



# Turning the Tables on Police

*Insurance defence counsel need to be diligent, thorough and prepared, given the Supreme Court of Canada's recent ruling that police can now be found liable for negligent prosecutions*



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Insurers of police forces across Canada will be interested in a recent Supreme Court of Canada decision in *Hill v. Hamilton-Wentworth*. On Oct. 4, 2007, a divided Supreme Court of Canada recognized the right of suspects to sue police officers for the tort of negligent investigation. Prior to this decision, every common law jurisdiction except Ontario had traditionally recognized that such a claim against the police was not available, primarily for policy reasons. Now, however, the Supreme Court has opened the door for

suspects to sue the police without requiring proof of malice, thereby exposing Canadian police officers to an added level of potential liability resulting from the way in which they carry out their duties.

The court's ruling arose out of an action by Jason George Hill against the Hamilton-Wentworth police and others arising out of his arrest, conviction and subsequent acquittal for a series of bank robberies in Hamilton in 1994 and 1995. Canada's high court ultimately concluded the police conduct in this case met the standard of care and therefore was not negligent; nevertheless, the majority of the Supreme Court had no difficulty in finding that a tort of "negligent investigation" should be recognized because, in its view, there were no compelling policy reasons to negate the imposition of such a duty of care on police officers.

The majority did not agree with the assertion by other common law courts that such a recognized tort would have a "chilling effect" on policing: the existence of the tort, it might be argued, could potentially result in the diversion of resources away from traditional police duties towards the defence against a foreseeable flood of litigation against the police. The majority felt the tort claims currently available to plaintiffs, such as false arrest, false imprisonment, malicious prosecution and breach of Charter rights, did not provide adequate remedies.

The minority, on the other hand, noted that unlike many other professionals, police officers have an overarching public duty to investigate crimes and apprehend criminals, which will necessarily conflict with the private duty now owed to suspects. The minority was also concerned with the significant consequences and detrimental effect such a tort would have on policing and society in general.

Based on this decision, any alleged improper investigation by a police officer can be subjected to review based on hindsight. The investigation process will be tested based on a standard of how a

reasonable officer in like circumstances would have acted. Importantly, however, the majority made it clear that the law will not expect a “perfect investigation” — only that police act reasonably. The majority stressed the standard should be applied “in a manner that gives due recognition to the discretion inherent in police investigation. Like other professionals, police officers are entitled to exercise their discretion as they see fit, provided that they stay within the bounds of reasonableness.” Mere errors in judgment, the court found, will not breach the standard of care.

Also important to note is the majority’s distinction — for the time being — between suspects’ claims and potential claims made by other members of the public. The court made it clear this decision only deals with the relationship between the police and a suspect being investigated. If a new relationship is alleged to attract liability (i.e. relationship between police and a victim, family member or member of the public) then it will be necessary to engage in a fresh analysis of the duty of care to determine whether the tort should extend to those individuals.

The general sentiment from those of us who do work on behalf of the police is that this decision will generate a significant number of new lawsuits against police, with police time and resources inevitably being drawn away from traditional policing and towards responding to these lawsuits and defending these claims.

In order to assist police in the defence of such claims, defence counsel should be prepared to consider a number of steps when faced with a “negligent investigation” claim.

First, counsel should take a hard look at the allegations in the statement of claim itself. Are the allegations of negligent investigation sufficiently particularized? If not, then consideration should be given to bringing a motion to strike that part of the claim.

Second, counsel should work with police early in the litigation to identify the standard operating procedures, guidelines and training received by the officers involved. Does it appear the officers reasonably followed an accepted process in investigating the matter? Does it appear the investigation may have been “imperfect,” but not “unreasonable”?

Third, early consideration should be given to identifying and retaining an appropriate expert to comment on the investigation. This expert should not be internal to the police force being sued, nor should he or she be closely related to the police force.

Police forces can implement a number of procedures to respond appropriately to such claims. They should ensure training is received regularly, and that the training the individual officers receive is always documented. In particular, the police force should ensure its officers receive updated and regular training on inves-

tigative techniques and advances in investigative procedures. Also, careful consideration should be given to organizing the particular investigation being undertaken in a particular case; the investigation itself should be documented, as well as the underlying decision-making process the officers followed.

As with all other claims against police forces, documents, notes and reports are critical. The more a police officer can document every step in the investigative process (including an explanation for why the officer did or did not undertake a certain course of action), the better. **CU**

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