liability in accordance with the restructured test for establishing liability in the modern law of delict in the post-*Carmichele 1* judgments of the SCA in *Van Duivenboden* and *Van Eeden*. Neither in *Carmichele 1* nor any of the later decisions was a line drawn between the police investigator and the prosecutor with regard to the issue of liability. In that spirit, no prosecutor has so far succeeded in claiming the statutory immunity from liability for acts taken in good faith since that exemption required him or her to have taken all reasonable precautions to avoid or minimise injury to others. All the cases discussed in this article show that no immunity accrues to a prosecutor who performs his or her duties negligently. The basis for imposing liability on both functionaries arises from the protection which the Constitution affords the individual with regard to the entrenched rights and the law of delict that could serve as an instrumentality to enforce against a public authority the constitutional values of accountability and responsiveness. Finally, the constitutional and statutory provisions which created the police and prosecutor as agents of the South African State and entrusted upon them the law enforcement functions and the protection of the individual and the society from crime do not contemplate a situation where the same public officials would deliberately or negligently injure the persons they are charged with the responsibility of protecting.

Public authority liability law in Canada has witnessed an unparalleled three-dimensional growth pattern in the last decade. To begin with, Canadian courts, just as the South African courts did at the turn of the century, discarded the obstructive English common-law public interest immunity of the police which enabled them to enunciate the tort of negligent police investigation in Canadian law in *Hamilton-Wentworth*. Thus, police investigators could be held accountable for doing sloppy investigative work and be judged in the same manner by establishing a duty of care in the Canadian tort law. On the other hand, public policy prevents imposing liability where a prosecutor negligently performs his duties and unless malice or bad faith or fraud is shown, the prosecutor will not be held liable for any damage caused by his or her negligent performance in the guise of a claim for malicious prosecution. Malice must be proved for a claim in malicious prosecution to succeed.

be heard to say that the proceedings terminated in his favour. He had failed to establish this necessary element of a claim for negligent police investigation as set out by Gans J in *Franklin v Toronto Police Board*.

136 *Grann* paras 71 and 85.

The second and the third developmental processes are so intimately connected that it is safe to say that the second gave birth to the third. Chronologically, however, the second is the Supreme Court of Canada judgment in *Ward*, where the apex court laid down the guidelines for recovering Charter or constitutional damages in breaches affecting the Canadian Charter of Rights and Freedoms. This development opened the door, albeit slightly, to the entry into public authority liability law in Canada of the third and most recent principle brought about by the judgment of the Supreme Court in *Henry SCC* whereby a Charter damages' claim can now be made in respect of a breach of the prosecutorial Charter duty of disclosing relevant evidence to the accused person if such non-disclosure will lead to the accused person not obtaining a fair trial. Although malice does not provide a useful liability threshold for Charter damages, this new cause of action came with a novel threshold which the majority set somewhere between malice and negligence. It is not enough for the claimant to allege a breach of Charter right; he or she must go further and show the additional element of fault. It is because Mr Henry met this liability threshold that his Charter damages claim was allowed to proceed to trial. Yet, his case was said to be an exceptional one which means that it is not every non-disclosure that may meet the required liability threshold since the *Henry SCC* judgment does not pretend to have engaged in a substantial expansion of prosecutorial liability. As it stands, the majority judgment is difficult to understand; it is complicated in terms of its application to future claims. To this extent, the minority opinion is preferable. It is as sound as the *Ward* judgment on which the minority in *Henry SCC* based its reasoning. That H's Charter damages claim was hedged around the same principles established in *Ward* is the clearest the court could get. *Ward's* straightforward principles for Charter rights' damages claims as adapted by the minority in *Henry SCC* would ensure that no higher burden of proof was loaded unto Charter rights' claims than already exists. It must, however, be admitted that in *Henry 2*, Hinkson CJ did not encounter so much of a problem in determining whether the right(s) of the claimant was breached, and if so, what that right was; whether damages were the appropriate and just remedy and whether it would serve the functional purposes of compensation, vindication and deterrence; whether the state had established a countervailing factor of availability of alternative remedies and good governance concerns; and, finally, determining the quantum of damages to compensate, vindicate and, possibly, deter future breaches in the circumstances of a person who was accused, convicted, and sentenced to long term imprisonment and who actually spent 27 years in prison.